

# History of the law of war on land

by

**HOWARD S. LEVIE**

**F**or many millennia there was no such thing as humanity in land warfare. From the caveman to biblical times, and for centuries thereafter, the winner in battle took from the loser not only his life, but also all of his available belongings, including women, children, domestic animals and personal property. See, for example, the Bible, Numbers 31: 7-8, where the following appears:

They made war on Midian as the Lord had commanded Moses, and slew all the men. In addition to those slain in battle, they killed the kings of Midian — Evi, Rekem, Zur, Hur and Reba, the five kings of Midian — and they put to death also Balaam, son of Beor. The Israelites took captive the Midianite women and their dependants, and carried off their beasts, their flocks, and their property. They burnt all their cities, in which they had settled, and all their encampments. They took all the spoil and plunder, both man and beast...

Similar statements will be found throughout the Bible. Unless circumstances permitted otherwise, all of the enemy who lived were killed and all their real property was seized or razed. An exception is to be found in the Koran, Surah xlvi, paragraph 4, which includes the following statement:

When you meet in battle those who have disbelieved, smite their necks, and after the slaughter tighten fast the bonds, until

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HOWARD S. LEVIE is Professor Emeritus of Law, Saint Louis University Law School, and Adjunct Professor of International Law, U.S. Naval War College. He is also Colonel (ret.), Judge Advocate General's Corps, U.S. Army.

the war lays aside its burdens. Then either release them as a favour, or in return for ransom.<sup>1</sup>

This dates from the sixth century AD. Sun Tsu, writing *The Art of War* in the fourth century BC, and *Manu Sriti*, an anonymous Sanskrit treatise (probably dating from sometime between 200 BC and 200 AD), both forbade the slaying of prisoners of war, giving as alternatives absorption into one's own army (a practice followed by Mao Tse-tung's communist army after the defeat of the Chinese Nationalists under Chiang Kai-shek in 1949, and by Kim Il-Sung's North Korean army during their early successes in South Korea in 1950), enslavement, or ransom. Of course, any one of these alternatives, inhumane as they may appear, was more humane than the earlier practice which had existed at the time of the period covered by the Bible.

It is obvious that at this period in the evolution of mankind humanity played no part, or a very small and almost accidental part, in land warfare. The captured soldier knew that the fate which awaited him was either death or enslavement. Ransom existed as a practice but was a very limited procedure until the Middle Ages, and even then applied only to the knight and not to the common soldier. Several centuries later, the practice of exchange of prisoners of war evolved. This practice continued up to the American Civil War (1861-1865), when an agreement to that effect was reached by the belligerents, but it proved to be completely ineffective.

### Codification of the law of war on land

The first attempt to lay down specific humanitarian rules to be applicable in time of war was the so-called *Lieber Code*, drafted by Professor Francis Lieber and, after revision by a board of officers, promulgated as General Orders No. 100 of the Union Army in 1863.<sup>2</sup>

<sup>1</sup> In the translation of M. Z. Kahn (1971).

<sup>2</sup> Reprinted in D. Schindler and J. Toman, *The Laws of Armed Conflicts*, 3rd ed., Martinus Nijhoff Publishers/Henry Dunant Institute, Dordrecht/Geneva, 1988 (here-

inafter cited as *Schindler/Toman*), p. 3. See also M. Deltenre, *Recueil général des lois et coutumes de la guerre*, Les Éditions Ferd. Wallens-Pay, 1943 (texts in French, Flemish, German and English).

Section II of that Code, containing Articles 31 to 47, provided for the “Protection of persons and especially of women, of religion, the arts and sciences. Punishment of crimes against the inhabitants of hostile countries”. There were also provisions requiring the humane treatment of prisoners of war.<sup>3</sup> This Code was, of course, a national action, not applicable to other countries, but it served as one of the sources of the international actions which were to follow.

