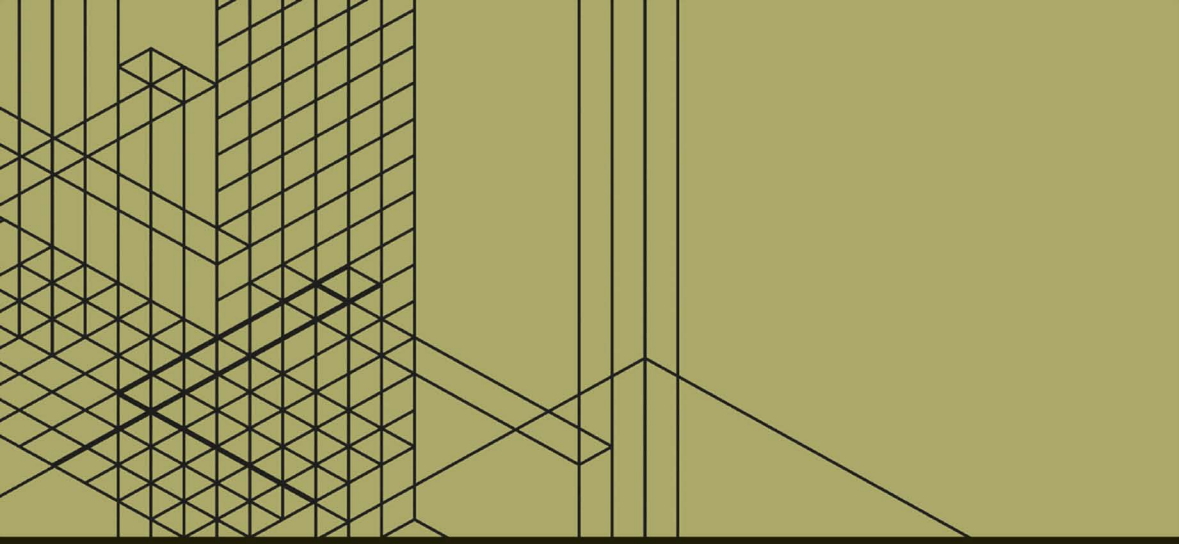
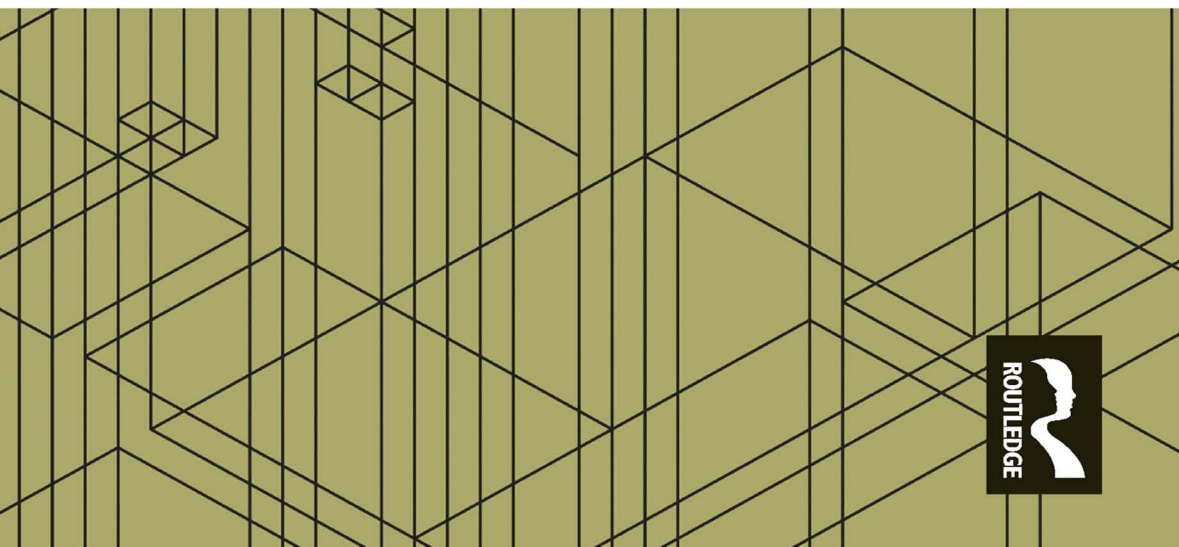


Justice, International Law and Global Security

INTERNATIONAL LAW, SECURITY, AND MILITARY POWER

US AND BRAZILIAN PERSPECTIVES

Edited by
Howard M. Hensel and Carlos Alberto Leite da Silva



ROUTLEDGE

International Law, Security, and Military Power

This book contributes to our understanding and appreciation of the contemporary relevance of international humanitarian law and international human rights law by analyzing and assessing the foundational norms, principles, and provisions contained within these bodies. It also explores the ways in which they inform and condition military doctrine and the planning and the execution of military operations in the land, air, cyber, and space domains as perceived through the lens of two of the most important military establishments in the Western Hemisphere – the United States and Brazilian militaries. The expert contributors promote a better awareness and comparative understanding of the rapidly changing, diverse traditional and non-traditional challenges and demands of the 21st century. This volume will be useful to both scholars whose research focuses on international law and military professionals.

Howard M. Hensel is the Henry H. Arnold Professor of International Relations and Strategic Studies at the U.S. Air Force Air War College. His publications include *The Law of Armed Conflict*, *The Legitimate Use of Military Force*, and *The Prism of Just War*.

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Justice, International Law and Global Security
Series Editor: Howard M. Hensel
Professor of Politico-Military Affairs at the USAF Air War College, USA

The global community is confronted with a wide variety of both traditional and non-traditional challenges to its security and even survival, as well as unprecedented opportunities for global socio-economic development. International law will play a major role as the international community attempts to address these challenges and opportunities while simultaneously attempting to create a just and secure global order capable of protecting and promoting the common good of the whole of mankind. The Routledge Series on *Justice, International Law and Global Security* is designed to encourage and highlight analytical, scholarly works that focus on the ways in which international law contributes to the management of a wide variety of contemporary challenges and opportunities, and helps to promote global justice and security. Toward that end, the series seeks to promote scholarship that addresses the critical linkage between the philosophical concept of justice as applied at the global level, international law, which in turn must be based upon justice, and the ability of international law to establish normative standards of behaviour.

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International Law, Security, and Military Power

US and Brazilian Perspectives

Edited by Howard M. Hensel and Carlos Alberto Leite da Silva

In association with Kesia G. Arraes Gomes and Carlos Eduardo Valle Rosa

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Forewords

In the increasingly uncertain global environment, the U.S. strategy of building Allies and Partners has never been more important. This is our shared neighborhood. Common values, culture and threats demand the United States and the countries of South America cooperate to pursue security, economic prosperity and personal freedoms. Adherence to international law and standards while countering existential threats, such as narco-trafficking and powerful gangs, is required in the pursuit of these common goals. There will always be friction between the demands of security and stability and the requirement to protect individual freedoms. This requires a thoughtful and deliberate policy framework that shapes operations of government and security services to deliver results while adhering to the rule of law.

