Lesson 1

THE LAW OF ARMED CONFLICT

Basic knowledge

ICRC

ICRC

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INTRODUCTION TO THE LAW OF ARMED CONFLICT

BASIC KNOWLEDGE

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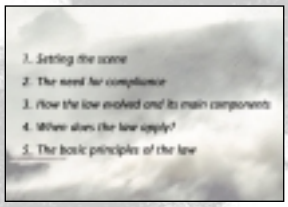

The aim of this lesson is to introduce the topic to the class, covering the following main points:

1. Background: setting the scene.

2. The need for compliance.

3. How the law evolved and its main components.

4. When does the law apply?

5. The basic principles of the law.

1. BACKGROUND: SETTING THE SCENE

Today we begin a series of lectures on the law of armed conflict, which is also known as the law of war, international humanitarian law, or simply IHL.

To begin, I'd like to take a guess at what you're thinking right now.

Some of you are probably thinking that this is an ideal opportunity to catch up on some well-earned rest. "Thank goodness I'm not on the assault course or on manoeuvres. This is absolutely marvellous. I can switch off and let this instructor ramble on for 45 minutes. I know all about the Geneva Conventions anyway – the law is part of my culture and our military traditions. I really don't need to listen to all this legal 'mumbo jumbo'."

The more sceptical and cynical among you might well be thinking along the lines of a very famous orator of ancient Rome – Cicero. He thought, "laws are silent amidst the clash of arms". In other words, war by its very nature is beyond the law. Wars break out when the rule of law breaks down, so there are no longer any rules. It's like finding yourself in the middle of a football / cricket / hockey match without referees or umpires, so just go for it. "We have to win at any cost, so let's forget the legal do-gooders."

Some of you may hold the view that consideration of the law, while of great interest to lawyers, leaves most operational officers and certainly every soldier absolutely cold. I am sure that the word "law" on your programme immediately brought to mind dust-covered old books and instilled feelings of boredom or remoteness and, to put it quite bluntly, irrelevance.

Some of you might actually think the subject is important for any professional soldier, but you are frightened by it. Becoming conversant with the law represents a massive investment of time and effort. How, on top of all your other commitments, can you be expected to come to grips with the subject?

So where do you stand on the issue? At this point, the instructor should draw out from the participants how they feel and where they fit, the aim being to promote class participation and interest right from the start.

We have heard what you think, now let's go back to the beginning.

To those of you who know all about the Geneva Conventions:
If you really do, that's fine, but can you tell me exactly what these mean?

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The instructor presents an illustration of the white flag of truce and asks the participants to explain exactly what it means and how they would react to enemy soldiers displaying it. Would they think it meant the soldiers wanted to surrender, negotiate or what? The answers will no doubt vary, helping you to illustrate that a little knowledge can be a dangerous thing.

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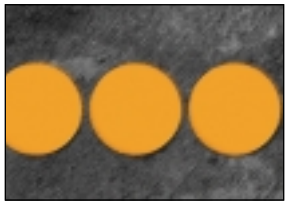
Then show the illustration of the three orange circles indicating dangerous forces. Ask the participants if they can tell you what they mean in the law of armed conflict. Few will know.



[**Slides 6-10**]

Then ask the class to describe their exact duties in relation to the following categories of persons and objects:

- captured combatants;
- civilians;
- the red cross protective emblem;
- the wounded, both military and civilian.

To those of you who think no rules apply once hostilities have started:
Perhaps you would like to consider whether it would be useful to you in battle for some provisions of the law to protect you:

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- if you have been captured, i.e. made a prisoner of war, or wounded;
- from torture while under interrogation or from poisonous gas attacks from your opponent;
- if you are a civilian.





Why would compliance with the rules benefit your own forces?

- Fewer casualties, as the other side may surrender because they know POWs will be treated properly.
- Detainees in enemy hands are likely to be treated better if you treat enemy captives well.
- Unnecessary destruction is avoided – you may want to travel through the territory and could make use of shelter.
- You can prevent your troops from being killed by friendly mines and unexploded ordnance if you've had them properly mapped.

The purpose of the following questions is not to obtain detailed answers but rather to make the participants think. The answers to all the questions will be covered in detail as the course progresses.