That same year, 1863, an international conference meeting in Geneva drafted resolutions which called for each country to establish a committee to assist the medical services, and to provide for the neutrality of ambulances and medical personnel.<sup>4</sup> This was the precursor for the Geneva Conferences which drafted the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field<sup>5</sup> and the 1868 Additional Articles relating to the Condition of the Wounded in War.<sup>6</sup>

In 1874 an international conference called by the Russian government met in Brussels and adopted the International Declaration Concerning the Laws and Customs of War,<sup>7</sup> a document which contained many provisions intended to make land warfare more humane. Unfortunately, it never became effective for lack of ratifications.<sup>8</sup> However, it served as one of the sources for the Regulations attached to the 1899 Convention (II) with Respect to the Laws and Customs of War on Land, drafted by the (first) International Peace Conference in The Hague. It was in the preamble to this Convention that the famous *de Martens Clause* made its appearance. It states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations

<sup>3</sup> Lieber Code, Section III, Articles 49 to 80.

<sup>4</sup> Schindler/Toman, p. 275.

<sup>5</sup> Schindler/Toman, p. 279.

<sup>6</sup> Schindler/Toman, p. 285.

<sup>7</sup> Schindler/Toman, p. 25.

<sup>8</sup> In 1880, the Institute of International Law completed the drafting of the *Oxford Manual*

*on the Laws of War on Land* (Schindler/Toman, p. 35). This was, of course, an unofficial document, but, like the unratified Brussels Project, its importance in the drafting of subsequent conventions on the law of war cannot be overestimated.

and belligerents remain under the protection and empire of the principles of international law, as they result from usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.<sup>9</sup>

At the same time three Declarations were adopted, one prohibiting the launching of projectiles and explosives from balloons,<sup>10</sup> one prohibiting the use of asphyxiating gases,<sup>11</sup> and one prohibiting the use of expanding bullets.<sup>12</sup>

The Second International Peace Conference, held in The Hague in 1907, adopted a slightly redrafted set of the Regulations attached to the 1907 Convention (IV) respecting the Laws and Customs of War on Land.<sup>13</sup> The only Declaration that it readopted was that relating to the dropping of projectiles and explosives from balloons.<sup>14</sup>

In 1906, an international conference met in Geneva and updated the 1864 Convention and the 1868 Additional Articles. It was this 1906 Convention for the Amelioration of the Condition of the

<sup>9</sup> Schindler/Toman, p. 70. The clause was repeated in a somewhat extended form in the 1907 Hague Convention IV and in the 1977 Additional Protocol I.

<sup>10</sup> Schindler/Toman, p. 202. This Declaration was to be in force for only five years. However, at the 1907 Second International Peace Conference its effectiveness was extended to "the close of the Third Peace Conference". *Ibid.* As that Conference has never taken place (it was to have convened eight years after the end of the 1907 Second Peace Conference, but World War I broke out before that date was reached), it has been argued that the Declaration is still in force; moreover, since it prohibited the discharge of projectiles and explosives from balloons "or by other new methods of a similar nature", it is sometimes argued that bombing by aircraft violates this Declaration. Needless to say, no nation has accepted this argument.

<sup>11</sup> Schindler/Toman, p. 105. Germany violated this Declaration by using gas projectiles in Poland in 1915 during World War I. When the Germans initiated the use of chlorine at Ypres in 1916, the claim was made that it was not a violation of the Declaration because no projectiles were used, the gas having been contained in barrels which were opened to allow the wind to carry the gas to the Allied lines. Nevertheless, that act initiated general gas warfare, a type of warfare which resulted in over 1,000,000 casualties during World War I.

<sup>12</sup> Schindler/Toman, p. 109. This Declaration was the prohibition of dumddum bullets. *Infra*, notes 26 and 27.

<sup>13</sup> Schindler/Toman, p. 63.

<sup>14</sup> *Supra*, note 9. The other two Declarations adopted at the 1899 International Peace Conference had no time limits.

Wounded and Sick in Armies in the Field<sup>15</sup> which was in force during the First World War. It was superseded by the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field<sup>16</sup> which was, in turn, superseded by the 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.<sup>17</sup>

While the Regulations attached to the 1899 and 1907 Conventions respecting the Laws and Customs of War on Land had contained a number of almost identical provisions for the protection of prisoners of war, it was not until 1929 that an international conference drafted a convention dealing exclusively with that subject.<sup>18</sup> The 1929 Geneva Convention relative to the Treatment of Prisoners of War<sup>19</sup> was in force during World War II. However, Japan was not a party to it. This Convention was, in turn, superseded by the 1949 Geneva Convention relative to the Treatment of Prisoners of War.<sup>20</sup> When hostilities were initiated in Korea in 1950, few nations had ratified this latter Convention. However, the International Committee of the Red Cross called upon each individual participant in those hostilities to apply the provisions of the 1949 Convention and they all stated their agreement to do so.<sup>21</sup>

<sup>15</sup> Schindler/Toman, p. 301.