In my time at United States Southern Command, I witnessed first-hand how security cooperation, joint education and combined exercises positively impact our relationship and support of our partner nations. Fragile democracies with complex security challenges, economic uncertainty and external influencers are directly challenged in their efforts to uphold good governance and rule-of-law. The United States military, in partnering with the military forces of these nations, can directly contribute to democratic resilience while simultaneously ensuring adherence to international law and the protection of human rights. This is our strength, it is recognized globally, and it will prevail.

Lieutenant General Andrew Croft

* * * * *

It is a great honor to write a few words concerning this new book that has been produced by the joint efforts of members of the United States Air Force Air University, the US Air Force Academy and members of the Brazilian Air Force – UNIFA team, as well as other members of the US military and civilian scholars.

As a proud graduate of the USAF Air War College Class of 2002, I had immense pleasure reading through these chapters and recalling very clearly the lectures given more than two decades ago. Although many things change over time, the foundations are solid and are still there, so that Douhet, Mitchell, Trenchard, as well as Clausewitz and Sun Tzu are, one by one, remembered.

In addition to the traditional domains of land and sea warfare, the 20th century has witnessed the emergence of three additional domains: first air, then space, and most recently cyberspace. For example, the transition to new domains comes with the understanding that the Gulf War of 1991 was, in many respects, the first Space War. Indeed, with respect to the domain of space, more than 65 years elapsed since the first Committee on the Peaceful Uses of Outer Space – COPUOS was created in December 1958 by the United Nations. In 1959, the Committee became permanent and Brazil was one of the 18 original participating states. Brazil has the capability to leverage its own aerospace resources and operate with other nations a compatible launching facility that already exists and is economically feasible.

The following quotation, extracted from the chapter on Space Law written by Tatiana Ribeiro Viana, translates perfectly the Brazilian standpoint:

> In all these efforts to advance international security in the activities of states and private entities in the development of space activities, a relevant factor in reaching consensus among nations is undoubtedly the willingness of states to ensure the commitment of their public and private institution to conflict prevention in the space environment.

Our commitment to the principles of International Humanitarian Law (IHL) is a natural expectation for a peaceful nation that always contributes its best knowledge to maintain non-aggressive behavior.

I am positive that our readers will enjoy this book!

Lieutenant General Stefan Egon Gracza

Introduction

Howard M. Hensel[1]

Throughout recorded human history, many attempts have been made by a variety of peoples to regulate and thereby mitigate the horrors of armed conflict. Indeed, the mainstream Western just war tradition spanning two millennia constitutes one of the most significant attempts to provide criteria for the decision to utilize armed force in interstate conflict resolution (*jus ad bellum*), as well as criteria governing the actual employment of armed force in the conduct of military operations (*jus in bello*). Based in large measure on the criteria developed within the context of the *jus in bello* component of that tradition, over the past century and a half the international community has developed an extensive body of conventional and customary international humanitarian law governing the employment of military force during armed conflicts. Simultaneously, especially in the aftermath of the Second World War, the international community also developed an impressive body of conventional and customary norms and standards contained within international human rights law that are designed to uphold and protect the human rights of the global citizenry.

This volume, entitled *International Law, Security, and Military Power: US and Brazilian Perspectives*, seeks to contribute to our understanding and appreciation of the contemporary relevance of international humanitarian law and international human rights law by analyzing and assessing the foundational norms, principles, and provisions contained within these bodies of customary and conventional law and the ways in which they inform and condition military doctrine, as well as the planning and execution of actual military operations in the land, air, cyber, and space domains. In doing so, it seeks to promote a better awareness and comparative understanding of the rapidly changing, diverse traditional and non-traditional challenges and demands of the 21st century as perceived through the lens of two of the most important military establishments in the Western Hemisphere – the United States military and the Brazilian military – and the manner in which the military establishments of these two hemispheric powers respond to these challenges and demands by planning and executing military operations within the land, air, cyber, and space military domains in a manner consistent with the norms, principles, and provisions of international humanitarian law and human rights law.

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Organization of the Book

Following the Forewords by Lieutenant General Andrew Croft, USAF (retired) and Lieutenant General Stefan Egon Gracza, Brazilian Air Force (retired), as well as the Introduction, the book is divided into four parts. Part I consists of four chapters and focuses on the roots and development of international human rights law and international humanitarian law. Part II consists of two chapters and analyzes and assesses cyber law and space law. Part III, which consists of five chapters, focuses on the ways in which international human rights law and international humanitarian law shape the operational responses of the US and Brazilian militaries to security challenges in South America. Part IV, consisting of three chapters, examines US and Brazilian perspectives regarding international law and the operational application of military power in the emerging domains of cyberspace and space. Finally, the volume concludes with a chapter that discusses the future of international law and its impact on land, air, space, and cyber defense.

Part I: The Development of Human Rights Law and International Humanitarian Law

In the first chapter in Part I, James Turner Johnson analyzes and assesses the interrelated development of the Western ecclesiastical and chivalric moral traditions concerning the legitimate criteria for both deciding whether to resort to military force in the resolution of conflict between political entities (*jus ad bellum*) and governing the actual use of armed force once the conflict has begun (*jus in bello*), as well as the heritage of human rights in Western thought. He points out that in the mid 12th century, Western canonical theoreticians unified what had heretofore been individual canons that had drawn upon the Augustinian tradition into a systematic framework concerning the legitimate criteria for determining whether or not to resort to the use of armed force: legitimate authority; just cause; and the restoration of peace.

Meanwhile, from the 12th century onward, secular authorities developed the Western version of the concept of chivalry which sought to provide parameters governing the actual use of armed force with reference to the protection of noncombatants and their property during periods of armed conflict. Eventually, the Western ecclesiastical and chivalric moral traditions merged and evolved into the mainstream Western just war tradition. Johnson then analyzes and assesses the development of the interrelationship between that tradition and the concept of human rights in Western thought. In doing so, he critically highlights the post-17th-century erosion of the Western medieval emphasis regarding the governing authority's moral responsibility for the protection and promotion of the community's common good, in favor of its more restricted role as the defender of the community's sovereignty and territorial integrity from external aggression. In short, Johnson's chapter stresses the importance of understanding the Western just war tradition and the development of the Western concept of human rights as the foundation for contemporary international humanitarian law and human rights law.

Chapter 2 by George J. Andreopoulos focuses on international human rights law, which, in turn, seeks to protect individuals and groups of individuals within society from undue interference by other groups and/or individuals within that society, or by the state itself. The goal of international human rights law is to provide a secure environment in which all members of often diverse societies have an unrestricted opportunity to realize their full potential as rational, social human beings. Andreopoulos analyzes and assesses the dynamic interplay between human rights and the state as perceived through the dual lens of cooperation and protection. His chapter is divided into three parts. Part I traces the development of international human rights law from 1945 to the end of the Cold War, a period in which international human rights law emerged as a major component of international law predicated upon state consent. He notes, however, that the emphasis was on cooperation among the states of the international community to establish standards and to promote adherence to those standards, not on the protection of individual members of society against violations of those standards by the states themselves. Moreover, the focus on human rights was aligned with the maintenance of international peace and security. The second part of the chapter focuses on the period from the end of the Cold War to 2001, in which greater emphasis was placed on limiting state sovereignty and the principle that governing authorities have a responsibility to adhere to the norms and standards of human rights and to protect their citizens from violations of those human rights. Finally, the chapter's third part assesses the period since 9/11 and highlights the measures taken by members of the international community in response to what was considered to be an exceptional global emergency posed by non-state actors that engaged in acts of international and domestic terrorism. Andreopoulos notes, however, that many of the counter-terrorism measures adopted by the states designed to ensure both domestic and international security often involved significant violations of human rights. Indeed, Andreopoulos concludes by observing that "the 9/11 attacks and the ensuing compartmentalization of security and human rights pushed human rights back to the periphery" and into "a space demarcated by a perception of human rights not as constraints, but as potential enablers of state violence."