To those of you who think the subject is dull and irrelevant, let me ask you:

Are you absolutely sure what your legal responsibilities are when planning an attack?
Are you sure how and when you can use weapons such as booby traps and flame throwers?

To those of you who think the law is important but takes too much time and effort to learn:

How much time have you devoted to the subject?
How hard have you actually tried to learn more?

I hope that this short introduction has allowed you to focus on the relevance of the law of armed conflict, to you and to those under your command.

The law is important to you as professionals. It was drafted by professional soldiers. It can't be left only to lawyers. They can certainly advise and help you, but you are the ones who have to put the law into effect, to uphold and apply it. You cannot plead ignorance or hide behind a smoke screen of ineffective knowledge. Remember the old saying, “a little knowledge is a dangerous thing”. Conflict is hazardous enough without making it worse if you can possibly avoid doing so. You cannot pass the buck, you cannot plead irrelevance or lack of time. If you get it wrong, the government on whose behalf you are fighting may be liable in civil law and you may be personally liable under criminal law.

2. THE NEED FOR COMPLIANCE

Let us now focus on the importance of compliance with the law to you personally, your command and your country.

INDIVIDUAL RESPONSIBILITY

The first and most important point to register is that every member of the armed forces, whatever his or her rank, has a personal responsibility to comply with the law of armed conflict, to ensure that it is complied with by others and to take action in the event of violations. If you break the rules, you can be tried, and not just by your own courts. And you will not be allowed to invoke superior orders in your defence.

Serious violations of the law of armed conflict are considered war crimes that can be prosecuted in national courts or in international tribunals / courts such as the ad hoc tribunals established to investigate violations of the law in the former Yugoslavia and Rwanda and the International Criminal Court.

COMMANDER’S RESPONSIBILITY

Commanders have a duty to:

- ensure that personnel under their command are trained in the rules of the law of armed conflict;
- give lawful and unambiguous orders;
- take responsibility for difficult decisions;
- ensure that their orders are lawfully carried out by their subordinates;
- report violations by members of enemy or allied forces, including their own, to a higher military authority.

In addition, commanders may be held to account under criminal law if they know or ought to know that subordinates are going to commit war crimes but fail to prevent them from doing so or if they know or ought to know that subordinates have committed war crimes and then fail to punish or report offenders.

STATE RESPONSIBILITY

States signatory to the Geneva Conventions undertake to respect and to ensure respect for the Conventions in all circumstances. They further undertake to ensure that the texts of the Conventions are disseminated as widely as possible, in particular to the armed forces. A party to the conflict violating the provisions of the law of armed conflict will, if the case demands, be liable to pay compensation. It is responsible for all acts committed by its armed forces.

There are other, equally important reasons to be familiar with the law of armed conflict and to comply with it. Compliance also:

- underlines the true professionalism of members of the armed forces;
- enhances morale and discipline;
- ensures the support of the civilian population at home and in the theatre of operations;
- makes reciprocal treatment, for example of the wounded and sick and prisoners of war, more likely;
- improves the prospects for a return to lasting peace (lingering bitterness caused by inhuman or brutal behaviour in conflict will slow down any peace process);
- ensures that the military effort is concentrated on defeating the adversary and not on unnecessary and counterproductive operations.

For each and all of these reasons, knowledge of the law of armed conflict and compliance with it make good practical military sense.

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The law of armed conflict was born on the battlefield. It has been shaped and gradually moulded by military experience. As you will see, it is steeped in the traditions and customs of all cultures, and contains practical rules or codes of conduct which all military personnel can and indeed must understand. One of the principles of war is simplicity of action. The law of armed conflict, as you will discover, is also simple and straightforward.

Because the law has evolved as a result of military experience, it is designed to be applied in time of armed conflict. In no area does it conflict with the principles of war, such as maintenance of momentum, concentration of effort, surprise, etc. What it does do, however, is tell combatants and their commanders that there are certain minimum standards of behaviour in conflict which, if sensibly and professionally applied, can and will reduce the suffering of the victims of the fighting.

There may be pride and patriotism in fighting for your country. Equally, it should be a matter of professional and personal pride to show humanity and compassion to your defeated opponent or to the innocent civilians caught up in battle. The law of armed conflict explains how this can and should be done. To put it more accurately, the law has been developed to limit the use of violence by:

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Protecting, in time of conflict, persons who do not take part or who have ceased to take part in hostilities, such as:

- civilians;
- medical and religious personnel;
- combatants who have stopped fighting because they are wounded, have been captured or have surrendered and are now defenceless.

