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The main epochs of modern international humanitarian law since 1864 and their related dominant legal constructions

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1. Introduction

The date of birth of modern international humanitarian law (IHL) is normally placed in the post-Solferino creation of the Red Cross Movement, and in particular the creation of the Geneva International Committee of the Red Cross dedicated to promoting the care of wounded or sick military personnel.¹ Since these times, in the 1860s, almost 150 years have elapsed. International society, the concept and the practice of war, the body of international humanitarian law, the practical problems posed for its varying subject matters – all these aspects have undergone significant, if not fundamental, changes.

The history of modern IHL has been expounded on numerous times and there would be no significant advantage to be gained in adding a further contribution to the numerous writings.² Nevertheless, very few written works have attempted to set out synoptically the main phases of evolution of this body of law, each characterised by a set of common fundamental understandings, problems and operational principles within the applicable IHL. If such a perspective is adopted, it may be possible to shed some light on the manner in which IHL has been perceived and applied in differing social and legal settings in order to address significantly different practical needs and aspirations. For even if there is an obvious continuity in the history of IHL, there are also fundamental departures and separate developments in certain phases. Thus, for example, the early phase saw states produce, construe and deal with IHL essentially as a matter of municipal military law, codified in the international sphere mainly through model rules, where lacunae and sub-regulations constituted a salient feature (1864–1899); the next phase saw the evolution of a system where the predominance of sovereignty,

as influenced by the famous (if not infamous) *Lotus* principle of state freedom,³ tended to prevail over the Martens Clause and to enhance the centrality of military necessities, i.e., a system where the presumption rested on the belligerent's freedom of action (1899–1946). A further phase developed in which IHL became centred around the concept of humanitarian protection of the victims of war through the introduction of very detailed and non-derogable rules, thereby restricting the freedom of state action, even in non-international armed conflicts (1949–1993). Finally, in the current phase, IHL is becoming progressively 'humanised', i.e., 'homo-centred' instead of 'state-centred', but also increasingly 'supplementary', in the sense that it progressively merges with human rights law considerations while being sanctioned and developed through the growing branch of international criminal law. At the same time, military functions are themselves becoming increasingly diverse and multifunctional, creating a need for further regulation of branches of international law other than IHL (1993 to date).

These four phases, which have here only been briefly presented, quite clearly portray and offer a basis for the operation of different types of IHL. The application of these different ways of interpreting IHL will lead to differing results, among others with regard to belligerent reprisals and reciprocity, the role of treaty law or customary law, the function ascribed to special agreements between the belligerents, the application of military necessity and other principles such as proportionality, the distinction between international and non-international armed conflicts, and the relation to other bodies of international law such as human rights law.

The danger of such categorisations is, of course, to overstate the sharpness of the distinction between the phases and to understate the existence of continuity and the subtle merging of one phase into another. Perhaps such over-emphasis is not only a danger, but is indeed an inescapable drawback of such an approach. The risk of doing so, however, may be justly incurred in light of the many insights which such an original approach may yield. There always remains the possibility of placing these findings in a broader context and to blunt their sharp edges in order to properly address the legitimate concerns of the caveat just presented.

The first of the phases will be explored in somewhat more detail, for two reasons. First, it is the formative period of IHL from which all subsequent epochs take reference. Secondly, as it is today more remote, its essential features are less well known and will gain greater clarity through a more thorough treatment.

I must also warn the reader that because of space constraints imposed by the editors, the often space-consuming explanations of basics or of legal concepts has been avoided in the following chapter; this means that a reasonable understanding of IHL is necessary in order to comfortably follow all the arguments presented. By the same token, I have provided the reader with footnote references quite unevenly; sometimes the notes are more absent than present, in an effort to save space; at other times, I have allowed myself a somewhat freer rein. I quote more extensively from older sources than from newer ones in the belief that these are less well known and accessible. Further, I have not hesitated to quote texts in French or other languages than English – it is today of the greatest usefulness to remind triumphant Anglo-Saxons that, in international relations at least, it is utterly insufficient to know only one language. Let us now plunge *in medias res*.

2. First phase (1864–1899): predominance of domestic law, ‘codification’ and gaps

This first phase⁴ spans from the adoption of the first Geneva Convention of 1864 (for the Amelioration of the Condition of the Wounded in Armies in the Field),⁵ to the St Petersburg Declaration of 1868 (on Explosive Projectiles under 400 Grammes Weight, important essentially for its Preamble which contains an outline of sorts on the philosophy and teleology underlying the modern law),⁶ to the first series of the three Hague Conventions of 1899 to which three declarations were added.⁷ Between these, there has been a series of codification efforts resulting in non-binding sets of rules: one may here mention the Brussels Declaration of 1874⁸ and the Oxford Manual of 1880,⁹ both attempting to cover the whole ground of the then applicable law of warfare. There has also been a set of remarkable codifications of the law of warfare in various national laws, the most influential of them being the seminal ‘Lieber Code’ (1863)¹⁰ proclaiming as compulsory legal rules for the federal armed forces during the American Civil War. There is no need to comment upon the precise scope and meaning of all these texts; one may in that regard refer to the existing literature. The focus here will rather be on the system of the law of war at this time. The following aspects may be emphasised here.

2.1 *Predominance of municipal law as ‘droit public externe’*

In the nineteenth century, many peoples in the ‘civilised’ part of the world achieved constitutional and democratic autonomy. This political

process resulted in a focus on constitutional law, i.e., on the municipal law of their state, which stood for their hard-acquired independence and legislative power. The United States, France, later Germany and Italy, are particularly conspicuous cases of this evolution. The challenge quickly arose as to how to square this municipal 'constitutional' (or public) law with the external commitments of the state, in a world moving towards constantly higher levels of interdependence. This way of perceiving the problem, however, contained in itself a limitation of the range of possible solutions. The point of departure was the constitutional law, the subjective 'I', and hence the freedom and autonomy of every state. The point of arrival was a way of construing a restriction on this freedom of action in order to reconcile it with some form of international law allowing ordered interrelations among nations, when these (as *prius* in the system) chose to have such ordered interrelations. It is especially in nations that most cherished their recent and hard-won freedom, and which had a pronounced preference for theoretical thinking (Germany and Italy), that the new way of thinking took a bright and distinct form. In this construction, international law is the part of each state's public law which relates to external relations; its binding force is thus derived from the municipal law. It is the state that binds itself to a certain course of conduct in its external relations (*Selbstverpflichtungslehre*).¹¹ Thus, there is no single or objective international law; the latter is simply the (ever-changing) area where the municipal laws of various states converge. International law is thus not binding in itself; its rules will be binding by virtue of the binding nature of municipal law, thus it will be binding for a particular state only so long as the relevant rule still exists in its municipal law. Nevertheless, only cogent reasons should lead a state to change such laws, lest all properly ordered international intercourse would be jeopardised. The theorists of the time firmly believed in practical reason and harmonious progress; they thus assumed that no state would abuse such a freedom. Consequently, this power of change was not seen as dangerous to international law. The circle was thus completed: a state is absolutely free, i.e., sovereign, and yet bound by international law through its own sovereign will. The famous phrase of the Permanent Court of International Justice (PCIJ) in the S.S. *Wimbledon* case here springs to mind, a phrase so magnificently smooth and optimistic (besides being manifestly true) as to immediately disclose its nineteenth century lineage: 'The Court declines to see in the conclusion of any Treaty by which a state undertakes to perform or to refrain from performing a particular act an abandonment of its sovereignty ... [T]he right of entering into international engagements

is an attribute of state sovereignty'.¹² The sovereignty is the pivotal point: it signifies both freedom and (relative) constraint. Moreover, public law and international law, the internal and external side of the state and of the law, at once merge into one another.

This type of systematic approach had a much greater influence on the law of war in the second part of the nineteenth century than is commonly perceived today. There are few efforts, up to the Hague Conference of 1899, which pursue a more or less exhaustive codification of the laws of war through a set of comprehensive conventions at the international level. During the second part of the nineteenth century, the path followed was rather that of either producing quite short and generic legal texts which would be spelled out in the municipal law of the various states (Geneva Convention of 1864), or non-binding model rules intended to inspire national military legislation and the drafting of national military manuals. This course of conduct was a result of the fact that, as the fate of the Brussels Declaration of 1874 or the additional Articles to the Geneva Convention adopted in 1868 showed, states were not yet ready to accept any extensive international codification of binding rules on the question of warfare.

The Geneva Convention of 1864 contains only ten Articles, both incomplete and underdeveloped. These Articles are not self-sufficient; they culminate in the duty of national legislators to pass municipal legislation and to take other related action. Thus, for example, the Convention obliges states to prepare sufficient medical services for the eventuality of war. This duty is not stated directly but indirectly, through the obligation placed on each belligerent to collect and care for the wounded and ill combatants of whatever nationality (Article 6). Article 1 states that the ambulances and military hospitals shall be recognised not only as neutral, but also 'protected', which means that states, for example, must enact legislation to repress pillage and looting. The distinctive emblem of the Red Cross must be protected by national legislation against abuses.¹³ The sanction for punishing offences against the provisions is left entirely to be enacted in national criminal law; such a sanction is not included in the Convention. Overall, the eight substantive Articles of the Convention are hardly able to cover the entire ground, even on such a narrow subject as the amelioration of the condition of the wounded in armies in the field. The thrust of its concrete application is thus left to internal legislation.

The Oxford Manual (1880) Preamble states the point of its existence very clearly:

The Institute [of international law], too, does not propose an international treaty, which 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 both the progress of juridical science and the needs of civilised armies.¹⁴

Indeed, in the United States and in almost all European states, being the essential military powers of the day, an intense process of national legislation and adoption of military manuals took place during these years.¹⁵ It is no coincidence that legal writings extensively refer to the various pieces of national legislation and military manuals on almost every point of the law of war. The relevant law is thus formed through international soft law (Brussels 1874, Oxford 1880, Lieber 1863) and various national laws in a complex array of interrelationships. Some authors rightly point out that the development of the modern *jus in bello* rests heavily upon progressive national legislation, such as that of France, the United States, Germany or Italy.¹⁶ This approach can still be felt to some extent in the landmark legislation of 1899 (The Hague). The 1899 Hague Convention II (on land warfare) opens as follows: 'The High Contracting Parties *shall issue instructions* to their armed land forces, which shall be in conformity with the [annexed Regulations]' (Article 1) (emphasis added). Understandably, the Convention requires some action from the states parties intending to implement it; at the same time it is still an echo of the older approach of inserting an obligation to enact specific instructions to the armed forces, only thereafter to recall that these instructions must of course conform (but not be limited to!) the duties under the Convention.¹⁷

There are several consequences resulting from this way of developing the law of war through municipal law influenced by international 'model' rules. The most important aspects are that the law becomes not unitary but divided; and that in a particular armed conflict, the applicable law will be defined by the converging or reciprocal rules contained in the municipal legislations of the warring states. In other words, the area of overlap between the national legislations will produce some common rules to be applied. Rather than being based on objective rules of international law, the gist of applicable law was in concrete cases the sum of varying subjective rules based on national law. Some common or objective rules of international law did exist, such as the Geneva Convention of 1864 or the St Petersburg Declaration of 1868; but such rules were exceptional, whereas the national rules were commonplace. It is only the repeated experiences of considerable differences in military usages and practice, provoking numerous complaints about violations of the laws and of bad faith, which finally inspired a process of codification. This process produced a series

of more detailed and objective rules on the international level, directed at silencing such complaints.¹⁸ The Franco-Prussian War of 1870–1871 was a landmark experience in that area, but it was not the only one.

2.2. *Principle of 'necessity' as the pivotal rule of the system*

The laws of war of the second half of the nineteenth century were replete with gaps and uncertainties.¹⁹ The older 'usages' of war were not considered to be fully legal: they were a mixture of religious, moral and other practices, falling short of the modern, purportedly strictly scientific, concept of law, originating in the nineteenth century positivistic ideal. Then again, legal codification was only in its earliest stages. Since there was a ready-made, complete set of precise rules to be relied on, it became essential to sum up the whole subject matter within some guiding principles. These principles could immediately inspire the work of both the legislator, when enacting new laws, as well as those applying the law in order to seek a legal answer to a concrete problem.

One way of approaching the issue is the time-honoured principle that the laws of war emerge out of a conciliation of two countervailing principles, those of military necessity and humanity.²⁰ But this equation is both too complicated and too limited: too complicated since it would perhaps be possible to state a clearer and easier principle, which should then be preferred; and too limited, because the equation presented addresses itself principally to the legislator and is of less avail to the law-applier. So what would be a simpler way of stating this? It would be to make 'military necessity' or 'war necessity' the *pivot* of the whole system, thereby creating a synthesis of the two concepts. This concept of 'necessity' encompasses both a positive, expansive, violence-permitting role, and a negative, restrictive, violence-limiting role. The equation reads as follows: (1) everything which is necessary to overpower the enemy must be permitted, and it would be pointless to attempt to prohibit it, even on account of humanity; (2) but everything which is not necessary remains incompatible with war and must be considered a superfluous, inhuman and prohibited destruction.²¹ The first component is thus always lawful while the second is always unlawful. In the absence of concrete prohibitive rules, this principle offers criteria for deciding the lawfulness of means of warfare. The principle of necessity therefore plays an essential residual role in a legal environment where detailed rules are rare and gaps frequent. 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 boundaries between what appears 'necessary' or not at any certain time. It is the main task of the legislator to take all these factors into account and to weigh them in the different historical situations.

The principle of humanity and all other restrictions on warfare developed within the second, restrictive component of necessity. The philosophy of this restrictive 'necessity' is admirably summarised in the Preamble to the St Petersburg Declaration (1868).²² Indeed, many authors of the time concluded that an action is unlawful simply because it involves more use of force than necessary to achieve a particular military objective.²³ Restrictive necessity also inspires entire branches of the law of armed conflict: thus, for example, the principle of 'unnecessary suffering' permeates the entire law of weapons.²⁴ How could such a restriction on warfare be accepted at all? One of the reasons for such a moderation flows from *jus ad bellum*: it is the old maxim, known since Augustine,²⁵ that a war involving excessive use of force renders the return to peace (which is the final aim) much harder because of the long-lasting resentment of the victims.²⁶ The other reasons arise from *jus in bello*: the aim of restricting behaviour is to encourage military discipline and focus on important rather than secondary objectives, as well as reducing injury to the bystanders of war. The aim is also to avoid reprisals and thus excessive losses.²⁷

The principle of necessity (expansive and restrictive) has the advantage that it may to a significant extent mask the absence of precise legal rules. It offers a guiding criterion, appearing reasonably precise enough to, *faute de mieux*, decide on what is lawful and what is unlawful in warfare. Moreover, the principle has a distinguished origin. It can be found in works by almost all classical authors, especially in Grotius,²⁸ Wolff,²⁹ Vattel,³⁰ and even in J. J. Rousseau;³¹ it furthermore appears more or less subliminally in many other passages of the classic writers.³² It can be encapsulated in the maxim: *in bello licere quae ad finem sunt necessaria*. What is easier than to cling to tradition?

