

# Clausewitz and the Law of Armed Conflict

By

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A Thesis submitted to the Faculty of Graduate Studies of

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## Abstract

Have globalization, nationalism and internationally operating insurgencies changed the nature of war? If so, what does this change mean for the law of armed conflict? Analyses of war as driven by political considerations, formulated most notably by Clausewitz in the 19th century, have received strong criticism recently. Critics claim that Clausewitz's trinitarian analysis of war cannot properly explain conflicts like those in sub-Saharan Africa and the Balkans, or the terrorist attacks of September 11, 2001. Therefore, the critics claim that the law of armed conflict, based on this analysis of war, is inapplicable to the types of conflict occurring today. My thesis evaluates this criticism through not only a careful reading of both Clausewitz's theory and the objection itself, but also by reviewing the history of modern warfare and the development of the laws of armed conflict.

## Table of Treaties

1555 Religious Peace of Augsburg

1648 Peace of Westphalia

1864 Geneva Convention for the Amelioration of the Condition of the Wounded in  
Armies in the Field

1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under  
400 Grammes Weight

1874 Brussels Conference, (I) Final Protocol, (II) Project of an International Declaration  
Concerning the Laws and Customs of War

1907 Hague Convention (I) Pacific Settlement of International Disputes

1907 Hague Convention (II) Limitation of Employment of Force for Recovery of  
Contract Debts

1907 Hague Convention (III) Relative to the Opening of Hostilities

1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land

1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and  
Persons in Case of War on Land

1907 Hague Convention (XI) Relative to Certain Restriction with Regard to the Exercise  
of the Right of Capture in Naval War

1907 Hague Convention (XII) Relative to the Creation of an International Prize Court

1909 Naval Conference of London, (I) Final Protocol, (II) Declaration Concerning the  
Laws of Naval War

1919 Treaty of Versailles

1924 Geneva Protocol for the Pacific Settlement of International Disputes

1928 Treaty of Paris (Kellogg-Briand Pact)

1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick  
in Armies in the Field

1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)

1945 Charter of the United Nations

1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

1949 Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

1949 Geneva Convention (III) relative to the Treatment of Prisoners of War

1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War

1966 International Covenant on Political Rights with Optional Protocol

1966 International Covenant on Economic, Social, and Cultural Rights

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

## Abbreviations

ICJ Reps	International Court of Justice Reports
LOAC	<i>The Laws of Armed Conflict</i> . Edited by Dietrich Schindler and Jiri Toman. 2nd. rev. ed. Alphen aan Rijn The Netherlands: Sijthoff & Noordhoff, 1981.
LOW	<i>The Law of War: A Documentary History</i> . Vol. 1. Edited by Leon Friedman. New York: Random House, 1972.
SP. No.166	Sessional Paper No. 16. Ottawa: F.A. Acland, 1925.
UNTS	United Nations Treaties Series



## Introduction

Have globalization, nationalism and internationally operating insurgencies changed the nature of war? If so, what does this change mean for the law of armed conflict? Analyses of war as driven by political considerations, formulated most notably by Clausewitz in the 19th century, have received strong criticism recently. Critics claim that Clausewitz's trinitarian analysis of war cannot properly explain conflicts like those in sub-Saharan Africa and the Balkans, or the terrorist attacks of September 11, 2001. Therefore, the critics claim that the law of armed conflict, based on this analysis of war, is inapplicable to the types of conflict occurring today. My thesis evaluates this criticism through not only a careful reading of both Clausewitz's theory and the objection itself, but also by reviewing the history of modern warfare and the development of the laws of armed conflict.

The particular dilemma said to face the law of armed conflict is that, though the majority of international law relevant to war applies to inter-state conflict, the majority of wars fought today occur on an intra-state level.<sup>1</sup> This prevents fully applying the humanitarian content of the law of armed conflict to intra-state conflicts. Thus, critics say, we need a new approach to dealing with the suffering caused by war. The argument of this thesis is that any attempt to apply the humanitarian content of the law of armed conflict in war-torn countries is likely to fail unless the political conditions that caused the conflict in the first place are taken into account. Thus, Clausewitz's trinitarian analysis of war is still relevant. Chapter 1 is an examination of the "Transformation of War"

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<sup>1</sup> Meredith Reid Sarkees, "The Correlates of War Data on War: An Update to 1997," in *Conflict Management and Peace Studies* 18 no.1: 123-144.

literature. In the mid-1990s, a series of authors argued that Clausewitz's trinitarian analysis of war, developed as it was in the 19th century, had ceased to be a helpful guide to understanding the wars of today. Large scale, conventional war has become outdated and in its place, a different form of warfare has emerged. The majority of wars since 1945 have been low-intensity conflicts, fought in less developed areas, by forces other than regular armies. Unlike Clausewitz's famous assertion that war was an extension of politics by other means, war had become an end in itself and different analytical tools were necessary to understand these conflicts properly. In this chapter, I examine several objections to the trinitarian analysis of war such as the denial of war as a tool of the nation state and the denial of war as a tool of politics

Chapter 2 examines the history of the law of armed conflict in light of the total wars of the 20th century. Prior to this period, the overwhelming concern of the law of war was with the rights of belligerents and ensuring reciprocity between states at war. Though the rules of conduct during war, the *jus in bello*, had made several advances during this time, such as the Lieber Code and the Hague Conventions, the law of war broke down under the impact of the politically motivated mass army and total war. Clausewitz would shoulder the blame for this situation. Many in the aftermath of the two World Wars came to see war as a human tragedy rather than a tool of national policy. In the wake of the Second World War, the law of war imposed duties upon belligerents. Chapter 2 examines this history, which marks a conceptual shift away from a sovereignty-oriented approach to the law of war to a people-centered approach to the law of armed conflict.

Chapter 3 examines an important change in the post-Second World War era that would, when combined with this new people-centered approach, have an important

impact on the law of war. As intra-state war became more prevalent and though international law still favoured states over insurgents, one type of insurgency did gain legal recognition: the struggle for national liberation. While some saw this as a proper extension of the law of armed conflict, others interpreted it as ideology creeping into what ought to be straightforward matters of law. Can the law of armed conflict accomplish its humanitarian task under such political conditions? Chapter 3 examines the question of why the extension of the law of armed conflict to intra-state warfare has been so unsuccessful in limiting the suffering of victims of war through the consideration of several examples.

The argument of Chapter 4 is that Clausewitz's trinitarian analysis of war is necessary if the application of restraint in armed conflict is to succeed. Those who claim that the social paradigm of government, army, and people is obsolete argue that the law of armed conflict is no longer applicable to contemporary armed conflict, based as it is on this paradigm. The state on this view has rapidly become irrelevant to war, making the distinction between the people and the military meaningless now that wars are in fact fought, not between states but among hostile populations within a state.

In this chapter, I argue that even though Clausewitz prioritizes the interest of the state over moral considerations, he would be the first to remind political leaders that war is uncertain and has inevitable costs. In addition, his approach to the subject of state interest leaves open the possibility that it can vary over time in ways that make restraint in war more or less likely.

## Chapter 1

### The Transformation of War Thesis

Trinitarian war is not War with a capital W but merely one of the many forms war has assumed. Nor is trinitarian war even the most important, given that, some previous parallels notwithstanding, it only emerged after the Peace of Westphalia. Based on the idea of the state and on the distinction between government, army, and people, trinitarian war was unknown to most societies during most of history.

- Martin van Creveld, *The Transformation of War*

Have globalization, nationalism, and internationally operating insurgencies changed the nature of war? In the mid 1990s a series of authors argued that Clausewitz's trinitarian analysis of war, developed as it was in the 19th century, had ceased to be a helpful guide to understanding the wars of today. Large scale, conventional wars between centralized, territorial-bound states, as a tool for the promotion of their national interests had become outdated. Since 1945, the majority of wars have been low-intensity conflicts, fought in less developed areas of the world, and by forces other than regular armies. Unlike Clausewitz's famous assertion that war was an extension of politics by other means, war, according to these authors, was now an end in itself. Accordingly, different analytical tools are required in order to understand the new nature of war properly.

In Chapter 1, I review the arguments surrounding this claim. In Section 1, I present Clausewitz's analysis of the nature of war without, hopefully, prejudicing the argument one way or the other. In the Clausewitz literature, commentators refer to this as the "trinitarian analysis" of war. Sections 2 and 3 of this chapter each examine a specific

type of objection to Clausewitz's analysis of the nature of war. The objection in Section 2, which I will refer to as the "anti-rational new wars thesis," claims that war is no longer a rational instrument of policy. These authors argue that instead of policy, irrational ethnic and religious identities determine the course of modern war. The objection in Section 3, which I will refer to as the "rational new wars theory," while accepting the nature of war as rational, claims that so-called "new wars" follow a different rationale than that suggested by Clausewitz. These authors claim that economic and scientific factors determine the course of modern war.

### 1.1 Clausewitz's Analysis of War

Clausewitz begins his analysis of the nature of war by considering it as an abstract concept.<sup>1</sup> The term "absolute war" represents Clausewitz's thoughts on his initial thesis that in itself "war is nothing but a duel on a larger scale" (W 75).<sup>2</sup> Put another way, war is "*an act of force to compel our enemy to do our will*" (W 75).<sup>3</sup> It is unrestrained by the policies of governments and the frictional effects of time, space and human nature. Absolute war is a pure form of war that is violent in the extreme. That Clausewitz includes violence in his analysis of war is obvious: "Essentially war is fighting, for fighting is the only effective principle in the manifold activities generally designated as

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<sup>1</sup> This interpretation of Clausewitz's "trinity" is from Christopher Bassford, *Clausewitz in English: The Reception of Clausewitz in Britain and America, 1815-1945* (Oxford: Oxford University Press, 1994), 9-33. See also Christopher Bassford and Edward J. Villacres, "Reclaiming the Clausewitzian Trinity," in *Parameters* (Autumn 1995): 9-19.

<sup>2</sup> W = Carl von Clausewitz, *On War* [1832], ed. and trans., Michael Howard and Peter Paret (Princeton NJ: Princeton University Press, 1989). All further citations to this work will appear in the text.

<sup>3</sup> Emphasis in the original.

war. Fighting, in turn, is a trial of moral and physical forces through the medium of the latter...Still, no matter how it is construed, the concept of fighting remains unchanged. That is what we mean by war" (W 127). In absolute war, there is no logical limit to the amount of force available for use.

Clausewitz's intention in analysing the concept of absolute war is to demonstrate its flaws. Though war may be an act of force to compel our enemies to do our will, there is more to it than just that. War's violence by itself does not account for the actual reality of war. Most of *On War* is an exploration of why real war is so different from absolute war.<sup>4</sup> War as it is experienced in reality is constrained by both the social and political contexts in which it occurs, by human nature, and by the restrictions imposed on it by the frictional aspects of space and time. Real wars occurs along a spectrum from the mere threat of force to conflicts that are unlimited in the sense that at least one of the antagonists is unwilling to accept any outcome other than the complete overthrow of his adversary.

According to Clausewitz, war is a form of social intercourse like commerce (W 97). The aim of war is a peace on terms that are acceptable to both parties; physical force is the means to that end. In Clausewitz's understanding, the violent duel is the essence of war. Yet he recognized that wars could differ across space and time:

War is more than a true chameleon that slightly adapts its characteristics to the given case. As a total phenomenon its dominant tendencies always make war a remarkable trinity - composed of primordial violence, hatred, and enmity, which are to be regarded as a blind natural force; of the play of chance and probability within which the creative spirit is free to roam; and of its element of subordination, as an instrument of policy, which makes it subject to reason alone (W 89).

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<sup>4</sup> Bassford, *Clausewitz in English*, 130-131.

Somewhat paradoxically, Clausewitz's view is that the essence of war is constant, while change is part of his understanding of war. Therefore, when Clausewitz wrote that war might have a grammar of its own but not its own logic, he meant that the logic of war, like politics, is the logic of social intercourse and not that of art or science.

Having qualified his initial thesis that war is nothing but an act of untrammelled force, Clausewitz turned to the apparently more reasonable notion that war is a purely rational act of state policy. Clausewitz used the German word "Politik" and his most famous phrase has been variously translated as "War is merely the continuation of 'policy' - or of 'politics' - by other means" (W 87). For the purpose of argument, he assumed that state policy would be rational in the sense that it aimed at improving the situation of the society it represented. Clausewitz, though, was quite aware that varying motives could drive policy. He also believed, as did most others of this time, that war was a legitimate means for a state's advancement of its interests. Frequently Clausewitz's detractors have accused him of advocating the resort to total war as a routine extension of unilateral state policy.<sup>5</sup> In fact, his famous line is the antithesis to his earlier argument and not meant to be an argument in itself.

After laying out the argument that war is a continuation of policy, Clausewitz begins to work towards the synthesis of his overall argument. This synthesis is meant to reconcile the rational calculation of policy with the domains of the irrational and the non-rational "in which strictly logical reasoning often plays no part at all and is always apt to be a most unsuitable and awkward intellectual tool" (W 580-581).

Clausewitz lived during the transition from the Enlightenment to the age of Romanticism and his worldview reflected elements of each. Clausewitz understood that

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<sup>5</sup> See Bassford, *Clausewitz in English*, 122-128.

war could take on a dynamic beyond the intentions of those who launched it since its conduct always rests on the variable energies, interests and abilities of the peoples, armies and governments involved. Political leaders on both sides may easily misjudge or lose control of the people's emotions on their side. The specific conditions of each situation uniquely shape the flow of military events. What Clausewitz called "friction" was another source of unpredictability. The effects of time, space and human nature all combine to create friction. Friction is the fundamental and unavoidable force that makes real war different from absolute war. Events take time to unfold, countless delays and distractions effect purely military or political courses of action, and strategic intelligence and battlefield information are often misleading or just plain wrong. Every individual is a friction producing part of the machine of war. To some extent, the causes of this difficulty are inherent in any large organization. Clausewitz saw this as unique to war because European armies were the first truly large, modern organizations.

Once Clausewitz has established that we cannot properly account for the observed phenomena of war as it actually occurs through any of the discussions and examples he has used so far, he synthesises the problem in his famous discussion of what he called the "remarkable trinity:"

The first of these three aspects mainly concerns the people; the second the commander and his army; the third the government. The passions that are to be kindled in war must already be inherent in the people; the scope which the play of courage and talent will enjoy in the realm of probability and chance depends on the particular character of the commander and the army; but the political aims are the business of government alone.

These three tendencies are like three different codes of law, deep-rooted in their subject and yet variable in their relationship to one another. A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless.



Our task therefore is to develop a theory that maintains a balance between these three tendencies, like an object suspended between three magnets. (W 89).

On this analysis, the armed forces are separable from the people, who do not take an active part in the fighting, and from the government that leads the war.

Heuser sees a tension in the claim that war has an eternal nature while its manifestations vary through space and time. She argues there are “two Clausewitzes.”<sup>6</sup> On the one hand, there is the young idealist who argued there were no logical limits on the nature of war. Absolute war strives to its “utmost boundaries” because of the interaction between two opponents both wanting to win. Mutual fear leads to attempts to outdo the other side leading to a spiral of violence knowing no bounds (W 77). Later, there was the mature realist who saw politics as restraining real war. Real war’s political nature means war need not become absolute with escalating violence. Yet this interpretation ignores the importance that the concept of absolute war plays in Clausewitz’s overall theory.<sup>7</sup> Absolute war forms a major part of the discussion of Book I, Chapter 1, the only piece Clausewitz claimed to be truly finished. Clausewitz uses absolute war to demonstrate that real world wars only approximate to this extreme.

The trinitarian analysis has received extensive criticism. Both John Keegan and Martin van Creveld have questioned to what extent the analysis is meaningful given that the distinctions between government, army, and people are difficult to keep up in weak states and warrior cultures.<sup>8</sup> This objection, it is important to realize, is made at the operationalization of forces and not the forces themselves. According to Van Creveld:

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<sup>6</sup> Beatrice Heuser, *Reading Clausewitz* (London: Pimlico, 2002), 24-43, 186-190.

<sup>7</sup> See the Unfinished Note, Presumably Written in 1830 (W 70).

“It follows that, where there are no states, the threefold division into government, army, and people does not exist in the same form. Nor would it be correct to say that, in such societies, war is used by governments using armies for making war at the expense of, or on the behalf of, their people.”<sup>9</sup>

Clausewitz took for granted that the state was the primary actor in war because he understood war as a political activity conducted by states, against other states as a rationally employed instrument of policy. Though he did admit that there were other types of war, he really did not use them in his analysis about the nature of war. What is implicit in his view is the belief that non-state war is different from war between states. This brings up the question of the continuing applicability of Clausewitz’s trinitarian view of war. Is the theory general enough to be useful in all cases found in our current experience? The arguments presented below, despite their differences, do belong together as they have helped shape contemporary thinking on the nature of war.

## 1.2 Anti-Rational New Wars

So-called “old wars,” those amenable to Clausewitz’s trinitarian analysis, are state-based wars, where political calculations motivate rulers to construct states, armies and economies to wage wars of overwhelming force against similarly organized opponents. Certain non-trinitarians argue, though, that war is not a rational instrument of

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<sup>8</sup> Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991); John Keegan, *A History of Warfare* (New York: Alfred A. Knopf, 1993).

<sup>9</sup> van Creveld, *The Transformation of War*, 50.

policy.<sup>10</sup> This group emphasizes the importance of culture for why people fight; believing that identity, emotions, and psychology are better suited to help us understand modern war. Focusing on the ethnic wars in the Balkans in the 1990s, they argue that ethnic identity in general and religious identity in particular determined the conflict in these wars.

Some of those writing on ethnic war, like Kaplan, argue that since ethnic war constitutes irrational, barbaric violence more like chaos than any organized phenomenon, it is non-Clausewitzian.<sup>11</sup> According to the Tofflers, we are heading into “a new dark age of tribal hate, planetary desolation, and wars multiplied with wars.”<sup>12</sup> Snow writes:

In a sense, what has emerged is a kind of ‘new-old’ form of war that is both pre-Clausewitzian and possibly post-Clausewitzian. What is most notable about it is the essential divorce of war from politics. In this style, war is not so clearly the continuation of politics by other means, a situation that some, including Keegan, contend is more historically prevalent than the conception of war during the Clausewitzian interlude. In that sense, the new warfare is pre-Clausewitzian, apolitical, and self-justifying. At the same time, the apparent chaos, savagery, and pointlessness of much of the new internal war would shock most pre-Clausewitzians of the period when armed conflict was imbued with notions of warrior ethic and chivalry.<sup>13</sup>

Holsti suggests that it may even be confusing to use the term “war” as ethnic violence is not organized: “Attrition, terror, psychology, and actions against civilians highlight ‘combat’. Rather than highly organized armed forces based on a strict command

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<sup>10</sup> See Jan Angstrom, “Introduction,” in *Rethinking the Nature of War*, ed., Isabelle Duyvesteyan and Jan Angstrom (New York: Frank Cass, 2005), 7-10; Herfried Münkler, *The New Wars* (Malden MA: Polity, 2005).

<sup>11</sup> Robert D. Kaplan, “The Coming Anarchy,” *Atlantic Monthly*, February 1994, 44-76.

<sup>12</sup> Alvin Toffler and Heidi Toffler, *War and Anti-War: Survival at the Dawn of the 21st Century* (London: Little & Brown, 1993), 1.