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Limiting the violence to what is necessary to achieve the military aim.

The law of armed conflict is **a branch of international law**, the law that States have agreed to accept as binding upon them in their dealings with other States. As well as governing relationships between States, international law applies to the conduct of hostilities within a State. It is therefore crucial to the profession of arms – your profession. You cannot take it or leave it as you see fit. For example, the core of the law of armed conflict, the 1949 Geneva Conventions, has been accepted by almost every member State of the United Nations. The law is therefore quite simply your State's law. It is binding on you as a member of the armed forces of your State. As the ultimate defenders of your State and its laws it is your **DUTY** to know the provisions of the law and to ensure they are respected and obeyed.

To summarize, **the law of armed conflict:**

- **is a branch of international law;**
- **governs relations between States during armed conflicts;**
- **also applies to fighting within the State;**
- **is intended to reduce as much as possible the suffering, loss and damage caused by war;**
- **places obligations on persons in the States involved, primarily members of the armed forces;**
- **is not designed to impede military efficiency in any way.**

The law protects you and is binding on you.

3. HOW THE LAW EVOLVED AND ITS MAIN COMPONENTS

Instructors should use their discretion in deciding how much legal background the participants need or can easily assimilate. Too much detail at the outset might be off-putting. The following options are therefore suggested:

A. For staff colleges and similar levels of expertise: a complete description of how the law evolved (see Annex A to this lesson).

B. For military academies and more junior audiences, Annex A could be issued as a handout either before or after the lesson and the details of the law summarized as suggested below.

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The law of armed conflict is made up of customary international law and treaty law.

CUSTOMARY INTERNATIONAL LAW

The law of armed conflict is clearly based on our customs and traditions and our experience of armed conflict throughout the ages. A good example is the universal ban on poisoning as a form of warfare, which dates back to ancient times when, for example, the military on both sides would issue orders not to poison wells, as much for their benefit as for that of the civilian population – they might need the water one day. Over the years, these customs, traditions and experiences have developed into “hard law”, namely customary international law and treaty law. Both are legally binding.

Customary international law results from the general and consistent practice applied by States out of a sense of legal obligation.

TREATY LAW

Treaty law is based on:

Geneva law

This branch of the law is aimed at protecting the victims of a conflict who are in the power of the adversary – civilians, or you, too, if you have been wounded or taken prisoner of war (POW). The four 1949 Geneva Conventions are aimed at exactly those situations. They protect the wounded and sick on land and at sea, prisoners of war and civilians.

Hague law

This is very much practical soldier's law. Its aim is to lay down rules for the conduct of operations, on how the fighting is to be carried out, by stating, for example, what you can attack and how you should attack it. It gives rules which limit the destructive effects of combat exceeding what is really necessary to achieve the military aim or mission.

Developments in treaty law

In order to protect civilians from the effects of the fighting, rules were needed not just to protect them from the enemy, but also on how the fighting had to be carried out. As the law evolved, it therefore sought to keep pace with changes in warfare and meet both requirements. The 1977 Protocols additional to the Geneva Conventions do just that: they often combine and update elements of Hague and Geneva law.

We can see that the law of armed conflict is dynamic. It attempts to take account of what is happening on today's battlefields.

Why Geneva and The Hague? Because the original treaties were drafted in those cities. Once a State has become party to those treaties, they become the law of the land and must be applied by the State. They are therefore part and parcel of the law governing your armed forces.
They are your law and must be obeyed by you.

4. WHEN DOES THE LAW APPLY?

The law of armed conflict applies even if there has been no formal declaration of war. It applies in two quite different types of situation.