The principle, however, could only produce increasingly significant clashes in a world where military conceptions and configurations of *raison d'Etat* 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 necessity³³) or a French, at that time more moderate conception of defensive patriotic war (and thus of necessity)? When there is no common conception of war and its principal aims, a general principle such as necessity allows excessive strain on particular rights and duties. The recurrence of abuse is mainly the reverse of lack of

common conceptions. It was thus understood, at the turn of the century, that the 'necessity' criterion was too vague and open to abuses,³⁴ and had to be complemented (and to some extent superseded) by a codification of particular rules in international conventions. It may also be recalled that in the more militarist visions of the law, *Kriegsräson* preceded *Kriegsmanier*, so that the rules on warfare always remained subject to the restrictions of necessity and to *rebus sic stantibus*.³⁵ Notwithstanding, we may here note that the principle of 'necessity' admirably fitted the system of the law of war as it stood in the nineteenth century, with its many gaps and uncertainties, its reliance on internal law (and thus also of municipal conceptions of the war), its military rather than humanitarian character, and its still formative impulse. All these aspects have been heavily nourished by the seminal general principle of necessity – chameleonic in its nature, at once expansive and then again restrictive.

2.3 *A subjective rather than an objective trigger for the applicability of the law of war*

The system of the law of war in the nineteenth century, and up until 1949, was based on a subjective rather than objective trigger for determining the applicability of that body of the law.³⁶ Traditionally, the application of the law of war depended on the existence of a state of 'war'. Since the concept of war was all but clear, shifting between formal (declared) and material (intensity) war, international and civil war, the necessary legal certainty as to what was going to be applied to whom was achieved through some acts of will by the concerned states. An international war was held to exist essentially when it was declared (this being a unilateral legal act, expressing a will), or at least when there was an ascertainable subjective *animus belligerendi* of at least one state to the violent contest. This explains the extraordinary importance of the declaration of war in the nineteenth century.³⁷ It was of the essence, especially for the neutral states and their commerce at sea, since their rights and duties towards the warring states would be altered from the declaration of war onwards. A civil war could also bear heavily on the rights of neutral states. Therefore, it was accepted that a 'recognition of belligerency' (again a unilateral legal act embodying an expression of will) would allow the two parties in a civil war to be treated as belligerents placed on an equal footing. Hence, the law of war, especially neutrality, would apply to both.³⁸ This recognition could emanate from the local government or from third states. A civil war could thus be transformed from a legal point of view into a full-fledged 'war' between

the recognising state and the recognised opposing entities, so that the law of war and of neutrality would apply.

These two devices (declaration of war and recognition of belligerency) fitted perfectly into the sovereignist and positivist frame of the nineteenth century:

1. Humanitarian protection was not paramount, thus gaps in protection were not felt as being inadmissible; if a particular violent contest were not formally classified as 'war' (e.g., armed reprisals), the law of war would simply not apply.³⁹ The formal aspect dominated the material one.
2. The sovereign will of the different states was decisive, each state remaining free in the application of the law according to its perception of a particular violent struggle (if it declares or recognises the war, the law of war applies; if not, the law of war would not apply).
3. This will is expressed through a unilateral act (declaration of war, recognition of belligerency), not through an agreement between the belligerents. We here once again confront a projection of the 'I' which reflects very well the above-mentioned paradigm of the primacy of municipal law;
4. The legal picture ensuing from such a system is fraught with relativity: the war formally exists or does not exist depending on the will of each state. Thus, the question of the existence of war was subjective rather than objective. It must be added that the sharp edges of such a doctrine were sometimes softened in legal writings, e.g., by the development of a category of 'material war' to be treated analogously to a 'formal' or declared war. The essence of the system, however, was subjective in the described sense and therefore material criteria were not easily applied.

This subjective system was abandoned in 1949. With the Geneva Conventions, through their Common Article 2, the trigger for the applicability of the law of armed conflicts now became neatly objective. The law of armed conflicts applies in cases of 'declared wars', 'international armed conflicts', 'occupation of territories without resistance' (hostile occupation even without hostilities), and to non-international armed conflicts (Common Article 3). All these concepts, with the exception of the first, are objectively defined and do not depend on declaration or recognition. Thus, for example, the concept of 'armed conflict' refers to effective hostile contacts between armed forces or to the existence of wounded and sick, prisoners of war, enemy civilians in need of protection (international

armed conflicts), or to a military organisation of the armed forces and a certain intensity of the armed contest (non-international armed conflicts). If there is such a situation in the field, which is to be objectively determined through the key concept of modern law, i.e., effectiveness, then the law of armed conflict applies. It is not by coincidence that the term 'law of war' was now progressively abandoned in favour of the larger term 'law of armed conflict' in order precisely to underscore this shift from a subjective to an objective system. The concept of 'war' essentially depended on a subjective will to be at war; 'armed conflict' refers to a fact on the *terrain*.

The main aim of this shift was to ensure the applicability of IHL to all situations of effective hostile contact. This reflects the major shift of the law from military matters (pre-1949) to the humanitarian protection of the victims of war (post-1949). Thus, while lacunae in applicability could easily be accepted before 1949, when the questions focused on military matters to be sorted out between professional armies, after 1949, such lacunae in protection could no longer be accepted, in view of the new paramount humanitarian aim of the law.⁴⁰ No victim may be left without protection because of legal subtleties surrounding the concept of war. It may be added that the subjective aspects have not, however, completely disappeared, especially in the context of non-international armed conflicts. Governments fighting internal rebellion are often reluctant to accept that an 'armed conflict' is ongoing; they prefer to claim that they face, at most, internal disturbances. This way, they seek to avoid the application of international obligations under the Geneva Conventions, the *droit de regard* of the international community and of the ICRC which this inevitably triggers (resented as interventions in internal affairs in an extremely sensitive moment), and the granting of an unwelcome political and legal status to the insurgents, who would then have to be treated as 'belligerents'. This margin of appreciation hardly fits modern law, but it is in fact exercised. Moreover, recognition of rebels as belligerents, in order to apply the whole body of the law of armed conflicts instead of only Common Article 3, was still possible after 1949, but in fact such recognition of belligerency fell quickly into disuse. To some extent, the modern law of armed conflict still faces difficulties in its application. These are ordinarily overcome through special agreements between the warring parties. Such ad hoc agreements grant some practical humanitarian guarantees, while at the same time reserving the correct legal qualification of the situation.

We may thus notice that the subjective approach of the nineteenth century augmented the gaps in the law. Not only was the law of warfare

incomplete in itself (gaps within the law), it was also easy to escape its application by not declaring war or by not recognising belligerency, thus creating a second type of gap (gaps in the application of the law).

2.4 *Fundamental paradigm of progress and civilisation (with its related beliefs)*

The modern movement for developing the law of war sprung from a deeply rooted sense of progress, philanthropism and civilisation, which was predominant in Europe in the nineteenth century.⁴¹ This sociological 'law of progress' was considered to be scientific law. It was much the same approach as applied by Hegel, Marx and others, who had presented ineluctable laws of evolution. In this context, the dominant belief was that almost everything done in the warfare of past centuries, where war had been cruel and inhuman, had been lawful; that limitations were now being imposed on the destructiveness of war through the progress of humanitarianism, and that the social phenomenon 'war' would become completely eliminated.⁴² The maxim could be paraphrased as follows: 'formerly nothing; now something; tomorrow everything'. This evolution from darkness to light was thought to be inevitable; it was implicit in the objective laws governing social evolution (nineteenth century scientism). Martti Koskenniemi⁴³ has shown with great clarity (but perhaps sometimes excessively through the critical lens of the modern man) how this idea of progress permeated the work of the founding fathers of the Institut de droit international, which incidentally gave much weight to the law of armed conflicts. This gospel of progress was particularly marked in continental thinking, especially in France, whereas the Anglo-Saxon concept of war remained somewhat more traditional.

Moreover, the laws of war were no longer, as they had often been with Grotius, Vattel and other classical writers, questions of natural law (as opposed to the positive law of nations)⁴⁴ or of personal morals (the personal conscience before God, as Vattel often put it).⁴⁵ They were now laws imposed by the positive law of nations itself, at once binding and incontrovertible.

References to progress and civilisation abound in the old treatises on the law of war.⁴⁶ Through that particular lens, the whole subject matter receives an unmistakable teleological, temporal and sometimes almost eschatological colouration, spanning from moral considerations, on the one hand, to the firm belief that growing enlightenment created by arguments⁴⁷ and conventions⁴⁸ will improve warfare, on the other. Thus:

La 'civilisation' de la guerre n'est plus aujourd'hui reculée dans le lointain d'un avenir idéal. S'il n'est pas permis encore d'affirmer que l'adoucissement des mœurs et le développement de la raison publique aient complètement et définitivement substitué à la primauté de la force la primauté du droit, il est impossible du moins de méconnaître le mouvement progressif qui, de nos jours, s'accomplit à cet égard dans l'ordre des idées et des faits.⁴⁹

Or: L'humanité, dans sa marche ascendante vers un idéal social, tend à asseoir de plus en plus sa constitution sur le respect du droit. Aucun critère du progrès n'est plus infaillible que l'idée juridique; plus elle s'épure, plus le règne de la force va s'affaiblissant.⁵⁰

This religion of progress had some characteristic corollaries. One of them was unlimited faith in the support of public opinion for the cause of progress.⁵¹ By a sort of fiction, public opinion was held to be automatically enlightened.⁵² Another corollary is that the law of war is perceived as a technical humanitarian question, permeated by the scientific laws of social evolution, and not a political question with all its inevitable fluctuations.⁵³ A third corollary is that the law of war applies only to 'civilised' states; they do not apply in colonial territories or in the 'barbarian' and 'savage' world.⁵⁴ The threefold classification of James Lorimer⁵⁵ of civilised, barbarian and savage communities was very common at that time.⁵⁶ The law of war was perceived as a specific Christian and Occidental practice, developed through centuries. The group benefiting from this practice was a closed one. Finally, another corollary was the concept that progress implied centralisation of all acts of warfare within professional armies, and thus within the organs of the state. Private wars are disordered, intrinsically unlimited and barbaric. Progress means rendering the war more professional; to this effect, it must be concentrated in the public domain. Hence, privateering and other forms of private participation in war were considered remnants of older practices which ought to be abolished.⁵⁷

2.5 *Varia*

There are some other aspects of the law of war of the nineteenth century which are of interest from a systemic perspective. They may be summed up very briefly.

Prevalence of the normative approach

The nineteenth century preserved an unbroken faith in the strength of legal norms and treaty arrangements. Its focus was to produce model rules

for insertion in the municipal law of the various sovereign states; it was far from being concerned with ensuring sanctions for the few rules-adopted on the international level. Every government was considered to acclaim the principle of *pacta sunt servanda* and its international repute; public opinion was thought to emphasise the respect of law. How optimistic the view of the times could be may be illustrated by the following sentences: 'Le droit hospitalier international [c'est-à-dire le droit humanitaire] porte avec lui sa sanction; car le connaître, c'est le respecter. Aussi bien, pour en assurer la scrupuleuse application, il suffit que chacun soit informé de ses règles et de l'esprit utilitaire qui les inspire';⁵⁸ 'La Convention de Genève en particulier est due à son influence [of public opinion], et nous pouvons nous fier à elle du soin de l'exécution des ordres qu'elle a dictés. C'est par un louable sentiment de justice et d'humanité que les souverains ont signé la Convention; les peines morales sont par conséquent celles qu'ils doivent redouter le plus, puisqu'elles sont plus que d'autres en harmonie avec les mobiles qui les ont guidés'.⁵⁹

It was only occasionally that the glaring insufficiencies of this approach were perceived. The troublesome experiences with applying the Geneva Convention of 1864 in the following wars (such as the gaps in the laws governing sea warfare shown by the Battle of Lissa, 1866; or the ignorance of the conventional provisions and the breaches which occurred in the Franco-Prussian War of 1870–1871) culminated in the proposal of Gustave Moynier, of the Geneva Committee (later the ICRC), for an international criminal tribunal.⁶⁰ This proposal was criticised in legal literature. The most these critics were ready to allow was the insertion of criminal provisions in the various national criminal codes or in special military legislation.⁶¹ The proposal was even less popular with states. Hence, again the national approach was preferred; every state was free to adopt penal legislation to the extent they wished. It was only through the shock of the First World War, with the massive (though often exaggerated by propaganda) contempt of the rules and the glaring violation of Belgian neutrality, that the problem really came to the forefront and that the 'failure' of international law (or rather, the old approach to it) became widely acknowledged.⁶² From then on, efforts to introduce some criminal sanction for violations of the rules on warfare on the international level were made. After the First World War, this led to the Leipzig trials; after the Second World War to the Nuremberg, Tokyo and other post-war trials; and in the 1990s to the ad hoc criminal tribunals, the mixed criminal tribunals, and the International Criminal Court (ICC).

Importance of the humanitarian initiative of the ICRC

Due to the fact that the law of war of the nineteenth century was replete with so many gaps and uncertainties, its development, strengthening and implementation rested essentially on the devoted action of its principal champion, the Geneva Committee, now called the ICRC. The main means at the disposal of the ICRC to push forward the legal body it championed was (and remains) the so-called 'humanitarian initiative'.⁶³ The ICRC exercised this initiative on a great number of occasions throughout the nineteenth century. It thus expanded its area of action from the wounded and sick military personnel in land warfare to the wounded, sick and shipwrecked at sea, later to non-injured prisoners of war, and finally to civilians.⁶⁴ From these times onwards, there has been an indissoluble connection between 'IHL' and the ICRC. Equally, in modern times the concept of the law of war (or IHL) is much more than the black letter law that was first introduced; it is also a spirit of protection and action. In this larger domain, the ICRC will seek to obtain guarantees and protections for the various victims of war by – if necessary separate – concessions of the belligerents. By this course of conduct, it will thus often attempt to go beyond the formal law, fraught with all its insufficiencies. But the letter killeth ...

Some attempts to uniform maritime and land warfare

In the nineteenth century, maritime warfare still had a paramount importance. The main communication lines for vital resources, and the bulk of commerce, were at that time maritime. To secure military victory, it was essential to disrupt or inflict damage on the enemy's maritime communications. Maritime warfare had thus, since time immemorial, been geared to hampering commerce. This inevitably meant inflicting damage not only on the state and its agents, but also on private individuals, enemies (confiscation, destruction) or neutrals (contraband of war, blockade). The Anglo-Saxon states accepted this as a necessity in maritime war; while many continental authors opposed it as an infringement on the rule that war should take place only between states and not between private persons. These rather progressive authors thus sought to harmonise maritime warfare and land warfare by subjecting them to the same core principles: the protection of private property.⁶⁵ This was one of the most important and controversial questions of the law of war of the nineteenth century. It produced a great array of legal arguments of a most interesting nature,⁶⁶ on which it is impossible to dwell here. It may just suffice to say that the

stern resistance of England and some other important maritime states did not allow the realisation of the proposed reforms towards protecting private property. Systemically speaking, the law of sea warfare remained under the guiding polar star of different principles from land warfare: for the former, a continued tribute to the older conception of war as taking place against the whole enemy community, state and private persons alike (collective responsibility); whilst the latter saw an increasing adherence to the famous Rousseauist theorem that war and its effects must be confined to the state, sparing private individuals from attack (state responsibility). Hence, private property was not protected at sea; but it was, at least to a greater extent, protected on land. The battle for unity within the law of war between its maritime and land branches was lost. The dichotomy has remained untouched until today, with the rider that the law of sea warfare has to a great extent lost its practical importance.