<sup>13</sup> Donald M. Snow, *Distant Thunder: Patterns of Conflict in the Developing World*, 2nd ed. (London: M. E. Sharpe, 1997), 129.

hierarchy, wars are fought by loosely knit groups of regulars, irregulars, cells, and not infrequently by locally-based warlords under little or no central authority.”<sup>14</sup>

Snow also suggests that some intra-state wars that have occurred after the Cold War are “new wars” because they are different from classic insurgent warfare. In so far as they lack clear military objectives, the fighting forces are irregulars, who display an “absence of even an appearance of military order and discipline,” resulting in a “level of ferocity and even atrocity that is routinely committed in these conflicts.”<sup>15</sup> Furthermore, Snow points out that in classic insurgencies the parties to the conflict partly shared the same centre of gravity: the legitimacy of the target population. This had a moderating effect on the warfare that is not present in new wars:

Ethnic conflict, civil disintegration, and interference with humanitarian relief efforts all make up the complex of actions that defies neat classification in traditional politico-military terms. They are the kinds of acts that one associates with the failed states and that give the new internal war its distinctively politically chaotic and military atrocious character. As one looked aghast at the genocide in Rwanda or the random atrocities against civilians in Sarajevo, one could not avoid observing that this was not warfare as we had known it. The new internal war simply does not conform to standard definitions of war.<sup>16</sup>

Common to the “anti-rational” thesis is the view that ethnic identity is almost primitive. Huntington has even suggested a coming clash of civilisations based primarily upon the world’s religions.<sup>17</sup> What is interesting about the anti-rational new war thesis is that it moves the politically relevant identity up a level to the supranational level rather

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<sup>14</sup> Holsti, *War, the State, and the State of War*, (Cambridge: Cambridge University Press, 1996), 20.

<sup>15</sup> Donald Snow, *Uncivil Wars: International Security and the New Internal Conflicts* (Boulder CO: Lynne Rienner Publishers, 1996), 106–107.

<sup>16</sup> Snow, *Uncivil Wars*, 105.

<sup>17</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996), 209-238.

than down to a sub-national level. Another common element supporters of this view draw upon to support their conclusions is evidence from so-called “failed states.”

Van Creveld, too, criticises Clausewitz’s analysis of war as a rational phenomenon by arguing it is “preposterous...to think that, just because some people wield power, they act like calculating machines that are unswayed by passions. In fact, they are no more rational than the rest of us.”<sup>18</sup> Van Creveld argues that Clausewitz’s trinitarian analysis of war no longer applies to the greater part of today’s armed conflicts: “what we are dealing with here is neither low-intensity nor some bastard offspring of war. Rather, it is WARRE in the elemental, Hobbesian sense of the word, by far the most important form of armed conflict in our time.”<sup>19</sup> Non-trinitarian war, as van Creveld terms it, is determined by the psychological set-up of men (*men*, not mankind). He argues that:

In any war, the readiness to suffer and die, as well as to kill, represents the single most important factor. Take it away, and even the most numerous, best organized, best trained, best equipped army in the world will turn out to be a brittle instrument. This applies to all wars regardless of time, place, and circumstance. It also applies regardless of the degree of technological sophistication involved, whether it is with the aid of sticks or tanks that the actual fighting is done.<sup>20</sup>

The “readiness,” van Creveld describes, is an end itself and a means to an end. He grounds his logic in men being compelled to play and war is the most interesting game as it contains the highest stake of all – life.<sup>21</sup> Therefore, war too is an end rather than a means to an end.

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<sup>18</sup> van Creveld, *The Transformation of War*, 157.

<sup>19</sup> van Creveld, *The Transformation of War*, 22.

<sup>20</sup> van Creveld, *The Transformation of War*, 160.

<sup>21</sup> van Creveld, *The Transformation of War*, 161-187.

Keegan attempts to explain the powerful role that culture plays in determining how we understand most social phenomena, including war: "We all find it difficult to stand far enough outside our own culture to perceive how it makes us, as individuals, what we are."<sup>22</sup> According to Keegan, this constraint applies equally to Clausewitz: "Good historian though he was, Clausewitz allowed the two institutions - state and regiment - that circumscribed his own perception of the world to dominate his thinking so narrowly that he denied himself the room to observe how different war might be in societies where both state and regiment were alien concepts."<sup>23</sup>

To illustrate his point, Keegan gives the example of a warrior culture that differentiates itself from the rest of its society with a distinct set of values, symbols and rituals. These warriors live in "a world apart, a very ancient world, which exists in parallel with the everyday world but does not belong to it."<sup>24</sup> This warrior world changes over time and adapts in step to the civilian culture; however, "the culture of the warrior can never be that of civilisation itself."<sup>25</sup> He argues further: "War may be, among many other things, the perpetuation of a culture by its own means."<sup>26</sup> Thus, Keegan negates the primacy of politics as a mere temporary phenomenon and believes instead in the primacy of culture.

However, one response to the anti-rational new wars thesis is that the sheer number of killings in conflicts like the Rwandan Genocide (1994) and the Bosnian Civil

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<sup>22</sup> John Keegan, *A History of Warfare* (Toronto ON: Vantage Books, 1994), 12

<sup>23</sup> Keegan, *A History of Warfare*, 23.

<sup>24</sup> Keegan, *A History of Warfare*, xvi.

<sup>25</sup> Keegan, *A History of Warfare*, xvi.

<sup>26</sup> Keegan, *A History of Warfare*, 46.

War (1992-1995) could not have been accomplished without some sort of strategic planning. Prunier argues that there must have been a high degree of organization in the example of Rwanda as the Hutu militia had a kill rate that was five times that of the Nazi concentration camps.<sup>27</sup> Shaw argues along similar lines with respect to Bosnia. He interprets genocide as a type of war because of two particular characteristics, its high degree of organization and mass killings:

Seeing genocide in this way enables us to see it as a destructive *process* and escape from the trap of defining it by physical destruction alone. War, as a social activity, involves identifying the enemy, formulating the goal of destruction, and developing its means; so too genocide. War involves the development of strategies, and also many different moments of preparation, organization, supply and deployment; so too genocide. War involves political, economic and ideological as well as military power; so too genocide. Physical destruction is the ultimate manifestation of the destructive process of war, but it is not what is going on most of the time in most wars; so too in genocides.<sup>28</sup>

Considering the example of Srebrenica, Honig and Both argue that Serb irregular forces “were acting on the basis of a carefully prepared plan.”<sup>29</sup> Once the Serbian force had taken the town they began to concentrate the refugees all in one place. They first separated the woman, children, and the elderly from the men and boys then sent the former to Kladanj in Bosnian government-held territory and sent the latter to a detention centre in Bratunac to be executed. Rather than concluding what had happened in the Balkans was “simply a chaotic maelstrom of uncivilized ‘Balkan’ peoples exorcizing their ghosts in orgies of primordial bloodletting,” Gow speaks of a “strategy deliberately

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<sup>27</sup> Gérard Prunier, *The Rwanda Crisis* (New York: Columbia University Press, 1998), 261.

<sup>28</sup> Martin Shaw, *What is Genocide* (Malden MA: Polity Press, 2007), 36.

<sup>29</sup> Jan Willem Honig and Norbert Both, *Srebrenica: Record of a War Crime* (London: Penguin, 1996), 29.

steeped in ambiguity, so as to limit the chances of the Serbian project being seen for what it was and crossing the threshold that might warrant international action.”<sup>30</sup>

### 1.3 Rational New Wars

Another objection to Clausewitz’s analysis of war, while understanding the nature of war as rational, still claims that contemporary wars are new.<sup>31</sup> We are witnessing new wars in the post Second World War era because these wars follow a different rationale than was suggested by Clausewitz. Kaldor points to the unique combination of warring parties’ emphasis on identity politics, the mode of warfare, and globalized war economies that have created a new form of war. Kaldor cites the war in Bosnia as the paradigm case of new war.<sup>32</sup> Kaldor’s emphasis on ethnic identity makes her argument appear like a version of the anti-rationalist thesis, but for her, ethnic identity is not the leading factor in these new wars. According to Kaldor, ethnicity does not cause war. What actually causes war is the clash between cosmopolitan and particularist ideologies; however, this is not all, for Kaldor adds the targeting of civilians as a criterion for separating new from old wars.

Just like ethnicity, though, the targeting of civilians has occurred in previous wars. Kaldor’s argument for the transformation of war thesis is that we are witnessing a new political economy of war. What makes her analysis unique is that she adds globalization to the equation: “By globalization, I mean the intensification of global

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<sup>30</sup> James Gow, *The Serbian Project and its Adversaries: A Strategy of War Crimes* (Montreal QC: McGill-Queens’s University Press, 2003), 23.

<sup>31</sup> See Angstrom, “Introduction,” 10-11, 15-17.

<sup>32</sup> Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 2nd ed. (Stanford CA: Stanford University Press, 2007), 6-9.



interconnectedness – political, economic, military and cultural – and the changing character of political authority.”<sup>33</sup> On this account, the global trade links that support armed movements fighting in these wars are the key attribute separating new from old wars. In existence are new military forces. Idle soldiers from armies of collapsing states, soldiers of fortune, paramilitary groups and even international troops are engaging in new forms of violence.<sup>34</sup> These new forms of violence include the systematic murder of other ethnic groups and the forcible population expulsions known as “ethnic cleansing.”

These forms of violence replicate themselves through an extreme form of globalization in which economic production collapses. Warring parties supply themselves through the diversion of international humanitarian aid and from funding by external governments and remittances from overseas relatives. To understand the new political economy of war that consists in globalized arms markets, trans-national ethnicities, and internationalized Western-global interventions, one must understand the new global economy.<sup>35</sup> On this analysis, the economy of the total war nation state was mobilizing and production oriented; the new globalized war economy is the opposite. In new wars, opposing forces direct their economies towards damaging the opponent’s economy while at the same time spreading refugees, identity-based politics, and illegal trade throughout a region. It creates so called “bad neighbourhoods” in the world economy and society-

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<sup>33</sup> Kaldor, *New and Old Wars*, 3.

<sup>34</sup> Mary Kaldor, introduction to *New Wars*, Mary Kaldor and Basker Vashee eds. (London: Pinter, 1998), 17-19; Kaldor, *New and Old Wars*, 90-111.

<sup>35</sup> See Genevieve Schmeder, “Global Trends in Military Efforts and Activities,” in *The End of Military Fordism*, ed. Mary Kaldor, Ulrich Albrecht and Genevieve Schmeder (London: Pinter, 1998).

regional clusters like the Balkans, Caucasus, the Horn of Africa, Central Africa, West Africa, Central Asia and the Middle East.<sup>36</sup>

Other advocates of an economic rationale in war, like Keen, claim in contrast to Clausewitz's rationality in terms of politics, that economic incentive determines the conduct of the war:

The military historian von Clausewitz saw war as overwhelmingly waged by states, which were envisioned as possessing a monopoly on the means of violence. He famously said that war was a continuation of politics by other means. But states may not have a monopoly in the means of violence, and rebel groups may also find it hard to direct or control violence within their areas of operation. Particularly where chains of command are weak, war may be a continuation of *economics* by other means.<sup>37</sup>

This does not necessarily mean that economic shortcomings cause war, but rather that economic incentives determine the conduct and continuation of war. It suggests that personal enrichment is the prime incentive in carrying out military operations in some parts of the developing world. There are also those like Holsti who, while they claim that modern war in the developing world is unorganised, attribute an economic rationale to modern war:

The new mediaevalism is demonstrated most dramatically in the nature of armed conflict in these states. War has become de-institutionalized in the sense of central control, rules, regulations, etiquette, and armaments. Armies are rag-tag groups frequently made up of teenagers paid in drugs, or not paid at all. In the absence of authority and discipline, but quite in keeping with the interests of the warlords, 'soldiers' discover opportunities for private enterprises of their own.<sup>38</sup>

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<sup>36</sup> Kaldor, *New and Old Wars*, 116.

<sup>37</sup> David Keen, "Incentives and Disincentives for Violence," in *Greed and Grievance: Economic Agendas in Civil Wars*, ed. Mats Berdal and David M. Malone (Boulder CO: Lynne Rienner, 2000), 27.

<sup>38</sup> Kalevi J. Holsti, "The Coming Chaos? Armed Conflict in the World's Periphery," in *International Order and the Future of World Politics*, ed. T. V. Paul and John A. Hall (Cambridge: Cambridge University Press, 1999), 304.

Against Kaldor and the globalization argument it can be pointed out that trade links have always existed between rebel movements and the outside world and are nothing new. Also, one could question if economic motivation is really all that new and unrelated to politics in places like Africa. Poor governance over a long period of time is the real problem in most of sub-Saharan Africa. Conflicts for control over resources in weak states results from, just as much as it is the cause of, armed conflict in places like Liberia and Sierra Leon. When groups challenge the state, especially in post colonial Africa where control over resources is of such importance, to challenge the state is to challenge for control of resources.

The debate over the “revolution in military affairs” (RMA) is another aspect of the rational new war thesis. One can see an antecedent to this in Fuller’s theory of strategic paralysis.<sup>39</sup> On this account, the goal is to weaken and destroy the enemy’s ability to resist by focusing on his command and control structures and sustainment capabilities. Strategic paralysis calls for precise attacks against an enemy’s most vital targets to paralyze his ability to continue the conflict and perhaps even break his will to do so.<sup>40</sup> Both Fuller and Liddell Hart witnessed the introduction of aerial warfare to the First World War and envisioned a decisive role for air power in inducing strategic paralysis. Fuller predicted that, “the difficulty of protecting all the vital points will be immense, and as long as armies are tied to roads and railways, and as long as their strength is mainly based on numbers, I am of the opinion that the advantages of the attack

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<sup>39</sup> J.F.C. Fuller, *On Future Warfare*, (London: Sifton Praed & Company, 1928), 83-105.

<sup>40</sup> The historical antecedent for this idea is Douhet. See David MacIassac, “Voices from the Central Blue: The Air Power Theorists,” in *Makers of Modern Strategy from Machiavelli to the Nuclear Age*, ed. Peter Peret (Princeton NJ: Princeton University Press, 1976), 630.

will rest with the air arm.”<sup>41</sup> Likewise, Liddell Hart reasoned: “The development of air forces offered the possibility of striking at the enemy’s economic and moral centers without having first to achieve ‘the destruction of the enemy’s main forces on the battlefield.’ Air-power might attain a direct end by indirect means – hopping over opposition instead of overthrowing it.”<sup>42</sup>

According to RMA advocates, the Gulf War (1991) signalled a change in the nature of war. While there has been an ongoing debate about whether the RMA constitutes a revolution or an evolution, the appeal of RMA arguments in the West is its mixture of “smart weapons” with the possibility they create for “clean” wars. Driven as it is by civilian rather than military technological developments, Sloan writes: “The central tenet of an RMA is that advances in technology must lead to significant changes in how military forces are organised, trained, and equipped for war, thereby reshaping the way in which wars are fought.”<sup>43</sup> RMA advocates claim improvements in battle space awareness in particular will be able to lift the “fog of war” and Clausewitzian friction and uncertainty.<sup>44</sup>

Others suggest that even though the RMA is technology-driven, the technology is an indication of a much wider change. The Tofflers argue that the character of war reflects the nature of work in a society.<sup>45</sup> They refer to agrarian warfare as “first wave

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<sup>41</sup> Fuller, *On Future Warfare*, 219.

<sup>42</sup> B.H. Liddell Hart, *Strategy: The Indirect Approach*, (1929; repr., London: Faber and Faber, 1954), 358.

<sup>43</sup> Elinor C. Sloan, *The Revolution in Military Affairs: Implications for Canada and NATO* (Montreal QC: McGill-Queen’s University Press, 2002), 3.

<sup>44</sup> See William Owens, *Lifting the Fog of War* (New York: Farrar, Straus and Giroux, 2000), 117-143. For a discussion of friction, see Clausewitz at W 119-121.

<sup>45</sup> Toffler and Toffler, *War and Anti-War*, 33-42, 64-79.

war.” When the hoarding of a surplus of food became possible, capturing surplus wealth and land motivated wars. Wars followed agrarian work patterns; being fought only during intervals between reaping and sowing. As the economy began to change in the 18th century with the introduction of steam power from one based on agriculture to one on industry, this led to industrial warfare or “second wave war.” Second wave war began with the wars of the French Revolution and “the nation in arms,” accelerated with the growing manufacture of interchangeable, machined parts and mass production eventually leading to the total wars of the 20th century. Today, some states have moved into the information age.<sup>46</sup> Information societies connect to and correspond by computer systems. Instead of mass production, there is customized production for markets using intelligent technology. Military forces reflect these economic changes by employing smart weapons with focused lethality and through a conscious attempt to reduce collateral damage. Information war, or “third wave war,” relies on sophisticated communications technology and the use of information feeding precision weaponry.

According to RMA advocates, the development of weapons that have become more accurate and synchronized with each other in their use has changed the nature of war. The “system of systems” will become more effective and lead to dominance of quality over quantity. Support for this claim comes from comparing the First Gulf War (1990-1991) and the Iraq War (2003). In the Iraq war, despite having fewer troops and being out-numbered with respect to number of battle tanks, there were no reports of the

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<sup>46</sup> See Owen E. Jensen, “Information Warfare: Principles of Third-Wave War, in *Aerospace Power Journal* (Winter 1994), <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj94/win94/jenson.html> (accessed 17 July, 2008).

destruction of a single Coalition tank. With respect to the War on Terror, Bruce

Berkowitz concludes:

*Today the ability to collect, communicate, process, and protect information is the most important factor defining military power. In the past armor, firepower, and mobility defined military power, but now it often matters less how fast you can move or how much destructive force you can apply. Stealth trumps armor, precision trumps explosive force, and being able to react faster than your opponent trumps speed.*<sup>47</sup>

Moreover, “information operations,” can also use the technology which brings with it yet another change, as noted by van Creveld:

In conventional warfare, the fact that an advance has to be made, supplies brought forward, ground occupied, and garrisons left behind tend to work against the attack and in favor of the defense; in so far as traversing territory takes time, the same is true of that factor. In information warfare, both geographical space and time is irrelevant. Attacks scarcely require a base. They do not demand that supplies be gathered first, and can be directed at any point from any other point regardless of distance.<sup>48</sup>

For RMA advocates, the increased dependence upon smart bombs and, perhaps in the not so distant future, the use of non-lethal weapons, means the possible minimization of collateral damage.

Yet no major modern war has been decided by a technological innovation. Germany lost the First World War due in large part to the British naval blockade and American intervention into the war, not because of the development of the tank. The invention of the V-2 rocket, the first ballistic missile, did not save Germany from defeat in the Second World War. Even though the US was well ahead of the USSR in military technology, the two countries spent the Cold War in a military stalemate; it was the

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<sup>47</sup> Bruce Berkowitz, *The New Face of War: How War Will be Fought in the 21st Century* (New York: The Free Press, 2003), 21. Emphasis in the original.

<sup>48</sup> Martin van Creveld, “The Transformation of War Revisited,” in *Small Wars and Insurgencies* 13, no.2 (2002): 10-11.

eventual internal collapse of the communist economic system that led to the demise of the USSR and the end of the Cold War. Moreover, while the developed world may dominate the formal battlefield, the actual outcome of conflicts has favored the less developed world and non state actors. The history of decolonization in Africa and South East Asia, the experience of France and the US in Vietnam and more recently the experience of the US in Somalia and NATO in Afghanistan all point in this direction.