[**Slide 20**] **International armed conflicts, e.g. the Gulf War, the Falklands/Malvinas War**

[**Slide 21**] **Non-international armed conflicts, e.g. Sri Lanka, Chechnya**

Before defining these terms, it is worth mentioning why we now refer to **conflict** and not **war**. The answer is straightforward. Under the 1945 United Nations Charter, adopted just after the horrors of World War II, the use of force by one State against another is prohibited (Article 2). States may resort to force in the exercise of their inherent right of individual or collective self-defence (Article 51) or as part of military sanctions authorized by the Security Council (Articles 43-48). Since then, therefore, States have avoided declaring war. The 1949 Geneva Conventions adopted the more general term "armed conflict" deliberately to cover the complete range of situations and to avoid legal arguments over the exact definition of war. States today are less inclined to speak of war or admit that a state of war exists, but as we all know armed conflicts certainly do.

An armed conflict arises whenever there is fighting between States or protracted armed violence between government authorities and organized armed groups or just between organized armed groups.

An international armed conflict arises when one State uses armed force against another State or States. The term also applies to all cases of total or partial military occupation, even if the occupation meets with no armed resistance. It is now irrelevant whether the States concerned consider themselves to be at war with each other or how they describe the conflict. An international armed conflict is considered to be over once active hostilities or territorial occupation have ceased. POWs still held by the parties nevertheless remain under the protection of the law until their ultimate release.

GC I, Art. 5
GC III, Art. 5
GC IV, Art. 6
GP I, Art. 3 (b)

Non-international armed conflicts, also known as internal armed conflicts, take place within the territory of a State and do not involve the armed forces of any other State. One example is the use of the State's armed forces against dissident, rebel or insurgent groups. Another is two or more armed groups fighting within a State, but not necessarily with the involvement of government troops.

This type of conflict is covered by specific provisions of the law. Slightly different provisions apply where the internal opposition is better organized in terms of command and control of territory and therefore able to carry out sustained and concerted military operations and itself implement the law, but only if government forces are involved.

GP I, Art. 1

This subject is covered in detail in the lesson on non-international armed conflicts.

Lower levels of internal violence – for example, internal disturbances and tensions involving violent demonstrations and riots – are not covered by the law of armed conflict. It can sometimes be difficult to tell exactly when the threshold for application has been crossed, but that is not a matter for you to decide. If in doubt, apply the rules for internal conflicts, together with whatever domestic legislation is applicable.

This subject is covered in detail in the lesson on internal security operations.

5. THE BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT

Just as military operations have principles of attack, defence, withdrawal, etc., so does the law of armed conflict contain a set of clearly defined principles. These principles are practical, reflect the realities of conflict and, most important of all, do not include anything that a professional soldier could not apply in battle. They strike a balance between humanity and military necessity, and are valid at all times, in all places and under all circumstances. You are not free to do what you want. As commanders or staff officers, it is of the utmost importance that you know and understand these principles. They must be taken into account as a matter of routine in any military appreciation, planning and indeed training that you undertake. Soldiers under your command must also understand them. You will find the following principles throughout the law of armed conflict.

DISTINCTION

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You must always clearly **distinguish between combatants and civilians or the civilian population as such.** Combatants may of course be attacked unless they are out of action, i.e. they are *hors de combat.* Civilians are protected from attack but lose that protection whenever they take a direct part in hostilities **for the time of their participation.** Similarly, you must always **distinguish between military objectives which can be attacked and civilian objects which must be respected.** The word "object" covers all kinds of objects, whether public or private, fixed or portable.

GP I, Art. 48
GP I, Art. 52 (2)

PROPORTIONALITY

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When military objectives are attacked, civilians and civilian objects must be spared from incidental or collateral damage to the maximum extent possible. Incidental damage must not be excessive in relation to the direct and concrete military advantage you anticipate from your operations. Excessive use of force quite clearly violates the law of armed conflict.

Here we get down to some basic military requirements, especially from commanders. To avoid violating this principle requires thought and effort. Poor planning and intelligence, slack staff work, leadership, command and

control can easily result in the destruction of a whole town or village, with its hospitals, religious centres and civilian population.

Good planning and clear rules of engagement are required to stay within the law, and both of those are, after all, only a product of good training and professionalism in any military force.

It also makes good sense not to waste your own lives, time and ammunition in disproportionate operations.

HR IV, Arts. 22 & 23
GP I, Art. 57

MILITARY NECESSITY

[**Slide 24**]

This principle is enshrined in the preamble to the 1868 St Petersburg Declaration, which states that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy" and that "for this purpose it is sufficient to disable the greatest possible number of men". Today we would of course also include women.