Absence of the 'civilian'

The law of war of the nineteenth century was only marginally concerned with civilian persons and their protection. The law was essentially a part of military law, concentrating on means and methods of warfare (referred to as 'Hague Law', flowing from the codifications of 1899/1907) and on the care of wounded, sick or shipwrecked military persons ('Geneva Law'). The civilian was thought to stand 'outside' the war and hence, being aloof, not to be in need of any specific regulation (except in sea warfare, as already explained). Civilians undoubtedly might suffer in certain situations, such as siege warfare or occupied territories; however, even in these cases, the law considered them at best as persons indirectly affected, having to suffer the inevitable course of hostilities. It was only in the particular situation of occupied territories that the civilian obtained direct legal protection.⁶⁷ This relative absence of the civilian had many causes.⁶⁸ First was the optimistic belief that land warfare, with its focus on professional armies, would barely impinge on civilians, and in those exceptional cases where it did, this impingement would in any case be inevitable (such as in besieged towns) so that the law would not be able to do much about it, except by special agreement between the belligerents. Second was the somewhat exacting concept of sovereignty, repelling any idea that the dealings of a state with private individuals (even if foreigners) could easily be made subject to international regulation. Third was the tradition of viewing the 'innocents' not as individual persons but rather in terms of categories such as the elderly, women, children, priests, the insane, who tended to remain alive. Finally, was the very fact that the law of war was

considered to be 'military' and not properly 'humanitarian' law, i.e., it was a special law for the combating forces rather than a general law protecting persons in general. The result of this eclipse of the 'civilian' was at least twofold. First, the law had to be further developed in order to fill the gap of protection of civilians, faced with ever-increasing suffering caused by ideological and technically improved warfare. This occurred first through some prudent humanitarian initiatives of the ICRC, such as the humanitarian assistance mission in Montenegro to the benefit of 40,000 refugees from Bosnia (1875–1878).⁶⁹ Secondly, the concept of prisoners of war was expanded to cover as many persons in the hands of the enemy as possible, on account of the non-existence of any parallel protective status of civilian internees. Thus, in the nineteenth century, the status of prisoners of war was accorded not only to combatants and to certain persons accompanying the armies, but also to a series of enemy persons performing a public function, such as ambassadors, ministers, heads of state, kings, etc.⁷⁰ Frequently,⁷¹ authors stressed that 'all persons' not clearly innocent, i.e., persons who could serve in the adverse army or support the adverse war effort, could be taken captive. Since there was no regulation of civilian captivity under the law of war, these persons were by necessity placed under the category of prisoners of war. This functional interpretation of the latter status ensured these persons some degree of protection. Hence, the concept of prisoners of war performed a broader function in the nineteenth century than it does today.

Permanence of conceptual problems

As regards many aspects of the law of war of the time, conceptual uncertainties continued to loom large. One of the branches of the law most obviously affected was the law of belligerent occupation. This concept, now generally construed as a transient and limited control of foreign territory, had only lately emerged from the fogs and clouds of conquest. This process of transformation was unfolding throughout the nineteenth century.⁷² If control of foreign territory under occupation was now considered to be only temporary, limited and precarious, and the right of 'ownership' of the original sovereign was preserved, the most acute problem was explaining how two titles to territorial control could coexist and be coordinated one with the other: the title of the original and ousted sovereign, which continued to exist, and the provisional title of the effective occupier, which was superposed on the former. This problem produced a series of theories, which placed the law of belligerent occupation under substantial strain of uncertainties for a considerable time. Some examples of such theories

may be mentioned here without venturing into further explanations. For some authors, occupation remained under the shadow of conquest;⁷³ for others, the occupier was a quasi-sovereign, able to change all institutions and laws of the occupied territory, and limited simply *ratione temporis* to the time of effective occupation.⁷⁴ For others again, occupation was nothing more than a mere power of fact (never a power of law), consequential to effective control of foreign territory and rooted in military necessity,⁷⁵ while some saw it as legal power (not a simple fact) flowing from effective control.⁷⁶ A small number of authors considered it to be based on private law, the occupier 'representing' the sovereign power of the occupied territory and being thus able to exercise all powers granted to the ousted state within its territory by its local municipal law.⁷⁷ These different theories tended to result in different approaches to the rights of the occupier.

2.6 Summary

The phase spanning from 1864 to the turn of the century, and indeed to the First World War, was essentially dominated by a municipal law approach to the law of war. The predominant idea was that international 'model rules' would serve as the basis for a substantially progressive municipal codification of the law. The applicable law of war would then in most cases be the area of convergence of the various national laws. This approach left significant divergences in the legal regulation and also a considerable number of gaps in the applicable law. The prevailing view of the day was optimistic, derived from ever-growing progress and civilisation. It believed in enlightened practice, not in detailed regulation. Since the evolution towards civilisation was considered to be an inescapable social law, there was no attempt to regulate the rules of warfare extensively or to protect against derogations, attempts at escape or covert subversion through legal subtleties. The law was one thing; the spirit was much more. This impressive but shaky edifice came down with a loud crash in the First World War.

3. Second phase (1899–1946): the law of war between fundamental criticism and configuration as a system of 'limited limitations'

The persisting differences in national regulations combined with experiences with abuse, disputes and accusations of violation provided a strong impetus to an international 'codification' of the law of warfare. This was first attempted in the Hague Conferences of 1899/1907 (the 1907 Conference producing fourteen agreements) and later in the London

Naval Conference of 1909. The First World War, however, witnessed a breakdown of many of the codified rules. Sea warfare became chaotic (long-distance blockade by England, unlimited *U-Bootkrieg* by Germany); and the law of land warfare was put under heavy strain by the progressive unfolding of total war (intense hate and national propaganda, participation of civilians in the war effort, targeting of industrial plants, aerial warfare over vast areas of territory including towns, etc.). It is true that the extent of the breakdown of the law has been exaggerated for propaganda purposes⁷⁸ or as a result of war psychosis.⁷⁹ Claiming that the enemy has violated the law reinforced the population's determination to resist and it also justified reprisals. Such claims were thus made more often than they should have been, illustrating the wisdom of the saying that the first casualty in war is truth. Nonetheless, the breakdown of the law cannot generally be negated; and its importance should not be minimised. The result of this overwhelming and grim experience was a plunge into cynicism and resignation,⁸⁰ at least as remarkable as the older ages' (at least superficial) optimism in its gospel of progress, civilisation and the invisible hand of an enlightened public opinion. These developments generated a phase characterised by two aspects: first, a full-fledged rejection of the law of armed conflict by a non-negligible number of commentators; and secondly, the systematic conception of the law of war as a modest set of rules limiting the general rule of freedom of belligerents. This latter approach was to some extent intended to counterbalance the excessive expectations and demands that had previously been formulated around a triumphant law of warfare, which had turned out in practice to be anything but that.⁸¹

3.1 Condemnation of the law of war

In a series of concordant articles,⁸² the most important of which was an anonymous contribution in the *British Yearbook of International Law*, several authors proposed that: (i) it had been a mistake to concentrate on the law of war instead of focusing on the ways of avoiding war in the first place (*jus contra bellum*),⁸³ and (ii) that on any account, it is impossible to regulate war by so-called rules on warfare since the volcanic violence of war is intrinsically unsuitable for legal restrictions.⁸⁴ The focus of legal attention, in the wake of the League of Nations, thus turned to the avoidance of war; the laws of war were neglected, classified as being illusory, bygone *naïvetés*, or 'child's play'. It was held that 'total war'⁸⁵ had made legal regulation of wars impossible: the new wars, involving all components of society in

the war effort, were unavoidably lawless; thus one could only attempt to prohibit them, not try to regulate them. This short-sighted attitude has been criticised with good arguments;⁸⁶ it was, however, dominant during the inter-war period. It hampered further adaptation and progress in the laws of war, especially with regard to weapons, aerial warfare and protection of civilians. The essential conventions adopted in this time period were the Geneva Gas Protocol of 1925⁸⁷ and the two Geneva Conventions of 1919 concerning the wounded and sick, and prisoners of war.⁸⁸ The first was the result of disarmament efforts by the League of Nations (supervision of international trade in arms) and thus fitted the *jus contra bellum* approach; the second was essentially humanitarian (not forming part of the laws of war in the narrow sense), being a result of the ICRC's efforts.

3.2 *The law of war as a system of concrete limitations on the general rule of residual freedom*

The authors particularly sensitive to systematic questions had already foreseen⁸⁹ what now tended to become a major feature in the *exposé* of the law of war:⁹⁰ its character as a set of restricted rules, limiting a residual freedom of belligerent action. As we have seen, military necessity had been the great principle for determining the lawfulness or illegality of a certain conduct. It was held that everything necessary to overpower the enemy had to be considered allowed. In times of extreme necessity such as war, permissive action included a peculiarly vast array of things. These cannot be listed or expressed individually. Residually to this main and vast category of allowed courses of conduct, some limitations could be imposed, because an action is irrelevant and superfluous to the aims of war (necessity in the restrictive sense), or due to dictates of humanity (cruel or excessively devastating means), or finally because of reasons of prudence (fear of reprisals). The presumption was freedom of action; the exception was a concrete limitation contained in the positive law. According to this conception, the law of war could not aim at more; and it was better to achieve less than to fall into illusions and delusions. This state of affairs had two immediate corollaries.

First, the law of war thus to a great extent strengthened the leading legal principle of the time, namely the concept that a state could not be bound by a rule without its express or implied consent. In the first part of the century, legal positivism (and its corollary: sovereignism) was still in its heyday in international law. The whole body of international law thus tended to become a set of rules formed by particular agreements: where

there was consent, the states consenting would be bound; where there was no consent, there would be no legal constraint on action. The result of such a conception was that the law was endlessly fragmented and 'archipelised'. There were scarcely any general rules of international law but rather particular rules of international law applicable to certain consenting states. Hence, the general rule was freedom from constraint. This was a sort of default modus in cases where no consent to a rule is expressed. The exception was the existence of a legal rule binding upon states, but only when such corresponding consent existed. When no particular will to bind itself was expressed, a state remained in the ordinary modus of not being bound; when a particular will was expressed, a state would be bound according to the terms of this undertaking. This concept of state freedom as the underlying and ordinary condition of international relations was admirably expressed in the much celebrated (and not less criticised) *Lotus* case (1927), where the PCIJ remarkably illustrated the general atmosphere of the time:

International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.⁹¹

Sovereignty, independence and power were the dominant ideals of that system; the law ideally reduced itself to transactions (treaties, diplomacy), responsibility and war.⁹² This conception permeated the law of the inter-war period. True, this conception was attacked by progressive legal doctrine, but it remained dominant in practice. It dominated even the most progressive pieces of law, such as the Covenant of the League of Nations. This is demonstrated especially in Article 5(1) of the Covenant, where unanimity is posed as the general voting rule. This voting modality was chosen precisely in order to maintain the equality and unaltered sovereignty of every state through the power of *liberum veto*.

Secondly, it meant that the 'Martens Clause'⁹³ was not really taken seriously before the post-Second World War trials. The residual rule was not humanity; it was state freedom. Geoffrey Best is thus right, I think, when he expressed the following:

The Martens Clause was, to begin with, not much more than a swallow announcing a summer still some way off. Much more attention has been paid to it in the second half-century of its life than was paid to it in the first. It attracted no significant attention until the public conscience of the

victorious civilised peoples, establishing on ground as firm as possible the post-war trials⁹⁴ of notoriously uncivilised enemies, found the idea of 'laws of humanity' peculiarly interesting and useful.⁹⁵

A reading of the old literature on the law of armed conflict, especially from the inter-war period, confirms this finding. This evanescence of the Martens Clause is nothing more than the reverse of the coin already discussed: that the dominating principle was state freedom in all cases of absence of a binding, prohibitive rule.

The most sensitive authors⁹⁶ went further in their painstaking legal analysis. They insisted on the fact that the law of armed conflict was based not on a residual 'right' to perform specific acts of violence, flowing from the absence of prohibitions, but on a simple '*de facto* freedom' to engage in such courses of action, due to the absence of legal regulation. Indeed, the law of war did not grant a subjective right to undertake and impose a belligerent action on the counterpart. The adverse party was in no way bound to suffer such action, as would be the case if there were a correlative subjective right granted to the belligerent state. The right of the adverse state to resist in order to ward off the coercion which it was being threatened with or subjected to, was rather unquestioned. The freedom to act was thus recognised by the legal order as a *de facto* freedom in the sense that the law abstained from prohibiting certain courses of conduct or regulating certain subject matters, thereby leaving them automatically to be sorted out by power and force. The freedom to act was not recognised by the legal order as a *legal* freedom, sanctioned as such by the law through a granting of rights of action and correlative duties of suffering (*facere et patire*). In the first case, the law referred to a fact; in the second, it referred to a norm. The 'freedom of fact' theory perfectly fits the system of the law of war in the inter-war period, at once decried, jeopardised and shaky.

3.3 Summary

This second phase was characterised by a profound crisis of the law of war. For the first time in the history of the law of nations, it was marginalised within the international body. Moreover, this phase was characterised by a legal construction of the law of war as a set of limited, residual and prohibitive rules set against the backdrop of the unlimited number of hostilities which the modern sovereign state, at the heyday of its might, was faced with. The abuses and destructiveness of such permissive premises would necessarily trigger a brutal shift of the law towards new constructions and values, as happened after the Second World War: the law of war

now placed at its centre humanitarian concerns. It would thus transform itself into 'international humanitarian law' (IHL).

4. Third phase (1949–1993): the humanitarian age of the Geneva Conventions of 1949

The adoption of the Geneva Conventions in 1949 (to which the two major Additional Protocols of 1977 were later added) marked a radical departure from old concepts and generated a new universe with regard to the law of war. Their importance as a breakthrough of new perspectives, substantive rules and systematic coordinates was epochal.⁹⁷ Essentially, the Geneva Conventions (GC) transformed the law of armed conflict into a 'humanitarian law'. The protection of the individual war victims became the pivotal centre of the system; IHL ceases to be merely (or even essentially) the old 'military law'. This new IHL, with its humanitarian outlook, would in due course necessarily come closer to the nascent and growing arm of international human rights law (HRL). To be able to ensure protection of all victims of (modern) war, it became necessary to abandon both the old concept of international model norms in national legislation (phase I) and the approach of minimum codification as in the Hague Conferences (phase II). The law was now clearly influenced by the idea of a thorough international codification of mandatory norms of behaviour imposed on belligerents, norms which do not permit derogation or reprisals. The three main features of this third phase were: (i) humanitarian protection; (ii) a friendly and cooperative relation with human rights; and (iii) detailed international codification. At this juncture, it may be useful to pause for a moment to analyse the meaning and construction of these great Geneva Conventions of 1949.

4.1 *What are the Geneva Conventions?*

After the end of the Second World War, new drafts on the law of armed conflict, taking into account the experiences gained during the war, were prepared. This war had shown that the traditional law of armed conflict had been insufficient, especially with regard to the protection of persons *hors de combat*. The treatment of prisoners of war (e.g., Russian prisoners in Germany or Allied prisoners in Japan) and the deportation of civilians bore tragic testimony to this. For the wounded and sick military personnel and for prisoners of war, there was already a set of Geneva Conventions which only needed to be updated: the Geneva Conventions

of 1929. Nonetheless, there had been a complete absence of conventional protection for civilians, especially if some scattered provisions applying to occupied territories are left out of account (Hague Convention IV, Regulations, Articles 42 ff.). It was therefore thought in 1949 that a new codification effort was necessary on four accounts:

1. The law of armed conflict had since 1919 suffered from regular criticism regarding its much-debated viability: can there truly be a law in armed conflict? Is the law of armed conflict not created in hindsight, and thus a war too late? Is it not unrealistic to think that a law of armed conflict can work? The law had also suffered serious violations during the Second World War. It was thus felt necessary to solemnly reaffirm this branch of international law and to give it a new impetus, starting from a clean slate: the GC codification.
2. The Second World War had shown that there existed a considerable urgency in protecting persons *hors de combat*. Thus, the new law was centred on that humanitarian issue, largely leaving aside the more military part of the law of armed conflicts (conduct of hostilities). For the conduct of hostilities, the old Hague Regulations of 1907 were still applicable.
3. The Second World War had shown the tendency of some belligerents to manipulate and to try to evade the law, as well as to use all the gaps and uncertainties to enable self-serving interpretations (e.g., on hostages). It was consequently considered in 1949 that the new law should be much more detailed than the previous general summary and optimistic law of 1907. This produced a codification with considerably more and longer provisions. Secondly, the drafters prohibited states from opting out of the conventional protection provided in the GCs through bilateral agreements between belligerents, or through unilateral renunciation of the accorded protection by the beneficiaries (see Articles 6–7 GC I–III, and Articles 7–8, 47 GC IV).
4. Experience had shown, through the Spanish Civil War (1936–1939), that some regulation was also needed for non-international armed conflicts (roughly speaking, ‘civil wars’). Thus, Common Article 3 of the four GCs was adopted. It provided a sort of ‘minimum convention’ within the Conventions, granting some elementary protections in the context of non-international armed conflicts.