A third aspect of the rational new war thesis is that war itself has become *postmodern*. According to the proponents of this view, war essentially has become a media event or a “spectator sport” rather than something that has an impact on the entire society. Wars take place in a social vacuum because they take place on television screens and so few of a society’s resources are utilized in fighting them. Michael Ignatieff argues:

War thus becomes virtual, not simply because it appears to take place on screen, but because it enlists societies only in virtual ways. Due to nuclear weapons, it is no longer a struggle for national survival; with the end of conscription, it no longer requires the actual participation of citizens; because of the bypassing of representative institutions, it no longer requires democratic consent; and as a result of the exceptional growth of the modern economy, it no longer draws on the entire economic system. These conditions transform war into something like a spectator sport.<sup>49</sup>

The reason for the emergence of virtual war is the West’s unwillingness to become militarily involved unless it enjoys overpowering superiority in military power. Increasing reliance upon airpower and precision-guided munitions among Western forces means the West even tries to take death out of wars. In the most recent war in Iraq, even if civilian casualties may exceed military losses, they are not anything like the devastating results of the strategic bombing campaign of the Second World War.

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<sup>49</sup> Michael Ignatieff, *Virtual War: Kosovo and Beyond* (Toronto: Viking Books, 2000), 191.

According to Coker, one reason for the waning utility of trinitarian warfare is public scrutiny of the way in which armed forces are used. He writes: "The military is now expected not only to share the values civil society holds in high esteem, but even in the way it prosecutes war it is expected to reflect civility and compassion - in a word, humanitarianism."<sup>50</sup> It is now much more difficult for states to control the spread of knowledge due to the ubiquity of information and its free accessibility via media such as the Internet. Living in a postmodern society means, "the past has lost its power to determine the present. Instead the future has taken its place as a determinant of present action."<sup>51</sup> The public's growing risk-averseness and increased politicization of previously non-politicized areas of policy has restricted governments' use of its armed forces for political purposes.

Some have criticized this virtual war thesis by claiming that the effects of war are by no means "virtual" for those on the ground.<sup>52</sup> For example, in the Bosnian war, according to the International Criminal Tribunal for the Former Yugoslavia, 55,261 civilians and 47,360 soldiers were killed. But this is to miss the point of the postmodern war argument. Ignatieff's and Cooker's criticism is not that civilians or enemy soldiers on the ground do not feel the effects of war, rather it is that Western civilians, and to a large extent their armies, are insulated from the violence. Yet how does this make these wars new? The colonial wars of the 19th century in Africa have these same characteristics.

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<sup>50</sup> Christopher Coker, *Humane Warfare* (London: Routledge, 2001), 93.

<sup>51</sup> Coker, *Humane Warfare*, 101.

<sup>52</sup> See Jean Baudrillard, *The Gulf War Did Not Take Place* (Bloomington IA: Indiana University Press, 1995).



#### 1.4 Conclusion

Nearly all the writers mentioned above claim that the essentially social paradigm of government, military, and people is obsolete and so is all of Clausewitz's theory. Furthermore, since the *jus in bello* is partly based on the distinction between the combatant and non-combatant, it too is obsolete. However, as the above objections to both versions of the transformation of war thesis indicate, it is not obvious that this is so. Recall that Clausewitz defined the components of the trinity as: (i) primordial violence, hatred, and enmity; (ii) the play of chance and probability; and (iii) the subordination of war to rational policy. It is at least not obvious that these components of the trinity are not relevant.

What is obvious, though, is that violations of the *jus in bello* have increased at an alarming rate. This is in spite of the fact of concerted attempts to extend it to wars that occur both between and within states. This breakdown is due to two factors. The first reason has to do with the nature of total war as it occurred in the 20th century. The underlying structure of the Westphalian state system, in which war played an integral part, had broken down. The second reason has to do with the increase in the number of forms of non-state armed conflicts such as wars of national liberation and civil wars. In these conflicts the law of war is wilfully ignored by one side in the belief that since its cause is just it is able to prosecute its war in any means necessary to win, or because those trying to enforce the law have failed to realize that its underlying cultural assumptions are not appropriate to the conflict at hand.

## Chapter 2

### Total War and the Loss of Restraint

As so often happens, Clausewitz' disciples carried his teaching to an extreme which their master had not intended.

Misinterpretation has been the common fate of most prophets and thinkers in every sphere. Devout but uncomprehending disciples have been more damaging to the original conception than even its prejudiced and purblind opponents. It must be admitted, however, that Clausewitz invited misinterpretation more than most.

- B.H. Liddell Hart, *Strategy: The Indirect Approach*

A consensus emerged in the 19th century that informal precepts of restraint were insufficient in reducing the suffering caused by the new industrial means of waging war. Improved armaments, organization, and transportation had increased the lethality of warfare between modern industrialized states. A more formal means of ensuring the predictability of action between armed forces was necessary to limit the potential destructiveness of war. This created a need for written rules. The motivation for this restraint was essentially the same as it had always been - to limit the effects of war to only those necessary to achieve victory. Attempts in the latter part of the 19th century to codify restraint were, in fact, of high purpose. Unfortunately, as history would show, this objective proved overly optimistic.

Nevertheless, states established a number of codes and conventions to regulate the conduct of war. As in previous times, there was a humanitarian motivation evident in the formulation of these rules. However, also prevalent was a sense of scepticism that humanitarianism was sufficient to moderate the application of force. Many considered the reference to principles of humanity alone as the chief means of limiting military action to

be an ineffective sentimentality. The underlying basis for the rules that emerged was the calculus of restraint by civilized nations predicated upon reciprocity, proportionality, and discrimination.

During the two world wars, though, the belligerents demonstrated that these principles did little to limit the actions of nations. As the conflicts spiralled out of control, established legal constraints became progressively less relevant. The diminishing prospect of victory coupled with military and civilian casualties measured in the hundreds of thousands required recourse to all means necessary to win. Predicated as it is upon a cost-benefit analysis, reciprocity as a moderating principle was suitable only to limited war. When survival itself was at issue, proportionality and discrimination were meaningless. There was, just as Clausewitz had predicted, a tendency toward unrestrained force (W 77).

## 2.1 The Nation in Arms

During the early formation of the Westphalian state system, from the 17th to the end of the 18th century, governments consisted mostly of absolute monarchies who held a sovereign claim over a given territory. When these sovereigns interacted so too did their states. The army was the battlefield representative of the king at war, fighting to achieve the will of the sovereign it represented.<sup>1</sup> These armies were generally small, fought in compact formations, consisted of long serving professional soldiers, many of whom were foreigners, and subject to extreme discipline. Soldiers formed a distinct group apart from the civilian population. They had their own set of customs and laws and formed a highly specialized labour force whose skills the average civilian could not easily learn.

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<sup>1</sup> Peter Paret, *Clausewitz and the State* (Oxford: Clarendon Press, 1976), 24-25.

Therefore, there was a mutual understanding among the sovereigns of Europe that the slaughter of each other's armies was not in anyone's best interest.

This limitation on the means of warfare reflected just one aspect of the unspoken social consensus that constituted Europe's *ancien régime*. This consensus arose out of the Religious Peace of Augsburg (1555), where Ferdinand, Holy Roman Emperor, in discussions with an alliance of Lutheran princes, officially granted Lutheranism official status with the Empire. They agreed that the religion of the region's ruler would determine the religion of the residents. The Religious Peace of Augsburg was only somewhat successful at dealing with the religious tensions in the Holy Roman Empire, as it did not protect other Protestant groups like Calvinists. Attacks on the Calvinists eventually led to the Thirty Years War (1618-1648), devastating much of the German countryside. The Peace of Westphalia (1648) ended the war by introducing the concept of national sovereignty and recognizing the principle of *cuius regio, eius religio*, by which each prince would have the right to determine the religion of his own state.

With the creation of the Westphalian system of sovereign states, when a sovereign made a decision to go to war it would be over some issue of vital national interest; something a war could settle. This limited the scope of war. The final aspect of this consensus was that sovereigns agreed to abide by the outcome of battle. Once a state had lost a decisive battle, it would negotiate a peace. This was in the long-term interest of all since today's enemy could be tomorrow's ally. However, this entailed that your opponent would not press home his advantage. It also reflected small professional armies. The army was an aristocratic institution playing an important role in the *raison d'être* of the nobility. Since one of the primary interests of the aristocracy was in its continued

existence, it made sense that aristocratic officers loyal to the royal families of Europe command soldiers.

However, by the mid 18th century soldiers were becoming increasingly dissatisfied with their lot in life. As Posen claims, "European armies were becoming too good at making war the old-fashioned way."<sup>2</sup> He cites two reasons. One was that the state's administrative and financial capacities were such that rulers could keep their armies in the field much longer than before. Another was that the combination of leadership, drill, and new firepower technology made combat costly to maintain. It was increasingly harder to replace one's infantry quickly enough. On the eve of the French Revolution, some military thinkers, like the Count de Guibert, argued for a committed citizen military, one motivated by loyalty to the state.<sup>3</sup>

The wars of the French Revolution signalled a challenge to the existing social relations among the sovereign, army, and people. These wars were not the wars of one state versus another within a system of states. Instead, these wars were the wars of a new society versus the social structure that held the old system together.<sup>4</sup> With the collapse of the *ancien régime* in France, the legitimacy of the French state's ruler no longer rested solely on the precedent of succession but on his or her relation to the people. This was the birth of popular sovereignty. The French state was no longer strictly a political structure that contained a sovereign power. It became a structure holding a nation of equal citizens.

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<sup>2</sup> Barry R. Posen, "Nationalism, the Mass Army, and Military Power," in *International Security* 18, no. 2 (Autumn 1993): 90.

<sup>3</sup> R.R. Palmer, "Frederick the Great, Guibert, Bulow: From Dynastic to National War," in, *Makers of Modern Strategy*, 107-108.

<sup>4</sup> Philip Windsor, *Strategic Thinking: An Introduction and Farewell*, ed. Mats Berdal and Spyros Economides (Boulder CO: Lynne Rienner Publishers, 2002), 25.

When it interacted with other states, it did so as the political representative of a sovereign people. As foreseen by Clausewitz, this resulted in ideological war and the increased size of armies would make the established limitations on war obsolete.<sup>5</sup>

Napoleon demonstrated the effectiveness of the new, politically motivated mass army. A state cannot easily oppose such an army, except with a similar army. However, those who adopted this model also needed to adopt its politics. This helped to spread nationalism across Europe.<sup>6</sup> The key to such an army's success is not just its size, but its ability to maintain that size in the face of war. It can maintain its size because with the right of citizenship also came the responsibility of defending the nation. Size alone is not the only requirement, though. To be truly successful, the mass army must be able to maintain its combat power. As noted by Posen, individual soldiers must arrive with the ability to be educated and a commitment to the outcome of battle, and then they must be quickly armed, trained, and organized in order to move them over great distances.<sup>7</sup> This made political motivation and literacy important elements in the development of the mass army.

Another important factor along with nationalism in the rapid increase in size of European armies was the implementation of conscription. Prussia implemented conscription reluctantly. In 1808, its Military Reorganization Commission recommended both the adding of conscripts and volunteers to the regular army and the formation of a volunteer militia. In 1810, it then recommended universal service, though the King, many aristocrats, and the middle classes opposed the idea. The Prussian army numbered 60,000

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<sup>5</sup> Windsor, *Strategic Thinking*, 26.

<sup>6</sup> Posen, "Nationalism, the Mass Army, and Military Power," 82.

<sup>7</sup> Posen, "Nationalism, the Mass Army, and Military Power," 83.

men on the eve of Napoleon's invasion of Russia. It would not be until Napoleon's defeat at Moscow, though, that Prussia, allied with France at the time, could contemplate rebellion. Clausewitz believed fighting a war to regain Prussian independence from France was a cause Prussians would embrace. In 1813, Prussia implemented universal military service and Scharnhorst eliminated the practice of foreign recruitment of soldiers in favour of a "national people's army," a directive put in place at the time of the 1813 revolt.<sup>8</sup> By March of 1813 the size of the Prussian army had more than doubled to 130,000 men. By the fall of 1813 it had more than doubled in size again to 270,000 men.

In the European state system that emerged with the defeat of Napoleon, national interest, rather than ideology, came once again to form the primary purpose of war. Policy, which expresses such objectives, as Clausewitz stated, is strictly the business of governments (W 89). Thus, armies fighting to achieve a political purpose in war were fighting to achieve the will of the governments they represented. Conversely, governments were attempting to realize their political objectives with their armies. These armies were bound to clash given the assumption that all states were sufficiently similar in nature and pursued similar goals. It was this kind of conflict, the conflict between armies as tools of state policy within a system of states, that Clausewitz considered war.

The 19th century gave the name "cabinet war" to such wars. These were wars completely controlled by the state, and separated as much as possible from the nation at large. Methods of land warfare had changed in Europe since the end of the Napoleonic Wars. Once again, war involved the use of limited means in order to achieve limited ends. When fighting a war the aim was to out-manoeuvre and out-gun your enemy and whoever

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<sup>8</sup> Hans Delbruck, *The Modern Era* [1920], vol. 4 of *History of the Art of War: Within the Framework of Political History*, trans. Walter J. Renfroe (Westport CT: Greenwood Press, 1985), 451; Peter Paret, *Clausewitz and the State*, 234-237

won the decisive battle claimed the right to the spoils of victory. The contest ended when one side had demonstrated it had fielded the superior fighting force.

## 2.2 Prelude to Total War

The US Civil War (1861-65) represents another important change in the nature of war. If total war means the use of “military force against the civilian population of the enemy,” then the Civil War marks a turning point.<sup>9</sup> The Union Army was the first to use this tactic on a widespread scale and it played a crucial role in defeating the South.<sup>10</sup> However, though the US Civil War is the historical antecedent to the phenomenon of total war it did not start out this way. Early on Civil War leaders found the tactic of targeting non-combatants repugnant as it contradicted their own social code of military behaviour. The North only turned to this strategy when faced with the intransigence of the South.

Grant, who studied at the US Military Academy at West Point, did not learn the strategy of total war there. Instead, he learnt engineering and fortification. When instructors taught military strategy, it was traditional European strategy and not about war versus civilians.<sup>11</sup> Indeed, there was positive pressure to prevent it as seen in Article 22 of General Orders 100:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself,

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<sup>9</sup> John Bennett Walters, *Merchant of Terror: General Sherman and Total War* (Indianapolis IN: Bobbs Merrill Company, 1973), xii.

<sup>10</sup> See Lance Janda, “Shutting the Gates of Mercy: The American Origins of Total War, 1860-1880,” in *The Journal of Military History* 59, no.1 (January 1995): 7-26; Russell F. Weigley, “A Strategy of Annihilation: U.S. Grant and the Union,” in *The American Way of War: A History of United States Military Strategy and Policy* (New York: Macmillian, 1973), 128-152;

<sup>11</sup> Janda, “Shutting the Gates of Mercy,” 9-10.



with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.<sup>12</sup>

Yet no one could foresee the consequences of what was about to happen.

The very nature of the US Civil War led to the targeting of civilians. While it may have taken the Union Army some time to realize it, bringing the Confederacy back into the Union and having it accept the Constitution would require the complete subjection of the South. Grant changed his view regarding Southern civilians after seeing their resistance at Shiloh:

I gave up all idea of saving the Union except by complete conquest. Up to that time it had been the policy of our army, certainly of that portion commanded by me, to protect the property of the citizens whose territory was invaded, without regard to their sentiments, where Union or Succession. After this, however, I regarded it as humane to both sides to protect the persons of those found at their homes but to consume everything that could be used to support or supply armies.<sup>13</sup>

He believed that the destruction of enemy supplies “tended to the same result as the destruction of armies.”<sup>14</sup> The question now was how to force millions of people, both civilian and military, into submission. No contemporary military doctrine answered this question so Grant decided to wage war on the Confederacy’s resources and fit traditional military tactics to accommodate the Union’s strategic needs. The result was both sides calling on their entire societies to contribute to the war effort. Ideologically, citizens could not be disinterested with one set of values fighting against another set of values.

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<sup>12</sup> Instructions for the Government of Armies of the United States in the Field, Promulgated as General Orders 100 (Leiber Code), 1863, *LOAC*, 7.

<sup>13</sup> U.S. Grant, *Person Memoirs of U.S. Grant* (Toronto: Rose Publishing Company, 1886), 1: 368-369.

<sup>14</sup> Grant, *Personal Memoirs of U.S. Grant*, 1: 369.

During this same time, several European nations were entering a phase of mass-mobilization. After Napoleon was defeated, the European powers restored the international and domestic *status quo*. There was no longer a European hegemon. The victorious allied powers restored the French monarchy under Louis XVIII, and many of the political reforms in countries previously allied with France were rolled back. Most importantly, they did not want highly motivated mass armies because of the types of wars to which these could lead. What France and Prussia both kept, though, was a homogenous national army devoid of foreign units and hired private soldiers.

According to Posen, both France and Prussia learnt important lessons during this period.<sup>15</sup> Their autocratic rulers came to understand the relationship between expanded participation in the military and expanded participation in politics. Therefore, they based their opposition to the former on their opposition to the latter. Yet France and Prussia did keep the idea of a homogenous national army and the state's right to conscript men into its service. They kept this because it was useful tool. As Prussian political ambitions grew it adopted, against the will of many in the aristocracy, a professionally controlled army that helped aid in the "socialization" of the Prussian people. Prussia even expanded and improved its education system to aid in this process despite its fears of the social consequences of such action.<sup>16</sup> Since Prussian policy had the most influence on France, it too implemented similar reforms.

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<sup>15</sup> Posen, "Nationalism, the Mass Army, and Military Power," 105-106.

<sup>16</sup> Gordon A. Craig, *Germany 1866-1945* (Oxford: Oxford University Press, 1978), 186-187.

The rising tensions between France and Prussia finally came to a head in the Franco-Prussian War (1870-71), shattering the European balance of power.<sup>17</sup> This war is important because advances in technology allowed Prussia and its German allies to utilize the private sector more so than had been the case in any previous war. The invention of cast steel allowed for cannon and breech loading needle guns, so effective in the Austro-Prussian War (1866), to be more easily mass-produced while standard army factories and armouries found the process expensive and beyond their means. The first half of the 19th century witnessed an industrial boom in Prussia and a system of railways was necessary for its proper development and organization. Railways allowed for quick mobilization of large numbers of troops to border points and for armies to take supplies with them in larger quantities than ever before. Moltke's invasion plans involved beating France to the battlefield by using Prussia's rail system.<sup>18</sup>

Efficient mobilization was the key to Prussia's victory in the Franco-Prussian War. The logistics of mobilizing and supplying militaries was becoming so complex that by the time the First World War began all the commanders in chief were logistics experts.<sup>19</sup> Such an increase in size, coupled with the process of mass-producing high quality cannon and rifles, meant that it was becoming much more expensive to wage war than previously. In 1816, the total expense of the Prussian military was 66.95 million

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<sup>17</sup> See Michael Howard, *The Franco-Prussian War: The German Invasion of France, 1870-1871*, (New York: Macmillan, 1962).