<sup>16</sup> Schindler/Toman, p. 325. This Convention was in force during World War II, but a number of the belligerents were not parties to it.

<sup>17</sup> Schindler/Toman, p. 373. All but four or five small nations with no armies are party to this Convention.

<sup>18</sup> In World War I the provisions of the 1907 Hague Regulations with respect to prisoners of war had been found so inadequate in coverage that a number of bilateral and multilateral agreements on the subject had been negotiated by the belligerents during the hostilities.

<sup>19</sup> Schindler/Toman, p. 339. The same Diplomatic Conference drafted the 1929 Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field and the 1929 Convention for the

Amelioration of the Wounded, Sick and Shipwrecked at Sea (Schindler/Toman, pp. 373 and 401, respectively) which were widely adopted.

<sup>20</sup> Schindler/Toman, p. 423. Once again, all but a handful of small nations with no armies are party to this Convention. It should be noted that the 1949 Convention relative to the Protection of Civilian Persons in Time of War (Schindler/Toman, p. 495), the first convention devoted exclusively to the protection of civilians in time of war, was also drafted at that time.

<sup>21</sup> North Korea, unwilling to take any action recognizing the ICRC, sent its reply to the Secretary-General of the United Nations, stating that it "is strictly abiding by principles of Geneva Convention in respect to Prisoners of War." As is well known, this was anything but the case!

Evidence of the modern effort to make land warfare more humane is to be found in a 1968 resolution of the General Assembly of the United Nations which stated in part as follows:<sup>22</sup>

1. *Affirms* resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, *inter alia*, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:

(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

(b) That it is prohibited to launch attacks against the civilian populations as such;

(c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

2. *Invites* the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study:

(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;

(b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare (...).

A Diplomatic Conference was convened in 1974 to fill in the lacunae which had been found to exist in the 1949 Geneva Conventions. So difficult was it to obtain strong support for various provisions that it was not until 1977 that the conference reached agreement on a Protocol Additional to the Geneva Conventions of

<sup>22</sup> UNGA Res. 2444 (XXIII) of 19 December 1968, reprinted in Schindler/Toman, p. 263.

12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),<sup>23</sup> as well as a Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977.<sup>24</sup>

### Limitations on the use of weapons

Almost all of the international activity mentioned above has dealt with the humane treatment to be accorded in land warfare to individuals, civilian non-combatants and prisoners of war. Limitations on the use of certain weapons are certainly another area which falls within the scope of international humanitarian law to be applied in time of war on land. While the international community has been much slower in addressing this subject, action to that effect has been taken on a number of occasions, particularly in the latter part of the present century.

The weapons of the early known period were primarily the bow and arrow, the sword, the spear and the throwing knife or other thrown object.<sup>25</sup> None of these weapons would be considered inadmissible if they were used today; in fact, many of them, like the bayonet, are still used in one form or another and there has been no complaint that they are inhumane. As time went on, the bow and arrow evolved into a much more powerful weapon in the form of the

<sup>23</sup> Schindler/Toman, p. 621. The United States has not ratified this Protocol, both because in its opinion it makes colonial wars international and because it abolishes the requirements for the recognition of a legitimate combatant.

<sup>24</sup> Schindler/Toman, p. 689. Prior to the drafting of this Protocol the only international humanitarian law provision with respect to non-international (civil) wars had been Article 3 of the 1949 Geneva Conventions.

<sup>25</sup> David used a sling and a stone in his encounter with Goliath and, having rendered

him unconscious or dead, proceeded to cut off his head. The use of the sling and the stone as a weapon of war was legitimate — and would probably be legitimate today. However, if Goliath was only unconscious, the act of cutting off his head would today be an inhumane act, and a war crime. If Goliath was dead, then David also committed what today would be a war crime, the maltreatment of the dead body of an enemy. See James H. Jeffries, "Law of war trivia", *Proc. U.S. Naval Inst.*, Vol. 114, June 1988, p. 57.

longbow and the cross-bow. Unfortunately, poison was sometimes placed on the arrowhead, and at the end of the thirteenth century this practice reached Europe.