In the 1970s, it was considered necessary to adapt the Geneva Conventions. This led to the adoption of the two Additional Protocols (AP) to the GCs in 1977. Adaptations of the law were necessary, especially in the following contexts:

1. *Non-international armed conflicts*: Most armed conflicts after 1949 had been civil wars (with or without some form of foreign military intervention). Common Article 3 of the GCs proved to be too sketchy to provide adequate protection for these multifaceted and numerous civil wars. Thus, Additional Protocol II was adopted, devoted only to non-international armed conflicts.
2. *Definition of combatants*: In the many struggles for liberation of colonised people, and also in other warfare situations (e.g., Vietnam), asymmetric guerrilla warfare had frequently occurred. The GCs (Article 4 GC III) did not permit such guerrilla fighters to be considered regular combatants: the conditions were too strict and could only be fulfilled when the rebels in fact controlled a part of the territory. This inequality in status (guerrilla fighters could not be regular combatants, and could not claim prisoner of war status or combatant privilege) led to discrimination and thus to problems of applying the law of armed conflict. Additional Protocol I, in Articles 43–4, somewhat relaxed the criteria for regular combatancy. Nevertheless, it attempted to avoid an excessive relaxing of the relevant criteria since this would have paved the way for terrorist action and placed the principle of distinction between civilians and combatants under too heavy a strain. The question as to whether AP I succeeded in striking a proper balance has remained controversial.
3. *The law relating to conduct of warfare*: The means and methods of warfare had not been reformed since 1907. The Vietnam War in particular had shown that some new efforts to better protect the civilian population were needed, especially in the case of bombardments. This led to the adoption of the most important Article 48 ff. of AP I, protecting civilians during hostilities (principle of distinction, targeting, collateral damages, precautions in attack, etc.).
4. *Human rights law*: Since 1949, human rights law had constantly evolved. In 1977, it was felt necessary to extend some fundamental protections flowing from the growing field of human rights law to the protected persons under the GCs. Thus, Article 75 AP I and Articles 4–6 AP II were adopted. These are quite detailed provisions.

4.2 *Applicability of the Geneva Conventions*

The adoption of the Geneva Conventions in 1949 marks a shift in the scope of application and in the substance of the law of warfare. Prior to 1949, the law of warfare or of armed conflict was applicable essentially to one

event: 'the state of war'. This supposed, on the part of a state, a subjective intent to consider itself at war with another state. The required intent was generally notified through a declaration of war. As to the substance of the law, it was largely centred on the conduct of hostilities, as is evidenced by Hague Convention IV. Some Geneva Conventions (1864, 1906, 1929), however, were already concerned with the protection of the wounded and sick, and of prisoners of war. With the adoption of the GCs of 1949, the substantive focus of the law changed: due to the horrific abuses of prisoners and civilians by the Axis powers during the Second World War, the new law of armed conflict developed essentially to protect all persons *hors de combat*, i.e., those who do not take part in hostilities (civilians) and those who have laid down their arms (combatants *hors de combat*). This new focus on the properly humanitarian protection of persons aroused a greater concern with the applicability of the law. It was considered that such elementary protection should be applicable as widely as possible and without any exceptions, at least in international armed conflicts (armed conflicts between states). Moreover, after the experience of the Spanish Civil War (1936–1939), it was considered necessary to introduce some provisions on non-international armed conflicts in order to ensure a minimum standard of humanity in this particular context also. The scope of application of the GCs is thus much more articulated and overall significantly broader than that of the older law, due to its focus on a humanitarian minimum standard. The essential provision for defining the material scope of application of the GCs is Common Article 2.⁹⁸

1. Some provisions of the GCs apply even in peacetime, from the time of ratification and entry into force of the Conventions for the particular state. Thus, for instance, the duty to disseminate the law of the Conventions applies immediately. This dissemination will have to be performed in training courses for armed forces and through information of the population at large, as far as feasible. See Articles 47/48/127/144 GC I–IV. See also, for other examples, Article 14 GC IV or Article 58 API.
2. The bulk of the provisions apply in times of armed conflict. The definition of that concept is very wide for international armed conflicts (armed conflicts among states), but somewhat stricter for non-international armed conflicts (civil wars). For international armed conflicts, there is no necessity of a full-fledged war or large-scale hostilities for the GCs to apply (these being obviously included *a fortiori*). A simple small incident between armed forces at the border, even the simple adverse

taking of a prisoner without any exchanges of fire, suffices to trigger the application of the Conventions under the heading of an 'armed conflict'. This purely functional perspective is warranted since there is no reason why humanitarian protection should be granted only for conflicts of a certain intensity. On the contrary, the Convention must apply to the first prisoner when captured, since he is in need of that protection. The only requirement is thus that armed forces of states come into hostile contact and thereby substantively trigger some protection granted by the Conventions. This broad approach is today accepted.

The meaning of armed conflict is different for non-international armed conflicts. Here, only Common Article 3 of the GCs applies, and potentially also AP II if ratified or acceded to. A non-international armed conflict exists only if: (i) the armed forces of the rebels are militarily organised to such a degree that there is discipline and a responsible command; (ii) the conflict has reached a certain intensity, so that it has become protracted and has affected a significant number of victims. As a rule of thumb, there is a non-international armed conflict if the police alone are unable to cope with the situation and military forces must be used. As far as AP II is concerned, according to its Article 1, it applies only to non-international armed conflicts where the rebel forces 'exercise such control over a part of its territory [of a High Contracting Party] as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. These three respective criteria (degree of organisation and intensity of the conflict for the GCs, to which territorial control is added by AP II) should not be interpreted narrowly, bearing in mind the humanitarian nature of the protection accorded. The threshold for reaching an international armed conflict, however, is significantly lower than the one for admitting the existence of a non-international conflict, be it for the purpose of Common Article 3 or AP II.

3. The GCs also apply to cases of declared war. If a declaration of war is followed by hostilities, there will be an armed conflict in the sense just discussed. There may, however, be a time gap between the declaration of war and the effective start of hostilities. To this initial time-span the GCs apply through the trigger of 'declared wars' in Common Article 2. If a declaration of war is eventually not followed by effective hostilities, the GCs equally apply by the same token. There are a series of provisions which may become relevant in such cases of declared war without hostilities, e.g., the treatment of enemy civilians on the territories of the belligerents (see Article 35 ff. GC IV). The fact that

the declaration of war is lawful (e.g., self-defence) or unlawful (e.g., aggression) is irrelevant: the law of armed conflict applies equally to all belligerent parties whatever the cause of their involvement (separation of *jus in bello* from *jus ad bellum* issues). Declarations of war have fallen into disuse since 1945.

4. The GCs apply also to territories occupied without resistance (Common Article 2(2) GCs). There may be cases where a territory is militarily occupied by hostile forces without any resistance from the attacked state. In such cases, there might be neither an armed conflict (no hostilities, no prisoners, no wounded) nor a declaration of war. Thus, a gap could emerge in the protection of the population of occupied territories. The GCs close that gap by the rule contained in Common Article 2(2). It is to be noted that paragraph 2 applies only in cases where a territory is occupied without resistance (residual clause). If a territory is occupied after or in the course of an armed conflict, it is paragraph 1 of Common Article 2 which applies ('armed conflict'). The distinction may have legal importance.⁹⁹
5. AP I adds one specific case to the category of international armed conflicts: namely wars of national liberation (see Article 1(4) AP I). This category belongs to the history of decolonisation.

It can be seen that the main thrust of the Geneva Conventions is to ensure the widest and most complete application of the GCs, as the residual mention of declared wars and of territories occupied without resistance shows. The main reason for this generosity is the humanitarian focus of the GCs.

To sum up, the Geneva Conventions bear testimony to a humanitarian shift of the law: the centre of the new law is the individual, military or civilian, as a victim of the war for whom non-derogable rules of protection must be ensured in all necessary contexts. The law of armed conflict becomes an 'international humanitarian law' (a terminology that was developed in ICRC circles of the 1950s, around Jean Pictet). This new approach allows more weight to be given to the Martens Clause, as state freedom of action is restrained wherever possible, inter alia, through excluding the possibility for derogation, reprisals, etc.

4.3 Synergies with human rights law

International humanitarian law of the Geneva period is rooted in 'humanitarianism'.¹⁰⁰ Hence, progressive interrelations with human rights law

were unavoidable. Geneva Convention IV (by its protection of civilians the Convention is structurally nearest to HRL) was the first to undertake interactions with HRL. Nothing is nearer to the 'human being' without qualification in the field of HRL than the newly discovered 'civilian' in the field of IHL. In the territories occupied by Israel after the Six Days War, this new approach of mixing and complementing HRL and IHL for the protection of civilians has been applied for many years, until the present time.¹⁰¹ All this contributed to the progressive demise of the old ideology of distrust with regard to IHL, prevalent in the United Nations at the beginning of its history. The belief that a focus on IHL could in any way jeopardise the effectiveness of the UN Charter's preventive arrangements against the use of force, which had turned out to be more modest in result than hoped for, had faded. A second essential factor for the two branches of law being drawn closer to each other was the immense growth of the number of civil wars (non-international armed conflicts). IHL was notoriously underdeveloped in the context of non-international armed conflicts. Therefore, it was quite natural to seek additional protection for suffering civilians by applying HRL, as developed since the 1960s. Indeed, HRL could easily be applied to such situations. Civil war takes place within a state. The state driven into civil war continues to be bound by HRL instruments. The only step that must be taken is to define which human rights cannot be derogated from in times of emergency and civil war. Today, the existence of the many HRL monitoring bodies and tribunals also accounts for the improved human rights protection of persons in armed conflicts. Since there are no true monitoring bodies (and even less tribunals) ensuring respect for IHL, it is quite natural to bring abuses of force during armed conflicts within the four corners of HRL violations, and to seek the jurisdiction of an HRL court in order to ensure a sanction.¹⁰² The interrelationship between IHL and HRL has consequently constantly improved and become more interconnected.

4.4 Summary

This phase is characterised by a shift from 'military' law to 'humanitarian' law (protection of war victims); this humanitarian law progressively opened itself to human rights law. The Martens Clause now found fertile soil for growth and gained some importance, whereas the rule of the residual freedom of the state was resolutely pushed back. The 'Hague' Law on conduct of hostilities has only been progressively developed in 1977 through the Additional Protocols. But even in this context, the

thrust of the legal regulation is the protection of persons. One may quote Article 48 ff. AP I, 'Protection of the Civilian Population against Effects of Hostilities', which is the heart of the Protocol.

5. Fourth phase (1993 to date): a phase of progressive 'humanisation' of IHL but also loss of autonomy

It is always difficult to encapsulate current developments within a clear-cut set of theoretical explanations. Only some reflections on the current systematic construction of IHL can here be offered to the reader, and only in a tentative tone. The starting date of this last phase is also rather fluid: 1993 was chosen as it is the year of the creation of the ICTY, marking a rebirth of international criminal law. This particular branch of international law is of non-negligible importance for the configuration of modern IHL. From the perspective of systematic construction of the law, there are two major developments in this phase.

5.1 *Progressive 'humanisation' of IHL*

The humanisation of IHL started in 1949 at the latest, through the Geneva Conventions; it continued in the 1960s to the 1990s through the fraternisation of IHL with HRL; but its heyday was in the 1990s, where it was in itself made the object of doctrinal attention.¹⁰³ This unclear concept connotes essentially two ideas, one more general, the other more specific:

1. On the general level, 'humanising' IHL means rendering it progressively 'homo-centric' instead of 'state-centred'. Traditionally, it is claimed, the law of war was essentially inter-state law, driven by collective responsibility, reprisals, means and methods of warfare, and reparations *post bellum*. Then, increasingly, homo-centred seeds have flourished: individual criminal responsibility (Nuremberg trials, ad hoc tribunals, ICC); human rights concerns (due process of law, torture, inhuman treatment, arbitrary arrest/detention, non-refoulement, non-discrimination, etc.); an extended applicability of IHL in order to ensure increased protection; special agreements concluded to the same effect; development of minimum humanitarian standards for situations of internal disturbances; strengthening of the principle of proportionality limiting collateral damages during attack (Article 51(5) (b) AP I), etc. This process has clearly been significantly accelerated in

the 1990s. Many actors contributed to its gaining momentum, be it the human rights monitoring organs, the UN Security Council, political bodies of regional organisations, the international criminal tribunals, etc. Moreover, this humanised IHL becomes a part of international public order: *jus cogens*, obligations *erga omnes*, and universal jurisdiction. One may find a symptomatic statement to such a perspective of humanisation in the *Kupreskić* judgment of the ICTY (Trial Chamber, 14 January 2000).¹⁰⁴

2. On the more specific level, the humanisation of IHL progressively leads to postulations of 'absolute' prohibitions. Being part of public order, the IHL obligations are protected against any attempts of evasion: reservations, reciprocity/reprisals, derogations by special agreements, evasion by applicability issues, all these tend to be eschewed by legal constructions guaranteeing the applicability of the protections stipulated for in any circumstances. It is undoubted that this effort often remains doctrinal; military practice is less inclined to be enthusiastic. But it cannot be doubted that this perspective and the practice to which it gives rise exerts pressure on the actors – humanitarian, political and military. A conspicuous example of the power of such arguments can be found again in the *Kupreskić* case (2000),¹⁰⁵ with regard to a prohibition of reprisals against civilians in customary international law. There are, however, also areas where IHL tends to be put aside under the influence of other norms of public order: one may think of the law of belligerent occupation, yielding at least partially to Security Council resolutions under Chapter VII of the UN Charter. The process of 'hardening' the obligations in IHL is thus a complex one.

5.2 *Progressive loss of autonomy of IHL*

Another notable feature of the current state of IHL is its relative loss of autonomy. Two distinct devices nourish this process.