In Chapter 3, Howard M. Hensel provides an overview of the development of international humanitarian law with reference to aerial bombardment prior to World War II. International humanitarian law is founded upon four principles: humanity, military necessity, distinction, and proportionality. Following an introductory section, the chapter details the way in which these foundational principles are reflected in landmark conventions and documents prior to 1914. The chapter then outlines and assesses the efforts of various internationally recognized bodies to apply these principles to bombardment in the new domain of aerial warfare prior to the Second World War. Finally, the chapter concludes with a summary of the basic tenets of customary international humanitarian law as they pertained to aerial bombardment in 1939.

Chapter 4, also by Howard M. Hensel, concludes Part I of the book. In this chapter, the author continues the overview of the international community's ongoing

efforts to set limits on the scope of aerial bombardment, by focusing on developments since the end of the Second World War. The chapter begins by reviewing the failure by the various belligerents during the World War II to adhere to the conventional and customary international humanitarian legal requirements concerning aerial bombardment. This lack of compliance resulted in massive numbers of non-combatant deaths and injuries, as well as the enormous devastation of the cities of Europe and East Asia. The chapter then reviews the efforts by the international community to further expand upon the pre-1939 body of conventional international humanitarian law, with special attention to 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1977 Protocols I and II Additional to the 1949 Geneva Conventions, and the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Following this overview of the development of post-1945 conventional law, the chapter focuses on the International Committee of the Red Cross's significant effort to codify the provisions of customary international humanitarian law, with special reference to those provisions that pertain to bombardment during periods of armed conflict. Finally, the chapter concludes with an evaluation of contemporary customary and conventional international humanitarian law, emphasizing the urgent need for greater adherence to these internationally recognized legal norms and provisions by military planners, commanders, and individual soldiers.

Part II: New Domains – New International Law

Part II of the book begins with Chapter 5. The author, Jeffrey Biller, reminds us that communications and information technologies are ubiquitous throughout modern society. Indeed, national security and military operations in the cyber domain are increasingly dependent upon these rapidly advancing technologies. International law, predicated on human rights, non-intervention, respect for state sovereignty, and the peaceful resolution of disputes, provides a basic framework of safeguards for the secure availability, integrity, and confidentiality of communications and information technologies, their infrastructure, and the data that is transmitted and stored. Nevertheless, the rapidly changing scope and character of the cyber domain presents unique challenges in the formulation and application of legal constraints governing cyberspace. In this chapter, Biller provides an analytical assessment of contemporary cyber law, highlighting efforts by the United Nations, the Tallinn Manual project, and the Budapest Convention, with special focus on application of the foundational legal principles that underpin international humanitarian law discussed in Chapters 3 and 4 as they relate to the use of cyber capabilities. In doing so, he analyzes and evaluates areas of consensus and divergence of opinion concerning the cyber rules relating to national and international security. Biller concludes by calling for accelerated international cooperation to address both the technological and security challenges of governing, as well as challenges related to the enforcement of legal rules in the rapidly changing domain of cyberspace.

The second chapter of Part II by Tatiana Ribeiro Viana examines the origin and development of space law, with special emphasis on the role of the United Nations

and the various international agencies responsible for overseeing activities in the space domain. In doing so, Viana highlights the activities of the United Nations Committee on the Peaceful Uses of Outer Space and the United Nations Office for Outer Space Affairs. In addition, she analyzes and evaluates the role of other international organizations, the states, and private entities that are active within the rapidly changing technological domain of space and which present profound transformational challenges to the legal norms, regulations, and *modus operandi* governing activities in space. In doing so, Viana also highlights the unique security challenges associated with the military use of space and the maintenance of the principle of the peaceful use of the international commons of space for the whole of mankind. Finally, the chapter addresses the legal framework governing an increasingly critical aspect of space activities – the registration of space objects.

Part III: International Law, Regional Security Challenges, and the Application of Military Power

Part III of the book begins with Chapter 7, in which Carlos Eduardo Valle Rosa elaborates on the unique challenges associated with applying the tenets of international humanitarian law in the air and space domains. Following a brief contextual review of various military actions during the two World Wars of the 20th century, as well as during the Korean and Vietnam Wars, culminating in the more recent conflicts in Syria, Ukraine, and the Middle East, the author recalls some of the key provisions contained in a number of international humanitarian legal conventions, as well as other informal, but authoritative rules governing aerial warfare that were previously discussed in Chapters 3 and 4. Building upon this background, Valle Rosa then analyzes and assesses the thoughts of several airpower theorists, framed against the dramatic technological developments of the past 125 years. In addition, the author also discusses the challenges associated with applying the tenets of international humanitarian law in both the air and the increasingly important domain of space. Valle Rosa maintains that, with respect to both air power and, more recently, with respect to space, aerospace theorists generally adhere to the postulates of international humanitarian law. Finally, Valle Rosa concludes the chapter with some thoughts concerning the relationship between international humanitarian law and contemporary aerospace power.

In Chapter 8, Michael Raming and David L. Lee explore the ways in which international humanitarian law and human rights law combine with other ethical and legal considerations to inform and guide the US military's role in South America, a region whose security, stability, and prosperity is closely linked to that of the United States. The authors begin by describing US perceptions and objectives, as well as regional, multilateral, and bilateral strategies that emphasize cooperation and collaborative partnerships in responding to traditional and non-traditional security threats, including those posed by transnational criminal organizations, transboundary challenges, and strategic competition. The chapter then analyzes various components of the US military strategy, including the Counter Narcotics Information Exchange System, the Leahy Laws, the Women, Peace,

and Security Action Plan, and the Civilian Harm Mitigation and Response Action Plan. These initiatives are assessed within the larger context of US grand strategy that emphasizes a whole of government approach in building, maintaining, and utilizing partnerships with those states in the Western Hemisphere that share the US commitment to upholding sovereignty, democracy, a rules-based international order, and the protection and advancement of human rights throughout the region.

