

### HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD

This work,\* published in honour of *Frits Kalshoven* and edited by Astrid J.M. Delissen and Gerard J. Tanja, came into being on the initiative of the Netherlands Red Cross and the Department of Public International Law of Leiden University. The 668-page volume contains twenty-four essays on international humanitarian law by different authors. As Jean Pictet points out in the first preface, Frits Kalshoven is one of a long line of Dutch legal scholars who, since Grotius, have greatly added to the fame of their country throughout the world. In this tribute paid to a legal scholar by another legal scholar, the decisive role played by Frits Kalshoven as rapporteur of the Ad Hoc Committee on Conventional Weapons at the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts (1974-1977) is duly mentioned.

In a second preface, Mr. Jan J. van der Weel, President of the Netherlands Red Cross, reviews the activities of this eminent expert on international humanitarian law within the National Society. A biographical note follows the two prefaces, and this introductory section ends with a list of Professor Kalshoven's many publications.

The contributions that make up the body of the book are divided into seven parts, dealing respectively with humanitarian law in general, the 1977 Additional Protocols, internal conflicts and internal strife, arms and armaments, neutrality and naval warfare, humanitarian law in practice and, lastly, related issues.

The chapter devoted to humanitarian law starts with Geoffrey Best's contribution, entitled "*The restraint of war in historical and philosophical perspective*". It traces the development of humanitarian law, linking the history of facts with the history of ideas. The author states among other things that if nations do not respect certain limits in their military operations, "*they must put up with the kind of war they themselves invent*" (p. 26). Yves Sandoz writes on the "*Pertinence et permanence du droit international humanitaire*" (Pertinence and permanence of international humanitarian law). In his conclusion on the nature of emergency aid, the author declares that it should never serve as an excuse for

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failing to address the root causes of underdevelopment and overpopulation (p. 38). René-Jean Wilhelm offers "*Quelques considérations générales sur l'évolution du droit international humanitaire*" (Some general considerations on the evolution of international humanitarian law). The article outlines the principal stages in the history of this area of law and shows the decisive role played by certain conflicts, such as the two world wars and the Vietnam war, in the development of humanitarian rules. In a paper entitled "*L'action humanitaire*" (Humanitarian action), René J. Dupuy notes that it took long years of experience to establish ICRC practice as a legal norm. As for assistance in the event of natural disasters, the author feels that local authorities should have the lead role in organizing relief operations, but that they should take care not to abuse their power (p. 75).

The second part of the book, devoted to the Additional Protocols, starts with Hans-Peter Gasser's article "*Negotiating the 1977 Additional Protocols: was it a waste of time?*". Among the effects that the adoption of these treaties has had on State practice, the author mentions clarifying customary law and contributing to its formation. Moreover, Mr. Gasser feels that the adoption of the Additional Protocols has heightened awareness of the relevance of humanitarian law, and points out that decision-makers can no longer plead ignorance of its precepts (p. 91). Christopher Greenwood analyses the "*Customary law status of the 1977 Geneva Protocols*". With particular reference to the positions taken by the parties to the Iran-Iraq war, the author gives his opinion as to the customary status or otherwise of Articles 35 to 60 of Additional Protocol I. In his conclusion, he states that provisions which do not yet have the status of customary international law may nevertheless be considered as an indication of the political expectations of parties to the conflict or the international community as a whole (p. 114). Georges Abi-Saab, in his article entitled "*The 1977 Additional Protocols and general international law: some preliminary reflections*", deals with custom and the criteria that enable us to establish its existence, while warning against the dangers of excessive voluntarism, whereby States pick and choose the treaty rules that suit their purposes (p. 125). George H. Aldrich, in his article entitled "*Why the United States of America should ratify Additional Protocol I*", concludes that Protocol I is a document which represents, for the most part, an international consensus — a consensus that the United States played a major role in creating. He therefore expresses the hope that the United States will reconsider its position in this respect (p. 144).

