CHAPTER 5
HUMANITARIAN LAW AND THE
LAW OF WAR ON LAND

Howard S. Levy

A. THE HISTORICAL PERIOD

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

They made war on Midian as the Lord had commanded Moses, and slew all the men. In addition to those slain in battle, they killed the kings of Midian—Evi, Rekem, Zur, Hur and Reba, the five kings of Midian—and they put to death also Balaam, son of Beor. The Israelites took captive the Midianite women and their dependents, and carried off their beasts, their flocks, and their property. They burnt all their cities, in which they had settled, and all their encampments. They took all the spoil and plunder, both man and beast.¹

Similar statements are found throughout the Bible. Unless circumstances permitted otherwise, all of the enemy who lived were killed and all their real property was seized or razed. An exception is to be found in the Koran, Surah xlvii, Paragraph 4, which includes the following statement: “When you meet in battle those who have disbelieved, smite their necks, and after the slaughter tighten fast the bonds, until the war lays aside its burdens. Then either release them as a favor, or in return for ransom.”²

This dates from the sixth century A.D. Sun Tsu, writing The Art of War in the fourth century B.C., and Manu Sriti, an anonymous Sanskrit treatise (probably dating from sometime between 200 B.C. and 200 A.D.), both forbade the slay-

¹ Numbers 31:7–11.
² M.Z. Kahn trans., 1971 (emphasis added).
ing of prisoners of war, giving as alternatives absorption into one’s own army (a practice followed by Mao Tse-tung’s Chinese Communists after the defeat of the Chinese Nationalists under Chiang Kai-shek in 1949 and by Kim Il-Sung’s North Korean Communists during their early successes in South Korea in 1950), enslavement, or ransom. Of course, any one of these alternatives, inhumane as they may appear, was more humane than the earlier practice which had existed in the period covered by the Bible.

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

B. THE BEGINNING OF CODIFICATION

The first attempt to lay down specific humanitarian rules to be applicable in time of war was the so-called “Lieber Code,” drafted by Professor Francis Lieber and, after revision by a board of officers, promulgated as General Order No. 100 of the Union Army in 1863. Section II of that Code, Articles 31 to 47, provided for the “Protection of persons and especially of women, of religion, the arts and sciences. Punishment of crimes against the inhabitants of hostile countries.” There were also provisions (Section II, Articles 49 to 80) requiring the humane treatment of prisoners of war. This Code was, of course, a national action, not applicable to other countries, but it served as one of the sources of the international actions which were to follow.

That same year, 1863, an international conference meeting in Geneva drafted resolutions which called for each country to establish a committee to assist the medical services and provided for the neutrality of ambulances. This was the precursor of the Geneva Conferences which drafted the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field and the 1868 Additional Articles Relating to the Condition of the Wounded in War.

---

4 Schindler & Toman, supra note 3, at 275; Recueil General des Lois et Coutumes de la Guerre 719 (Marcel Deltenre ed., Les Editions Ferd. Wallens-Pay 1943) [hereinafter Deltenre] (It is in four languages: French, Flemish, German, and English.)
5 Schindler & Toman, supra note 3, at 279; Deltenre, supra note 4, at 31.
6 Schindler & Toman, supra note 3, at 285; Deltenre, supra note 4, at 41.