Chapter 9, by Carlos Alberto Leite da Silva and Gustavo da Frota Simões, analyzes the important role of the Brazilian Air Force in mitigating the impact of the flow of Venezuelan migrants in the Brazilian Amazon. The chapter first places these efforts within the context of Brazil's broader National Defense Policy and its National Defense Strategy. The authors then observe that refugees are customarily defined as people who have left their home country due to actual, or a well-founded fear of, racial, religious, ethnic/national, or political persecution. In addition to these concerns, consistent with the 1984 Cartagena Declaration, they point out that the Brazilian government also includes violations or well-founded fears of violations of human rights. The authors note that, since 2016, due to persecution and violations of human rights in Venezuela, at least 6–7 million Venezuelans have been forced to take refuge in neighboring countries. Indeed, as of March 2023, 426,000 Venezuelans have sought refuge in Brazil. In response to this refugee flow, in 2018, the Government of Brazil established Operation Acolhida. This initiative was designed to coordinate the activities of local, state, and federal governments, along with numerous non-governmental organizations and agencies. Accompanying this initiative, the Brazilian Government created a Logistics and Humanitarian Task Force which was designed to synergistically coordinate with the other levels of government and non-governmental organizations in ameliorating Brazil's refugee crisis. The authors note that Provisional Measure No. 820 provided for ten key areas whereby the Brazilian government would assist the refugees. Within this context, the authors describe and analyze the operational and logistical roles of the Brazilian Armed Forces in facilitating Operation Acolhida. These include assisting in the following roles: border management, refugee processing and documentation; the provision of transit shelters, food, vaccination, and other medical assistance; and in the "internalization" of refugees and migrants. The authors point out that the Brazilian Air Force plays a key role in Operation Acolhida by providing air transportation for the relocation and integration of Venezuelan refugees and migrants to other parts of Brazil. The authors conclude by observing that Operation Acolhida, facilitated by the Brazilian Armed Forces, especially the Brazilian Air Force, plays a crucial role in preserving Brazil's territorial integrity and border security. It also ensures the personal security of the people residing in Brazil's northern borders and the well-being of the refugees in an orderly and effective manner.

Chapter 10 focuses on another aspect of humanitarian operations by the Brazilian Armed Forces – their role in responding to natural and man-made disasters. In this chapter, following a contextualizing review concerning the types, scope, and intensity of natural and man-made disasters, Rodrigo Antônio Silveira dos Santos and Natasha da Silva Terres ground their analysis in an overview of key legal frameworks that govern the Brazilian Armed Forces, as well as the National

Defense Policy, the National Defense Strategy, and the National Defense White Paper, related to the Brazilian Armed Forces' role in civil defense and humanitarian operations. The authors then expand on the Armed Forces' humanitarian relief and support role by highlighting its readiness, capability for immediate responses, mobility, organizational structure, and discipline in addressing municipal, regional, and national natural and man-made disasters. They illustrate the combined response of the Armed Forces and the Brazilian Civil Defense authorities in five recent Operations: Brumadinho, Acolhida, COVID-19, Taquari I, and Operation Taquari II. The authors stress that the record of tangible and timely assistance provided by the Brazilian Armed Forces, grounded upon the provisions contained in the Brazilian Constitution, Federal laws, and a number of documents issued by the Brazilian Armed Forces, illustrate the invaluable role that it plays in conjunction with Civil Defense authorities and other non-governmental groups in responding to natural and man-made disasters. In doing so, the authors emphasize that, as in the past, the Brazilian Armed Forces stand ready and able to engage in future humanitarian relief operation, and, in doing so, continue to demonstrate their commitment to humanitarian values, as well as the protection of Brazil's sovereignty, the welfare of Brazilian society, the security of the Brazilian people, and to national development and social stability.

Finally, in Chapter 11, which concludes Part III of the book, Carlos Alberto Leite da Silva and Guilherme Sandoval Góes, maintain that, given the record of egregious violations of human rights during the 20th and early 21st centuries, an expanded cosmopolitan international approach to the protection of human rights throughout the global community against egregious violations by national and non-state, transnational actors has become urgent. In their view, this involves a conflation of international human rights law and international humanitarian law into a "Law of Humanity." Consequently, after reviewing the thoughts of a number of scholars concerning the challenges associated with upholding human rights within the global community, with special reference to the philosophical contributions of Immanuel Kant, the authors call for a reorientation away from the great power-dominated, multipolar international power configuration and toward a greater universal, non-hierarchical configuration that places uppermost emphasis on the dignity, rights, and protection of the individual, thereby transcending state boundaries, race, gender, and national origin. Indeed, the universal application and defense of human rights is closely linked to the international rule of law and the concept of global citizenship. Consequently, the authors conclude with a series of recommendations, including the revision of the United Nations Charter to place greater power in the General Assembly. They recommend that this enhanced power include authority to authorize the use of force, not only to engage in collective security actions against states that threaten international peace and security, but also against actions emanating from within the states by the state authorities, or by transnational groups, or other groups within states, that egregiously threaten the human rights of peoples and which the state in question lacks the willingness and/or ability to halt these violations. The authors assert that this emphasis on the global common good and the responsibility to preserve and protect the human rights of all

peoples everywhere in the world would contribute greatly to the establishment of a more egalitarian and just global community.

Part IV: International Law and the Application of Power in New Domains

In Chapter 12, which begins Part IV, Timothy Goines analyzes and assesses the United States' interpretation of the tenets of international law and international humanitarian law as they apply to cyberspace. The author begins with an overview of the US's "defend forward" policy toward cyber operations as reflected in the 2023 *National Cybersecurity Strategy*, *the Department of Defense Law of War Manual*, and the March 2020 speech by the then-Department of Defense General Counsel, Paul Ney, as well as authoritative statements by other Department of Defense and US Cyber Command legal advisors. Goines maintains that, while the US holds that international law applies to operations in the cyber domain, the US has adopted a more permissive interpretation regarding its application with respect to cyber operations compared to other states, especially as it pertains to operations that are designed to reinforce US security. Goines then divides the remainder of the chapter into two parts: peacetime security principles and international humanitarian law. With respect to the peacetime security principles that underpin international law, Goines successively analyzes and assesses the US interpretation of the applicability of the principles of sovereignty, the rule of non-intervention, countermeasures, the use of force and armed attack, the right of self-defense, and international crime to operations in the cyber domain. He next turns to an analysis and evaluation of the US interpretation regarding the applicability of the following components of international humanitarian law to cyber operations: targeting rules, definition of attacks, distinction, proportionality and precautions in attack, perfidy, weapons review, and the law of neutrality. Overall, Goines concludes that, just as many aspects regarding the application of international law to cyber operations remain unsettled within the international community, similarly, the US interpretation of the relationship between international law and several aspects of cyber operations remains vague. Nevertheless, he stresses that the United States very seriously considers and carefully applies both international legal peacetime security principles and international humanitarian law when planning and executing cyber operations, as well as in evaluating the actions in the cyber domain emanating from abroad.

In Chapter 13, Pedro Arthur Linhares Lima and Constanca Maria Maia explain the Brazilian military's approach to cyber security. The authors point out that, given the Air Force's intrinsic dependence on advanced information technology and supporting networks, especially with respect to command and control, it is particularly vulnerable to cyber disruptions and, therefore, must imperatively ensure the security of the cyber domain. Therefore, beginning with the pioneering efforts undertaken by the Brazilian Air Force in 2008 in response to the ubiquitous challenges associated with the military's dependence, and more broadly society's dependence, on the rapidly evolving interconnected information technological network, the chapter provides a comprehensive overview of the development of the

Brazilian military's structural network designed to govern defensive and offensive cyber operations and thereby maintain cyber security. Within that context, Brazilian Cyber Defense Doctrine delineates three interrelated layers of cyberspace: physical, logical, and cyber-persona. These correspond to the three layers described in US Air Force Doctrine on Cyberspace Operations. The authors emphasize that Brazil recognizes its obligation to govern its cyber operations in accord with the tenets of human rights law and international humanitarian law. Moreover, the authors argue that, rather than assigning exclusive responsibility for cyber operations to one service, cyber operations inherently require a joint approach that comprehensively integrates cyber doctrine, capabilities, and processes under a joint cyber command that, in turn, can synergistically and effectively coordinate and direct the planning and execution of cyber activities by all three services – the Army, Navy, and Air Force – under the overall direction of the Joint General Staff of the Brazilian Armed Forces or the Brazilian Ministry of Defense.