<sup>18</sup> Hajo Holborn, "The Prusso-German School: Moltke and the Rise of the General Staff," in *Makers of Modern Strategy*, 287.

<sup>19</sup> See Michael Howard, "The Wars of the Technologists," in *War in European History* (Oxford: Oxford University Press, 1976), 116-135.

marks. By 1862 it had risen to 118.8 million marks.<sup>20</sup> The funding and supplying of a war now had to come from the nation through taxation and industry.

These advances in technology coincided with widespread reform of the Prussian military in the early 1860s. Von Roon, the Prussian Minister of War, shifted the *Landwehr* into the main body of the army. This was both a hedge against revolution and insurance that the Prussian government would have a monopoly on force within Germany. Von Roon also increased the number of years of service required in the reserves. This increased Prussian wartime strength from 212,650 in 1861 to 552,000 by 1869.<sup>21</sup> The series of campaigns against Austria for control of the German principalities increased Germany's confidence in Bismarck. The defeat of the Austrian army at Königgrätz (July 3, 1866), the largest battle seen in Europe to that date, brought Bismarck tremendous political support in the 1866 Prussian election where liberals suffered a major defeat. Most of the German principalities joined in a Northern German Confederation dominated by Prussia. This made the Prussians and Germans more aggressive when considering war with France. Moltke's strategy for war involved a swift, decisive action to achieve a quick victory. The first part of the campaign worked well as the Prussian army was more organized than was the French army. Within four weeks, the French were contained in Metz and Prussia had defeated the main French army at Sedan, capturing Napoleon III.

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<sup>20</sup> Manfred Messerschmidt, "The Prussian Army from Reform to War," in *On the Road to Total War: The American Civil War and the German Wars of Unification, 1861-1871*, ed. Stig Forster and Jorg Nagler (Cambridge: Cambridge University Press, 2002), 267-268.

<sup>21</sup> Martin Kitchen, *A Military History of Germany from the Eighteenth Century to the Present Day* (Bloomington IN: Indiana University Press, 1975), 122.

By the unspoken rules under which cabinet wars functioned, the French should have surrendered on terms dictated to them by Prussia. However, Prussia failed to take account of the level of French nationalism. The French government was overthrown, a new republic declared, and a citizen's army created. Guerrilla warfare threatened Prussian troops and their supply lines.<sup>22</sup> This led to orders to execute guerrillas. This in turn led to more attacks on the Prussians. The willingness of French citizens to fight on behalf of their country reflects other trends towards total war. First, it demonstrated that an untrained militia was no real match for a modern conscript army. Second, the targeting of civilians gained sudden wartime legitimacy because, though the guerrillas were *franc-tireurs* targets, any citizen who could conceivably influence the outcome of the war was now one as well. This included the entire city of Paris, which had set up a people's commune - a government in civilian hands.

### 2.3 The Codification of the Laws of War

It was during the period between the US Civil War and the First World War that a series of international agreements codified into positive law the distinction between government, army, and people. One reason was to distinguish war from mere criminal activity. Only soldiers were legally permitted to engage in armed violence on behalf of the state. The intention behind the formalization of the distinction between combatants and non-combatants was to protect soldiers from citizens as much as the other way around by insisting that only soldiers could wage war. Although non-combatants were becoming an important factor in waging war, political philosophers still considered it unjust to attack non-combatants directly. This attitude was found in both the religious

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<sup>22</sup> See Howard, *The Franco-Prussian War*, 249-256

concept of just war and the secularized *jus in bello*.<sup>23</sup> Another reason was to replace the general principle of military necessity with a set of context-free, specific rules that Neff refers to as the “code of conduct” approach.<sup>24</sup> These laws would apply even-handedly to each side and intended to engender a kind of sporting ethos with respect to war.

The seminal step in the codification process was the Lieber Code. Developed as a set of rules for the conduct of the US Civil War, the Code is significant because it was the first time since ancient Rome that a state had adopted a formal code of law to regulate its army’s conduct towards enemy soldiers and protect non-combatants and prisoners of war. However, the Code envisioned a reciprocal relationship between the population and the army. As long as the population did not resist military authority, the army treated the population well. Should civilians violate this compact by taking up arms and supporting guerrilla movements they were open to “be treated summarily as highway robbers or pirates.”<sup>25</sup>

Around the same time, Henri Dunant and others at an international conference in Geneva adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field and formed the International Committee of the Red Cross (1864).<sup>26</sup> Additional Geneva Conventions in 1929 and 1949 would address issues regarding the

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<sup>23</sup> F.H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), 186; Ian Clark, *Limited Nuclear War* (Princeton NJ: Princeton University Press, 1982), 51-52.

<sup>24</sup> Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), 186-191.

<sup>25</sup> Article 82, Lieber Code, *LOAC*, 14.

<sup>26</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field forming the International Committee of the Red Cross, 1864, *LOAC*, 213-216.

treatment of prisoners of war, the protection of civilians, the treatment of the sick and wounded and the status of medical persons and facilities.

In 1868, representatives of various states met in St. Petersburg and adopted a declaration against the use of explosive bullets. Their reasoning was as follows:

The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; for this purpose, it is sufficient to disable the greatest number of men; this object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable; the employment of such arms would, therefore, be contrary to the laws of humanity.<sup>27</sup>

The importance of the St. Petersburg Declaration lay in the fact it was the first international agreement regulating the conduct of war and it clearly acknowledged the principle that unnecessary harm was “contrary to the laws of humanity.” It also expressed the prevailing ethos of the time that targeting civilians was an illegitimate war aim by stating the only legitimate goal in war is to weaken the military forces of the opponent. Unfortunately, this and other “laws of humanity” applied only in “time of war between civilized nations” and only to wars conducted between the contracting parties. Outside the confines of the Westphalian state system, things could be quite different.

Influenced by Bloch’s views about the effects of new technology and total war, Czar Nicholas II called for a peace conference. Bloch, who had made his fortune in railways, banking, and investments, began to write in the early 1890s that the world had evolved to a point where peaceful competition and cooperation between states was

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<sup>27</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868, *LOAC*, 95-96.

essential to the maintenance of the global economic system.<sup>28</sup> War would undermine economic stability and the European state system would not be able to survive either its economic or political strains. Bloch proposed that the economic linkages and technological advances that had occurred in European society required parallel legal systems and political institutions to protect them against aggressive nationalism and militarism. New technologies such as smokeless gunpowder and maxim guns had changed the nature of war and made open ground manoeuvres such as bayonet and cavalry charges obsolete.<sup>29</sup> Bloch's analysis of new weapons was an accurate description of the overwhelming firepower that was now in the hands of modern industrial armies. The conclusion he drew from this was that any war in the future between Europe's Great Powers would be a defensive war of attrition involving all their social, economic, and industrial might. The side that would win would be the one who could hold out the longest.

Along with these changes, Bloch also emphasized the psychological effect that modernity was having on European civilization. He thought a great revolution in moral life had taken place that had unsettled the emotions of most urbanized Europeans.<sup>30</sup> One interpretation of this situation understood modern European society as degenerate.<sup>31</sup> On this analysis, modern life was moving too quickly and the average person was being overwhelmed. Bloch did not conclude from this that modernity was bad. He did believe,

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<sup>28</sup> See Grant Dawson, "Preventing 'A Great Moral Evil': Jean de Bloch's 'The Future of War' as Anti-Revolutionary Pacifism," in *Journal of Contemporary History* 37, no.1 (January 2002): 5-19.

<sup>29</sup> Jean (aka Ivan) de Bloch, *The Future of War in its Technical, Economic, and Political Relations* [1902], trans. R.C. Long (New York: Garland Publishing, 1972), 33-34, 50.

<sup>30</sup> Bloch, *The Future of War*, 60.

<sup>31</sup> See Max Nordau, *Degeneration*, [1895] (New York: H. Fertig, 1968).



though, that modern men were no longer psychologically capable of waging war and that peace was necessary to ensure for economic security. Speaking about future industrialized war, Bloch said, “the wear and tear would be terrible, and the modern man is much less capable of bearing it than were his ancestors. The majority of the population tends more and more to gravitate to cities, and the city dweller is by no means so capable of lying out at nights in damp and exposed positions as the peasant.”<sup>32</sup>

The Czar, though, was not so much interested in peace as he was fearful of Russia’s inability to keep up with Western technological advances.<sup>33</sup> The two Hague Conferences of 1899 and 1907 were the largest diplomatic conferences between the Congress of Vienna and the outbreak of the First World War.<sup>34</sup> Eyffinger has described the Hague Conferences as a “head on clash of two opposite perceptions of international society and conflicting outlooks on the law.”<sup>35</sup> On the strict positivist view, there was no such thing as international law since it was not enforceable. Treaties expressed the will of states and states could abrogate treaties when they no longer served the state’s interests.

However, a new humanitarian outlook was developing during this time. Growing wealth and education was creating a society uneasy with the brutalities of war; brutalities that new developments in communications technology brought to their very doorsteps.

The reporting of William Russell of *The Times* and Roger Fenton’s photographs of the

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<sup>32</sup> Bloch, *The Future of War*, xxxix.

<sup>33</sup> Sandi Cooper, Introduction to *The Future of War*, 5.

<sup>34</sup> For a history see Barbara Tuchman, *The Proud Tower: A Portrait of the World Before the War, 1890-1914* (New York: MacMillan, 1966), 229-288; Adam Roberts, “Land Warfare from Hague to Nuremberg,” in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopoulos, Mark R. Shulman (New Haven CT: Yale University Press, 1994), 119-123.

<sup>35</sup> Arthur Eyffinger, “A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference,” in *Netherlands International Law Review*, 54 (August 2007): 199.

Crimean War (1854-56), especially regarding the charge of the Light Brigade and the conditions endured by the British army during the harsh winter of 1854, led to the resignation of Lord Aberdeen as Prime Minister. Sidney Herbert, the Minister of War, appointed Florence Nightingale to go to Turkey and establish the use of nurses in hospitals for the wounded. During the US Civil War, the photography of Mathew Brady appeared in *Harper's Weekly*. Northern reporters freely walked the battlefields questioning Generals on subjects such as tactics and used telegraphs to send out their stories more quickly than ever before.

As middle class Western European liberals became wealthier due to industry and trade, they struggled for political power against aristocratic, agrarian based elites who derived their power from, heredity, their military status, and mercantilist economic policies.<sup>36</sup> According to mercantilism, the economic theory driving the European dynasties, increasing the nation's wealth required a positive balance of trade. Following this logic, economic policy is a zero-sum game that leads to military rivalry over such things as commodities and trade routes. Yet warfare disrupted the growing wealth of the emerging commercial class. As the franchise began to expand, aristocratic foreign ministers who were now sharing power with businessmen, had to take public opinion into account. Peace movements began to spring up in Britain, France, and America and they received much of their support from this emerging business class.

This new humanitarianism also made itself felt in international law. Lawyers like Bluntschli and Westlake saw the essence of law, not in the presence of an effective

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<sup>36</sup> See Michael Howard, *War and the Liberal Conscience: The George Macaulay Trevelyan Lectures in the University of Cambridge, 1977* (New Brunswick NJ: Rutgers University Press, 1978), 36-39.

sanction, but in law-abiding sentiments that lay behind the law.<sup>37</sup> They shared in the liberal view that the unprecedented economic prosperity of the times made peace too important an issue to be left in the hands of Europe's dynastic families. Nationalism served the interests of dynasties while internationalism served the interest of the people and democracy. The objective basis of international society in their eyes was law and the determining element of the law was not the sovereign but the people.<sup>38</sup> As it turned out, the peace movement could not so easily move public opinion. The Crimean War, for example, was popular among the British people. More importantly, liberals on the Continent were not so much interested in peace as they were in freedom; a freedom for which they were ready to fight.<sup>39</sup>

Nicholas II originally proposed the Hague Peace Conference to discuss the limitation of armaments but expanded the agenda to include the laws of war on land, extension of the 1864 Geneva Conventions, war at sea, and international arbitration. These topics made the conference acceptable to governments determined to oppose arms limitation. At the same time, peace movement leaders who labelled the proposed meeting a "peace conference" welcomed the addition of arbitration to the agenda.

The 1899 conference accomplished little with regard to the reduction of armaments. The German delegates opposed limits on armies and the British opposed limits on navies. The Russians proposed bans on new firearms, submarines, and ships with rams, and prohibitions against throwing projectiles or explosives from balloons. The

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<sup>37</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), 48.

<sup>38</sup> Koskenniemi, *The Gentle Civilizer of Nations*, 47-67.

<sup>39</sup> Howard, *War and the Liberal Conscience*, 46-47.

conference did nothing about new firearms or submarines but did negotiate declarations against expanding bullets, poison gas, and the aerial use of explosives from balloons. Renewal of the balloon declaration was the only arms limitation of the 1907 conference. German opposition to arms limitation convinced the Russians that this topic should not appear on the 1907 agenda. An Anglo-American resolution recognizing the seriousness of the arms race was only a gesture.

However, the Hague Conferences did make important advances in codifying the laws of land warfare. The Lieber Code strongly influenced the non-ratified Brussels Project.<sup>40</sup> The 1899 Hague Conference concluded a comprehensive convention based on that declaration, which proved its worth during the Second Boer War (1899-1902) and the Russo-Japanese War (1904-1905). The 1907 Hague Conference revised that convention and concluded two related conventions: one, concerning neutral rights and duties on land and another requiring a formal declaration of war before the beginning hostilities.<sup>41</sup> The 1899 conference achieved little for the laws of war at sea. The Russian proposals called for extending the 1864 Geneva Convention protecting victims of war on land to those at sea. Though accomplished, there was little discussion of larger matters such as an American proposal that the conference consider immunity of private property at sea from capture, a traditional US principle. The British blocked this proposal.

The 1907 conference, however, dealt seriously with war at sea because the Russo-Japanese War had presented neutrals with several problems. The conference concluded a new convention about the Geneva rules at sea and conventions about the

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<sup>40</sup> Project of an International Declaration Concerning the Laws and Customs of War, (Brussels Project), 1874, *LOAC*, 25-34.

<sup>41</sup> Hague Convention V, 1907, *LOAC*, 848-854; Hague Convention III, 1907, *LOW*, 303-307.

status of merchant ships at the beginning of hostilities, conversion of such vessels into warships, submarine mines, and the maritime rights and duties of neutrals. British, German, and American delegates pushed for Convention XII, which provided for an international prize court, but there was general recognition that the restrictions on capture in Convention XI were inadequate for decisions by the proposed court.<sup>42</sup> The British called a special conference to consider blockades and contraband. The result was the Declaration of London (1909), a careful statement of prize law. But when the British House of Lords blocked ratification, other governments also delayed action.<sup>43</sup> During the first months of the First World War, American efforts to secure the adherence of the belligerents failed largely because of British objections. Soon forgotten, too, was the project for an international prize court.

International arbitration agreements were major achievements of the Hague conferences. The 1899 conference framed a convention setting forth principles and procedures.<sup>44</sup> British and American proposals resulted in the Permanent Court of Arbitration; a list of judges named by signatory powers from which parties to an arbitration could select a panel of judges.<sup>45</sup> US delegates at the 1907 conference called for an agreement to make arbitration obligatory in a very limited sense and a Court of Arbitral Justice that would have had a few judges sitting continuously. The Germans defeated agreement on obligatory arbitration. Several small nations, particularly in Latin

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<sup>42</sup> Hague Convention XII, 1907, *LOAC*, 737-749; Hague Convention XI, 1907, *LOAC*, 731-736.

<sup>43</sup> Final Protocol and Declaration Concerning the Laws of Naval War, (Declaration of London), 1909, *LOAC*, 755-768.

<sup>44</sup> Hague Convention I, 1899, *LOW*, 204-220.

<sup>45</sup> Chapter 2, Hague Convention I, 1899, *LOW*, 211-213.

America, defeated the court proposal by insisting upon equal representation for all member governments. The United States, however, secured a convention requiring that unless first offered arbitration no nation could use force to collect debts.<sup>46</sup>

Though such agreements as the Hague Conventions comprise much of international law with respect to warfare, customary law also plays a significant role. As stated in the Preamble to Hague Convention IV:

Until a more complete code of laws of war had been issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public consciousness.<sup>47</sup>

However the total, industrialized warfare of the 20th century that pitted society against society was about to question this assumption of a common code of conduct and values that underlay the Westphalian system.

## 2.4 Total War and the Loss of Restraint

Clausewitz's influence on European strategy arose from Moltke's successes in the Austrian and French campaigns. As a result, Clausewitz became instantly fashionable.<sup>48</sup> However, though the operational aspects of Clausewitz's writings influenced Moltke, he believed that Clausewitz's subordination of the military to political control was incorrect. It would be "Moltke's view of the matter, not that of Clausewitz, which became dominant in Imperial Germany toward the end of the nineteenth century

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<sup>46</sup> Hague Convention II, 1907, *LOW*, 298-302.

<sup>47</sup> Preamble to Hague Convention IV, 1907, *LOAC*, 64.

<sup>48</sup> Michael Howard, *Clausewitz* (Oxford: Oxford University Press, 1983), 59.

even though it was during those years that Clausewitz was being most widely acclaimed.”<sup>49</sup>

Then, in 1883, von der Goltz published *Das Volk en Waffen* challenging Clausewitz’s view of the nature of war. For Clausewitz, armies under the direction of the state fought wars. His concept of absolute war, in contrast to total war, was something used in a dialectical analysis of the nature of war. Actual war would be quite different from absolute war because of the forces of friction. Modern economic, technological, and military developments made Clausewitz’s trinitarian view obsolete according to von der Goltz. The railway and telegraph made it possible for the integration of a country’s entire resources towards waging war. Between 1870 and 1910 the number of kilometres of railway track in Germany grew from 18,560 to 59,031 while the number of telegraph offices increased more than ten-fold from 4,000 to 45,000.<sup>50</sup> In fact, Germany laid out its railway specifically for military purposes. During the wars against Austria and France, the German General Staff took control over both the railway and the telegraph system.

For von der Goltz, in contrast to Clausewitz, total war involved the supremacy of military priorities over civilian priorities. War gave the military an opportunity to reassert itself over the commercial and industrial classes that, as von der Goltz understood, had used their economic power to gain greater social importance over the military. Those in the military saw war as “the ultimate proving ground” for their countries in the social

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<sup>49</sup> Michael Howard, “The Influence of Clausewitz,” in *On War*, 31.

<sup>50</sup> Hans Speier, “Ludendorff: The German Concept of Total War,” in *Makers of Modern Strategy: Military Thought from Machiavelli to Hitler*, ed. Edward Mead Earle (Princeton NJ: Princeton University Press, 1943), 310.

Darwinist sense of the term.<sup>51</sup> Just like other organisms, countries were in competition for survival. Devoting every resource their country had to win this struggle for survival was just common sense to them. As van Crefeld described the military's sentiment, the armoured king, not the suit-wearing politician, should lead war.<sup>52</sup>

By the time of the First World War, warfare had reached an unprecedented level of industrial sophistication. This period witnessed major changes in gunpowder weapons and ammunition on land, and improved ships and firepower for navies. On land, the improved speed and accuracy of guns meant that traditional offensive tactics like charging cavalry or infantry were no longer effective. Rifles could now fire every few seconds and the machine gun could fire up to 600 bullets per minute at targets nearly 4,000 metres away. If well entrenched, gunners could kill up to 1,000 infantrymen in a matter of minutes. Superiority now lay with the defence. At sea, there was a build up of heavily armoured steam powered warships with increasingly larger cannons. This period also saw the rise of smaller torpedo boats and submarines.