H IV, Art. 23 (g)

This principle is entirely practical. It accepts the realities of battle. It allows for whatever
reasonable force is necessary,
is lawful and
can be operationally justified in combat to make your opponent submit.

Activities which are clearly unnecessary militarily are prohibited.

The principle of military necessity protects good commanders and allows them to fulfil their mission. If an action is necessary – fine, then carry it out. Just ensure it is within the law and complies with all the other principles, in particular those of distinction and proportionality. You must never use military necessity as an excuse for slackness, indifference, poor planning or leadership. Military necessity is built into the law; it cannot be invoked to justify violations of the law.

St Petersburg Declaration

LIMITATION

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In any armed conflict, the right of the parties involved to choose methods and means of warfare **is not unlimited**, i.e. IHL limits how weapons and military tactics may be used.

Weapons and tactics that are of a nature to cause **unnecessary suffering or superfluous injury** are prohibited.

The purpose of the second sentence of this principle is to prohibit weapons which cause more suffering or injury than is necessary to put enemy combatants out of action. It applies, for example, to weapons designed to cause injuries that are impossible to treat or that result in a cruel and lingering death. It does not prohibit weapons such as fragmentation weapons or armour-piercing rounds which, even when properly used, may have those unintended consequences as a result of their use rather than their design. These limits will be covered in detail in later lessons. For the present, remember that the fact that you have graduated from a military academy does not give you the right to do as you wish on the battlefield. There are limits and you must know exactly what they are.

HR IV, Arts. 22 & 23
GP I, Arts. 35 & 57

GOOD FAITH

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Good faith between opponents is a customary principle of warfare. The military should show good faith in their interpretation of the law of armed conflict. Good faith must also be observed in negotiations between opponents and with humanitarian organizations.

HUMANE TREATMENT AND NON-DISCRIMINATION

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All people must be treated humanely and without discrimination based on sex, nationality, race, religion or political beliefs.

Those who are out of action *(hors de combat)*, such as surrendering combatants, air crew parachuting from downed aircraft, the wounded, sick and shipwrecked, prisoners of war and other captives and detainees, must be identified as such and treated humanely.

THE PRINCIPLES OF THE LAW VERSUS THE REALITIES OF COMBAT

We have now covered the basic principles of the law of armed conflict. You can see that no principle asks you as a soldier or a commander to implement rules that are impossibly difficult. Remember that in any case the law evolved from military experience.

SUMMARY OF THE LESSON

The law of armed conflict was born on the battlefield. Its aim is to provide protection for the victims of conflict and to lay down rules for the conduct of military operations, good practical rules with which you are legally obliged to comply as members of the profession of arms. It is also worth remembering that the law, if correctly applied, is there to help you as well as the victims of armed conflict.

Questions from the class.

NOTES

APPENDIX

Questions from the instructor to the class to consolidate the lesson

1. One of the purposes of the law of armed conflict is to:

a. establish the basic organization of military government in an occupied region.
b. discourage conflict.
c. make it easier to court-martial offenders.
d. regulate violence in conflict.

Answer: **d.**

2. Military necessity is the principle of the law of armed conflict that:

a. justifies all measures taken by a commander to accomplish the mission.
b. confers the right on the commander to use any weapon in the armed forces' arsenal against a military target.
c. permits those measures not forbidden by international law which are necessary to defeat the enemy as economically as possible.
d. allows the law of armed conflict to be suspended in grave military situations, provided advance notice is given to the enemy.

Answer: **c.**

EXAMPLES AND CASES

Customs

Even in very ancient times, war was waged in accordance with practices and agreements containing humanitarian elements designed to protect those taking part. Although those ancient customs were adopted chiefly for practical, tactical or economic purposes, the resulting effect was nevertheless humanitarian. For example, one of the most ancient customs, the prohibition on poisoning wells, which was very common in African traditional law, was a practical rule benefiting both sides – after all, you might one day need the water yourself. Similarly, it was prohibited to kill prisoners of war more to guarantee the availability of future slaves or to demand a ransom than to spare the lives of former combatants in a noble gesture. These and similar customs or practices existed in cultures, regions and civilizations as diverse as Asia, Africa, pre-Columbian America and Europe. Here are a few examples of their scope and importance.