Chapter 14, entitled "New Frontiers for the US Armed Forces: International Law and Operations in Space" concludes Part IV of the book. In this chapter, Theodore Richard examines the ways the United States plans and execute its operations in the space domain in a manner compliant with the tenets of international law, within the broader context of its commitment to upholding and strengthening the rules-based international order. While noting the economic significance of space for the American and global economy, Richard maintains that the security of operations in the domain of space is an absolutely essential requirement for US national security. Potential adversaries recognize this and have developed capabilities to deny the US access to space. Therefore, recognizing the vital importance of space, in 2019, the US established the US Space Force with the missions of organizing, training, and equipping forces for the reestablished US Space Command, a unified combatant command with responsibility for military operations in space. Within this context, Richard reviews the various conventions governing space to which the US is a party. In addition, he cites the five "tenets," and the specific behaviors embedded within those tenets, that the US maintains should constitute the standards governing responsible, orderly, predictable behavior in space. After establishing that although there is not a universally recognized legal boundary between outer space and airspace, Richard notes that space operations can be analytically divided into three components: the orbital components, which consists of objects in outer space; the link or signals component, which communicates between space objects or between those objects and stations on earth; and the terrestrial facilities located on earth. Richard then goes on to review, analyze, and assess the US's operational mission areas in space: intelligence, surveillance, and reconnaissance; missile warning and missile defense; space domain awareness; satellite communications; positioning, navigation, and timing; electromagnetic spectrum operations; and direct-ascent anti-satellite weapons. He points out that, while the US seeks to integrate commercial space capabilities within the US's space security architecture, insofar as this synergistic effort includes the integration of Department of Defense civilians and defense contractors into roles in which they would effectively participate in the sustainment or conduct of combat operations in the space domain,

their participation could compromise their status as non-combatants. Similarly, the integration of commercial and military capabilities in support of or participation in combat operations also raises vexing questions regarding the application of the principle of distinction. Concerning combat operations in the space domain, Richard discusses defensive and offensive operations, as well as specific issues involved in targeting in a manner compliant with the international humanitarian legal principles of discrimination and proportionality. Richard concludes his chapter by stressing that the United States is absolutely committed to supporting the maintenance of a rules-based order in space, predicated upon the norms, principles, and provisions of conventional and customary international law, so as to make both commercial and military activities in the space domain peaceful, secure, and sustainable for the entire international community.

Conclusion: The Future of International Law and Air, Space, and Cyber Defense

Concluding the book, Julia Grignon underscores the significance and contemporary relevance of international humanitarian law and international human rights law by noting that, as recent conflicts in Ukraine and Gaza have graphically shown, injury and death of civilians as well as damage and destruction of civilian objects, have remained ubiquitous in contemporary times. Consequently, it remains vitally important that the members of the international community understand and appreciate the synergistic interrelationship between the normative standards contained within the mainstream Western just war tradition, international human rights law, and international humanitarian law. While noting that both international human rights law and international humanitarian law have undergone significant development since originally articulated, there remain gaps in the law, as well as divergent interpretations of the law, especially as it applies to operations in the new domains of space and cyberspace. Nevertheless, as reflected in the chapters in this book, the basic legal framework for regulating the use of armed force in all domains is well established. The challenge now focuses on the universal acceptance and implementation of international humanitarian law and international human rights law. In this context, Grignon calls for greater interactive involvement and collaboration between academicians, lawyers, military professionals, governmental officials, and representatives from various non-governmental organizations. Consistent with a constructivist perspective on international relations, she states that, "the future of international humanitarian law will reflect our collective actions, values and decisions" and, consequently, it "will become what we choose to make it; a body that either upholds human dignity in conflicts or falls short." She concludes by observing that, as members of the international community, "we are the future of international humanitarian law and that future will be what we collectively decide it is."

Final Thoughts

The contributors to this book all agree that adherence to international humanitarian law and international human rights law is central to the maintenance of a

rules-based international order which, in turn, contributes to the protection and maintenance of a secure common good for the whole of mankind. It is hoped that this volume will make a significant contribution to a greater understanding of the development and the current state of international humanitarian law and international human rights law. In doing so, it is also hoped that the volume will help to illuminate the ways in which the norms, principles, and provisions contained within these two bodies of law shape and guide the application of military power across the land, air, cyberspace, and space domains by the armed forces of the United States and Brazil – two of the most prominent military institutions in the Western Hemisphere.

For example, building upon the foundational principles underpinning international humanitarian law (military necessity, humanity, distinction, and proportionality) examined in considerable detail in Chapters 3 and 4, Chapter 5 shows how these principles remain foundational with respect to the developing law governing cyberspace. Chapter 12, "New Frontiers for the US Armed Forces: International Law and Operations in the Cyber Domain," then examines the way cyber law is applied respect to actual operations within the cyber domain. Similarly, Chapter 7, "International Humanitarian Law and Theory of Aerospace Power" shows how the foundational principles of international humanitarian law examined in Chapters 3 and 4 are reflected in airpower theory and doctrine. Moreover, Chapter 8, "International Humanitarian Law, Human Rights Law, and the US Armed Force's Role in Responding to Contemporary 'Traditional' and 'Non-Traditional' Security Challenges in South America" illustrates the application of the foundational principles and tenets of these bodies of law in significant operational settings. Similarly, Chapters 9 and 10 illustrate Brazil's commitment to humanitarian relief consistent with the foundational norms and tenets of international human rights law. Finally, Chapter 14, "New Frontiers for the US Armed Forces: International Law and Operations in Space," highlights the linkage between the principles and tenets of international humanitarian law and the way in which these principles and tenets inform and condition the way in which the US approaches actual operations in the domain of space. In short, this volume is unique in that it not only examines the foundational principles and tenets of international humanitarian law and international human rights law (Parts I and II), it also specifically illustrates how the American and Brazilian militaries continue to apply the norms, principles, and provisions contained within these bodies of law with respect to operations both in traditional and in newer domains (Parts III and IV).

Finally, in the broadest sense, this book illustrates the commitment of the US and Brazilian militaries to an internationally accepted rules-based international order and, as part of that order, their continuing commitment to upholding the norms and standards embodied within international humanitarian law and international human rights law. Moreover, this volume is also emblematic of the bonds of partnership and friendship between the US military and the Brazilian military, as they both seek to uphold and defend the human rights of all individuals, while simultaneously maintaining peace and security throughout the Western Hemisphere in a manner that is consistent with the norms, principles, and provisions of customary and conventional international law.

Note

1 The opinions, conclusions, and/or recommendations expressed or implied within this book are solely those of the author(s) and should not be interpreted as representing the views of the USAF Air War College, the USAF Air University, the US Air Force, the US Department of Defense, or any other US government agency. In addition, they should not be interpreted as representing the views of the Brazilian Air University, the Brazilian Air Force, or the Government of Brazil.