First, it is hardly possible to fully expose the law relating to specific protection under IHL without taking into account many other areas of international law: HRL, refugee law, international criminal law, international police law (to the extent it exists), etc. Many modern military manuals, rules of engagement, training programmes in IHL, and the like, do contain such references to extra-IHL sources. When I have been asked myself to contribute to concrete solutions in the context of my military service in the 'Law of Armed Conflicts' Section of the Swiss Army (where

I perform my military service), I have often needed to consider issues of human rights law, interlinked with IHL. Moreover, the extent to which the contemporary international criminal tribunals have contributed to the development of IHL can hardly be overstated.¹⁰⁶ The importance of that contribution, especially in the area of non-international armed conflicts, is well known. The ICTY, more than all other criminal tribunals, has applied many rules of IHL for international armed conflicts also in non-international armed conflicts, declaring the former also applicable in the latter on the basis of customary international law.¹⁰⁷

Secondly, the tasks of modern armies have themselves diversified. They are no longer limited to strictly military or fighting roles, but also include humanitarian tasks (e.g., providing and securing humanitarian aid), policing tasks (e.g., riot control, road checkpoints, fighting piracy on the high seas), and even contributions to nation rebuilding programmes under the aegis of the United Nations or regional arrangements. Furthermore, these different functions tend to merge together. It is not often the case that there are clear-cut periods where the army will do one task, later another and still later something else. On the contrary, it will most often be necessary to perform many of these tasks at the same time, in the same place, with respect to different actors: fighting, police control, humanitarian services. This multidisciplinary puts a heavy strain on modern armies. Military personnel are often not trained to do all these tasks. Thus, American soldiers in Iraq had not received adequate training for the police functions they were required to exercise (checkpoints, riot control, etc.). The Swiss Army itself is aware of the challenges faced by it through such multiple functions, including potential police functions within the boundaries of Switzerland (e.g., securing sensitive installations). Therefore, training exclusively geared towards the combat function and its IHL counterpart would not be adequate. This multifunctionality accentuates the loss of relative autonomy of IHL. Hence, it is not only the human rights bodies or the criminal tribunals that look at IHL through the lens of their specific competence, which succeed in splitting up its old-fashioned autonomy; the military branch itself, to some extent the guardian of IHL, is today increasingly aware that in the multifunctional modern world, its missions require a mix of different legal supports and abilities.

Both evolutions mentioned consequentially lead to a reshaping of IHL. Like an unsaturated molecule, IHL seeks more and more the complementation of other sources of international and national law.

5.3 Summary

From the systematic perspective, the current phase of development is characterised by two conflicting tendencies. On the one hand, there is the strengthening of a 'humanised' IHL. It is considered as expressing a set of norms of public order, which is hailed as an 'absolute' in a world where the human rights logic, since the 1990s, has celebrated a triumphant victory. On the other hand, IHL tends to be enmeshed in an ever more complex network of legal sources, all attempting to give some legal guidance or direction to situations of conflict. The particular flavour of our time is the rise towards the 'absolute', on the one hand, and being caught up in the 'relative', on the other. The two movements are by no means contradictory: both movements strengthen IHL, one in itself, the other by adjoining fresh and supplementary resources to its combat. In the meantime, the situation on the ground remains as dramatic as ever.

6. Conclusion

This contribution has attempted to show that the modern law of armed conflict underwent profound systematic changes to an extent paralleling Ovid's *Metamorphoses*. Even if many essential concrete rules have remained unaltered (e.g., prohibition of poisoned weapons, declaring that no quarter will be given, the protection of prisoners of war, etc.), their systematic surroundings at different times have been as varied as a landscape in different seasons, different weather conditions, and day or night. Few areas of international law have witnessed such profound upheavals. Regulating boundaries of human existence, the law of warfare will certainly continue to respond to important systematic and structural changes in the future. At the same time, some more permanent lines emerge out of the mist of time. A distinguished feature in this body of law is the Geneva Conventions of 1949, which, on the whole, are to be regarded as the most advanced effort made to introduce some humane regulation to wartime situations. It responds to the quest of modern man to secure as far as possible the overriding aim of human dignity. The Conventions of 1949 are in that sense a *Gipfelkomplex*, a sovereign mountain dominating the surrounding landscape, in the long chain of events and texts spanning the changing continent of war.

Notes

- 1 On this formative stage, see H. Haug, *Humanité pour tous, Le Mouvement international de la Croix-Rouge et du Croissant-Rouge* (Berne/Stuttgart/Vienna, 1993) 19 ff.; F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre* (Geneva, 1994) 11 ff. (there exists an English translation of this major book, but French is the original version and it will be quoted in this text). See also J. de Senarclens, *Gustave Moynier, Le bâtisseur* (Geneva, 2000).
- 2 See P. Boissier, *Histoire du Comité international de la Croix-Rouge, de Solférino à Tsoushima* (Geneva, 1963); A. Durand, *Histoire du Comité international de la Croix-Rouge* (Geneva, 1978); C. Rey-Schyr, *Histoire du Comité international de la Croix-Rouge, De Yalta à Dien Bien Phu, 1945–1955* (Geneva, 2007); Bugnion, *Le Comité international de la Croix-Rouge*; G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London, 1980); H. Coursier, *Etudes sur la formation du droit humanitaire* (Geneva, 1952). See also S.C. Neff, *War and the Law of Nations, A General History* (Cambridge, 2005). For a short introduction, see C. Greenwood, 'Historical development and legal basis' in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn., Oxford, 2008) 20 ff. For the period after 1945, see G. Best, *War and Law Since 1945* (Oxford, 1994). In general see also: C. F. Amerasinghe, 'History and sources of the law of war' (2004) 16 *Sri Lanka Journal of International Law* 263; K.H. Ziegler, 'Zur Entwicklung von Kriegsrecht und Kriegsverhütung im Völkerrecht des 19. und frühen 20. Jahrhunderts' (2004) 42 *Archiv des Völkerrechts* 271 ff.
- 3 On this point, see P. M. Dupuy, 'L'unité de l'ordre juridique international – Cours général de droit international public', *RCADI* 297 (2002), 93, who speaks of a 'Lotus-type' of international society.
- 4 There are countless writings on the law of war in this period. Almost any international law textbook will contain a substantial section on the law of war, unlike the textbooks of the twentieth century. Since Grotius' *De iure belli ac pacis* (1625), the law of war has been a prominent part of the law of nations, to which all the classic works on international law devoted a great part of their publications. In the nineteenth century, with the renewal of the law of war through the Paris Declaration on Maritime Warfare (1856) and through the Red Cross Movement, there have been further reasons to devote keen attention to this branch of the law. There can be no point in providing a complete list of such publications here; only some of the most important treatises will be mentioned. Some of them are published slightly after the dates of the phase mentioned, but are inspired by the law of the nineteenth century. In the French language: C. Calvo, *Le droit international théorique et pratique* (5th edn., Paris, 1896) vol. IV, 41 ff.; vol. VI, 481 ff.; P. Pradier-Fodéré, *Traité de droit international public européen et américain* vol. VII (Paris, 1897) 1 ff.; vol. VIII (Paris, 1906) 24 ff.; H. Bonfils, *Manuel de droit international public* (3rd edn., Paris, 1901) 571 ff.; F. Despagnet (and C. de Boeck), *Cours de droit international public* (4th edn., Paris, 1910) 802 ff. In the English language: W. O. Manning, *Commentaries on the Law of Nations* (London, 1839) 94 ff.; J. Kent, *Commentary on International Law* (ed. by J.T. Abdy) (Cambridge/London, 1866) 186ff.; H. W. Halleck, *Elements of International Law and Laws of War* (Philadelphia, 1874); S. Amos, *Lectures on International Law* (London, 1874) 54 ff.; E. S. Creasy, *First Platform of International Law* (London, 1876) 412 ff.; J. H. Ferguson, *Manual of International Law* (London/The Hague/Hong Kong, 1884) vol. II 262 ff.; T. Twiss, *The Law of Nations*

- considered as *Independent Political Communities* (Oxford, 1884) vol. II; R. Phillimore, *Commentaries upon International Law* (3rd ed., London, 1885) vol. III 115 ff.; H. S. Maine, *International Law* (London, 1888) 57 ff.; T. A. Walker, *A Manual of Public International Law* (Cambridge, 1895) 102 ff.; S. Baker, *First Steps in International Law* (London, 1899) 184 ff.; G. B. Davis, *The Elements of International Law* (New York/London, 1900) 271 ff.; H. Taylor, *A Treatise on International Public Law* (Chicago, 1901) 447 ff. In the Italian language: L. Casanova, *Del diritto internazionale* (2nd edn., Florence, 1870) vol. II 47 ff.; P. Fiore, *Il diritto internazionale codificato* (2nd edn., Turin, 1898) 430 ff. In the German language: E. Lueder, 'Krieg und Kriebsrecht im Allgemeinen' in F. v. Holtzendorff, *Handbuch des Völkerrechts* (Hamburg, 1889) vol. IV 169 ff. and F. H. Geffcken, 'Das Seekriegsrecht', in *ibid.* 545 ff. In the Spanish language: M de Olivart, *Tratado de derecho internacional publico* vol. III (4th edn, Madrid, 1903) 59 ff. and vol. IV, 1 ff. See also the various specialised monographs: G. Moynier, *Etude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne* (1864 et 1868) (Paris, 1870); F. Dahn, *Le droit de la guerre* (Antwerp, 1871) (*Das Kriebsrecht*, Würzburg, 1870)); A. Morin, *Les lois relatives à la guerre* (Paris, 1872); J. C. Bluntschli, *Das moderne Kriebsrecht der civilisierten Staaten* (2nd edn, Nördlingen, 1874); F. Lentner, *Das Recht im Kriege* (Vienna, 1880); C. A. Notebaert, *Droit, lois et coutumes de la guerre* (Mons, 1881); J. Guelle, *La guerre continentale et les personnes* (Paris, 1881); J. Guelle, *Précis des lois de la guerre* (Paris, 1884); P. Resch, *Das moderne Kriebsrecht des civilisierten Staatenwelt* (Graz/Leipzig, 1885); E. Linde, *Das Völkerrecht im Kriege* (Berlin, 1888 (extract)); H. Hetzel, *Die Humanisierung des Kriebs in den letzten hundert Jahren* (Frankfurt an der Oder, 1891) (compendium of documents showing the progress of the law of war); A. Pillet, *Le droit de la guerre* (Paris, 1892); H. Triepel, *Die neuesten Fortschritte auf dem Gebiete des Kriebsrechtes* (Leipzig, 1894); J. S. Risley, *The Law of War* (London, 1897); A. Pillet, *Les lois actuelles de la guerre* (2nd edn, Paris, 1901).
- 5 See D. Schindler and J. Toman, *The Laws of Armed Conflicts* (4th edn, Leiden/Boston, 2004) 365 ff. On this Geneva Convention, see e.g., Calvo, *Le droit international*, vol. IV, 207 ff.; Pradier-Fodéré, *Traité*, vol. VII, 318 ff.; Guelle, *Guerre*, 103 ff.; Guelle, *Précis*, vol. I, 144 ff.; Moynier, *Etude*; Lueder, 'Krieg', 289 ff., 398 ff.; C. Lueder, *Die Genfer Convention* (Erlangen, 1876); Pillet, *Lois*, 165 ff. It is much less frequent that Anglo-Saxon treatises indulge in lengthy treatments of the Geneva Convention of 1864; the treatment of the question is here much shorter, see e.g., Risley, *Law of War*, 132-3. See also G. Münzel, *Untersuchungen über die Genfer Konvention* (Freiburg im Breisgau, 1901); L. E. Visser, *La Convention de Genève du 22 août 1864 et les Sociétés de la Croix-Rouge* (La Haye, 1902); C. Meurer, *Die Genfer Konvention und ihre Reformen* (Munich, 1906); H. Coursier, 'The Geneva Convention of 1864 in International Law' (1954) 7 *Revue Internationale de la Croix-Rouge*, English Supplement 144 ff.; P. Boissier, 'Centième anniversaire de la 1ère Convention de Genève' (1964) 46 *Revue internationale de la Croix-Rouge* 379 ff.; J.H. Dunant, 'La Convention de Genève de 1864' in H. Maza, *Neuf meneurs internationaux* (Paris, 1965) 87 ff.; D. Bujard, 'The Geneva Convention of 1864 and the Brussels Conference of 1874' (1974) 14 *International Review of the Red Cross* 527 at 575 ff.
- 6 Schindler and Toman, *Laws*, 91. See H. Meyrowitz, 'Reflections on the Centenary of the Declarations of St. Petersburg' (1968) 8 *IRRC* 611; Best, *War and Law Since 1945*, 42-3.
- 7 Schindler and Toman, *Laws*, 41 ff., 95 ff., 309 ff., 373 ff. On these Conferences, see amongst others A. Mérignhac, *La Conférence internationale de la paix* (Paris, 1900);

- J. B. Scott, *The Hague Conferences of 1899 and 1907* (Oxford, 1909); A. Bustamante y Sirven, *La Seconde Conférence de la Paix réunie à La Haye en 1907* (Paris, 1909); O. Nippold, *Die zweite Haager Friedenskonferenz, Teil II: Das Kriegsrecht* (Berlin, 1911); J. H. Choate, *The Two Hague Conferences* (Princeton, 1913); W. I. Hull, *The Two Hague Conferences and their Contributions to International Law* (New York, 1972).
- 8 Schindler and Toman, *Laws*, 21 ff., and on the substance Lentner, *Das Recht*, 33 ff.
 - 9 Schindler and Toman, *Laws*, 29 ff.
 - 10 *Ibid.* 3 ff. On these instruments, see also R. Kolb, *Ius in bello, Le droit des conflits armés* (2nd edn, Basel/Brussels, 2009) 42 ff.
 - 11 On this doctrine, see A. Truyol y Serra and R. Kolb, *Doctrines sur le fondement du droit des gens* (Paris, 2007) 59 ff; M. Giuliano, *La Comunità internazionale e il suo diritto* (Padua, 1950) 77 ff. Writers such as Hegel, G. Jellinek, Wenzel, Bergbohm, Triepel, the early Anzilotti, the early Verdross, and others could be recalled here, each one with their own nuances. See e.g., G. Hegel, *Grundlinien der Philosophie des Rechts* (Berlin, 1821); G. Jellinek, *Die rechtliche Natur der Staatsverträge* (Vienna, 1880); K. Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (Dorpat, 1887).
 - 12 *Wimbledon Case*, PCIJ, ser. A, no. 1, 25.
 - 13 Cf. Pradier-Fodéré, *Traité*, vol. VII, 411.
 - 14 Schindler and Toman, *Laws*, 30.
 - 15 For the sake of brevity, no list will be provided here. See the information contained in Pradier-Fodéré, *Traité*, vol. VII, 80 ff., 111 ff., 123 ff., 131–2; 172–3, 184, 200–1, 231–5; Bonfils, *Manuel*, 575; Maine, *International Law*, 107. The municipal law approach was commended by many authors, who warned against an extensive codification at the international level: see e.g. Triepel, *Fortschritte*, 55.
 - 16 G. Balladore-Pallieri, *La guerra* (Padua, 1935) 116.
 - 17 This model value of Hague Convention II of 1899 was perceived in the legal writings of the time, see e.g., Despagnet, *Cours*, 806.
 - 18 See Best, *War and Law Since 1945*, 40.
 - 19 This is noted by almost all the commentators; see e.g., Bonfils, *Manuel*, 574–5; Lueder, 'Krieg', 265. This is also noted in various Preambles to international instruments, e.g., to the Brussels Declaration and the Oxford Manual already quoted.
 - 20 See e.g., Bonfils, *Manuel*, 572.
 - 21 See e.g., Lueder, 'Krieg', 186 ff., 254, 265, 276, 388 ff., 389, 391. See also the references in: Calvo, *Le droit international*, vol. IV, 124–6; Pradier-Fodéré, *Traité*, vol. VII, 474; Bonfils, *Manuel*, 571–2, 607, 644; Guelle, *Guerre*, 173; Despagnet, *Cours*, 802–3; Pillet, *Lois*, 6; Halleck, *Elements*, 179; Amos, *Lectures*, 60; Baker, *First Steps*, 204; Risley, *Law of War*, 106. Some authors particularly stressed the restrictive aspect of necessity, in order to better bring to the frontline the exigencies of humanity: see e.g., Moynier, *Etude*, 15 ff. See also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (Perugia, 1981) 356–7. One attributes to Napoleon the following phrase: 'My great maxim has always been, in politics and war alike, that every injury done to the enemy even though permitted by the rules, is excusable only so far as it is absolutely necessary; everything beyond that is criminal', quoted in Best, *War and Law Since 1945* 242.
 - 22 Schindler and Toman, *Laws*, 92. The relevant passage reads as follows: '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.' Note that the principle of humanity is a consequence of the principle of (restrictive) necessity, not an autonomous rule.