The Indian epic *Mahabharata* (c. 400 BC) and the Laws of Manu contained provisions which prohibited the killing of an adversary who had surrendered; forbade the use of certain means of combat, such as poisoned or burning arrows; and provided for the protection of enemy property and prisoners of war.

Islam also acknowledged the essential requirements of humanity. The Prophet, himself a military commander, laid down strict rules for the conduct of warfare, including respect for defeated warriors, women, children and property. In his orders to his commanders, the first caliph, Abu Bakr (c. 632 AD), stipulated that "the blood of women, children and old people shall not stain your victory. Do not destroy a palm tree, nor burn houses and cornfields and do not cut any fruitful tree. You must not slay any flock or herds, save for your subsistence".

The *Bushi-Do*, the medieval code of honour of the warrior caste of Japan, included the rule that humanity must be exercised even in battle and towards prisoners of war.

Customary law and rational behaviour – Carl von Clausewitz, the Prussian philosopher of war, had this to say: "If we find civilized nations do not put their prisoners to death, do not devastate towns and countries, this is because their intelligence exercises greater influence on their mode of carrying on war, and has taught them more effectual means of applying force than these rude acts of mere instinct".

Military necessity – when General Eisenhower briefed his senior commanders just prior to the D-Day landings in the Second World War, he told them: "I do not want the expression military necessity to mask slackness or indifference... It is sometimes used where it would be exact to say military convenience or even personal convenience".

Proportionality

A. **An example of the rule of proportionality** is described by the author, J. Masters. In Iraq, in 1945, his battalion had just completed a successful assault on a feature known as the Bid House. They saw wicker boats being launched onto the inland floods and were about to call up artillery fire when the CO told them to wait because there might be women and children in the boats. As the boats were setting out from a concealed village, this was quite possible. Masters protested that, whether or not the boats contained women and children, they certainly contained enemy soldiers. Nevertheless, the CO gave the order not to fire. Disgusted at the time by his CO's attitude, on reflection Masters thought he had acted honourably. From the legal point of view, the CO acted correctly. He instinctively presumed that there were civilians in the boats as well as soldiers and concluded that to kill those civilians would have been out of proportion to the military gain achieved by killing enemy soldiers who posed no immediate threat to his unit. He applied the principle of proportionality.

Sources: J. Masters, The Road Past Mandalay, *Michael Joseph, 1961, p. 35;* Law on the Battlefield, *A.P.V. Rogers, p. 14.*

B. **A practical demonstration of the rule of proportionality.** You might wish to give your class a practical demonstration of the principles of proportionality.

Equipment:

2 cheap plant pots, the larger the better
2 hammers – one very small, one as large as you can obtain, i.e. a sledge hammer
2 small nuts, e.g. walnuts

Method:

Describe the scenario. Say that the plant pots represent two villages. The villages contain civilians, a temple or church, a school, a medical centre, etc., etc. They also contain an enemy force represented by the two nuts.

The force commander, General Bold, decides he must deal with the enemy in the two villages. He orders two of his subordinate commanders, Captain Bright and Captain Rambo, to destroy or neutralize the enemy in each village by first light tomorrow.

Develop the story. Say that Captain Bright, being an intelligent and professional officer, takes great care in preparing his orders and formulating his plan. He takes into account the principles of the law of armed conflict, in particular distinction and proportionality. He carefully briefs his platoon on orders for opening fire, respect for civilians and for their property, and so on.

Captain Rambo, on the other hand, cares little for the law. His view is that he has a mission, to destroy a village the next day. "We will rendez-vous at 0500 hours tomorrow and get the job done!"

Demonstration. Return to the plant pots. Place them upside down in front of the class to represent the two villages. Place one nut on each plant pot to represent the enemy.

Assume the role of Captain Bright – approach plant pot 1 with the small hammer and simply crack the nut. Say Bright has achieved his military aim successfully. The enemy has been defeated with little or no collateral damage. He has kept things in proportion.

Assume the role of Captain Rambo – approach plant pot 2 with the sledge hammer. Bring it down with a mighty crash on the plant pot. The result is obvious to everyone. The village and the civilians and protected property in it have been totally destroyed. Distinction and proportionality have been completely ignored. In this part of the demonstration, the walnut often flies off when the edge of the second plant pot is struck. This gives added impact. Not only have the laws of armed conflict been completely ignored, your enemy has escaped! Your mission was a dismal failure.