The combination of advanced military technology and the resources of the modern industrial state would allow military commanders like Ludendorff to transform von der Goltz's vision of total war into reality.<sup>53</sup> According to Ludendorff, the basis of total war was not in its political structure but in demographics and technological developments. A larger population and a more efficient destructive capacity created total war. For Ludendorff, war was total in that it required the active participation of the entire

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<sup>51</sup> Azar Gat, *The Development of Military Thought: The Nineteenth Century* (Oxford: Clarendon Press, 1992), 79-80.

<sup>52</sup> Van Crefeld, *The Transformation of War*, 44.

<sup>53</sup> See Speier, "Ludendorff: The German Concept of Total War," 315-318.



nation and in the geographic sense that the theatre of war extended over the entire territory of the enemy. To achieve victory, the state required the entire economic structure of the nation put towards the prosecution of the war. However, this would have to occur well before the outbreak of actual hostilities. In order to get the entire nation behind the war effort, propaganda would be required to strengthen morale at home. Propaganda would also be useful in weakening the morale of the enemy nation. Finally, to achieve the necessary economic, technological, and military efficiencies, one supreme authority - the commander-in-chief - would direct the war effort:

The military staff must be adequately composed: it must contain the best brains in the fields of land, air, and sea warfare, propaganda, war technology, economics, politics and also those who know the people's life. They have to inform the Chief-of Staff, and if required, the Commander-in-Chief, about their respective fields. *They have no policy-making function.*<sup>54</sup>

There would be no Clausewitzian division of government, army and people, only a war-state with one leader, in permanent control, and not subject to elections.

Conventional wisdom was that such a level of industrialization would lead to decisive action on the battlefield just as had occurred in the Franco-Prussian War. However, this was not the case for two reasons.<sup>55</sup> One was the supremacy of the defence. Well-entrenched gunners with the new machine guns could kill hundreds of infantrymen in minutes while barbed wire could outlast modern artillery fire. The supremacy of the defence consigned equally matched opponents to the stalemate of the trenches. One obvious way of breaking the stalemate was to cut off the supply of munitions and other equipment to the front by destroying the factories that produced the goods. However,

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<sup>54</sup> Erich von Ludendorff, *The Nation at War* (London: Hutchinson, 1936), 111. Italics added.

<sup>55</sup> Windsor, *Strategic Thinking*, 38-40.

there was little practical means of actually destroying domestic production behind enemy lines. This strategy would have to wait until air forces fully matured in the Second World War.

A second reason was that, as the death toll in war increased, countries could no longer appeal to narrow self-interest to motivate new recruits and existing troops. However, as the principles fought for became vaguer, such as “to make a land fit for heroes to live in,” it became harder to know for what one was fighting. This in turn made negotiating a peace unfeasible since, if war means anything, it is as a tool for resolving disputes.

It was unrealistic to believe that the economic, technological and military advances occurring in industrial societies up to this point would end. It was also unrealistic to expect armies in the future to forgo the advantages they may receive from these factors. The internal-combustion engine made the Second World War more mobile than any previous war. Ground transportation became much more efficient and reliable than in the previous war. However, air power truly changed how both sides fought the war. As noted by MacIsaac: “The task of such forces would be to attack targets far removed from the battle lines, with the aim of destroying essential elements of the enemy’s capability to wage war by bombing his factories, transportation hubs, and centers of government.”<sup>56</sup> Cutting off enemy supplies at the source was now a real possibility and held out the hope of avoiding the level of battlefield destruction witnessed during the previous World War.

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<sup>56</sup> David MacIsaac, “Voices from the Central Blue: The Air Power Theorists,” in *Makers of Modern Strategy*, 628.

Though planners hoped that strategic bombing would avoid the need for blockades and wars of attrition, things did not work out as planned. Due to the general inaccuracy of targeting, strategic bombing was of only limited effectiveness. However, what it did accomplish was the further blurring of one aspect of the trinitarian structure of war: the combatant/non-combatant distinction. The inaccuracy of targeting led to the destruction of both residential and industrial areas. There was a psychological effect also intended by the strategic bombing campaign. In line with the theory of total war, one way to prevent citizens from going to work in the factories and support the continuation of the war effort was to terrorize them. This would make the enemy easier to defeat. The combination of industrial technology and mass mobilization had finally put civilians directly into harms way.

## 2.5 The Outlawing of Aggressive War

It seemed that the only solution to this deadly mix of industrialization and war was to outlaw the resort to war entirely. After the First World War, the prevailing attitude was that any future war was going to be far worse than anything witnessed to date. Given the resources of the modern industrial state and advances in military technology, it seemed far more realistic that countries prevent the outbreak of war rather than attempt to humanize it.<sup>57</sup>

The Covenant of the League of Nations attempted to qualify the right to go to war in a more comprehensive way than ever before. In Article 10, members undertook “to respect and preserve, as against external aggression, the territorial integrity and existing

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<sup>57</sup> Adam Roberts, “Land Warfare: From the Hague to Nuremberg,” in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopoulos and Mark R. Shulman (New Haven CT: Yale University Press, 1994), 128.

political independence of all Members of the League.”<sup>58</sup> The League introduced the concept of collective security to accomplish this goal. Article 11 stated that any war or threat of war was a matter of concern to the entire League.<sup>59</sup> Article 16 stipulated that if any member resorted to war in violation of its obligations under Articles 12, 13, or 15 of the Covenant, then that member had committed an act of aggression against all other members.<sup>60</sup> Though member states could apply commercial and financial measures against an aggressor state, only the League’s Council was entitled to make (non-binding) recommendations regarding military action.

The Covenant, though qualifying the right to go to war, did not abolish it altogether. For example, Article 15 allowed states, in the absence of unanimous or a proper majority in the Assembly, to “reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.”<sup>61</sup> Article 12 implied that if the Council or the Assembly could not reach a decision regarding a dispute within six months, or a judicial decision or judicial award did not come “within a reasonable time,” the parties to the dispute would be free to take whatever action they saw fit.<sup>62</sup> The League attempted to close these gaps with the Geneva Protocol for the Pacific Settlement of International Disputes (1924). Though it never entered into force, in Article

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<sup>58</sup> Article 10, Covenant of the League of Nations, 1919, *LOW*, 424.

<sup>59</sup> Article 11, Covenant of the League of Nations, 1919, *LOW*, 424.

<sup>60</sup> Article 16, Covenant of the League of Nations, 1919, *LOW*, 426-427.

<sup>61</sup> Article 15, Covenant of the League of Nations, 1919, *LOW*, 426.

<sup>62</sup> Article 12, Covenant of the League of Nations, 1919, *LOW*, 425.

2 the Contracting Parties agreed “in no case to resort to war,” except in resistance to aggression or with the consent of the League’s Council or Assembly.<sup>63</sup>

It would not be until the Treaty of Paris (1928) that war as an instrument of national policy became illegal. Article I condemned the “recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.”<sup>64</sup> According to the Preamble, any Contracting Party “which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.”<sup>65</sup> In Article II, the Contracting Parties agreed that the settlement of all disputes with each other “shall never be sought except by pacific means.”<sup>66</sup> Some claim the Treaty’s significance for the international law of war lay in the fact that the law had now progressed from *jus ad bellum* to *jus contra bellum*.<sup>67</sup> Yet war remained lawful under certain circumstances, such as wars of self-defence and the upholding of general community values.<sup>68</sup> Since the Kellogg-Briand Pact did not explicitly regulate self-defence, it did not set out its parameters, nor was a body created to determine whether a state employing military force was acting in self-defence or in breach of the Pact. War outside the reciprocal relations of the Contracting Parties also continued to be possible. The renunciation of War in Article I was limited only to

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<sup>63</sup> Article 2, Geneva Protocol for the Pacific Settlement of International Disputes, 1924, *SP No.116*, 14.

<sup>64</sup> Article I, Treaty of Paris (Kellogg-Briand Pact), 1928, *LOW*, 468-469.

<sup>65</sup> Preamble, Kellogg-Briand Pact, 1928, *LOW*, 467.

<sup>66</sup> Article II, Kellogg-Briand Pact, 1928, *LOW*, 468-469.

<sup>67</sup> Michael Howard, “Temperamenta Belli: Can War Be Controlled,” in *Restraints on War*, ed. Michael Howard (Oxford, Oxford University Press, 1979), 11.

<sup>68</sup> Neff, *War and the Law of Nations*, 294.

relations between the Contracting parties such that the freedom of war was preserved between the Contracting and non-Contracting parties.<sup>69</sup>

The failure of the League of Nations to restrain the conduct of modern, industrialized warfare finally led to the criminalization of aggressive war in treaties that are legally binding. First, there was the Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.<sup>70</sup> This Agreement served as the fulcrum for the Nuremberg Trials of the major German war criminals. Article 6 of the Charter established the jurisdiction of the Tribunal over crimes against peace, war crimes and crimes against humanity. Article 6(a), reads: "Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing," defined crimes against peace.<sup>71</sup>

In its judgement, the International Military Tribunal at Nuremberg held that Article 6(a) of the London Agreement was declaratory of modern international law.<sup>72</sup> Therefore, the Tribunal rejected the argument that the provisions of the Article amounted to an *ex post facto* criminalization of the defendants' actions. The Tribunal had relied heavily on the Kellogg-Briand Pact in their reasoning.<sup>73</sup> The Judgement had inferred from the Pact's establishment of the illegality of war as a tool of national policy that, "those

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<sup>69</sup> Article I, Kellogg-Briand Pact, 1928, *LOW*, 468-469.

<sup>70</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 1945, *LOAC*, 823-831.

<sup>71</sup> London Agreement, 1945, *LOAC*, 826.

<sup>72</sup> The Nuremberg Judgment, 1946, *LOW*, 936.

<sup>73</sup> The Nuremberg Judgment, 1946, *LOW*, 936-937.

who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.”<sup>74</sup> The reasoning of the Tribunal’s positions was that “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>75</sup> As such, the banning of war has no practical significance unless international law is prepared to hand out stiff penalties to the real human persons acting on behalf of the artificial legal person that is the state.

Second is the United Nations Charter. Article 2(4) restricts not only the use of force, but also the threat of the use of force: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>76</sup> The sole exceptions to this prohibition on the use of force include self-defence and enforcement actions authorized by the UN Security Council. Together these developments reinforce a strong presumption against the use of force in the modern-day *jus ad bellum*.

An obvious question to ask is “why have all these agreements, from the Hague Conventions to the UN Charter, failed to restrain conduct in total war?” The reasons have to do with the underlying structure of the Westphalian system, the social consensus that held the system together, and the integral part war played in that structure.

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<sup>74</sup> The Nuremberg Judgment, 1946, *LOW*, 937.

<sup>75</sup> The Nuremberg Judgment, 1946, *LOW*, 939.

<sup>76</sup> The World Court has held this ban to be a general rule of customary law. See *Nicaragua v. USA*, *ICJ Rep.*, 1986.

Neff cites two reasons for the failure of the Hague Conventions.<sup>77</sup> One is the underlying *laissez-faire* spirit states took towards the laws of war at the time. If the law did not specifically ban a weapon then armies would use it. For example, though it was contrary to the laws of war to drop poison gas from the air, this just led to armies to release the gas from canisters on the ground. A second reason is that the restrictions were only qualitative rather than both qualitative and quantitative. The law banned certain types of weapons yet it did not put a ceiling on the number of weapons a country could have nor could it prevent countries from taking advantage of technological improvements to those weapons already in existence.

Furthermore, Hague Convention IV was limited in its application by the participation clause: “The provisions contained in the Regulations referred to in Article 1 (Instructions to armed forces), *as well as in the Present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.*”<sup>78</sup> Germany attempted to use similar reasoning to deny the same level of Geneva Convention protection to Soviet soldiers who suffered harsh captivities and died in large numbers. The official justification used by the Germans for this policy was that the USSR had not signed the Geneva Convention. This was not legally justifiable, though, since under Article 25 of the Geneva Convention signatory countries had to give prisoners of all signatory and non-signatory countries the rights assigned by the convention.<sup>79</sup>

With respect to the customary rules of war as embodied in the Martens Clause, these too assumed a common code of conduct that had operated in the Westphalian

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<sup>77</sup> Neff, *War and the Law of Nations*, 203.

<sup>78</sup> Article 2, Hague Convention IV, 1907, *LOAC*, 65. Emphasis in the original.

<sup>79</sup> Article 25, Geneva Convention, 1929, *LOAC*, 264.



system until that time. However, “In the elimination of enemies of the proletariat or the establishment of a racial hegemony there was no room for ‘laws of humanity’ or ‘dictates of the public conscience.’”<sup>80</sup> The treatment of prisoners of war depended on the social attitudes and policies of the governments and militaries in question. Nazi Germany tended to treat prisoners from the Western allies in accordance with the Geneva Convention. This was in stark contrast to treatment of Soviet prisoners.<sup>81</sup> On the Soviet side, they regarded German prisoners as having forfeited their right to fair treatment because of the widespread crimes committed against Soviet civilians during their invasion. This combined with the fact that much of the Soviet workforce was in the hands of Nazi Germany also led to employment of many German prisoners as forced labour.

Until the First World War, states within the Westphalian system did not seriously question the use of force to resolve their differences of opinion. However, the experience of the war made many query whether such a dispute settlement mechanism was a natural and value-free component of international relations. The initial reaction to the outlawing of war, at least among states in the West, was that they stopped declaring war while continuing to fight them. Perhaps more significant is the reasoning behind the prohibitions on aggressive war. Neff describes the post Second World War attitude towards the use of force, as embodied in Article 2(4) of the UN Charter as a “neo just-war order.”<sup>82</sup> This implies a comprehensive and widely held view of social relations, as was the case in the Middle Ages. However, such social relations no longer exist. Rooted

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<sup>80</sup> Howard, “Constraints on Warfare,” in *The Laws of War*, 8.

<sup>81</sup> See Alexander Dallin, *German Rule in Russia: 1941-1945* (London: Macmillan, 1957).

<sup>82</sup> See Neff, *War and the Law of Nations*, 316-334.

within the just war was a detailed body of natural law and Christian doctrine that is out of place in the 21st century.

## 2.6 Conclusion

The brutal character of total war is due to comprehensive factors that Clausewitz would have easily understood, considering his view of war a socio-political activity. Clausewitz's social trinity of government, army, and people all set the stage for the major industrialized wars of the 20th century. This social trinity interacted to set the limits to these wars, sometimes bringing them closer to the absolute and at other times restraining them. Early in the 20th century, Europe exemplified a trinity poised for absolute rather than limited war.

The massive armies involved in these wars were not the result of Clausewitz's call to put the largest possible army in the field but because of economic, technological, and military circumstances of the time. Technology, through advances in munitions and mass production, had created armies of such deadliness that no amount of law could have contained them. The spread of democratic principles had made governments more, rather than less, bellicose. The passions of the people, transmitted through the government and the army, influenced the wars and did much to influence those who before the First World War had seized upon only certain of Clausewitz's writings. Clausewitz expressed an understanding beyond Liddell Hart's of the forces shaping the character of war when he wrote: "The aims a belligerent adopts, and the resources he employs, must be governed by the particular characteristics of his own position; but they will also conform to the spirit of the age and its general character" (W 594).

## Chapter 3

### Non-State War and the Loss of Restraint

It had ceased to be in harmony with the spirit of the times to plunder and lay waste the enemy's land, which had played such an important role in antiquity, in Tartar days and indeed in mediaeval times. It was rightly held to be unnecessarily barbarous, an invitation to reprisals, and a practice that hurt the enemy's subjects rather than their government – one therefore that was ineffective and only served permanently to impede the advance of general civilization.

Carl von Clausewitz, *On War*

That the *jus in bello* (right conduct in war) can be defined separately from the *jus ad bellum* (justification for going to war) is important. It is important because if correct, then the same set of *in bello* rules can be applied to all belligerents irrespective of the justice of the cause for which they fight. This has been advanced as a central presupposition of traditional just war theory.<sup>1</sup> Historically this is not the case. From the time of Augustine to Grotius, the *jus in bello* was largely treated as an extension of the *jus ad bellum*. During this period, only the party that possessed a just cause could claim belligerent rights. Because its cause was unjust, the opposing party could not enjoy such rights and for this reason there could be no set of *in bello* rules that applied equally to both sides of a conflict.

In the 18th century, in the writings of Wolff and Vattel, the exclusion of just cause from *ad bellum* considerations allowed for a conception of belligerent equality to become a full-fledged normative theory of war. Vattel referred to this as “regular war” in order to underscore how the same set of rules would apply to all sovereign belligerents

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<sup>1</sup> Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations*. (New York: Basic Books, 1977), 21.

regardless of the justice of their cause.<sup>1</sup> It was from this concept that modern international law articulated the positive norms around which the idea of belligerent equality was organized.<sup>2</sup>

However, the increasing participation of non-state actors in armed conflict in the 20th century began to undermine the Westphalian system in important ways. The constraints that soldiers observe when engaging other soldiers are easy enough to maintain since they view each other as professional adversaries. Constraints break down though when civilians, who regard soldiers as foreign occupiers who they have a right to resist, confront them. Civilian participation in war in the form of national liberation movements and humanitarian interventions also undermines the constraints of the Westphalian system. By reintroducing the concept of just cause to the *jus ad bellum*, civilian participation compromised the equality regime of the regular war paradigm. This chapter examines the extent to which it is realistic to believe that the law of armed conflict can successfully limit the suffering of victims of non-state war.

### 3.1 Separating the *Jus In Bello* from the *Jus Ad Bellum*

When Christianity became the official religion of the Roman Empire under Constantine, the Church had to change its view towards war. As long as the Emperors were pagans, the Christian Church maintained its pacifist stance. Such a radical shift in the Church's basic teachings required a theological grounding for its justification. St. Augustine (354-430) accomplished this by reviving the ancient Roman concept of the

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<sup>1</sup> Emerich de Vattel, *The Law of Nations or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Book 3, §190.

<sup>2</sup> See William Ballis, *The legal Position of War: Changes in Its Practice and Theory from Plato to Vattel* (New York: Garland Publishing, 1973); Windsor, *Strategic Thinking*, 7-22.

*bellum justum*, though framed in terms of Christian morality. The key to his thinking regarding just war was his assertion that, "It is the wrong-doing of the opposing party which compels the wise man to wage just wars."<sup>3</sup> St. Thomas Aquinas (1225–1274) later systematized Augustine's ideas under the heading of "just cause." Historically, just war thinking equated just cause with requirements of self-defence, restitution, and retribution.

Aquinas noted that a private individual should not resort to war because "he can seek for redress of his rights from the tribunal of his superior."<sup>4</sup> The implication is that the resort to war is justified in cases where no such judgment is available, as in the case of the relationship of one independent polity to another. The one who determines the requirements of just cause relative to the political community has been the sovereign head of state. The head of state is the one who possessed the right to declare war. The legitimate authority in European political culture had long been the sovereign prince, recognized as such by papal authority and other sovereigns. The *jus ad bellum* regulated wars between these princes.