Yoram Dinstein writes on siege and famine as methods of warfare ("*Siege warfare and the starvation of civilians*"). In the author's opinion, "the absolute prohibition of starvation of civilians in siege warfare in Article 54 of Protocol I is unjustifiable as well as utopian" (p. 152). This is in contrast to C. Greenwood's opinion, stated earlier in the same book, that most of Article 54 "is likely to become part of customary law with little difficulty if it does not already have that status" (p. 110). Astrid J.M. Delissen, after reviewing the preparatory work on Article 38 of the Convention on the Rights of the Child ("*Legal protection of child-combatants after the Protocols: Reaffirmation, development or a step backwards?*"), concludes that this provision

constitutes neither a step forward nor a step backwards in relation to humanitarian law. Stanislaw E. Nahlik's contribution, entitled "*From reprisals to individual penal responsibility*", first recalls the discussions on the subject of reprisals that took place during the Diplomatic Conference, and then goes on to examine the difficulties involved in penal repression in wartime. "*The system of repression of breaches of Additional Protocol I*" is also the subject of Julian J.E. Schutte's article, which gives an in-depth analysis of Article 85 of Protocol I and thus defines the scope of this provision. However, we are not sure that we agree with his interpretation of Article 85, para. 3 (a), i.e. that making civilian objects the object of attacks, even in cases where this causes death or serious injury to body or health of civilians, does not constitute a grave breach, unless such attacks are covered by the terms of subparagraphs (b), (c) or (d) (p. 190). Indeed, a grave breach occurs as soon as an attack against the civilian population or individual civilians meets the general conditions laid down in paragraph 3. The subject of war crimes is also dealt with by Christine van den Wyngaert, in her article "*The suppression of war crimes under Additional Protocol I*". The author rightly points out that Protocol I does not contain any clause ruling out the excuse of orders received from a superior, or the excuse of necessity (p. 202). However, it must be borne in mind that Article 86, para. 2, of Protocol I establishes the responsibility of superior officers for acts committed by their subordinates. Moreover, in regard to necessity, it is admitted in principle that this excuse cannot justify failure to comply with humanitarian law.<sup>1</sup>

Part three, which focuses on internal armed conflicts and internal strife, begins with an article by Rosemary Abi-Saab on "*Humanitarian law and internal conflicts: the evolution of legal concern*". The author points out that there is room for improvement in the rules of international law pertaining to the protection of the civilian population against the effects of hostilities and to the treatment of captured combatants. Peter H. Kooijmans, who addresses the problem of the grey area between civil war and internal strife in a paper entitled "*In the shadowland between civil war and civil strife: some reflections on the standard-setting process*", notes that a clear distinction must be drawn between humanitarian law and human rights law if the respective effectiveness of these two branches of international law is to be preserved (p. 247). Lastly Theodor Meron, writing on "*Internal strife: applicable norms and a proposed instrument*", outlines a declaration applicable to all situations, including internal strife, which would deal in particular with summary executions, capital punishment, the excessive use of force, massive and prolonged administrative detention and collective punishments. The author concludes that such a declaration would constitute an "irreducible core of human rights law that must be applied as a minimum at all times" (p. 266).

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<sup>1</sup> See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swinarski, B. Zimmermann, eds., ICRC, Martinus Nijhoff Publishers, Geneva, 1987, p. 391, para. 1387 ff.

Arms and armaments is the subject of part four, which begins with an article by Leslie C. Green on the rules relating to the conduct of hostilities, entitled "*What one may do in combat — then and now*". The author deals first with the classic humanitarian restrictions on the use of weapons, the principle of distinguishing between civilians and combatants, and the protection afforded women and children, then goes on to examine the restrictions on methods and means of combat imposed by existing treaty law. In the second piece, entitled "*Les armes nucléaires et le droit de la guerre*" (Nuclear weapons and the law of war), Henri Meyrowitz provides a lucid analysis of the relationship between humanitarian law and the use of nuclear weapons. He concludes that "under existing international law nuclear weapons, far from enjoying a privileged status, are subject to strict rules severely limiting their potential use" (p. 323). Hisakazu Fujita discusses the denuclearization of the Pacific Ocean in an article on "*The changing role of international law in the nuclear age: from freedom of the high seas to nuclear-free zones*", concluding that the Pacific region "still remains the arena of an old-fashioned cold war situation" (p. 350). This part of the book ends with a paper by Bernhard Graefrath on "*Implementation measures and international law of arms control*", in which the author points out that effective arms control systems strengthen the relationship between disarmament and humanitarian law.