Additionally, some parallel can be drawn to the *jus ad bellum*, where the concept of just war or defensive war turned around the concept of self-preservation, i.e., war waged for vital interests in a situation of 'necessity' (see I. Brownlie, *International Law and the Use of Force by States*, (Oxford, 1963) 19 ff.). This demonstrates the pervasive influence of the principle of necessity in *jus in bello* and *jus ad bellum* alike, as far as the nineteenth century is concerned (the principle of necessity is not defined identically in both branches of the law, *jus in bello* and *jus ad bellum*).

- 23 See e.g., Calvo, *Le droit international*, vol. IV, 147, 148 (for bombardment of a besieged town). Or even in general terms: Lueder, 'Krieg', 391: all milder means to achieve a certain military result must be preferred to harsher means to achieve the same result (principle of *resultiter uti*). One finds the same principle applied to arms in Balladore-Pallieri, *La guerra*, 193.
- 24 See E. David, *Principes de droit des conflits armés* (4th edn, Brussels, 2008) 357 ff., with further references.
- 25 *De civitate Dei*, ch. XIX. See V. Hrabar, 'La doctrine de droit international chez Saint Augustin' (1932) *Archives de philosophie du droit et de sociologie juridique* 437 ff.
- 26 See e.g., Pradier-Fodéré, *Traité*, vol. VII, 595, 945, 1088.
- 27 On the reasons for respecting rules on warfare and humanitarian protections, see R. Kolb, *Ius in bello, Le droit international des conflits armés* (Basel/Brussels, 2003) 5–9.
- 28 In Grotius, only the positive side of the rule is stressed, the negative remains somewhat implicit (and hence there are some controversies about the exact scope of the Grotian *exposé*): *De jure belli ac pacis* (1625) Book III, ch. I, s. 2: 'In war things which are necessary to attain the end are permissible' (which incidentally is not a phrase in the text but in the Index). P. Haggenmacher, 'Grotius et le droit international: Le texte et la légende' in A. Dufour, P. Haggenmacher and J. Toman (eds.), *Grotius et l'ordre juridique international* (Lausanne, 1985) 129 stresses that this sentence implies also the negative (restrictive) principle in the system expounded by Grotius: 'Car la règle en question sous-entend un aspect limitatif [...]: le juste belligérent est certes autorisé à faire ce qui est nécessaire pour atteindre sa fin – c'est là le rétablissement de son droit violé – mais rien de plus!'. Haggenmacher (*ibid.* 131, note 65) refers also to all the *temperamenta belli* contained in chs X to XVI expounding limitations of warfare in natural law (as opposed to the law of nations, or positive law). For a different view, see F. Kalshoven in *ibid.* 89–90. The truth seems to be somewhere in between: Grotius foreshadows the modern 'necessity' criterion but does not develop its potentialities. The negative rule clearly emerges in Wolff and Vattel. See also the further references given by Haggenmacher, in the quoted pages.
- 29 C. Wolff, *Jus gentium methodo scientifica pertractatum* (1749), ch. VII, s. 781: 'Qui bellum justum gerit, illi in bello licitum est, sino quo jus suum ab adversa parte consequi nequit; quod ad hunc finem consequendum non facit, illicitum est.' To this he adds the following sentence (translated): 'For by the law of nature a right in war exists only to that without which one cannot attain the right, for the sake of which the war is waged.' The restrictive part of the principle is here clearly developed.
- 30 E. de Vattel, *Le Droit des gens ou principes de la loi naturelle* (1758) Book III, chs. VIII and IX, s. 136: 'Tout cela [what is lawful in war] doit se déduire d'un seul principe, du but de la guerre juste. Car dès qu'une fin est légitime, celui qui a le droit de tendre à cette fin, est en droit par cela même d'employer tous les moyens qui sont nécessaires

pour y arriver.' See also s. 137: 'La fin légitime ne donne un véritable droit qu'aux seuls moyens nécessaires pour obtenir cette fin: tout ce qu'on fait au delà est réprouvé par la loi naturelle.' Since the law of war must be composed of some general rules and not only of circumstantial necessity arguments, varying from situation to situation, however, it is possible that a belligerent has recourse to a means which is held lawful in the law of war in general, but which is not necessary in the particular context. In this case, the recourse to that means constitutes a moral tort (s. 137): 'Ainsi, dès qu'il est certain et bien reconnu que tel moyen, tel acte d'hostilité, est nécessaire dans sa généralité, pour surmonter la résistance de l'ennemi et atteindre le but d'une guerre légitime, ce moyen, pris ainsi en général, passe pour légitime et honnête dans la guerre, suivant le droit des gens, quoique celui qui l'emploie sans nécessité, lorsque des moyens plus doux pouvaient lui suffire, ne soit point innocent devant Dieu et dans sa conscience. Here as elsewhere in that great treatise emerges Vattel's obsession with legal certainty.' It may be added that Vattel in more than one passage condemns any military action having recourse to more destructive means than necessary in the particular context: see Book III, ch. IX, s. 168; Book III, ch. X, s. 178; and he extends that principle even to peacetime: Book III, ch. XIII, s. 201 (peace treaty); Book IV, ch. IV, s. 43 (self-defence). The principle is, in these passages (except the last one), presented as a moral or humanitarian guidance, beyond the strict law.

- 31 *Du contrat social* (1762), Book I, ch. IV: '[L]a guerre ne donne aucun droit qui ne soit nécessaire à sa fin'.
- 32 See e.g., J. W. Textor, *Synopsis juris gentium* (1680) ch. XVIII (Carnegie Edition, translation, 1916) 191: 'A great distinction, therefore, must be drawn between such a destruction of property as can materially conduce to victory in war, and the destruction of other things. The former kind of destruction of enemy property is not only lawful in itself, but absolutely free from blame; but one may object, to the latter kind of destruction, that if not improper by Law it is at any rate contrary to the dictates of humanity.' The distinction made here between strict law and moral law is not material for the strength of the necessity argument.
- 33 Including, thus, private individuals in the legitimate targets of war, as far as commerce and private property is concerned.
- 34 Up to the violation of Belgian neutrality in 1914. For an early critique of 'necessity', see Pradier-Fodéré, *Traité*, vol. VII, 71, 80, who, however, still relies heavily on it: *ibid.*, vol. VI, 474.
- 35 See Lueder, 'Krieg', 254–6 (but such precedence is only exceptional and must remain so). See generally, on the question: L. Oppenheim, *International Law*, vol. II, *War and Neutrality* s. 69 (e.g., 3rd edn, London, 1921, 90–2). Some authors subjected the entire *jus in bello* to the *rebus sic stantibus* rule, always implied: see e.g., F.W. Jerusalem, *Kriegsrecht und Kodifikation* (Breslau, 1918) 72 ff., following the important thesis of E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (Tübingen, 1911). In many writings, we find the implication that a rule of the law of war may always be derogated from by military necessities (implied clause): see e.g., Pillet, *Lois*, 100. On the whole question of necessity in warfare, see Y. Dinstein, 'Military necessity' (1997) *EPIL* III 395; R. Kolb, 'La nécessité dans le droit des conflits armés: Essai de clarification conceptuelle' in SFDI, *Colloque de Grenoble, La nécessité en droit international* (Paris, 2007) 151 ff.; J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge, 2004) 59 ff.; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*

(Cambridge, 2001) 16 ff.; C. Greenwood, 'Historical development and legal basis', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, 1995) 30–33; L. Sbolci, 'Sulla necessità militare nel diritto internazionale applicabile nei conflitti armati' in *Mélanges G. Barile* (Padua, 1995) 653 ff.; H. McCoubrey, 'The nature of the modern doctrine of military necessity', *Revue de droit pénal militaire et de droit de la guerre* 30 (1991) 215; G. Venturini, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale* (Milan, 1988) 123 ff.; P.A. Pillitu, *Lo stato di necessità nel diritto internazionale* (Pérouse, 1981) 347 ff.; E. Rauch, 'Le concept de nécessité militaire dans le droit de la guerre', *RDPMDG* 19 (1980) 205 ff. Among the older contributions, see N.C.H. Dunbar, 'Military necessity in war crimes trials' (1952) 29 *BYIL* 442; W.G. Downey, 'The law of war and military necessity' (1953) 47 *AJIL* 251; W.V. O'Brien, *The Development of the Concept of Military Necessity and its Interpretation in the Modern Law of War* (Georgetown, 1953); W.V. O'Brien, 'The Meaning of Military Necessity in International Law' (1957) *World Polity* 109; G. Schwarzenberger, 'Military necessity: a misnomer' in *Mélanges S. Sefériadès* (Athens, 1961) 13 ff.; G.I.A.D. Draper, 'Military necessity and humanitarian imperatives', *RDPMDG* 12 (1973) 129. See also M.G. Cowling, 'The relationship between military necessity and the principle of superfluous injury and useless suffering in the law of armed conflict' (2000) 25 *South African Yearbook of International Law* 131; P. A. Ragone, 'The applicability of military necessity in the nuclear age' (1984) 16 *New York University Journal of International Law and Politics* 701; M. Messerschmidt, 'Völkerrecht und Kriegsnotwendigkeit in der deutschen militärischen Tradition seit den Einigungskriegen', *RDPMDG* 22 (1983) 211; J. De Breucker, 'La réserve des nécessités militaires dans la Convention de La Haye de 1954 sur la protection des biens culturels', *RDPMDG* 14 (1975) 255; C. Eustathiadès, 'La réserve des nécessités militaires et la Convention de La Haye pour la protection des biens culturels en cas de conflit armé' in *Essays J. Basdevant* (Paris, 1960) 183 ff. For a digest of old documents on military necessity see M. Whiteman, *Digest of International Law* (Washington, 1968) vol. 10, 298 ff.

- 36 On this question, see R.R. Baxter, 'The definition of war' (1960) *Revue égyptienne de droit international* 4 at 13; H.J. Wolff, *Kriegserklärung und Kriegszustand nach klassischem Völkerrecht* (Berlin, 1990) 64 ff. See also R. Kolb, 'Le droit international public et le concept de guerre civile depuis 1945' (2001) 105 *Relations internationales* 9.
- 37 The Congress of Paris of 1856 (after the Crimean War) recognised that the declaration of war is necessary and thus required, except in the case of invasion and spontaneous self-defence: see Calvo, *Le droit international*, vol. IV, 47.
- 38 E.C. Stowell, *International Law* (New York, 1931) 401: '[S]ome intercourse with the insurrectionists is often necessary. In the troubled conditions of civil warfare it becomes especially urgent for other States to look out for the protection of their nationals within the zone of operations, and the economic demands of war greatly increase the trade in contraband and a variety of articles. In these circumstances, forced by the necessity of providing for effective protection of their nationals, and urged by the desire to continue and extend an authorized trade with all portions and parties of the state engaged in the conflict, other states accord what is called Recognition of Belligerency'. See also H. Wheaton, *Elements of International Law* (8th edn, Oxford, 1866) 35.
- 39 L. Kotsch, *The Concept of War in Contemporary History and International Law* (Geneva, 1956) 50 ff.

- 40 H.J. Taubenfeld, 'The applicability of the laws of war in civil war' in J.N. Moore (ed.), *Law and Civil War in the Modern World* (Baltimore/London, 1974) 502 ff.
- 41 On the idea of civilisation in the nineteenth century, see W. G. Grewe, *The Epochs of International Law* (Berlin/New York, 2000) 445 ff., with further references.
- 42 This conception of the progress of limitations on war moving from an almost complete licence of action to binding legal rules of an ever-growing scope, can be found in many writings of the time, e.g. in Guelle, *Guerre*, 99 (in the context of reprisals); Risley, *Law of War*, 73. It was later still noted in Balladore-Pallieri, *La guerra*, 113 ff.
- 43 M. Koskenniemi, *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870-1960* (Cambridge, 2001) 11 ff.
- 44 This distinction has a prominent place in Grotius' *De jure belli ac pacis* (1625) Book III. See P. Haggrenmacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983) 568 ff.
- 45 See e.g., *Le droit des gens* (1758) Book III, ch. VIII, s. 137.
- 46 See e.g., Calvo, *Le droit international*, vol. IV, 190, 213, 218, 237, 243, 256, 287, 504; Pradier-Fodéré, *Traité*, vol. VII, 18, 191, 303, 320, 430, 757, 924, 927, 1085, 1133, 1161; vol. VIII, 72 ff., 510, 786-7, 810, 831; Guelle, *Guerre*, 99-100; Guelle, *Précis*, vol. I; Despagnet, *Cours*, 838 ff. (on means and methods of warfare); Halleck, *Elements*, 211; Maine, *International Law*, 75 ff.; Moynier, *Etude*, 1 ff., 22 (the idea of progress in on almost every page); Pillet, *Lois*, 7-11; see also Bluntschli, *Kriegsrecht*; Hetzel, *Humanisierung*; Triepel, *Fortschritte*; the argument here permeates the whole treatise, as their titles aptly suggest.
- 47 Hence the belief that legal doctrine prepared the progress: Pradier-Fodéré, *Traité*, vol. VII, 956. A contrast was sometimes created between enlightened science and stubborn military personnel clinging on to past prejudices: *ibid.* vol. VIII, 24 ff.
- 48 The belief that the adoption of a convention solved the problem and insured a definitive breakthrough to progress was also very common: see e.g., Moynier, *Etude*, 24: 'Il suffira dorénavant d'un trait de plume pour bannir du jour au lendemain les pratiques vieilles[...]. One may then understand the shock produced in civilised circles by the scrap of paper doctrine and the violation of Belgian neutrality in the First World War.
- 49 P. Pradier-Fodéré, 'Préface', in Guelle, *Précis*, vol. I.
- 50 Moynier, *Etude*, 1.
- 51 See e.g., Pillet, *Lois*, 11; Moynier, *Etude*, 12-15.
- 52 There is here perhaps something of the Kantian idea that republican or democratic states do not go to war against one another (*Zum ewigen Frieden*, 1795), translated from *jus ad bellum* into *jus in bello*: republicans do not go to war; if they happen to go to war, they will more easily accept rules of war (*debitus modus*).
- 53 On the change of this paradigm in the twentieth century, see Best, *War and Law Since 1945*, 403 ff.
- 54 See e.g., Guelle, *Précis*, vol. I, 5-6.
- 55 J. Lorimer, *The Institutes of the Law of Nations* (Edinburgh, 1883) vol. I, 101.
- 56 It can, e.g., be found in the works of such a thoughtful and prudently progressive author as Bonfils, *Manuel*, 572, and not only in those of that somewhat 'curious' author, J. Lorimer.
- 57 See e.g., Calvo, *Le droit international*, vol. IV, 50; Pradier-Fodéré, *Traité*, vol. VIII, 44 ff., 151 ff. On the necessity of professional armies, see Moynier, *Etude*, 8.
- 58 N. Politis and P. Fauchille, *Manuel de la Croix-Rouge* (Paris, 1908) 157.
- 59 Moynier, *Etude*, 301.
- 60 G. Moynier, 'Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève', *Bulletin international* (no 11, April 1872) 122 ff.