In contrast to the juridical connotation of just cause, right intention looks to the inner moral quality of an agent's action:

It is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil...For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intension. Hence Augustine says (*Contra Faust.*xxii.74): *The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust for power, and such like things, all these are rightly condemned in war.*<sup>5</sup>

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<sup>3</sup> St. Augustine, *The City of God*, Book 19, Chap.7.

<sup>4</sup> St. Thomas Aquinas, *Summa Theologica*, II-II q. 40 a.1.

<sup>5</sup> Aquinas, *Summa Theologica*, II-II q. 40 a.1; emphasis in the original.

It is difficult to determine the exact scope of this requirement.<sup>6</sup> One may interpret it as an *ad bellum* requirement addressed to political leaders who might be tempted to use just cause as a pretext to pursue interests incompatible with the demands of justice. On the other hand, it may be directed primarily towards soldiers warning them against violations of *in bello* rules.

The Reformation and the Thirty Years War led to the eventual collapse of the tacit acceptance of the moral rules that held the just war framework together because the universal authority of the Christian Church had also collapsed. Together, the Peace of Augsburg and the Peace of Westphalia implemented a new international order based on both the legal division of Christianity within the Holy Roman Empire and the principle of state sovereignty. However, though the framework of a common morality had broken down under the pressures of ideological war, this had given way to a framework of a common European civilization based increasingly on international law.

With the beginning of the Westphalian state system the concept of just war returned to Europe, though in a secularized version. Vitoria (1486-1546) and Suárez (1548-1617) laid the groundwork for the separation of the *jus in bello* from the *jus ad bellum* nearly a century prior to the Peace of Westphalia by substituting a new, more objective criterion for right intension: the proper manner for waging war. According to Suárez, when fighting a war “the method of its conduct must be proper, and due proportion must be observed at its beginning, during its prosecution and after victory.”<sup>7</sup>

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<sup>6</sup> Windsor, *Strategic Thinking*, 10.

<sup>7</sup> Francisco Suárez, “De Triplici Virtuti Theologica,” in *Selection from Three Works*, Disputation XIII, On War, Section I, §7.

This shifts the right intention criterion away from the subjective judgment of a particular prince and towards an objective methodology.

Within the just war perspective, problems surrounding just cause were also explored. Vitoria argued that belligerents who represent an unjust cause could be subjects of “invincible ignorance” with respect to their claims of justice. He claimed that soldiers are quite often in this position and as such, “subjects on both sides may be doing what is lawful when they fight.”<sup>8</sup> This leaves open the possibility that there may exist between opposing sides what Johnson terms a “simultaneous ostensible justice” whereby each side believes it is in the right, one correctly and the other sincerely yet incorrectly.<sup>9</sup>

In Book III of *De Jure Belli ac Pacis*, where he discussed what is permissible in a formally declared public war, Grotius (1583-1645) takes up Vitoria’s argument about the belligerent equality of soldiers.<sup>10</sup> He noted that, owing to a permanently implied understanding holding true in virtue of the law of nations (*jus gentium*), the parties to a public war could carry out acts with impunity; acts normally considered impermissible under natural law. This concept of belligerent equality, founded on the positive law of nations, would apply regardless of the belligerent’s standing vis-à-vis just cause.

Grotius based his argument for the suspension of just cause on an appeal to the principle of the lesser evil. He feared the drawing into a conflict of neutral powers unless certain legal effects would accompany the formally declared state of war. Though

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<sup>8</sup> Francisco de Vitoria, *De Jure Belli Reflectiones*, para.32.

<sup>9</sup> See James Turner Johnson, *Ideology, Reason, and the Limitation of War* (Princeton NJ: Princeton University Press, 1975), 175–195.

<sup>10</sup> Grotius, *De Jure Belli ac Pacis*, Book III, Chap. III ff.

Grotius's concern was humanitarian, it was not so in today's ordinary *in bello* sense of the term. He expressly rejected the idea of *in bello* belligerent equality:

We say that if the cause of a war should be unjust, even if the war should have been undertaken in a lawful way, all acts which arise therefrom are unjust from the point of view of moral injustice (*interna iniustitia*). In consequence the persons who knowingly perform such acts, or co-operate in them, are to be considered of the number of those who cannot reach the Kingdom of Heaven without repentance. True repentance, again, if time and means are adequate, absolutely requires that he who inflicted the wrong, whether by killing, by destroying property, or by taking booty, should make good the wrong done.<sup>11</sup>

Grotius's goal in introducing his new equality regime was to narrow the *jus ad bellum*; namely to prevent a conflict from encompassing states having no special stake in the matter under dispute.<sup>12</sup> It becomes apparent in his treatment of these effects that they were anything but humanitarian in character. To the contrary, he detailed practices that would seem repugnant to us today and indeed seemed repugnant to him even then, such as the direct targeting of women and children. Yet these considerations were the sorts of things acceptable among the people documented by him in this work.

A century later with Wolff (1679-1754) the beginnings of the modern separation of *jus in bello* from the *jus ad bellum* becomes visible in international law. First, Wolff rejected the idea that the just belligerent could act as judge over his unjust adversary.<sup>13</sup> This was part of a new conception of sovereignty that developed by Wolff's day. According to this conception, each state was free to decide what actions would best serve its interests.<sup>14</sup> Previously, the system of just cause constituted the center of gravity around

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<sup>11</sup> Grotius, *De Jure Belli ac Pacis*, Book III, Chap. X, Section III.

<sup>12</sup> Grotius, *De Jure Belli ac Pacis*, Book III, Chap. IV, Section IV.

<sup>13</sup> Christian von Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, §888.

<sup>14</sup> See F.H. Hinsley, *Sovereignty* (London: C.A. Watts, 1966), 179-195.



which earlier treatments of war were organized. Now each sovereign's private conscience would determine just cause and a set of conventional rules that Wolff termed "the voluntary law of nations" would regulate the public sphere. Second, Wolff argued that the rules of warfare should also be formulated in terms of the norms and obligations that sovereign entities ought to observe on the battlefield, such as prisoners of war ought to be humanely treated and non-combatants on the enemy side should not be targeted.<sup>15</sup>

Vattel (1714-1767) popularized Wolff's ideas in his famous work *The Law of Nations*. Vattel emphasized that the rules of war, now construed explicitly in terms of both rights and obligations, would apply equally to all belligerents if they had the status of sovereign states. He also conceptualized these rules as an autonomous sphere of norms regulating the conduct of sovereign, legally equal nations. Whereas Grotius and his predecessors had viewed the norms of the *jus gentium* as applicable to a variety of different subjects insofar as they existed within distinct jurisdictions, Vattel addressed the norms in question very narrowly to states now conceived as compact entities that confront each other within a state of war.<sup>16</sup> Vattel transformed the *jus gentium* into a law between nations (*jus inter-gentes*) and within the field of international law sovereign states pushed individuals from the scene.<sup>17</sup>

Vattel provided a detailed treatment of the humanitarian norms that he thought were reciprocally binding upon parties at war thus setting specific limits on what one could do to enemy combatants, enemy civilians, and enemy property. The Hague Rules of

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<sup>15</sup> Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, §891, §890 ff.

<sup>16</sup> See Grotius, *De Jure Belli ac Pacis*, Book I, Chap. I, Section I; Vattel, *The Law of Nations*, Book III, Chapt. III.

<sup>17</sup> Peter Pavel Remec, *The Position of the Individual in International Law According to Grotius and Vattel*, (The Hague: Martinus Nijhoff, 1960), 193.

Land Warfare and Geneva Conventions would later subsume many of these norms. In so doing, Vattel made abundantly clear that the application of these rules depended on four key presuppositions. First, the rules applied only to sovereign nations, each of which was free to decide, “In its own conscience what its duties require of it” with respect to the *jus ad bellum*. Second, “the rights founded upon the state of war, the legal nature of its effects, the validity of the acquisitions made in it do not depend...upon the justice of the cause but upon on the legality of the means as such, that is to say, upon the presence of the elements constituting a regular war.” Third, the rules in question provided only an external legality and not an ideal moral code. If all combatants follow these rules then there is no reason to complain. Finally, the rules emerge from each nation’s tacit consent and thus belong, not to natural law directly, but instead to the voluntary law of nations.<sup>18</sup>

### 3.2 Civilian Involvement in International Conflict

In the Westphalian system, only the state has the legitimate authority to wage war. Furthermore, the assumption that professional, regular armed forces do the fighting on behalf of the state is the basis of the customs and laws of war. Until the Hague Conventions, civilians who came to the defence of their country against a foreign invader had no rights in either international or domestic law. If this was the case, it was probably for no other reason than prior to the 19th century, civilian involvement in armed conflict just did not happen that often. The first notable example of civilians in a Western country coming to the defence of their country occurred in Spain during the Peninsular War (1808-14). However, this did not result in any updating of the laws of war. The next significant example of civilian involvement in war, and one that did have an impact on

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<sup>18</sup> Vattel, *The Law of Nations*, Book III, Chap. XII.

the law, was that of French civilians in the Franco-Prussian War. Their willingness to fight in defence of their country reflected the increasing nationalist sentiment of the late 19th century. Their participation in attempting to fight off the Prussian led to the deliberate targeting of civilians. This gained a certain amount of legitimacy since in this situation any citizen could conceivably be a combatant.

Change was required in order to construct a legal environment surrounding civilian participation in war. Prohibiting them from fighting had been mostly customary. However, since custom could be so easily set aside in war it was no longer an acceptable means of restraint. Partisan movements in occupied territories directly linked civilians to military forces in war and it was necessary that there be some form of binding legal code relative to them. The *Levée en masse* clause of Hague Convention IV reflects this concern: "The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war."<sup>19</sup>

The experience of resistance movements in Nazi-occupied Europe during the Second World War led directly to the inclusion of civilian groups in humanitarian law. The Nazi occupying forces throughout Europe had reacted to armed resistance with extreme retribution, prompting a measure of sympathy for such resistance in the new humanitarian approach of international law makers. In addition, many European states owed their post-war existence to resistance fighters. De Gaulle, who led the Free French Movement, would become Prime Minister of the Provisional Government and Tito formed a Communist government in Yugoslavia. Recognized by their citizens and the

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<sup>19</sup> Article 2, Hague Convention IV, 1907, *LOAC*, 69.

international community as morally legitimate because of their patriotic actions during the war, it would be very hard for the drafters of international law to deny their claims to power.

The Protected Persons Clause of the Geneva Conventions specifies the six categories of individuals to whom the Conventions apply.<sup>20</sup> If someone falls under one of these categories, that person has considerable legal protection as a “privileged combatant.” Unfortunately, the first five categories apply to regular armed forces while the sixth category is nearly a word for word duplication of the *Levée en masse* clause of Hague Convention IV. The applicability of this clause to armed conflict involving civilians is questionable for two reasons. First, the clause is moot because since 1949 there has been no clear-cut example of a people “spontaneously taking up arms” in defence against a foreign invader. Second, the clause does not apply easily to partisan warfare whose favourite tactic, guerrilla war, is by its very nature secret warfare.

A middle ground was required to allow an enemy force occupying a country to maintain its existence and power while at the same time ensuring that the civilians under their control were able to live their lives as normally as possible. Such a concession reflected the balancing act that was beginning to take shape in the 20th century between humanitarian rights and the rights of belligerents. However, the law also had to take into account the fact that an occupied population is likely to be hostile to an occupying military force. Important questions arise concerning this reality, such as “how much trouble should the occupier put up with?” and “how tough is an occupier allowed to get?” The Derogations Clause of Geneva Convention IV provides for the right of an occupying

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<sup>20</sup> Article 13, Geneva Conventions I and II, 1949, *LOAC*, 311-312, 340-341; Article 4(A), Geneva Convention III, 1949, *LOAC*, 362-363.

power to arrest and hold for trial civilians suspected of spying, sabotage or any other hostile activity.<sup>21</sup> Wherever possible, the “law of the land” should prevail when punishing such individuals under Article 5.<sup>22</sup> Should that course prove inadequate, the occupying country may enforce its own disciplinary legislation.

These laws establish a corresponding relationship between the combatant and the non-combatant, while at the same time reinforcing their distinction in terms of the activities of the armed force and the enemy non-combatant. A list of punitive measures allowed against civilians who violate the rules and against armed forces occupying a territory back up this distinction and the maintenance of it.<sup>23</sup> While this does not necessarily bar civilians from attacking occupying troops, these Articles do make clear that if caught, they may be charged and punished as criminals. The aim was to deter the active involvement of civilians who do not qualify as combatants yet whose governments could not necessarily control their unorganized participation in an armed conflict. As such, drafters of the Geneva Conventions hoped they could uphold the key trinitarian distinction between combatant and non-combatant.

What this reconstruction of the law of war failed to take into account was that the social structure that gave rise to the traditions existing before the 20th century was no longer in place. War was no longer a contest exclusively limited to organized armed forces as participants. Though armies still formed the substantial bulk of the participants in war, the economic linkages of the modern industrial state made population centres

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<sup>21</sup> Article 5, Geneva Convention IV, 1949, *LOAC*, 435.

<sup>22</sup> L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993), 232.

<sup>23</sup> Articles 64-70, Part III, Section III, Geneva Convention IV, 1949, *LOAC*, 452-454.

targets for bombardment. Thus, members of occupation forces met with armed resistance from populations that felt they had the right to defend themselves by any means necessary.

### 3.3 National Liberation Movements

The intention behind the updated Geneva Conventions was to alter the way in which the international community viewed war. They dealt with both declared wars and all other armed conflicts between states, regardless of the intensity of the conflict.<sup>24</sup> There were now two categories of conflict, international and non-international. The classification of a war as an international or a non-international conflict was of central importance with regard to the Geneva Conventions and the protection of war victims as non-international conflicts fell outside the scope of all provisions of the Geneva Conventions except for Common Article 3.

While traditional international law had always held domestic law should govern internal conflicts, one of the aims of the 1949 Diplomatic Conference was to bring non-international conflicts within the jurisdiction of humanitarian law. In 1948, the International Committee of the Red Cross prepared Draft Conventions for the Protection of War Victims and submitted them to the 17th International Red Cross Conference at Stockholm. These Draft Conventions saw a fourth paragraph added to Common Article 2, which stated:

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these

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<sup>24</sup> Article 2, Geneva Conventions, I, II, III, IV, 1949, *LOAC*, 308, 336, 361, 433.

circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status.<sup>25</sup>

This provision met with resistance at both the Stockholm and Diplomatic Conferences. Opponents worried that in spite of the express formal denial of any effect of such an integral application on the legal status of the parties to a conflict, such a solution opened the possibility for rebels to appoint another State as “protecting Power,” thus internationalizing the conflict. The attempt to extend humanitarian law to non-international armed conflict eventually resulted in Common Article 3.

The rationale behind Common Article 3 is that non-international armed conflicts involve fighting between the military forces of a government in power and civil factions wanting to rid themselves of what they determine to be overly repressive regimes or colonial domination. The emergence of national liberation movements after the Second World War reintroduced the criterion of just cause to the *jus ad bellum* and changed the pattern of warfare.<sup>26</sup> Guerrilla techniques spread through out the European colonial empires. Nationalism provided a strong motivation for liberation movements.

Some national liberation movements were willing to apply, and to declare their intention to apply, the Geneva Conventions in an effort to internationalize and legitimize their struggle. The hope of national liberation movements was that their adherence to the Geneva Conventions would generate a reciprocal adherence by the colonial power. For example, in both 1956 and 1958, the National Liberation Front of Algeria (FLN) declared its intention to apply Geneva Convention (III) Relative to the Treatment of Prisoners of War to French prisoners and gave orders to its soldiers to comply with international

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<sup>25</sup> See Jean Pictet, *Commentary of the Geneva Conventions of 12 August 1949*, Vol. III, Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, ICRC, 1960, 31.

<sup>26</sup> George J Andreopoulos, “The Age of National Liberation Movements,” 191.

humanitarian law. The *Gouvernement Provisoire de la République Algérienne* (GPRA) notified the depositary of the Geneva Conventions of its accession to the Convention in 1960. The Swiss government then notified the other High Contracting Parties of the Conventions but made a reservation to the accession because it did not recognize the GPRA.<sup>27</sup> For its part, the French government had recognized the applicability of Common Article 3 to the Algerian War in 1956 but as Wilson comments: “This was at least partially because the FLN threatened reprisals if executions of captured FLN members continued.”<sup>28</sup>

Many difficulties faced national liberation movements in their attempt to have the Geneva Conventions applied to wars of national liberation. Colonial governments had been unwilling to apply the Conventions and only did so as a concession and if the principle of reciprocity was considered necessary. Nor did these states accept a legal obligation to apply the Geneva Conventions, which made for a very unpredictable and unsatisfactory pattern of application. The main concession made by colonial governments in wars of national liberation of a high intensity was to treat captured rebels like prisoners of war and to allow them visits by the International Committee of the Red Cross.

Since the Western colonial powers regarded wars of national liberation as non-international conflicts, the application of Common Article 3 seemed logical to them. However, this attitude was changing, due largely to the Algerian war for independence from French Colonial rule. The FLN argued that instead of being involved in a rebellion against a colonial yet legally constituted government, it was actually attempting to regain

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<sup>27</sup> Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Oxford University Press, 1988), 51.

<sup>28</sup> Wilson, *International Law*, 153.



the independence France had stolen from the Algerian people. The FLN believed theirs was the legitimate government of Algeria. Therefore, they were a lawful belligerent involved in an international armed conflict with France.

This reasoning caused alarm throughout the Western world since a great many national liberation movements espoused some variant of Marxist ideology. On the other hand, the West could hardly have expected such movements to adopt the dominant ideology of the forces of which they wanted to rid themselves. Western governments attributed the causes of these conflicts mainly to Soviet expansionism rather than to local resentment of foreign occupation. However, not all these revolutionaries had been educated in Moscow, but rather in cities like London and Paris.

The tactic used by national liberation movements in their conflicts was guerrilla warfare. The classical model of guerrilla war has three stages.<sup>29</sup> In the first stage, tiny bands of guerrilla fighters carry out small raids and ambushes only to disappear and move somewhere else to fight. Their goal is to force the government's army to disperse, making them vulnerable to surprise attacks and thus increasing the possibility of them taking repressive measures against the civilian population. The next state occurs when guerrilla forces begin to take control of territory. As noted by Windsor, this is when the decisive battle for the support of the people begins.<sup>30</sup> The goal is to win the hearts and minds of villagers. If successful, the guerrilla leaders will link the territories under their control in an effort to create a basis for mass mobilization. This is when the third and final stage begins. Guerrilla forces must now engage government troops in the field to demonstrate they are no longer in control.

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<sup>29</sup> Windsor, *Strategic Thinking*, 152-153.

<sup>30</sup> Windsor, *Strategic Thinking*, 152.

The success of national liberation movements was not attributable to the Marxist ideology they espoused but rather to the particular social environment in which they operated. The colonial powers, weakened because of the Second World War, were not interested in fighting them. Though there was little question that the conventional forces of the European powers could defeat these movements, they realized that such war would be long, drawn-out, and expensive ones to fight. In these wars of national liberation, the European imperial powers' national interests were not at stake. This is contrary to the example of Germany fighting the Yugoslavian guerrillas in the Second World War where the Nazi regime's existence clearly was at stake. The lesson learned in wars of national liberation was that military victory was not required. What was necessary was to make it expensive enough in both cost and effort so that the colonial power would cut its losses and leave.