Part I

The Development of Human Rights Law and International Humanitarian Law


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1 The Moral Heritage

International Law, Just War Tradition, and the Concept of Human Rights

James Turner Johnson

International law is founded on positive agreement to its provisions by the states signatory to this law. Yet such positive assent is not merely arbitrary: even across major cultural lines, it reflects broad agreement as to its moral heritage. The historical development of both international law on war and international law on human rights rests heavily on the historical moral traditions of both of these in Western historical experience. This chapter explores those traditions and their interrelations over the major period of their coming together and interacting from the high Middle Ages into the Modern period, then turns to the growth of international law as a marker of common agreement on underlying moral ideals.

The Medieval Coming Together of Moral Tradition on Just War

The idea of just war has roots that reach deep into Western and Hebraic cultures. In the fourth and early fifth centuries the Christian theologian Augustine of Hippo, making use of these roots, included brief passages on the idea of just war in his numerous publications. Later, beginning in the sixth century, these passages were identified, separated out as standalone statements, and fashioned as canons, rules for Christian behavior, in a series of collections circulated among the clergy and employed to promote community of belief and behavior throughout Western Europe after the fall of the Roman Empire in the West. The Augustinian just war idea presented in this way was especially influential in the highly militarized secular societies that became normative throughout western Europe after the collapse of the Empire. Yet the character of the collections of individual canons meant that what was transmitted and took root were separate moral ideas, not a systematic conception of just war and its relation to political life. Only in the middle of the twelfth century was this canonically conceived body of work on just war systematically drawn together and given topical focus by a theorist of canonical law named Gratian, in a work generally known as the *Decretum.*[1] Gratian was a member of the preeminent faculty of canon law in Europe, that of the University of Bologna. At the time he was composing the *Decretum* colleagues also on the canonical faculty were working on the recovery of Roman law in all its complexity. A particular element of this recovery, the Roman idea of natural law, influenced Gratian and his two generations of successors, the Decretists and the Decretalists. This idea of

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natural law also provided a key focus for the medieval idea of rights, and from the twelfth century forward the idea of just war and that of rights developed alongside each other, each with its own connection to the older Roman idea of natural law.

By the end of the period of the Decretalists a century after the *Decretum* the canonical idea of just war had achieved systematic unity and been defined in terms of three requirements: the necessary authority and justification and the purpose of peaceful life in political community. This canonical conception was in turn taken up, summarized, placed in a theological context, and given what became a classic form only a bit later by Thomas Aquinas, a Dominican theologian, in his *Systematic Theology, Part II.II., Q. 40, On War.* While much present-day theological commentary has argued that Aquinas developed this conception on his own, working from Aristotle, whatever may have been Aristotle's influence, textual evidence links Aquinas's pithy statement of what is necessary for a just war directly to Gratian. Thus what was by that time the standard canonical conception of just war became with Aquinas the standard theological conception as well, stated concisely but with Augustine's influence highlighted.

In Article 1 of Q. 40 Aquinas asked what is necessary for a just war, answering with the three requisites derived from the canonists: first the authority of a *princeps*, a Latin term meaning the temporal ruler of a *res publica* (political community) with no temporal superior, a just cause (a violation of justice that had not been remedied), and a right intention (which he defined in two ways: particularly by reference to a list of wrong intentions itemized and forbidden by Augustine in a passage from his early work *Contra Faustum*, and generally by reference to Augustine's maxim that a just war should aim at peace). In the question *On War* Aquinas did not mention proper conduct in war, though the canon law before him had defined a form of noncombatant immunity and had sought to limit the use of certain kinds of weapons. Moreover, various implications for war-conduct could be drawn from the definition of just war he did provide.

These developments, canonical and theological, both took place within a churchly context. Too much should not be made of this, as all education during this period took place within the frame of the church. Also important for those who studied and wrote about war and political life was that members of the knightly class were heavily represented on the university faculties and those who studied with them. Thomas Aquinas's father and brothers were all members of a prominent knightly faculty. More broadly, membership in families who exercised authority and responsibility for maintenance of good order and peace within the broader community gave academicians from the knightly class a special sensitivity toward the moral dimensions of temporal authority. So, as far back as Gratian's two generations of successors, the just war requisite of right authority had been identified as referring to the exercise of temporal authority and responsibility within political communities and in relations among such communities. Aquinas's choice of the word *princeps*, prince, for the person identified as having authority for a just war was no arbitrary choice of his: it represented a deep and culture-wide conception of the responsibility of public life. Temporal life – life in the world, including importantly life in community – had fundamentally to do with the order of nature,

not with the spiritual order. The latter was conceived as the order of the church, and those in authority within the church possessed spiritual authority, distinct from authority in the temporal sphere.

This discussion leaves the idea of just war as essentially a set of parameters defining the right and responsibility of temporal authorities to resort to armed force. Much later, in the period when the idea of the law of nations was developing in the period after Grotius, this set of parameters within just war tradition came to be known as the *jus ad bellum*, denoting the part of the law (*jus*) having to do with resort to war. Today the idea of just war is generally understood as having two components, the *jus ad bellum* and the *jus in bello*. As the twelfth- and thirteenth-century canonical and theological conceptions of just war did not include a statement of the latter, where did it come from?

Expansion of the Moral Heritage: The Chivalric Code, the Law of Arms, and the Idea of Sovereignty

The moral heritage defining right conduct in war developed separately beginning in the twelfth century as part of a distinct code of conduct rooted in a different social frame, that of the sphere of chivalry or knightly life. This chivalric code developed in French, the preferred language of the knightly class, whereas the idea of just war developed in the Latin of the university and the church. In the context of chivalry by the twelfth century, the French term *souverain* (sovereign) was being used for a knight whose status and function was as a temporal ruler with no temporal superior. This term thus referred to a member of the knightly class who met the requirement of right authority for just war, denoted as a prince (*princeps*) in Aquinas's summary statement of the requirements for just war. Knights, while members of a recognized class of warriors who fought on horseback by contrast to the commoners who fought on foot, were not equal in their own social sphere but were distinguished there by wealth, background, and function. *Souverain* thus was a term of relation: it signified those members of the chivalric class who were at the apex of the recognized system of ruling authority among that class. The Latin term *princeps* was by contrast a term rooted in Roman law and indicated rule of a *res publica*, a legally recognized political community. Over time, however, usage of these terms shifted. By the end of the Middle Ages the usage had effectively merged, but with the waning of Latin in the modern period the French *souverain* and its derivatives in the various European languages (like the English "sovereign" and "sovereignty") took on the legal meanings earlier carried by the Latin *princeps*. Thus we come to the usage in modern international relations and in international law.