This demonstration is cheap and easy to lay on. It has proved to the writer to be most effective in gaining attention and enlivening a lecture on the law. It demonstrates the principle of proportionality, and can also be used to bring out key points on command responsibility as well.

THE DEVELOPMENT OF THE LAW OF ARMED CONFLICT

This annex describes how the law has developed up to the present time.

Customary international law and treaty law

[**Slide 28**]

CUSTOMARY INTERNATIONAL LAW

The modern law of armed conflict is clearly based on customs and traditions and our experience of armed conflicts throughout the ages, all of which have, over the years, developed into "hard law", namely customary international law and treaty law.

In our consideration of the law of armed conflict it is important to take into account customary international law. Together with treaty law, which we will cover shortly, it is the principal source or component of the law of armed conflict. It results from the general and consistent practice followed by States out of a sense of legal obligation. The most obvious significance of the rules of customary international law is that they are binding on all States. This has some very important consequences. Even if a State is not party to a particular treaty, it is nevertheless bound by the provisions of that treaty which either codify existing customary international law or which have themselves become customary. For example, the International Military Tribunal at Nuremberg decided that the regulations annexed to Hague Convention No. IV of 1907 (the Hague Regulations) reflected customary international law, and were therefore binding on Germany, a party to the Convention, even though it was engaged in an armed conflict with Czechoslovakia, which was not party to the Convention. It is also important to note that customary international law is binding on non-State actors as well.

Customary international law is also important for regulating matters which are not covered by law of armed conflict treaties. For example, few of the rules applicable in non-international armed conflicts have been codified, but there is a substantial body of customary international law governing the conduct of operations in such conflict situations.

The subsequent codification of existing rules of customary international law in treaties or conventions does not mean the customary rules cease to exist or can no longer be invoked. In fact, they continue to exist and to evolve independently, alongside the treaty norms. This is expressed

in what has become known as the Martens Clause, which first appeared in the Preamble to the 1899 Hague Convention No. II and was later to take the form of an article common to each of the Geneva Conventions. The Martens Clause reaffirms that even if a party denounces the convention, this:

"Shall in no way impair the obligations which the Parties to a conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usage established among civilised peoples, from the laws of humanity and the dictates of public conscience".

In short, customary international law is of considerable importance to us. At times it constitutes the cornerstone of modern treaty law, at others it has developed from treaty law, and sometimes it fills the gaps where no treaty law exists. Further, it clearly demonstrates the universal nature of the law of armed conflict. It is neither western nor eastern law.

TREATY LAW

Although the foundations of the modern law of armed conflict are very old, it was only in the second half of the nineteenth century that the customary principles began to be codified in specific binding multilateral agreements. Why, given the wealth of customary rules that existed, did we need other laws to guide our conduct in conflict? The reason is that no doubt States saw the need to lay down precise rules. One of the weaknesses of customary international law is proving the scope and content of a rule. Written rules, on the other hand, provide greater clarity; sometimes customary law was too general.

The treaty-making process began in the 1860s, when an international conference was held on two separate occasions to conclude treaties dealing with a very specific aspect of the law.

The first treaty was born quite literally on the battlefield of Solferino in 1859. Here some 30,000 soldiers were left wounded or dead within the space of a few hours. Army medical services were virtually non-existent at the time. The scene of carnage was witnessed by a Swiss business-man, Henry Dunant, who happened to be in the region. He postponed his business trip and with the help of local villagers, did what he could to assist. On his return to Geneva, Dunant wrote a book on his experience, A *Memory of Solferino*. In it he suggested that the States should "formulate some international principles sanctioned by a Convention inviolate in character" and giving legal protection to wounded soldiers in the field. His proposals received enormous support all over Europe.

To make a long story short, Dunant's practical experiences of battle led to a diplomatic conference in Geneva, Switzerland, which resulted in the initial Geneva Convention of August 1864 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. For the very first time, States agreed to limit, in an international treaty open to all, their own power to wage war in favour of the individual, and for the first time, war gave way to written law. Modern **international humanitarian law** or, as we will continue to refer to it for military audiences, **the law of armed conflict**, had been born.