Part five centres on neutrality and naval warfare. In the first article, entitled "*Transformations in the law of neutrality since 1945*", Dietrich Schindler examines the implications of the United Nations Charter with respect to the concept of neutrality. Michael Bothe, writing about "*Neutrality in naval warfare*", wonders whether the existing rules concerning neutrality in naval warfare are still appropriate today and concludes that the matter "*deserves much thought de lege ferenda*" (p. 405). Dieter Fleck, in an article on "*Topical approaches towards developing the laws of armed conflict at sea*", puts forward several proposals concerning the development of the law of naval warfare, with particular reference to the situation of merchant vessels, the use of mines and submarine warfare. In the last article, entitled "*The merchant vessel as legitimate target in the law of naval warfare*", William J. Fenrick provides an in-depth analysis of the law governing the status of merchant vessels.

The subject of part six is humanitarian law in practice. In the first contribution, "*The treatment of rebels in conflicts of a disputed character: the Anglo-Boer war and the 'ANC-Boer war' compared*" John Dugard takes a look at case law deriving from trials of ANC members in South Africa. Paul J.I.M. De Waart, in an article entitled "*Subscribing to the 'law of Geneva' as manifestation of self-determination: the case of Palestine*", discusses the issue of Palestine's accession to the humanitarian law instruments and suggests that the United Nations request an advisory opinion from the International Court of Justice on the possibility of Palestine becoming a Member State of the UN (p. 492). Theo C. van Boven, discussing "*Reliance on norms of humanitarian law by United Nations' organs*", cites four situations in which the UN has referred to humanitarian law (in connection with the territories occupied by

Israel, Afghanistan, El Salvador and Sri Lanka). He is in favour of complementary roles for the UN and the ICRC, while at the same time stressing the differences between the two institutions and their working methods (pp. 511-512). Writing about "*International humanitarian law and the Security Council resolutions on the 1990-1991 Gulf conflict*", Erik Suy examines the way in which the UN Security Council took humanitarian law into account in its resolutions on the Gulf conflict and concludes that the Council must ensure that humanitarian standards are respected in that context (p. 526). The Gulf conflict is also the subject of an article by Michel Veuthey entitled "*De la guerre d'octobre 1973 au conflit du Golfe 1992: les appels du CICR pour la protection de la population civile*" (From the October 1973 war to the 1991 Gulf conflict: ICRC appeals for protection of the civilian population). The examples given by the author will be of great value to all those interested in how the practice of international organizations contributes to the formation of customary law. In a paper on "*Reporting mechanism for supervision of national legislation implementing international humanitarian law*", Krzysztof Drzewicki recommends that a group of experts be set up to examine, on the basis of reports submitted by governments, measures taken at the national level for the implementation of international humanitarian law. Unfortunately, the author does not appear to give due credit to the efforts made by the ICRC to focus the attention of States on the importance of adopting such measures.

Part seven, which centres on issues related to humanitarian law, begins with Torsten Stein's paper "*How much humanity do terrorists deserve?*". The author concludes that democratic States should guarantee the human rights of every individual without exception (p. 581). Henry G. Schermers, in an article on "*The obligation to intervene in the domestic affairs of States*", considers that "effective intervention, in particular in urgent cases, may well mean military intervention" (p. 591). He notes in conclusion that "the necessary legal rules on intervention are underdeveloped" (p. 592). Writing on "*Jus ad bellum and jus cogens: is immorality illegal?*", Alfred P. Rubin shows that the current international order hinges on the internal organization of States. He concludes that it would be preferable to "build legal institutions capable of achieving virtue-moral goals" rather than to try to change the traditional national structures on which the international order is based (p. 611). Manfred Lachs, addressing the subject of "*Slavery: the past and the present*", observes that forms of slavery evolve and that children, in particular, are its new victims. He recommends serious revision of the Conventions prohibiting the practice of slavery (p. 625).

This work compiled as a tribute to Frits Kalshoven provides specialized readers with an excellent source of information on a wide range of issues relating to the interpretation, implementation and development of humanitarian law. It will undoubtedly contribute to the advancement of knowledge of this crucial area of international law.

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