The chivalric code had particular interest in the *loi d'armes*, the law of arms, the rules defining right behavior while under arms. In the Latin of the scholarly world and the Church, including the canon law, the term *loi d'armes* was translated *jus in bello.* During the era of the Hundred Years' War two writers (Honoré Bonet – or Bovet; it has been rendered both ways – and his disciple Christine de Pisan) knowledgeable in both the just war idea and the chivalric code drew these two traditions together, and subsequent accounts of the just war idea thus included

both the *jus ad bellum* earlier established (but not yet named as such) and the new *jus in bello* reflecting the influence of the chivalric *loi d'armes.* The content of the *jus in bello* in the just war frame was two different kinds of restraint: first, a definition of noncombatant protection forbidding direct, intentional menace or harm to members of classes of persons who normally did not take part in war: persons deemed too young or too old to bear arms; women, whatever their age; persons suffering some form of infirmity, physical or mental; and persons not members of the knightly class, so long as these were engaged in practicing their normal livelihood – including peasants on the land, merchants and shopkeepers, clergy and members of religious orders, as well as peaceful travelers caught in a zone of war. The medieval concept of noncombatant protection also extended to the property of all the aforementioned classes of protected persons, imposing restrictions based on considerations of proportionality on their property. Considerations of proportionality also led to efforts to limit certain kinds of arms considered inherently disproportionate in their effects: siege weapons and bows and arrows. The chivalric code did not allow knights to take part in the use of either of these types of weapons in war, though non-knights in fact did employ them. These forms of limitation on the menace or harm done in war – efforts to define protections for noncombatants and efforts to limit disproportionate forms of fighting up to and including disallowing certain types of weapons – have remained integral to subsequent just war thinking and also have been adopted in international law establishing restraints on forms of war-conduct by parties to that law.

Further Developments in the Moral Tradition: Rights, Responsibility in Governing, and Limits on War-Conduct

The idea of just war in this form, including provisions defining both resort to war and proper war-conduct, developed in the context of Western culture. Other major cultures have similar traditions, which enable them to cooperate with one another in their interactions and, increasingly, in the arena of international law – at first through customary law, then through positive law anchored in formal agreements among states. In the development of positive international law on war the relation to the deeper moral tradition of the West is acknowledged in the Preamble to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. At the same time, scholars such as Quincy Wright have argued that war across major cultural borders is inherently difficult to restrain.

Turning now to the development of the historical moral tradition on rights, this shares with the tradition on just war a fundamental dependency on the idea of natural law retrieved from Roman law in the academic flourishing of the twelfth century. The effort to retrieve Roman law provided an intellectual and cultural environment that included not only the rediscovery of Roman law in itself but influences from churchly sources, Germanic traditions, and coalescing patterns of political life. Much of what the canonists engaged in this project of recovery aimed to achieve a synthesis among these disparate influences. The broad sweep of Roman law offered a persuasive model of such a synthesis, defining a normative relationship linking the positive law (*lex*) by which Rome governed to the laws and

customs of particular peoples in the Empire (the *ius gentium*) and the underlying, or overarching, structure of the law of nature (the *ius naturale*), conceived as properly the root of good law in any cultural context.

Of particular importance in both the recovery of Roman law and the definition of the just war idea, and carrying forward into new thinking about the relation between the use of arms and individual rights, was the Latin word *ius*. This term, as understood in Roman law and carried into medieval thinking, had several meanings which are distinguished from one another in English usage today: 1) right, in the sense of proper or correct; 2) right, in the sense of a claim one individual has in relation to another or to others; and 3) law, not in the sense of *lex* or man-made positive law, but in the sense of the law that is "in one's members" or in nature, or the law that is experienced through expected customary behavior. *Lex* and *ius* also differed in how they were known: knowledge of *lex* was through reason, while knowledge of *ius* came through introversion, empathetic sensation, and judgment. In medieval political thought an independent ruler – a temporal ruler with no temporal superior – was understood as responsible for interpreting natural law and incorporating its guidance into the exercise of rule itself. A person without such supreme responsibility lacked an element necessary to know what natural law requires in any given instance. On this conception there was no fixed, rational content to *ius naturale*; rather, knowledge of its content was a matter for judgment by those persons responsible for such judgment and could differ from context to context.

As regards the use of arms, every member of the knightly class in this period was understood to possess the right to carry and use arms, the *ius armae*. By contrast, church law denied this right to clerics and religious, whatever their social rank. People located elsewhere in the social order might or might not possess this right depending on context: for example, by a thirteenth-century canonical ruling, the natural law allows any person to use arms in self-defense against attack while the attack is underway, though after the attack is ended it falls to the governing authority to restore whatever justice the attack might have disordered. For those persons possessing the *ius armae*, this was at once "right and proper" in the sense of being accepted as correct, as well as a reflection of the natural and customary order of things. But a knight's right to carry and employ arms in support of his individual claims over others (*ius armae*) was not the same as the right of war (*ius bellum* or *ius bellare*), which referred to the right landed knights or higher nobles had to use arms for the good of the whole society encompassed by their landholdings. The right to war, *ius bellum*, referred specifically to rights and responsibilities of a landed member of the knightly class to govern his lands and the people living on them, maintaining their personal security both relative to one another (and to the landowner himself) and to others from outside communities. Government on this conception was thus essentially judicial in function, having the right of collective use of armed force (the core meaning of *bellum*) to maintain justice in the face of some fault (as in Gratian's linking of just war to the functioning of a judge in *Decretum*, Part II, *Causa* 23, Q. II, C. 1). Other uses of arms, whether within or outside the commonwealth, were not *bellum* but *duellum* (dueling), the settlement of private quarrels.

But the right of a landowner to undertake *bellum* on his own property was not yet just war, *bellum iustum.* On this matter the canonists made an especially valuable distinction. When they defined the concept of just war, *bellum iustum*, they reserved this specific term for the use of collective armed force by a temporal ruler with no temporal superior to correct and punish an injustice already accomplished with the aim of vindicating justice (*iustitia*, the right order of things) and thus ensuring the peace of the common order. The settled concept of *bellum iustum* thus depended on the right of arms, the *ius armae*, but limited and channeled it to define the place of the use of armed force in the exercise of governing responsibility. A lower landholder – one who did in fact have a temporal superior – needed to refer any needed vindication of justice to that superior for judgment and action.

A New Focus in the Idea of Rights and Changes in the Conception of Sovereignty

As discussed previously, the Latin term for a temporal ruler with no temporal superior, one who had the right to wage *bellum iustum*, was *princeps*, prince. In contemporaneous French, this was replaced by *souverain*, sovereign. Thus the just war idea, as it came together in the late twelfth and early thirteenth centuries, centered on a conception of sovereignty as responsibility – the same phrase employed in the International Commission on Intervention and State Sovereignty's report, *The Responsibility to Protect*, suggesting the persistence over time of the medieval linkage among right, responsibility, and sovereignty, though with important changes. In classic just war thinking sovereign responsibility is for the common good of the community governed, to be exercised through resort to arms only to vindicate justice after some injustice has occurred and gone unrectified. This is fundamentally a responsibility to and for the moral order itself, understood as an order in accord with the natural law. In *The Responsibility to Protect*, somewhat differently, the responsibility is owed to groups of people by virtue of rights they are understood to possess as individuals simply by virtue of their humanity. This is a conception of rights that did not exist before the modern age, or indeed before the work of such thinkers as Hobbes, Locke, and Rousseau.