Shortly after this, in 1868 in St Petersburg, Russia, an international treaty was drawn up prohibiting the use of explosive rifle bullets under 400 grammes in weight. The St Petersburg Declaration, as the treaty is called, was the first to limit the use of a weapon of war. It also codified the customary principle prohibiting the use of weapons that cause unnecessary suffering or superfluous injury, which is still valid today.

These two international conferences were therefore the starting point of the contemporary law of armed conflict. Both, as you can see, dealt with practical aspects of war: the first, which protects the victims of armed conflicts, has generally become known as **Geneva law**; the second, which contains restrictions and prohibitions on the means and methods of warfare, is known as **Hague law**. The terms derive from the fact that the relevant treaties were drafted primarily in those cities. Since then, both branches have undergone a process of dynamic change. Let's take a look at them and at more recent provisions which attempt to keep pace with developments in warfare.

GENEVA LAW

Geneva law comprises the four Geneva Conventions drawn up in 1949 (and which supplemented the earlier Conventions of 1864, 1906 and 1929). They concentrate on protecting the victims of armed conflict:

- the First Geneva Convention protects the wounded and sick on land;
- the Second Geneva Convention protects the wounded, sick and shipwrecked at sea;
- the Third Geneva Convention deals with the status and treatment of prisoners of war;
- the Fourth Geneva Convention protects civilians in times of war.

HAGUE LAW

This branch of the law deals with the practical military aspects of the conduct of hostilities. For example, the Hague Regulations, first drafted in 1899 and amended in 1907, deal with the laws and customs of war on land, and the 1899 Hague Declaration on Expanding Bullets banned the use of such ammunition. Hague law covers in particular:

- the rights and duties of the belligerents in their conduct of operations;
- the limitations and prohibitions in the choice of methods and means of warfare;
- the rules regarding occupation and neutrality.

DEVELOPING TREATY LAW

The law of armed conflict has undergone a process of dynamic change in recent years, as new provisions have been adopted to keep pace with the changing nature of conflicts. The new provisions often combine aspects of both Hague and Geneva law. Some examples are:

- the 1954 Hague Convention on Cultural Property, its Protocol I of 1954 and its newest Protocol II of 1999;
- the 1972 Biological Weapons Convention;
- the two 1977 Protocols additional to the Geneva Conventions, the first relating to international armed conflicts, the second to non-international armed conflicts;
- the 1980 UN Conventional Weapons Convention, with protocols covering
  - non-detectable fragments,
  - mines and booby traps (amended in 1996),
  - incendiary weapons,
  - the prohibition of blinding laser weapons (adopted in 1996);
- the 1993 Chemical Weapons Convention;
- the 1997 Ottawa Convention banning anti-personnel landmines.

These treaties and conventions will be covered in detail in later lessons. For the present, however, we can conclude that the law is indeed dynamic, attempting as best it can to keep pace with developments in the way war is waged and in weapons systems.

HUMAN RIGHTS LAW

Our introduction to the rules governing armed conflict would be incomplete without a few words on another branch of international law which applies both during armed conflicts and in peacetime, namely human rights law. This branch of the law is as important to the military as those we have already mentioned. Its aim is to protect the rights of citizens against State authorities. The rights are contained in UN instruments such as the UN Covenant on Civil and Political Rights, and in regional conventions and charters in Europe, Africa and the Americas.

All the rights listed in those treaties apply at all times. Although a State may derogate, under very specific conditions, from certain human rights in the event of a public emergency threatening the existence of the nation, a number of core rights always apply. For the military, the two most important ones to remember are:

The right to life – even in armed conflicts, acts such as the killing of prisoners and execution of hostages are unlawful.

The prohibition of torture – no one may be subjected to torture or to cruel, inhumane or degrading treatment or punishment. Rape and sexual assault can also constitute torture.

All the other rights can be modified, but never eliminated. For example, in an international armed conflict, former fighters can be detained as prisoners of war, but even in an armed conflict it is unlawful arbitrarily to detain people and to hold them incommunicado for a long period of time without having the detention properly authorized.

The human rights system and the law of armed conflict should be seen as complementary. Respect for human rights should not be fragmented into time of peace and conflict. It is after all in conflict situations that those rights are most at risk and that civilians will look to the armed forces for protection.

Mission

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

Lesson 1

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