The next major step in the evolution of weapons of warfare was the development of gunpowder and the gun, of which the first mention is in the middle of the fourteenth century. This weapon, from handgun to heavy artillery, still exists in many forms which would be completely unrecognizable to its original users. It does not appear that the gun, firing an ordinary bullet, or artillery, firing a shell, has ever been charged with being an inhumane method of land warfare.

Later the Russians invented a bullet which exploded on impact. Originally it did so only on striking a hard object, but later it was modified in such a way that it would explode on contact with a soft object, such as a human body. Considering this to be inhumane, the Russian government convened an international conference at St Petersburg which drafted the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight.<sup>26</sup> Thus explosive rifle bullets were banned even before they had been used in land warfare, but explosive artillery shells remained lawful.

In its clashes with local inhabitants on the Indian frontier in the late nineteenth century the British used bullets known as "dum-dums", because they were manufactured in an arsenal situated in Dum-Dum, Bengal. The peculiarity of these bullets was that the lead core was exposed, so that instead of passing through a body it expanded on impact and tore it apart. Declaration IV(3) of the 1899 First Peace Conference prohibited "the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions".<sup>27</sup>

<sup>26</sup> Schindler/Toman, p. 101.

<sup>27</sup> Schindler/Toman, p. 109. — The British are alleged to have used dum-dum bullets in South Africa and the Russians are alleged to have used them in their war with the Japanese.

Both sides are alleged to have used them during World War I. Even today instances will be found where individual soldiers pierce the ends of their bullets with a knife, thus in effect making them dum-dum bullets.



It has long been appreciated that international humanitarian law applicable in land warfare was sadly deficient in restrictions when it came to bacteriological and toxin weapons,<sup>28</sup> chemical weapons, and certain types of conventional weapons.<sup>29</sup> Numerous resolutions on these subjects had been adopted by the General Assembly of the United Nations and by various humanitarian organizations, but it was not until 1972 that an international conference was convened to draft a convention with respect to bacteriological weapons. It was successful in its endeavour and there is now such a convention to which almost every nation on earth is party.<sup>30</sup> It not only prohibits the development, production, and stockpiling of such weapons, but requires the destruction within nine months of the Convention's entry into force (a date which has long since passed) of "all agents, toxins, weapons, equipment and means of delivery".

In 1980 a diplomatic conference meeting in Geneva drafted the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.<sup>31</sup> The Convention itself has no substantive provisions but is a "carrier" for three Protocols. Its Protocol I prohibits the use of "any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays". Inasmuch as no such weapon was or is known to exist at the present time, this Protocol was adopted without dissent. Protocol II prohibits or restricts the use of mines, booby traps and other devices. As we shall see, the prohibitions and restrictions on the use of mines are not what they appear to be. Finally,

<sup>28</sup> While the 1925 Geneva Protocol included a ban on bacteriological weapons, this fact was rarely noted and the Protocol was always referred to as a "gas" Protocol.

<sup>29</sup> Reference to nuclear weapons has been omitted because, while there are treaties on this subject, there is no multilateral international convention banning their use, nor is there likely to be one in the foreseeable

future. The recent nuclear tests by India and Pakistan are indicative of the comparatively uncontrolled status of this weapon.

<sup>30</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, Schindler/Toman, p. 137.

<sup>31</sup> Schindler/Toman, p. 179.

Protocol III prohibits or restricts the use of incendiary weapons. Once again, the prohibitions and restrictions on the use of incendiary weapons are not what they appear to be.

The prohibition on the use of anti-personnel mines set forth in Protocol II is in fact limited to their use against civilians and civilian objects. The use of mines remains one of the most inhumane acts of war today, not because they are any more effective than an explosive artillery shell, but because once they are buried their location is soon forgotten and they remain a danger to innocent civilians even when hostilities have ended. It is estimated that there are over one hundred million mines buried throughout the world (Afghanistan alone is infested with millions of mines) and every week dozens of civilians are killed or maimed by mines planted long ago and whose location is no longer known. Efforts to draft a convention banning the use of land mines have been continuous in recent years.<sup>32</sup> At last, on 3 May 1996, the Amended Protocol II, which remedies some of the deficiencies of the original Protocol II of 1980, was accepted,<sup>33</sup> and on 18 September 1997 a Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was adopted at Ottawa.<sup>34</sup> This Convention has not yet come into force. It will do so on the first day of the sixth month after receipt by the Secretary-General of the United Nations of the 40th instrument of acceptance. Reservations are not permitted.