The medieval through early modern conception of rights possessed by individuals assumed that these rights were granted in custom and/or nature, but different individuals were understood as having different levels or types of rights depending on such factors as social or community status, age, gender, and personal ability to enforce any rights claimed. Rights, moreover, were conceived as claims particular individuals might make in relation to others. People of higher social status were understood to have greater rights (that is, claims) over their social inferiors than the other way around. But some rights, understood as deeply rooted in nature or custom, entitled persons of socially inferior status to make a claim against a social superior. Consider the original rationale for what we today call noncombatant immunity (a relatively recent term). Both church teaching and the chivalric code laid down that classes of persons who do not normally take part in war should not be directly, intentionally attacked in *bellum*. The rationale in each case proceeded

from the moral order itself "downward" to the protection of the classes of noncombatants named in the various lists: for the churchly rules, these persons had committed no fault, and it would be unjust to harm them; for the chivalric writers, harming people who did not bear arms would bring dishonor on the knight who did so. Of course, people in the protected classes were understood to have a "right" to be left alone, but in the frame of thinking of that time this was a claim against those who might attack them, a claim that justified immediate self-defense against such attack or a subsequent claim for justice against the perpetrators. This is very different from saying that a claim to be left alone defined the immunity from being attacked for those protected.

How did understandings change so as to get to those embodied in the Westphalian system of international order? I will give a very compressed answer. Over the last part of the sixteenth century and the first part of the seventeenth, a series of thinkers ending with Grotius recast the understanding of natural law relative to the right to use armed force so that it referred no longer to the responsibility of the temporal ruler with no temporal superior to maintain justice, and thus a peaceful order in the political community ruled, but instead referred to the right of each individual member of such a community to self-defense against unjust attack. This was understood by these thinkers as the fundamental right guaranteed by natural law, with other rights depending on it. On this conception ruling authorities in each political community possessed the right to use armed force only as delegated to them collectively by the individual members of their polities, and the rulers had this right, as did the individual members of the community, only for defense against attack. As given specific form by Grotius, this conception became the foundation of the Westphalian system of international order and the new science of the Law of Nations developed by Grotius's intellectual successors. In this way of thinking sovereignty ceased to be defined in terms of the moral responsibility of the ruler for the common good of the political community governed, for that good was now understood as contingent on the right of self-defense possessed by each member of that community.[2] Sovereignty, accordingly, was redefined in terms of the political community's territory, with a violation of sovereignty being an attack across the frontier of a community's territory, thus threatening the members of that community.[3] The underlying rationale based on the natural right of everyone to self-defense against an attack in progress was quickly forgotten, so that the new norm became simply the sanctity of the borders of each political community. This conception endures in Article 2.4 of the United Nations Charter and thus in positive international law. Ironically, this shift in the history of political thinking towards emphasizing the individual right of self-defense as the fundamental natural right made the designated ruler responsible only for protecting the individual members of each political community against attack from outside. It did nothing to protect them from attacks coming from those holding power inside the political community, and in fact it protected malevolent rulers from interference from outside powers. The older idea that the ruler is responsible to the moral order for serving the broader common good of the community governed disappears here, and indeed the very idea of the common good disappeared from discussion of political order as the nature of the idea of natural rights changed.

We can see this as an example of the law of unintended consequences. Once the unintended results are in place, it is not entirely clear how to remove them without a change in the whole system of assumptions that opened the door to these negative results. If political communities are protected from one another by the right of their citizens to protect themselves individually and communally against threats coming from outside, then the responsibility to protect themselves against threats from inside the community also rests on them. Of course, they may fail at this: they may not be able to protect themselves and their rights against one another or against ruling authorities who may oppress them. The political theorists of the eighteenth century who stressed the importance of the "virtue" necessary in a populace in order for it to be able to exercise self-rule did so as a defense against allowing themselves to be oppressed by their own governing authorities. But the problem remains, for what is to be done when that "virtue" turns out not to provide for sufficient self-protection.

The Moral Heritage and Contemporary International Law

The system of rights developed within the United Nations System establishes a set of guardrails enforceable through international law that tend to counter the possibility of the sort of ill effects I have indicated as arising from the law of unintended consequences. After developing along separate historical tracks from the Middle Ages forward, the moral tradition on human rights was given formal legal status in the United Nations system beginning with the adoption of the Genocide Convention on December 9, 1948, and the establishment of a general framework of internationally recognized human rights in the Universal Declaration of Human Rights (UDHR) on December 10, 1948. These were followed by the adoption soon after of additional formal Covenants and Conventions firming up the idea of human rights and the protections given such rights. Of these, arguably the most important are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), both of which were adopted in 1966 and entered into force in 1976. Together with the UDHR, these texts are known as the International Bill of Human Rights. But there have also been other additions to international law on the subject of human rights.[4]

The transformation of the moral tradition on right conduct in war began earlier, with the 1856 Paris Declaration Respecting Maritime Law and the 1868 St, Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, then took a broader form in the actions of the 1899 and 1907 Hague Conferences. The latter of these in particular established a comprehensive framework for the Law of War, both on land and at sea. As noted earlier, the Preamble to 1907 Hague Convention IV formally notes the connection to the earlier moral tradition establishing the customary law of war. Various other additions to the developing international law on war were made between the two World Wars and after World War II. These include the Geneva Conventions, the records of the International Military Tribunals at Nuremberg and Tokyo, and the earlier-noted Genocide Convention.[5]

Still, the body of human rights law and the law pertaining to war-conduct, while overlapping in certain respects, remained recognizably distinct branches of international law until three further developments had occurred: first, the adoption of the 1977 Protocols Additional to the Geneva Protocols of 12 August 1949; second, the adoption in 1988 of the Red Cross Fundamental Rules of International Humanitarian Law Applicable to Armed Conflicts; and third, the adoption of the 1998 Rome Statute of the International Criminal Court. This Statute established the Court in Part I and specified its Jurisdiction, Admissibility, and Applicable Law in Part 2.[6] For those persons who know the writings of Bonet/Bovet and Pisan, this section of the Rome Statute runs along broadly parallel tracks, on the one hand providing detailed definitions of noncombatants and on the other identifying kinds of restricted or forbidden actions in war or by a military force in other forms of armed conflict. A notable difference, though, is that in the Rome Statute noncombatants are protected because of their human rights, while in the medieval conception the focus is closely on the lack of actual functioning or ability to function as a combatant by those protected. This change alone signals the importance of the idea of human rights and its relevance when considering the setting of limits on what may be done in the course of armed conflict. The cited portions of international law bring into being a kind of merging between moral thinking on human rights and warfare, both understood broadly. But the emergence of bodies of international law focused on human rights and on right conduct in armed conflict has not caused the moral traditions behind each to disappear or removed their importance. Rather, across the spectrum of moral investigation, research, debate, and intellectual discourse both human rights and the moral dimensions of war and war-conduct remain subjects of energetic and sustained attention. It is important to add as well that attention to the moral dimension of these topics is not absent from legal study and debate, so that the possibility for continued cross-influence between the moral heritage and the mechanisms for legal control make human rights, right conduct in war, and related issues a broad framework for continued interaction and further development.

Notes

1 Cited in the references as *Corpus Juris Canonici* 1582. Pars Prior, *Decretum Magistri Gratiani.*
2 Grotius 1949, pp. 71–77.
3 On this shift in the idea of sovereignty see further Johnson 2014, pp. 83–88.
4 See further Bouchet-Saulnier 2002.
5 A complete list is provided at Roberts and Guelff 2000, pp. xi–xiv.
6 Roberts and Guelff 2000, pp. 673–680.

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