What had also gone unnoticed during this time was that fact that guerrilla tactics were largely unsuccessful against a locally based government that had the support of a major local ethnic group.<sup>31</sup> In these cases, it is harder for the guerrillas to generate the antipathy that they may be able to against a foreign occupier. In addition, a locally based government, unlike a colonial power, cannot withdraw and go home. Guerrilla forces need a strategy for victory in open combat against the state's regular forces. In only three such cases: (i) China in 1949; (ii) Cuba in 1959; and (iii) Nicaragua, in 1979 has such a force been successful. When taken out of its proper social environment, guerrilla warfare

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<sup>31</sup> Gwynne Dyer, *War* (Toronto ON: Stoddard, 1985), 183.

was not nearly as successful a tactic as it had been when fighting the forces of colonial rule. In the 1960s, guerrilla movements sprang up all over South America and all failed.<sup>32</sup>

The Vietnam War (1963-75) obscured the fact that the era of successful guerrilla war had ended. Widely viewed as a counter-insurgency war, the war in Vietnam was in fact a conventional limited war. Only a minority of US troops engaged in counter-insurgency tactics. US strategy involved sending enough troops to take the pressure of the South Vietnamese army and aerial bombardment of an ever-increasing amount of North Vietnamese targets until the North's regime could no longer afford to arm the rebels in the South. The predicament was that the North was motivated to continue to fight by an intense nationalism and under the control of a totalitarian regime that did not want to give in.

This led the revolutionaries to urban guerrilla warfare, or terrorism, to drive target regimes into extreme repression. These groups use tactics like assassination and random bombings to achieve publicity. Their goal is either to displace a democratic regime by a military one or to drive an existing military regime to repressive measures in order to alienate the government from the people and enhance the justice of their cause. During the Battle of Algiers (1956-57), the FLN used such tactics as placing bombs in civilian areas and assassinating French officials.<sup>33</sup> In this example, as with Vietnam, state armies are unable to tell civilian non-combatant from civilian combatant and as a result must treat all civilians as potential combatants for their own safety. The guerrilla fighter's refusal to adopt a single identity politicizes the conflict in such a way that places untenable burdens on the government's army and people. According to Andreopoulos:

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<sup>32</sup> Dwyer, *War*, 166.

<sup>33</sup> Andreopoulos, "The Age of National Liberation Movements," 208.

The everybody is a potential enemy mentality exemplified an intriguing paradox. Initially, opponents of national liberation movements had accused them of violating the strict separation between *jus ad bellum* and *jus in bello* by subsuming the latter under the former. However, as the struggle unfolded, their opponents were to resort to a form of warfare that exhibited the very conflation of the two notions that they had sought to keep apart. Thus, in the Algerian War, the case of the Algérie française and the containment of the ubiquitous Communist challenge were to become the *jus ad bellum* that ipso facto marginalized most *jus in bello* considerations.<sup>34</sup>

This reintroduction of just cause to the *jus ad bellum* would have an important impact on the law of war.

### 3.4 The Protocols Additional to the Geneva Conventions

The inclusion of human rights in the law of armed conflict would appear to be a logical extension of many of the principles underlying the Geneva Conventions.

Important United Nations human rights documents such as the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966) both have articles stating: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>35</sup>

In 1974, the Swiss Government invited the representatives of 122 governments and a given number of representatives from national liberation movements to consider proposals prepared by the International Committee of the Red Cross.<sup>36</sup> The Geneva Diplomatic Conference on the Reaffirmation and Development of International

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<sup>34</sup> Andreopoulos, "The Age of National Liberation Movements," 213.

<sup>35</sup> International Covenant on Economic, Social, and Cultural Rights, 1966, *UNTS*, 3; International Covenant on Civil and Political Rights, 1966, *UNTS*, 171.

<sup>36</sup> See Bradley Duncan McAllister, "Code and Conduct: An Analysis of the Modern Law of Armed Conflict" (master's thesis, University of Manitoba, 1998), 97-114.

Humanitarian Law Applicable in Armed Conflicts, ended with the adoption of the Protocols Additional to the Geneva Conventions (1977). The conference achieved the upgrading of wars of national liberation to the full equivalent of inter-state war. Neff characterizes this as “one of the most distinctive contributions of socialist and Third-World thought to the legal conception of war.”<sup>37</sup>

Additional Protocol I made basic changes to the law of war as it had existed in international armed conflicts. It extended the protection given to civilian and non-military objects and forbade actions likely to have long-term deleterious effects upon civilians.<sup>38</sup> It also widened the concept of “grave breaches” found in the Geneva Conventions.<sup>39</sup> It extended the list to include wilful acts or omissions that endanger the physical or mental health or integrity of any person in the power of a party other than that on which he depends. Moreover, all medical practices must conform to “generally accepted medical standards.” Additional Protocol I also lists other acts that constitute grave breaches if committed wilfully causing serious bodily injury or death. In doing all this, Additional Protocol I had the effect of blending the Hague and Geneva Conventions together. Therefore, the laws of war applied even-handedly in international armed conflict since all the laws were humanitarian in nature. This preserved the regular war paradigm.

Yet Article 1(4) of Additional Protocol I was already outdated. The drafters limited the application of Additional Protocol I to those, “fighting against colonial

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<sup>37</sup> Neff, *War and the Law of Nations*, 283.

<sup>38</sup> Articles 52-56, Protocol I Additional to the Geneva Conventions, 1977, *LOAC*, 582-584.

<sup>39</sup> See Article 50, Geneva Convention I, *LOAC*, 324; Article 51, Geneva Convention II, *LOAC*, 350; Article 130, Geneva Convention III, *LOAC*, 408; Article 147, Geneva Convention IV, 1949, *LOAC*, 479; Articles 85-91, Protocol I Additional to the Geneva Conventions, 1977, *LOAC*, 601-605.

domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”<sup>40</sup> All three categories of conflict were in decline well before 1977. Another criticism of Article 1(4) is that any state that has what some might consider a regime falling within the scope of the article, such as Israel, would be very unlikely to accede to Additional Protocol I. A national liberation movement in such a state would therefore find it difficult to accede to Additional Protocol I and to demand application of the Protocol to its conflict with the State authorities.

The purpose of Additional Protocol II was to restrict the kinds of violence that states could use in suppressing civil unrest. It replaced Common Article 3 by expanding the range of protections available to persons in detention. Most importantly, it placed restrictions on how conflicts were fought largely in the interest of protecting civilians. Civilians needed protection since some estimates put the percentage of civilian casualties in intra-state conflict in the post-1945 world at around 90 per cent.<sup>41</sup>

However, Additional Protocol II did not cover all civil conflicts. The definition of a non-international armed conflict was limited to a situation in which both the government and the rebel forces under responsible command are in control of part of the national territory, and have the ability to carry out the Protocol.<sup>42</sup> By demanding that an insurgent party be in control of a given amount of territory, the law attempted to eliminate riots and other similar disturbances from legitimacy as insurgent activities. What Additional Protocol II certainly did not do was place civil war on a legal par with international war. There was no prisoner of war status as existed under the older category

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<sup>40</sup> Protocol I Additional to the Geneva Convention, 1977, *LOAC*, 558.

<sup>41</sup> Neff, *War and the Law of Nations*, 367.

<sup>42</sup> Article 1(1), Protocol II Additional to the Geneva Conventions, 1977, *LOAC*, 621.

of insurgency, it did not require a third state as Protecting Power to ensure the implementation of humanitarian rules, nor was there any concept of grave breaches which would have afforded global jurisdiction over offenders.<sup>43</sup> All that was required was humane treatment.<sup>44</sup>

Additional Protocol II was the first major attempt to introduce international legal control to intra-state conflicts. But it did something else as well. Through the means of international legislation, it brought in the concepts of trinitarian war to internal conflict. The possession of territory requires organization and administration. By having an area to serve as a base of operations, an insurgent force gains military legitimacy relative to the state they are challenging. The existence of civilians within the territory is not a requirement, although the law acknowledges their presence, in that the entire purpose behind the Geneva Conventions and Additional Protocols was the protection of non-combatants. The insurgents are presumably fighting to either force the incumbent government to accept their demands or to form a new government themselves. In any case, the presence of civilians is ubiquitous. They receive their separation from the administrative and military components of either group. In both, they form the third element of trinitarian warfare.

Additional Protocols I and II emerged because of demands made by anti-colonial forces on the international community to include their conflicts under the *jus in bello*. In reality, there was less of a concern with the lessening of suffering than with privileging certain politically favoured belligerencies. The colonial powers resisted these changes because it gave their opponents the status of belligerents rather than that of outlaws or

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<sup>43</sup> Neff, *War and the Law of Nations*, 368.

<sup>44</sup> Article 4, Protocol II Additional to the Geneva Convention, 1977, *LOAC*, 622.

criminals. Who the parties to a conflict were was not as important as the recognition of belligerency. When it comes to belligerency, the international community must consider a threshold of applicability. The recognition of belligerency entails certain obligations on the part of the belligerent. Outside powers should extend such a right to participants in a civil war only when they have assured themselves that the participant can uphold the *jus in bello*. However, to grant the privileges, protections, and immunities of prisoner of war status to those who were, according to their opponents, mere criminals was intolerable.

Belligerent recognition, as an offshoot of the Law of Neutrality, was designed to protect the interests of both international belligerents and neutrals. The aim was to inconvenience neutral parties as little as possible when two countries went to war. The extension of recognition of belligerency to encompass intra-state war implicitly acknowledges that a party to that conflict has the means and the willingness to act as though they were a regular army of a state with respect to prisoners of war, neutrals, and civilians. However, Additional Protocols I and II do not impose any tests necessary for determining the insurgent's suitability under the law to fulfil this requirement. This makes the law of armed conflict appear one-sided. However, since a large UN majority was prepared to make a political gesture in support of the ideology of anti-colonialism, the change was made.

The principle of sovereignty and the right of a government to preserve itself limits the ability of Additional Protocol II to reduce the extreme violence that tends to occur in intra-state conflicts.<sup>45</sup> As Bedjaoui states, "The whole system of control remains

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<sup>45</sup> L.C. Green, *Essays on the Modern Law of War* (Dobbs Ferry NY: Transnational Publishers, 1985), 22.



subservient to the will of States. The establishment and of course the actual operation of these mechanisms is ultimately subject to State consent.”<sup>46</sup> Additional Protocol II enters into force following its ratification by two states, as per Article 23.<sup>47</sup> The assumption is that one of these states would be the one whose government is under attack by internal forces. Additional Protocol II and its provisions come into effect when the affairs in that state deteriorate to the point where an intra-state conflict is taking place. However, application of Additional Protocol II still depends on the recognition, by ratification of the Protocol, of an official state of non-international conflict.

One problem underlying the law of armed conflict regarding intra-state warfare is that there is a basic difference between the existence of an inter-state milieu and a transnational society.<sup>48</sup> The basic organization of these two structures is very different and the increase in intra-state violence has produced a serious misunderstanding between the levels of analysis.<sup>49</sup> Whereas the levels of analysis had kept the world of international relations organized into the three main categories of the individual, the state, and the international system, non-international conflict has been concentrated around certain non-state actors. This has led to the neglect of the state as principal actor in the system.

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<sup>46</sup> Mohammed Bedjaoui, “Humanitarian Law at a Time of Failing National and International Consciousness,” in *Modern Wars*, ed. Pierre Garber and Zia Rizvi (London: Zed Books, 1986), 21.

<sup>47</sup> Article 23, Protocol II Additional to the Geneva Conventions, 1977, *LOAC*, 628.

<sup>48</sup> See McAllister, “Code and Conduct,” 130-132.

<sup>49</sup> Stanley Hoffman, *Janus and Minerva* (Boulder CO: Westview Press, 1987), 85.

One can think of “transnationalism” as a form of interaction and coalition building across state boundaries involving a diverse set of non-governmental actors.<sup>50</sup> Examples of such non-state actors are multinational corporations, religious groups, terrorist networks and increasingly ethnic groups that exist within several states at once maintaining links between them without regard for the supposed inviolability of state borders.

Transnationalism de-emphasizes the state as the primary and unitary actor. Some transnational actors pursue violent activities on behalf of a number of causes and as the nature of transnational society transcends state borders, so too does the violence these non-state actors commit.

The organizing principles of the state do not translate well to the transnational level. The law dealing with intra-state violence provides non-state military forces with certain freedoms and obligations designed to act in accordance with similar duties possessed by the state government they are challenging. Those rules were based on the idea that the only reason a group would challenge an already existing government would be because they believed it was racist, alien, or colonial. The only genuinely acceptable aim of these groups would be to reorder the government into a better, more humanitarian one, but as another state. According to critics of the law of armed conflict, this format in intra-state violence does not truly account for the direction of non-state actors whose goals may be something other than the reorganization of their home state. As a result, the *in bello* rules of war have little power of enforcement beyond moral condemnation.

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<sup>50</sup> James Dougherty and Robert Pfaltzgraff, *Contending Theories of International Relations: A Contemporary Survey*, 5th ed. (New York: Longman, 2001), 30

### 3.5 Conclusion

Delegates to the Geneva Diplomatic Conference formulated the Additional Protocols with the expectation that they would generate the same concern regarding intra-state war that human rights law sought to generate around inter-state conflicts. That would not prove to be the case. Additional Protocol II defines intra-state conflict so restrictively that many such conflicts would have to continue to rely on the coverage of Common Article 3. Even as the occurrence of inter-state war took a back seat to civil wars, states were no more inclined to conform to the laws of armed conflict than they were prior to the Additional Protocols' existence. This was despite the fact that organizations such as the International Committee of the Red Cross spent most of its energies on these types of conflict.

It is noticeable that with the end of colonialism not one post-colonial country has been prepared to recognize belligerency in its own territory, thereby giving their opponents the benefits of the Additional Protocols. Law can only function if it is reflective of the reality of the society that gives rise to it. The law of armed conflict failed in terms of the requirements for belligerent status because the reality of modern conflict is one in which the combatants are in no position and are unwilling to live up to the obligations of governments under those laws. If then we are living in an age where the law of war reflects the needs of the Westphalian state system, yet states are no longer the primary actors when it comes to waging war, how is constraint to be applied in time of war?

## Chapter 4

### Restraint in Armed Conflict

Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force – that is, physical force, for moral force has no existence save as expressed in the state and the law – is thus the *means* of war; to impose our will on the enemy is its *object*.

- Carl von Clausewitz, *On War*

The law rarely anticipates situations that have never arisen before. For example, the prospect of a nation state waging war on a terrorist group with no state sponsorship or defined nationality is something that never occurred to those attending the Hague and Geneva Conferences. Thus, the law of armed conflict addresses terrorists with a relationship to a state or a nationalist movement. However, when terrorists without such a relationship or even other types of non-state actors such as mercenaries, criminal organizations and even multinational corporations are powerful enough to influence international conflicts for their own political purposes, can law provide adequate protection?

For Clausewitz, policy, not law, is concerned with protecting the state's position in the world vis-à-vis other actors. It represents the sum of the community's interests and "whatever else the moral philosopher may care to add" (W 607). He does prioritize the interest of the state over moral considerations. However, Clausewitz would be the first to remind political leaders that war is uncertain and has inevitable costs. In addition, his approach to the subject of state interest leaves open the possibility that it can vary over time in ways that make restraint in war more or less possible

#### 4.1 Humanitarian Intervention: Somalia and Operation Restore Hope

As Clausewitz pointed out, war is not an autonomous activity. War gets its meaning, as an instrument of policy, from its political goals. This is not only true of war *per se*, but also of humanitarian crisis caused by war. Frequently, humanitarian missions fail to meet their goals because they fail to alter the political conditions that caused the crisis in the first place. Operation Restore Hope (1992-1993) is one such example.<sup>1</sup> Though the goal of this humanitarian mission was to put an end to the suffering caused by famine, it was a famine caused, for the most part, by fighting among various clan-based militias. Those proposing humanitarian intervention in Somalia should have known they needed to first, strike at the power base of the warlords and their militias, and second, help create civilian political structures that would act as an alternative to the militias.

Once a definite set of goals was established, those supporting intervention in Somalia could ask the military to formulate operations and tactics consistent with the strategic goal of establishing a stability that the warlords could no longer threaten. This would have allowed for a realistic assessment of resources and timelines, and political decision makers could then decide if they wanted to go ahead with an intervention. Yet the Bush administration established no such realistic political objectives for the mission. President Bush viewed any such help to Somalia strictly in humanitarian terms and believed that a follow-up mission led by the UN with US military participation would be responsible for the political task of nation building. Operation Restore Hope's stated goal, to create a sufficiently secure environment for the distribution of food aid, was vague.

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<sup>1</sup> See Walter Clarke and Jeffrey Herbst eds., *Learning from Somalia: The Lessons of Armed Humanitarian Intervention* (Boulder CO: Westview Press, 1997).

What was to count as sufficiently secure? The lack of a strategic goal meant the US would turn over to the UN an unchanged political situation.

This absence of political goals is strange, as noted by Fox, for several reasons.<sup>2</sup> First, the “Powell Doctrine” stressed the importance of clear aims, including political goals. Second, the decision making process that resulted in Operation Restore Hope relied on those in the US State Department and civilian staff in the Defence Department who based their views on political considerations. Finally, it was widely understood at the time that a purely humanitarian approach would have difficulty succeeding in a crisis that was manmade. For example, according to Powell, “The famine had been provoked not by the whims of nature but by internal feuding. How were we to get out of Somalia without turning the country back to the same warlords whose rivalries had produced the famine in the first place?”<sup>3</sup> The answer to such a question, in Clausewitzian terms, would have been to use military intervention to alter the political and military situation in Somalia just enough that the country would be stable once forces left.

Fox cites three reasons for why the Bush administration did not set clear political goals for Operation Restore Hope.<sup>4</sup> One reason was the US administration’s intent to leave political questions, question they were not interested in dealing with, to a follow-up UN mission. A second reason was that US Central Command developed its operational plan based solely on military feasibility without attention to political considerations. They preferred to base operations in Mogadishu with its air and seaport, rather than to base

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<sup>2</sup> John G. Fox, “Approaching Humanitarian Intervention Strategically: The Case of Somalia,” in *SAIS Review*, 21, no.1 (Winter/Spring, 2001), 151.

<sup>3</sup> Colin L. Powell, *My American Journey* (New York: Random House, 1995), 565-566.

<sup>4</sup> Fox, “Approaching Humanitarian Intervention Strategically,” 152-154.

operations in the more stable North. A final reason was that the United States Agency for International Development, the US government agency that provides economic and humanitarian assistance, argued relief should not be political. In other words, they believed distributing aid to the more stable regions in the North, in order to bypass the warlords in the South, was using aid for political purposes. The problem, in the final analysis, was not realizing that what caused the famine in Somalia was not so much by a lack of food, but politics.