- 61 See e.g., Pradier-Fodéré, *Traité*, vol. VII, 441–53; Guelle, *Guerre*, 127–8; Lueder, 'Krieg', 416–17. This was also the original approach of Moynier, *Etude*, 299 ff.
- 62 See, amongst other critical pieces, the very instructive book by O. Nippold, *Das Völkerrecht nach dem Weltkrieg* (Zurich, 1917).
- 63 Article 5 of the Statutes of the International Movement of the Red Cross and the Red Crescent contains a general statement as to the missions of the ICRC. It also contains the following sentence: 'The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution'. To the extent the ICRC remains within the bounds of humanitarian action (which by reason of its Statutes it cannot overstep) it can propose any practical improvement or solution to a humanitarian problem arising during an armed conflict (or even in peacetime). The ICRC can also be contacted at any time in order to help in a particular situation where war-related humanitarian and practical problems are faced. The ICRC will not refuse to provide help to the extent of its possibilities and the limits of its mandate. This right of initiative is also recognised in Common Article 3 of the GCs of 1949, and in Articles 9/9/9/10 GCs.
- 64 See the precise account in F. Bugnion, *Le CICR et la protection des victimes de la guerre* (Genève, 1994) 31 ff.
- 65 In favour of harmonisation, see e.g., Pradier-Fodéré, *Traité*, vol. VIII, 24 ff.; Despagnet, *Cours*, 950–1; Moynier, *Etude*, 27; against such harmonisation, see e.g., Pillet, *Lois*, 118 ff; simply exposing the law as it stands, probably implying that it should remain such, see e.g. Halleck, *Elements*, 215 ff; Manning, *Commentaries*, etc.
- 66 See the very powerful discussion of these arguments in Bonfils, *Manuel*, 705 ff.
- 67 See Article 42 ff. of the Hague Regulations (1907).
- 68 As to some important aspects of this evolutions, see J. F. Quéguiner, *Le principe de distinction dans la conduite des hostilités*, thèse no. 706 (Genève, 2006) 37 ff; on the evolution after 1919 in the context of the modern war, see *ibid.* 115 ff.
- 69 On the action of the ICRC in the Oriental War of 1875–1878, see F. Bugnion, *Le CICR et la protection des victimes de la guerre* (Genève, 1994) 43 ff.
- 70 See e.g., Pradier-Fodéré, *Traité*, vol. VII, 133 ff; Lueder, 'Krieg', 430–1 (any person who could contribute to the war effort); Pillet, *Lois*, 151–2 (only the innocent inhabitants cannot be captured as prisoners of war). Balladore-Pallieri, *La guerra*, 136 still in 1935 goes as far as to affirm that even civilians able to serve in the adverse army could be held captive [...] as prisoners of war. That such persons may be interned is conceded today by Geneva Convention IV of 1949, but as civilian internees, not prisoners of war.
- 71 See *supra* note 70.
- 72 On the reasons for these transformations and on their development, see R. Kolb and S. Vité, *Le droit de l'occupation militaire* (Brussels, 2009) 7 ff.
- 73 Halleck, *Elements*, 330 ff.
- 74 Maine, *International Law*, 108–10. All legislative and executive power passes to the invader. Contrary to Halleck, quoted *supra* note 73, Maine avoids the term 'conquest', i.e., the hallmark of definitiveness.
- 75 See e.g., Pradier-Fodéré, *Traité*, vol. VII, 686, 696, 703, 715–16, 754. The manifest aim of this theory is not to allow the 'usurper' to enjoy true 'rights' over his spoils; it would be anti-patriotic to grant such rights to the enemy, organising in advance a regime of defeat. See also Bonfils, *Manuel*, 645, 671. This view was cherished most by French and Belgian authors, who feared more than anything an occupation of their territories by Germany. Occupation was thus often compared to mere possession

- of fact: Guelle, *Guerre*, 160. The law of occupation derives then essentially from military necessity and is thus circumstantial: Despagnet, *Cours*, 903.
- 76 Lueder, 'Krieg', 510 ff. Later, very clearly, Balladore-Pallieri, *La guerra*, 329 ff.
- 77 M. Marinoni, *Della natura giuridica dell'occupazione bellica* (Rome, 1911) 50 ff, 58-9, 155 ff.
- 78 J.K. Blaschek, *Das bedrohte Völkerrecht* (Perchtoldsdorf, 1915).
- 79 See J. Kunz, 'Plus de lois de la guerre?', *RGDIP* 41 (1934) 30.
- 80 See E. Zitelmann, *Haben wir noch ein Völkerrecht?* (Bonn, 1914); P. Eltzbacher, *Totes und lebendes Völkerrecht* (Munich, 1916); H.E. Richards, *Does International Law Still Exist?* (London/New York, 1915).
- 81 English language treatises of international law containing informed chapters on the law of war written in this period: F.E. Smith, *International Law* (4th edn, J. Wylie (ed.), London, 1911) 110 ff; C.H. Stockton, *Outlines of International Law* (New York/Chicago/Boston, 1914) 293 ff; L. Oppenheim, *International Law: A Treatise*, vol. II, *War and Neutrality* (R.F. Roxburgh (ed.), London, 1921); W.E. Hall, *A Treatise on International Law* (8th edn, Oxford, 1924) 444 ff.; A.S. Hershey, *The Essentials of International Public Law and Organization* (New York, 1927) 557 ff.; Stowell, *International Law* 489 ff.; G.G. Wilson, *Handbook of International Law* (3rd edn, St Paul, 1939) 253 ff.
- 82 See Anonymous, 'The League of Nations and the laws of war' (1920-1921) 1 *BYIL* 109; J.B. Moore, *International Law and Some Current Illusions* (New York, 1924) 5, 38-39; E. Dickinson, 'The new law of nations' (1925-1926) 32 *West Virginia Law Quarterly* 4; F.W. Jerusalem, *Kriegsrecht und Kodifikation* (Breslau, 1918) 3 ff, 72 ff; O. Nippold, *Das Völkerrecht nach dem Weltkrieg* (Zurich, 1917) 8-9. Contrast these writings with the tone still prevailing some years before the war; see e.g., H. Kägi, *Die Kriegsführenden im Landkrieg* (Rostock/Basel, 1909).
- 83 Thus the argument was: (i) excessive focus on the *jus in bello* has resulted in a loss of time and energy spent on improving the law of peace and devices to protect the peace (peaceful settlement of disputes), the latter being much more useful for international law; (ii) to continue to devote attention to the law of war today is to convey the idea that one doubts the capacity of the League of Nations to protect the peace. See Anonymous, 'League of Nations' 114-15; Dickinson, 'New law', 25, 29; M. Huber, 'Der Wert des Völkerrechts', in *Neue Zürcher Zeitung*, 20 November 1916. For the argument that devoting attention to the *jus in bello* may weaken the belief in *jus contra bellum*, see Politis (Greece) et Sokal (Poland) in the disarmament commission of the League of Nations (*Documents de la Commission préparatoire de désarmement* [Société des Nations], sér. VIII, 1929, 87 [Sokal], 91 [Politis]). Contra Rutgers (Holland), *ibid.* 90. See also K. de Strupp, *Eléments du droit international humanitaire universel, européen et américain* (Paris, 1930) vol. II, 503, note 1. The same approach was taken in the first years of the United Nations: (1949) *Yearbook ILC* 281, s. 18: 'It was considered that if the Commission, at the very beginning of its work, were to undertake this study [on the laws of war], public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace'. See also C.G. Fenwick, 'The progress of international law during the last forty years', *RCADI* 79 (1951), 60 at 63-4: '[the laws of war are indeed a] law of lawlessness'; 'gone is the naïve belief that it is possible to draft new laws of war'. From the military and political point of view, see B.H. Liddel Hart, *The Revolution in Warfare* (New Haven, 1947). See also,

generally, D. Costantopoulos, 'Les raisons de la crise du droit de la guerre' (1957) 7 *Jahrbuch für internationales Recht* 22.

- 84 The argument here was as follows: (i) technological advance and progress of total war have made it impossible to limit war by rules and regulations; (ii) the law of war always codifies the experiences of the last war and is thus inevitably out of tune with the necessities of the next war; (iii) the laws of war are the weakest part of international law and have contributed to discrediting that branch of the law; (iv) law is violence (like a tempest), and this cannot be regulated by law; it is chameleonic, ever-changing, and thus inaccessible to legal regulation. See Anonymous, 'League of Nations' 111 ff.; Dickinson, 'Law of Nations' 24 ff.; Jerusalem, *Kriegsrecht* 3 ff., 72 ff.; Nippold, *Völkerrecht*, 8-10. It has also been argued that a functioning law of war is structurally impossible: if its prohibitions are sufficiently firm and absolute in order not to allow evasion, the prohibitions will quickly turn out to be outmoded and ineffective; conversely, flexible prohibitions allowing for exceptions on the basis of military necessity will as such prove more realistic, but will be distorted to advance egoistic interests in case of war, thereby depriving the prohibitions of almost all their practical value: see M. W. Roysse, *Aerial Warfare* (New York, 1928) particularly 132 ff.
- 85 The following passage gives a vivid account of the challenges of the time: 'Under the stress of the war even Great Britain, notwithstanding a strong tradition of individualism, was forced to become totalitarian. When the national effort reached its maximum the whole population, male and female, within very wide limits of age, was mobilised for the prosecution of the war. Exemption from compulsory war service was only granted if the applicant could prove that he or she was privately engaged upon work of national importance. No person within the age limits had any free choice of occupation, and every individual could be told by the government what kind of work he or she had to do. Whatever the particular order given might be, whether the conscript was told to join the army or to work in a factory, in every case the only test was how that individual might be most usefully employed for the purpose of winning the war.

To this it must be added that many millions of men and women, in addition to those enrolled in the regular forces, were mobilised for a form of active service which was known as "civil defence". The main purpose of this organisation was to reduce as far as possible the damage caused by enemy attacks, and it was therefore a form of direct resistance to the enemy's military effort. Millions of men were also enrolled in what was called the "Home Guard". These were combatant troops in the strictest sense when they were on duty and in uniform, but they were only on duty for limited hours and for the rest of their time they were employed on their ordinary work. If so, it follows that every town and every village in the country contained a large number of combatants who could quite lawfully be the objects of direct and deliberate attack at any time. This is quite a different matter from the incidental destruction of civilian life to which I have referred.

What is true of Great Britain is substantially true of all belligerent countries which took a major part in the recent war. To this we must add that the principle of complete mobilisation which was applied to persons was applied equally to industry and to property. The whole system of production, importation, and distribution was organised under a single control with a view to the prosecution of the war effort, and nothing more than the barest minimum was permitted for the satisfaction of normal civilian requirements.

In short, the traditional distinction between combatants and non-combatants rested upon the fact that in practice it was usually quite easy to draw a line between those who were taking an active part in the war and those who were not. The great change has entirely taken place within living memory. In all wars previous to 1914 only a small minority of the population was put into uniform and employed by the government for the purpose of fighting the enemy. The great majority were left free to carry on their ordinary occupations in their own way, and usually there was no difficulty in doing this, except in the immediate neighbourhood of the fighting forces. This distinction was sound in principle, and is still valid today, whenever the facts enable it to be drawn. If it cannot today be observed in practice, the responsibility lies with the governments and peoples who have decided, rightly or wrongly, that the modern war cannot be carried on with anything less than the combined effort of the whole nation. We must accept the consequences of our choice. We cannot boast, as we have done, that every man and woman in the country is now mobilised for war service, and at the same time claim for them immunity of non-combatants'. See H. A. Smith, *The Crisis in the Law of Nations* (London, 1947) 75-7.

- 86 See in particular A. De La Pradelle, 'Négligera-t-on longtemps encore l'étude des lois de la guerre?', *Revue de droit international (Paris)* 12 (1933) 511; J. Kunz, 'Plus de lois de la guerre?', *RGDIP* 41 (1934) 22, the perplexity of both authors emerging clearly through the use in both cases of question marks. The same criticisms were voiced in the first phase of the existence of the United Nations, where similar arguments against the law of war had prevailed: *Ann. IDI*, vol. 47-I (1957) 323 ff. and the opinion of the Rapporteur, J.-P. A. François, *ibid.* 367 ff. See also J. Kunz, 'The chaotic status of the laws of war and the urgent necessity for their revision' (1951) 45 *AJIL* 37; J. Kunz, 'The laws of war' (1956) 50 *AJIL* 313; H. Lauterpacht, 'The revision of the laws of war' (1952) 29 *BYIL* 360; A.P. Sereni, *Diritto internazionale* (Milan, 1965) vol. IV, 1823-6.
- 87 See Schindler and Toman, *Laws*, 105 ff.
- 88 *Ibid.* 405 ff.
- 89 See e.g., Bonfils, *Manuel*, 607: in war, everything that is not prohibited is permitted. Thus, there is no point in compiling lists of acts permitted; it is sufficient to state the prohibited acts and deeds. See also Risley, *Law of War*, 106: the rules on warfare are essentially negative, being restrictions upon the primitive right of devastation in war.
- 90 See in particular the most penetrating analysis in Balladore-Pallieri, *La guerra*, 163-4; M. Cruchaga Tocornal, *Nociones de derecho internacional* (3rd edn, Madrid, 1925) vol. II, 51 ff. (all acts 'que tiendan a procurar la victoria' are lawful, subject to certain legal prohibitions); J. de Louter, *Le droit international public positif* (Oxford, 1920) vol. II, 276; L. Oppenheim, *International Law*, vol. II, *War and Neutrality* (3rd edn, R. F. Roxburgh (ed.), London, 1921) 167 (reserving the principle of restrictive necessity). See also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (Perugia, 1981) 359; A. P. Sereni, *Diritto internazionale* (Milan, 1965) vol. IV, 1924. Some authors do not really spell out the principle but address the whole subject matter by supposing it, i.e. by focusing on the prohibitions of the law; see e.g., E. Ullmann, *Völkerrecht* (Freiburg im Breisgau, 1898) 323; K. Strupp, *Éléments du droit international public universel, européen et américain* (2nd edn, Paris, 1930) vol. II, 548 ff.; F.V. Liszt, *Das Völkerrecht* (11th edn, Berlin, 1918) 296 ff. Some authors maintained the classical principle of necessity: the (only) means prohibited are those not necessary