The use of fire in warfare has a long and ancient history. However, the prohibition on the use of fire set forth in the 1980 Protocol III is likewise limited to "individual civilians or civilian objects" and to "military objectives located within a concentration of civilians". Inasmuch as fire causes as much or more pain than a dum-

<sup>32</sup> Elsewhere, the present author has suggested a Convention banning mines other than those requiring several tons of pressure to explode them. This would make them useful as protection against tanks, but would prevent their activation by contact with or the

proximity of civilians. Another possible requirement is that every mine that is laid be required to contain a timed self-deactivation mechanism.

<sup>33</sup> 35 I.L.M. 1206 (1996).

<sup>34</sup> 36 I.L.M. 1907 (1997).

dum bullet, it would appear that far stricter limitations on its use are justified. Unfortunately, there seems little probability of such action.

The Treaty of Versailles, which ended World War I, contained a provision which prohibited the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices. This undoubtedly referred to Declaration IV(2) of the 1899 Peace Conference.<sup>35</sup> In 1922 a small group of nations drafted the Treaty of Washington which, while basically intended to place controls on submarine warfare, contained a provision under which the use of “asphyxiating, poisonous or other gases and all analogous liquids, materials or devices” was prohibited.<sup>36</sup> This convention was to become effective only if ratified by all the drafting States. As France failed to ratify it, the convention never came into force.

In 1925, however, a League of Nations arms conference meeting in Geneva took it upon itself to draft a Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.<sup>37</sup> Finally, in January 1993 a Diplomatic Conference meeting in Paris adopted the Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on their Destruction.<sup>38</sup> While the ratifications of this Convention were slow in the making, by the end of 1997 well over 100 States had become parties to it.<sup>39</sup>

### Conclusion

It is apparent from the foregoing review of international activities in this area over the past century and a half that nations have become more and more aware of the need for restrictions on the methods of conducting warfare, resulting in the formulation of numerous

<sup>35</sup> Schindler/Toman, p. 105.

<sup>36</sup> Schindler/Toman, p. 877.

<sup>37</sup> Schindler/Toman, p. 115. Although this Protocol was very widely accepted, the United States did not ratify it until 1975, fifty years later!

<sup>38</sup> 32 I.L.M. 800 (1993).

<sup>39</sup> Whether other States will accept the ratification by the United States remains to be seen, as it contains a multitude of reservations, including one with regard to the prohibition of the use of herbicides. Moreover, Article XXII of the Convention specifically prohibits all reservations.

international agreements aimed at making warfare less inhumane, particularly with respect to the helpless, such as non-combatants and prisoners of war. Unfortunately, a number of nations have seen fit to abstain from becoming parties to many of these humanitarian agreements and, on occasion, parties to them have seen fit to disregard their provisions (particularly in instances of internal conflict). This was recognized in the “war crimes” trials conducted after World War II and, more recently, by the United Nations in the creation of special international criminal courts for the former Yugoslavia and for Rwanda, as well as by the 1998 Rome Convention establishing the International Criminal Court. In any future conflicts it can be expected that, while most nations will endeavour to comply with the humanitarian rules for the conduct of warfare, there will unfortunately always be renegade nations which, whether or not parties thereto, will violate their provisions whenever it appears to their advantage to do so.

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## ***Résumé***

### **L’histoire du droit de la guerre sur terre**

par HOWARD S. LEVIE

*Ce bref récit de la main d’un des grands maîtres du droit des conflits armés présente l’évolution du droit de la guerre sur terre à travers les âges. De l’Ancien Testament de la Bible et des écrits de Sun Tsu au Statut de Rome de la Cour pénale internationale, l’auteur met en lumière les points forts du droit humanitaire. Il conclut son analyse par la constatation que le droit a sans aucun doute fait de grands progrès en vue d’imposer des limites à la violence meurtrière de la guerre. Toutefois, il constate que la volonté n’est pas toujours présente pour respecter, en toutes circonstances, les obligations à caractère humanitaire.*