for securing the legitimate war aim or excessive in that respect; see e.g., S. Gemma, *Appunti di diritto internazionale* (Bologna, 1923) 304; L. Olivi, *Manuale di diritto internazionale pubblico e privato* (Milan, 1911) 509: '[I] mali della guerra vengono limitati al *minimum* occorrente alle operazioni militari perchè queste "öttenganō il loro fine" (emphasis in the original); P. Fauchille, *Traité de droit international public* (8th edn, Paris, 1921) vol. II, 114–15; and also of humanity or Christianity, see G. Bry, *Précis élémentaire de droit international public* (Paris, 1910) 534. In these conceptions too, the underlying rule is for residual freedom: if the law essentially contains the limitation of necessity (in the restrictive sense), all necessary means of warfare are lawful since they are not prohibited. Instead of being limited only by specific rules, the limitation can also follow from a general principle; but the inherent logic of the system remains the same. Some authors further refine the system: see e.g., W.E. Hall, *A Treatise on International Law* (8th edn, Oxford, 1924) 635, who admits that *prima facie* all acts of violence are unlawful, and then proceeds to limit them by specific rules and by the principle of necessity, but adds a further limitation – wanton acts and disproportionate acts: 'In a general sense a belligerent has a right to use all kinds of violence against the person and property of his enemy which may be necessary to bring the latter to terms. *Prima facie* therefore all forms of violence are permissible. But the qualification that the violence used shall be necessary violence has received a specific meaning; so that acts not only cease to be permitted as soon as it is shown that they are wanton, but when they are grossly disproportioned to the object to be attained; and the sense that certain classes of acts are of this character has led to the establishment of certain prohibitory usages ... Some questions not falling under either of these heads [specific prohibitions listed] have to be determined by reference to the general limitation forbidding wanton or disproportionate violence'. One may easily see that the more general principles of this kind are admitted, the more the law moves from the principle of 'what is not prohibited is permitted' (a negative rule) to an intermediary status of the kind 'what is not prohibited is permitted only if compatible with the rule of necessity, the rule on wantonness, the rule on proportionality (or disproportionality), the dictates of humanity'. At a certain juncture, the residual principles of limitation become so dense as to erase the negative approach thereby transforming it into a positive one; then, quantity has become quality. Finally, some authors do not take a position on our problem and simply address lawful and unlawful acts, side by side: see e.g., J. Hatschek, *Völkerrecht* (Leipzig/Erlangen, 1923) 305 ff. Overall, it may be said that the practice of states in the inter-war period was clearly inspired by the idea that the military licence was full and unbridled as long as the law imposed no clear limitations. On the whole question of lawful and unlawful means of warfare, see also, in the literature of the first fifteen years of the twentieth century: L. Fatoux, *La guerre continentale: limitation des moyens de nuire* (Paris, 1903); A. Zorn, *Kriegsmittel und Kriegsführung im Landkrieg nach den Bestimmungen der Haager Konferenz* (Königsberg, 1902); R. D. de Trobriand, *Les moyens de guerre nouveaux et des principales objections qu'ils soulèvent au point de vue du droit international* (Paris, 1909); A. Tettenborn, *Prinzip und Richtungen der Kriegsmittelverbote des Landkriegsrechtes* (Würzburg/Bonn, 1909); R. Jacomet, *Les lois de la guerre continentale* (3rd edn, Paris, 1913). See also A. Rolin, *Le droit moderne de la guerre, Les principes, les conventions, les usages et les abus* (Brussels, 1920–1921).

91 PCIJ, ser. A, no. 9, 18. See also P.M. Dupuy, 'L'unité de l'ordre juridique international: Cours général de droit international public', *RCADI* 297 (2002) 93.

- 92 See B. Simma, 'From bilateralism to community interest in international law', *RCADI* 250 (1994) 229.
- 93 In the Preambles to Hague Convention II (1899) and Hague Convention IV (1907) one finds a peculiarly styled clause, known as the Martens Clause (after the name of the Russian delegate at the Hague Conference of 1899, who proposed it) which has gained some celebrity in international law: '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 public conscience.' This clause has been repeated in Articles 63/64/142/158 Geneva Conventions I-IV. It has also been recalled in Article 1(2), of Additional Protocol I of 1977 with the following, somewhat modernised wording: 'In cases not covered by this 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.' Considering that there thus remained important gaps in the emerging law of armed conflict, the delegates unanimously agreed to include the so-called Martens Clause, requiring the belligerents to behave in a civilised and humane way even if in a particular instance no specific rule could be found in the corpus of codified law of armed conflict. The Martens Clause requires any belligerent always to consider if a proposed conduct, even if not explicitly prohibited, is compatible with the principle of humanity and compassion. The rule should not simply be: what is not prohibited is therefore allowed. On the Martens Clause, see H. Strebel, 'Martens Clause' (1997) III *EPIL* (Amsterdam e.a.) 326-7; F. Münch, 'Die Martens'sche Klausel und die Grundlagen des Völkerrechts', *ZaöRV* 36 (1976) 347; S. Miyazaki, 'The Martens Clause and international humanitarian law' in *Essays in Honour of J. Pictet* (Geneva, 1984) 433 ff.; T. Meron, 'On custom and the antecedents of the Martens Clause in medieval and renaissance ordinances of war' in *Essays in Honour of R. Bernhardt* (Berlin e.a., 1995) 173 ff.; V.V. Pustogarov, 'The Martens Clause in international law' (1999) *Journal of the History of International Law*; A. Cassese, 'The Martens Clause: half a loaf or simply pie in the sky?' (2000) 11 *EJIL* 187; R. Ticehurst, 'The Martens Clause and the laws of armed conflict' in N. Sanjaoba (ed.), *A Manual of International Humanitarian Laws* (New Delhi, 2004) 312 (see already in (1997) 37 *IRRC* 125); M.N. Hayashi, 'The Martens Clause and military necessity' in H.M. Hensel (ed.), *The Legitimate Use of Military Force, The Just War Tradition and the Customary Law of Armed Conflict* (Aldershot e.a., 2008) 135 ff.
- 94 See in particular the *Krupp* case (1948), (1948) 15 *Annual Digest of Public International Law Cases (ILR)* 622.
- 95 Best, *War and Law Since 1945*, 250.
- 96 Balladore-Pallieri, *La guerra*, 163-4.
- 97 On the Geneva Conventions of 1949, see J. A. C. Gutteridge, 'The Geneva Conventions of 1949' (1949) 26 *BYIL* 294; L. Orcasitas Llorente, 'La Conferencia de Ginebra de 1949 para mejorar la suerte de la victimas de la guerra' (1949) 2 *Revista española de derecho internacional* 605; F. Siordet, 'La Conférence diplomatique de Genève' *RICR* 31 (1949) 475 at 554; J. Pictet, 'La Croix-Rouge et les Conventions de Genève', *RCADI* 76 (1950-I) 1; M. Bourquin, 'Les Conventions de Genève du 12 août 1949', *RICR* 32 (1950) 90; E. Djafari, *Les Conventions de Genève du 12 août 1949 sur la protection*

des victimes de la guerre (Paris, 1950); S. Tschirkovitch, 'Les nouvelles Conventions internationales de Genève relatives à la protection des victimes de la guerre du 12 août 1949', *RGDIP* 54 (1950) 97 at 525; P. De La Pradelle, *La Conférence diplomatique et les nouvelles Conventions de Genève du 12 août 1949* (Paris, 1951); R.D. Paine, *The 1949 Geneva Conventions Concerning War Victims* (thesis, Northwestern University, Evanston, Ill., 1951); A. Schickelé, 'L'avenir des Conventions de Genève', *RICR* 33 (1951) 496; R.T. Yingling and R.W. Ginane, 'The Geneva Conventions of 1949' (1952) 46 *AJIL* 393; J. Kunz, 'The Geneva Conventions of August 12, 1949' in G.A. Lipsky (ed.), *Law and Politics in the World Community* (Berkeley/Los Angeles, 1953) Part III, 279 ff.; E. Lodemann, 'Die Genfer Rotkreuzabkommen vom 12. August 1949' (1953) 4 *Archiv des Völkerrechts* 72; G.I.A.D. Draper, *The Red Cross Conventions* (London, 1958); H. Coursier, *Cours de cinq leçons sur les Conventions de Genève* (Geneva, 1963); G.I.A.D. Draper, 'The Geneva Conventions of 1949', *RCADI* 114 (1965-I) 59; A. Maresca, *La protezione internazionale dei combattenti e dei civili: Le Convenzioni di Ginevra del 12 agosto 1949* (Milan, 1965); D. Schindler, 'Die Anwendung der Genfer Rotkreuzabkommen seit 1949' (1965) *ASDI* 22 75; C. Pilloud, 'Les Conventions de Genève - 1949 - 1969 - Bilan et perspectives', *RICR* 51 (1969) 465; C. Pilloud, 'Les Conventions de Genève, 1949-1969', *RICR* 51 (1984) 465; T. Meron, 'The Geneva Conventions as customary law' (1987) 81 *AJIL* 348; F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre* (Geneva, 1994) 354; Best, *War and Law Since 1945*, 80; Y. Sandoz, 'Le demi-siècle des Conventions de Genève', *RICR* 81 (1999) 241; C. Rey-Schyr, 'Les Conventions de Genève de 1949: une percée décisive', *RICR* 81, no. 834 (1999) 209; 81, no. 835 (1999) 499; F. Bugnion, 'Les Conventions de Genève du 12 août 1949', *RSDIE* 9 (1999) 371; D. Schindler, 'Significance of the Geneva Conventions for the contemporary world' in N. Sanajaoba (ed.), *A Manual of International Humanitarian Laws* (New Delhi, 2004) 42 ff.; D. Forsythe, '1949 and 1999: making the Geneva Conventions relevant after the Cold War' in *ibid.* 56 ff.; C. Rey-Schyr, *De Yalta à Dien Bien Phu, Histoire du Comité international de la Croix-Rouge, 1945-1955* (Geneva, 2007) 239 ff. One may further consult the commentaries to the four Geneva Conventions edited by the ICRC under the direction of J. Pictet in the 1950s: J. Pictet (ed.), *Commentary I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, ICRC, 1952); J. Pictet (ed.), *Commentary II, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Geneva, ICRC, 1960); J. Pictet (ed.), *Commentary III, Geneva Convention relative to the Treatment of Prisoners of War* (Geneva, ICRC, 1960); J. Pictet (ed.), *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Geneva, ICRC, 1958). For the Additional Protocols of 1977, see essentially Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987); M. Bothe, K.J. Partsch and W. Solf (eds.), *New Rules for Victims of Armed Conflicts* (The Hague/Boston/London, 1982).

98 This provision is today held to express customary international law. Its content applies to all conventions on armed conflicts, including the older ones, such as the Hague Convention of 1907, which according to the text, applies only to war.

99 See e.g., ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Reports 136 (the *Israeli Wall case*), para. 95.

- 100 On these evolutions, see R. Kolb, 'Aspects historiques de la relation entre le droit international humanitaire et les droits de l'homme' (1999) 37 *Canadian Yearbook of International Law* 57; R. Kolb, 'Human rights and humanitarian law' in *Max Planck Encyclopaedia of Public International Law* (2008) www.mpepil.com. See also Centre pour les droits de l'homme (ed.), *Bulletin des droits de l'homme* (United Nations, Geneva, 1992); L. Doswald-Beck and S. Vité, 'International humanitarian law and human rights law' (1993) 293 *IRRC* 94; R. Provost, *International Human Rights and Humanitarian Law* (Cambridge, 2002); H.P. Gasser, 'International humanitarian law and human rights law in non-international armed conflict: joint venture or mutual exclusion?' (2002) 45 *German Yearbook of International Law* 149; T. Meron, 'International law in the age of human rights,' *RCADI* 310 (2003) 68; H.J. Heintze, 'On the relationship between human rights law protection and international humanitarian law' (2004) 856 *IRRC* 789; F.F. Martin, S.J. Schnably, R. Wilson, J. Simon and M. Tushnet, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge, 2006); R. Arnold and N. Quéniwet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Boston, 2008).
- 101 See e.g., the *Israeli Wall Advisory Opinion* of the ICJ (2004), *supra* note 99.
- 102 As to the contribution of the ECHR, see e.g., G. Gaggioli and R. Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights,' (2007) 37 *Israel Yearbook on Human Rights* 115. See generally the case law of these tribunals, in particular: (1) UN Human Rights Committee: *Pedro Pablo Camargo v. Colombia*, 31 March 1982: Communication No. 45/1979, UN doc. CCPR/C/15/D/45/1979; *Baboeram et al. v. Suriname*, 4 April 1985: Communications Nos. 146/1983 and 148 to 154/1983, UN doc. CCPR/C/24/D/146/1983; *Concluding Observations, Israel*, 21 August 2003: UN doc. CCPR/CO/78/ISR; *Concluding Observations, USA*, 15 September 2006: UN doc. CCPR/C/USA/CO/3. (2) European Commission of Human Rights: *Cyprus v. Turkey*, 10 July 1976: Appl. No. 6780/74 and 6950/75. (3) European Court of Human Rights: *Kaya v. Turkey*, 19 February 1998; *Ergi v. Turkey*, 28 July 1998; *Ahmet Özkan and others v. Turkey*, 6 April 2004; *Isayeva, Yusupova and Bazayeva v. Russia*, 24 February 2005; *Isayeva v. Russia*, 24 February 2005; *Khatsiyeva v. Russia*, 17 January 2008; *Akkum and others v. Turkey*, 24 March 2005. (4) Inter-American Commission of Human Rights: *Arturo Ribon Avila v. Colombia*, 30 September 1997; *Juan Carlos Abella v. Argentina*, 18 November 1997 (the *La Tablada* case); *Guerrero et al. v. Colombia*, 13 April 1999; *Coard et al. v. USA*, 29 September 1999; *Report on Terrorism and Human Rights*, 22 October 2002; (5) Inter-American Court of Human Rights: *Bámaca-Velásquez v. Guatemala*, 25 November 2000; *Mapiripán Massacre* case, 15 September 2005; *Pueblo Bello Massacre* case, 31 January 2006; *Ituango Massacres* case, 01 July 2006; *De la Rochela Massacre* case, 11 May 2007; *Myrna Mack Chang v. Guatemala*, 25 November 2003; *Plan de Sánchez Massacre* case, 29 April 2004; *Moiwana Community v. Suriname*, 15 June 2005; (6) African Commission of Human and People's Rights: *Commission Nationale des Droits de l'Homme et des Libertés v. Tchad*: Comm. No. 74/92 (1995); *Free Legal Assistance Group and others v. Zaïre*, Comm. Nos. 25/89, 47/90, 56/91, 100/93 (1995); *Organisation Mondiale Contre La Torture v. Rwanda*, African, Comm. Nos. 27/89, 46/91, 49/91, 99/93 (1996); *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Comm. No. 218/98 (1998); *Amnesty International and others v. Sudan*, Comm. No. 48/90, 50/91, 52/91,

- 89/93 (1999); *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001).
- 103 See in particular Meron, 'Age of human rights' 24 ff.; T. Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239.
- 104 Paragraphs 518–520. We may here just quote para. 518: 'The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called "humanisation" of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century. After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings. Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the "categorical imperative" formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it.'
- 105 *Ibid.*, para. 527 ff.
- 106 On the customary status of the rules of the Additional Protocols (including a reference to the case law of the criminal tribunals), see J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, 2005) vol. I–III. On the development of IHL through the criminal tribunals, see C. Greenwood, 'The development of international humanitarian law by the International Criminal Tribunal for the Former Yugoslavia' (1998) 2 *Max Planck Yearbook of United Nations Law* 97; G. Abi-Saab, 'International Criminal Tribunals and the development of international humanitarian and human rights law' in E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, 1999) 649 ff.; J.-F. Quéguiner, 'Dix ans après la création du Tribunal pénal international pour l'ex-Yugoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire' (2003) 85 *IRRC* 271; M. Sassòli, 'Humanitarian law and international criminal law' in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford, 2009) 111 ff. See also R. Kolb, 'The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes' (2000) 71 *British Yearbook of International Law* 259 ff and R. Kolb, 'The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes (2000–2004)' (2004) *BYIL* 269; R. Kolb, 'International humanitarian law and its implementation by the international criminal court' in J. Doria, H.-P. Gasser and M.C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (The Hague, 2008).
- 107 See e.g., Meron, 'Age of human rights', 49 ff.



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