The effect of not placing Operation Restore Hope in a political framework was to make the handover to UN officials more difficult than necessary.<sup>5</sup> The failure to establish minimum political stability in Somalia led to confusion about what the international community's goals ought to be and to criticism of the UN for expanding its operations to include dubious political objectives such as national building. A more Clausewitzian view would have shown that the US led operation was, in point of fact, unrealistically narrow. The choice of Mogadishu as the main base of operations, though sensible from a military and relief point of view, made the city a more valuable prize for the militias and led to fighting for its control. From a relief point of view, concentrating efforts in the South where the famine was worse was sensible. Yet this strategy neglected the more peaceful North where it may have been easier to distribute aid. It also gave the impression that the intervention was punishing those in the North for their good behaviour.

War caused the humanitarian crisis in Somalia. Thus ending the crisis required restoring a minimum level of political stability to the country and weakening the power of the warlords who owed their standing and wealth to the war itself. Those pushing for a humanitarian intervention needed to understand from the outset that this required a set of

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<sup>5</sup> Fox, "Approaching Humanitarian Intervention Strategically," 154-155.

particularly daunting political goals. As noted by Fox, had this been the case, they may have put together a larger diplomatic force, considered disarming and weakening the warlords from the beginning, and set more realistic timelines.<sup>6</sup> Faced with such an understanding, the Bush administration may have chosen not to send a force at all or other options that placed more emphasis on UN involvement. Nevertheless, there was no guarantee any course of action would work since the Administration did not understand Somalia nor did US citizens seem very willing to pay the costs of an intervention.

The international environment had been changing since at least the fall of the Berlin Wall and the US, dissatisfied with the ability of the rule-based system to respond, employed relative power to maintain an international order that supported its interests and security requirements. These requirements to a large degree reflected the same needs of many nations in the developed world and thus the US, although predominant, did not act alone in its interventions. However, neither were they all the result of consensus within the framework of the UN. Even before the US committed to action against Iraq, operations in the former Yugoslavia had proceeded without UN authorization. This action reflected impatience with the inability of the UN and the inclusive, rule-based system it represented to respond effectively to security threats that became predominant after the Cold War.

#### 4.2 The Responsibility to Protect

The most recent response to the problems encountered in places such as Somalia has been the UN's International Commission on Intervention and State Sovereignty and

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<sup>6</sup> Fox, "Approaching Humanitarian Intervention Strategically," 155-156.



its concept of the Responsibility to Protect.<sup>7</sup> According to its report, state sovereignty is conditional rather than absolute. As stated by Axworthy:

In essence, the commission crafted a definition of sovereignty centred not on the prerogatives of the state but on its primary responsibility to protect its citizens. If a state legitimately protects its citizens, then it is in full right of its sovereign power. If it fails to do so, or is the perpetrator of a massive attack on the rights of its citizens, then the international community must assume the function.<sup>8</sup>

The Responsibility to Protect is comprised of three tasks: prevention, reaction and rebuilding. The responsibility to prevent requires the international community to address both the root causes and direct causes of internal conflict and other man made crises putting populations at risk. The responsibility to react requires it to respond to situations of compelling human need with appropriate measures, including coercive measures like sanctions, international prosecution and in extreme cases military intervention. The responsibility to rebuild requires the international community to provide full assistance with recovery, reconstruction and reconciliation after any military intervention.

The Commission stressed that “prevention options should always be exhausted before intervention is contemplated” and these options “should always involve less intrusive measures before coercive measures are used,” though it allows for military intervention under certain circumstances. The Report sets out four conditions for the use of military force. First is the “just cause threshold.” According to this condition, military intervention for human protection purposes is warranted only when there is serious and

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<sup>7</sup> The International Commission on Intervention and State Sovereignty, “The Responsibility to Protect,” <http://www.iciss.ca/report2-en.asp>. (accessed June 4, 2008).

<sup>8</sup> Lloyd Axworthy, *Navigating a New World: Canada's Global Future*, 2nd ed. (Toronto: Vintage, 2004), 192.

irreparable harm occurring or imminent harm likely to occur. Such harm is constituted by either large scale loss of life or large scale ethnic cleansing.

The second condition constitutes four “precautionary principles.” First is that of “right intention.” The primary purpose of military intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. The second principle is “last resort.” Military intervention is only justified when every non-military option for the prevention or peaceful resolution of a crisis has been explored, with reasonable grounds for believing that lesser measures would not have succeeded. The third principle is that of “proportional means.” This requires that the scale, duration, and intensity of any planned military intervention must be the minimum necessary to secure the defined human protection objective. The final principle is “reasonable prospects.” According to this principle, there must be a reasonable chance of success in halting or averting the suffering that has justified the military intervention, with the consequences of action not likely to be worse than the consequences of inaction.

The third principle of military intervention is “right authority.” The UN Security Council assigns to itself the mantle of “right authority” to justify military intervention for humanitarian principles. As stated in the ICISS Report:

There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has. Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large-scale loss of human

life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.<sup>9</sup>

It also requires the five permanent members of the Security Council not to apply their veto power to matters where their vital state interests are not involved and not to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support. If the Security Council rejects a proposal for military intervention or fails to deal with it in a reasonable time, it has two options. It can either have the matter considered by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure or have action taken within the area of jurisdiction by regional or sub-regional organizations under Chapter 7 of the UN Charter, subject to their seeking subsequent authorization from the Security Council.

Finally, there are specific “operational principles” for any such military intervention. First, any military intervention for humanitarian principles must have clear objectives: a clear and unambiguous mandate at all times and resources to match. Second, there must be a common military approach among all those involved involving unity of command, clear and unequivocal communications and chain of command. Third is acceptance of limitations. Any military intervention for humanitarian purposes should use incrementalism and gradualism in the application of force with its objective being the protection of a population, not the defeat of a state. Fourth are the rules of engagement. These must fit the operational concept of the mission, must be precise, reflect the principle of proportionality and involve total adherence to international humanitarian law. Fifth requires an acceptance that force protection cannot become the principal objective

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<sup>9</sup> The International Commission on Intervention and State Sovereignty, “The Responsibility to Protect,” <http://www.iciss.ca/report2-en.asp>. (accessed June 4, 2008).

for any military intervention for humanitarian purposes. Finally, the maximum possible coordination with humanitarian organizations is required.

The rationale for the principle of non-intervention is to guarantee that a community is free to determine its own political affairs. Consider the following analogy.<sup>10</sup> Individuals in civil society are free to live the life of their choosing as long as they do not harm or otherwise interfere in the lives of others. In the language of rights, these individual freedoms manifest themselves in the rights of life and liberty. In international society, the individual rights of life and liberty render themselves as territorial integrity and political independence and the UN Charter expresses these rights this way. In addition, for every right one enjoys one also incurs a reciprocal duty. In the case of civil society, individuals have the right to life and liberty and the duty not to interfere with the life and liberty of others. In international society, nations have the right to territorial integrity and political independence and the duty not to interfere with the territorial integrity and political independence of other nations. Since talk of rights is at the centre of our political system and central to the UN Charter, it seems natural to think of state sovereignty in these terms.

The assumption of the Responsibility to Protect is that the purpose of granting rights to political entities like states is not for the benefit of the states themselves but rather to protect the fundamental freedoms of the constituents of those states. One possible argument for this position is that political communities, which are abstract entities, cannot be moral agents. We recognize states' rights in order to leave citizens free to determine the political processes that will govern them, not to protect states from harm. Protecting the liberty of people is what motivates the principle of non-intervention.

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<sup>10</sup> See Walzer, *Just and Unjust Wars*, 58-59.

Because the *raison d'être* for a nation's absolute right to sovereignty is to protect political independence and self-determination, the right of absolute sovereignty is conditionally based on fulfillment of this purpose. When a state adopts policies of genocide, slavery and other injustices, talk of political sovereignty is gratuitous.<sup>11</sup>

Historically, though, it has not been the case that the prime function of the state was the protection of individual rights. As rulers from the mid 17th century on were able to consolidate territorial boundaries and centralize power, the function of the state was the establishment of order. There was an implicit contract between the ruler and his or her subjects for protection in exchange for taxation.<sup>12</sup> The state enforced this protection at the level of international society with its army and within its own borders with domestic police forces. As private forms of protection came to be outlawed, legitimate economic activity began to thrive in safety and the taxation revenues it generated increased.

The concept of state sovereignty is a Western idea that grew out of the Peace of Westphalia and says nothing about the quality of government. Its express purpose was to limit warfare by insisting that states did not have the right to interfere in the domestic issues of other states. The Responsibility to Protect, based as it is on just war principles, broadens the grounds for going to war. Moreover, war within the Westphalian system is not intended as a method of spreading liberal democracy but as a means of conflict resolution. The spreading of democracy around the world threatens many states such as China. This is why supporters of the Report have to argue that globalization, technology

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<sup>11</sup> Walzer, *Just and Unjust Wars*, 90.

<sup>12</sup> Martin van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 1999), 155-170.

and other such things are subverting sovereignty. Otherwise, it is the Responsibility to Protect which is itself subversive to the world order.

#### 4.3 Conclusion

Since the time of Grotius, the decision to go to war had been an exclusive right of the state that was recognized by other states within the Westphalian system. The Westphalian system of states' very existence rests on this right. Until states were the final arbiter of the justice of their cause and did not need to appeal to any higher authority such as the Pope, such a system of states was not even possible. Further, it is possible to demonstrate that the Westphalian system was a tool for limiting the suffering of war, as it was a reaction to the devastation caused by the Thirty Years War. A similar situation existed in the 20th century, as the modern industrial state combined with advanced military technology was devastation undreamed of by Clausewitz and any of his contemporaries.

Beginning in the 20th century with the League of Nations and the Charter of the United Nations, legal prohibition of the state's right to go to war in circumstances other than self-defence brought into question the relationship between the *jus ad bellum* and *jus in bello*. With the resort to force now deemed unlawful, questions were raised as to what extent those responding to aggressive war should be bound by the restrictions and obligations of international law. The International Court of Justice tried to answer this question in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.<sup>13</sup> What has proven particularly controversial is the ambiguity of the Court's

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<sup>13</sup> The Legality of the Threat or Use of Nuclear Weapons, *ICJ Reps*, 1996, 226.

conclusions relating to the interaction between the *jus ad bellum* and *jus in bello* and its analysis of the principle of proportionality.

The majority opinion determined that the use of nuclear weapons was “scarcely reconcilable” with the dictates of *jus in bello*, and concluded that the threat and use of nuclear weapons would generally be contrary to international law applicable in an armed conflict.<sup>14</sup> Yet, the majority opinion also stated: “In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”<sup>15</sup> Justice Higgins, in her Dissenting Opinion, tried to reconcile these views observing that, proportionality in the strategic sense could be reconciled with proportionality in the tactical sense in circumstances of “state survival.” She noted:

It must be that, in order to meet the legal requirement that a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage, the ‘military advantage’ must indeed be one related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; and that no other method of eliminating this military target be available.<sup>16</sup>

The advisory opinion gave neither specific authority to nor a universal prohibition against the threat or use of nuclear weapons. The same reasoning that allows for unavoidable non-combatant casualties during any military operation seems to operate

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<sup>14</sup> The Legality of the Threat or Use of Nuclear Weapons, *ICJ Reps*, 1996, 226, 262-266.

<sup>15</sup> The Legality of the Threat or Use of Nuclear Weapons, *ICJ Reps*, 1996, 226, para. 2E, 266.

<sup>16</sup> The Legality of the Threat or Use of Nuclear Weapons, *ICJ Reps*, 1996, 226 (Dissenting Opinion of Judge Higgins), 588

with nuclear strikes, given the accidental nature of the non-combatant deaths.<sup>17</sup> With the exception of initiating hostilities, there is no actual international law restricting the use of nuclear weapons. Rather, the Advisory Opinion stated that the threat or use of force by nuclear means ought not to be contrary to the United Nations Charter Article 2(4). In addition, their use is unlawful if it does not conform to Article 51 of the Charter. Each nuclear power would need to decide on its own if their use of nuclear weapons would be justified. This makes the use of nuclear weapons an *ad bellum* and not an *in bello* consideration.

The reasoning of the Advisory Opinion is odd in the sense that it is not especially clear how *in bello* considerations would even apply in the case of nuclear weapons. With respect to the principles of discrimination and proportionality, a war that involved nuclear weapons would come as close to the Clausewitzian ideal of absolute war as anything ever seen. However, just war reasoning is not the only tradition available for justifying restraint in war. A tradition of explaining restraint in terms of self-interest or *raison d'état*, also exists. On this account, if two sides can find a mutual self-interest in restraining the effects of war then they can codify this self-interest into rules that may have a legal character. This is what Clausewitz has in mind with respect to the law of war.

Clausewitz's views on international relations reflect realism. Realists hold that, since anarchy is the defining characteristic of international relations and states are the primary actor in world politics, war between states is a constant possibility. Therefore, states must be concerned about their power relative to other states and be willing to use force to maintain their relative position. Given the dangerous nature of international relations, national survival is the key consideration guiding national policy.

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<sup>17</sup> David Rosenberg, "Nuclear War Planning," in *The Laws of War*, 165.



Clausewitz's realism would seem to leave little room for constraint respecting the use of force in international relations. His claim: "Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force – that is, physical force, for moral force has no existence save as expressed in the state and the law – is thus the *means* of war; to impose our will on the enemy is its *object*" (W 75) appears to deny international law any role to play in considerations regarding the use of force. Like Hobbes, Clausewitz equates morality with positive law.<sup>18</sup> Neither international law nor morality exist where there is no power to enforce it.

From the claims that international law has no force and that morality has no meaning outside the state, it appears to follow that one should not consider restraint when deciding to go to war. Yet moderation can still enter into decisions to go to war in the form of prudential concerns.<sup>19</sup> Depending on the situation a state finds itself in, it may exercise greater or lesser restraint in the decision to go to war. Recall that Clausewitz amplified the claim that "war is merely the continuation of policy by other means" with the proposition "the political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose" (W 87). Therefore, questions about limiting the means and objectives of war are questions of policy; about which Clausewitz says:

It can be taken as agreed that the aim of policy is to unify and reconcile all aspects of internal administration as well as spiritual values, and whatever else the moral philosopher may care to add. Policy, of course, is nothing in itself; it is

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<sup>18</sup> Hobbes claims: "Where there is no common Power, there is no Law." Thomas Hobbes, *Leviathan*. Part I, Chap. XIII.

<sup>19</sup> See Suzanne C. Nielsen, "The Tragedy of War: Clausewitz on Morality and the Use of Force," in *Defence Studies* 7, no. 2 (June 2007): 213-222.

simply the trustee for all these interests against other states. That it can err, subserve the ambitions, private interests, and vanity of those in power is neither here nor there. In no sense can the art of war ever be regarded as the preceptor of policy, and here we can only treat policy as representative of all interests of the community (W 606-607).

The implication here is that criticism of policy itself is beyond the scope of a theory of war and that the social forces and values that affect policy is where one should look for factors to moderate the decision to go to war.

Clausewitz reminds the reader that, since war is a political instrument, the degree of effort put into fighting should be appropriate to the ends sought. However, deciding on the appropriate degree of force is not easy and requires the "intuition of a genius" since military leaders must take into account such things as the scale of political demands, the situation and condition of the belligerents, the government's and the people's will, character and ability, and the political sympathies of other states. From this historical examination, Clausewitz concludes: "The aims a belligerent adopts, and the resources he employs, must be governed by the particular characteristics of his own position; but it will also conform to the spirit of the age and to its general character. Finally, they must also be governed by the general conclusions to be drawn from the nature of war itself" (W, 594). Since every age has its own type of warfare and limiting conditions, in some periods restriction on a state's decision to use force may be appropriate.

Since Clausewitz appears to deny that moral considerations and international law should govern a state's decision to go to war, and yet he also suggests that restraint may be appropriate, a decision to go to war will depend on the interests and values of the states involved and the character of the times. This does not imply that Clausewitz takes war to be just like any other policy a government may undertake. War is distinct because of its unique means - force (W 75). Clausewitz makes it clear that "war in itself does not

suspend political intercourse or change it into something entirely different” (W 605).

Neither is it in keeping with Clausewitz’s overall manner to think he takes war lightly: “No one starts a war – or rather no one in his senses ought to do so – without first being clear in his mind what he intends to achieve by that war and how he intends to conduct it” (W 579). Following this logic seems to point in the direction of restraint.

Finally, one must remember that Clausewitz argues war should never be an end in itself:

“War is no pastime; it is no mere joy in daring and winning, no place for irresponsible enthusiasts. It is a serious means to a serious end” (W 86).

It is more consistent to interpret Clausewitz’s famous maxim as leading to restraint in warfare. Given that governments on Clausewitz’s view are the ones that set policy and that policy represents the rational aspect of war, he argues that: “Since war is no an act of senseless passion but is controlled by its political object, the value of this object must determine the sacrifices to be made for it in *magnitude* and also in *duration*. Once the expenditure of effort exceeds the value of the political object, the object must be renounced and peace must follow” (W 92). As such, policy functions as a restraining force on war. However, policy is not the only thing at work.

Despite the fact Clausewitz does not draw on moral considerations when discussing restraint on the means of warfare, it may nevertheless be possible to observe certain limitations. As Clausewitz writes:

If wars between civilized nations are far less cruel and destructive than wars between savages, the reason lies in the social condition of the states themselves and in the relationships to one another. These are the forces that give rise to war; the same forces circumscribe and moderate it. They themselves however are not part of war; they already exist before the fighting starts (W 76).

His point is that policy has the effect of restraining the means of warfare since there is nothing in the nature of war itself that has a moderating effect. Following this, Clausewitz says: "If, then, civilized nations do not put their prisoners to death or devastate cities or countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct" (W 76). Again, Clausewitz is saying that the nature of the societies involved in war determines the tendency towards unrestrained violence. It is important to note, though, that Clausewitz does not think it is necessarily true that "wars between civilized nations" will be "less cruel and destructive."

Just like Clausewitz's views regarding the resort to force, he believes that moderation when fighting a war cannot be unilateral: "If one side uses force without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand" (W 75-76). Though he does not consider the possibility that it may be in one's self-interest to unilaterally limit means, say in the case of avoidance of reprisals in counter-insurgencies where you want to win over the population, with respect to weapons, this at least requires tacit acceptance of both sides.

He also believes that restraint with respect to the *in bello* rules must not make leaders lose sight of the fact that war itself is not humane: "It would be futile – even wrong – to try to shut one's eyes to what war really is from sheer distress at its brutality" (W 76). However, Clausewitz's survey of the history of warfare in Book VIII, a discussion of a time when there was restraint in war, show he does not approve of senseless slaughter:

It had ceased to be in harmony with the spirit of the times to plunder and lay waste the enemy's land, which had played such an important role in antiquity, in

Tartar days and indeed in mediaeval times. It was rightly held to be unnecessarily barbarous, an invitation to reprisals, and a practice that hurt the enemy's subjects rather than the government – one therefore that was ineffective and only served permanently to impede the advancement of general civilization (W 590-591).

Though he writes that: “it is the natural law of the moral world that a nation that finds itself on the brink of an abyss will try to save itself by any means” (W 483), it does not follow that a state is always in this position. As such, even if war is not humane, this does not mean that any action is appropriate. Instead, Clausewitz believes that even when destruction is limited, one should not think that war would not contain brutal elements.

Most important, with respect to *in bello* restraints, is Clausewitz's historicism. He denies the identification of progress with history. For example, he specifically argues that those who identify the restraint observed in 18th century warfare with the general enlightenment of man are misguided (W 591). This view of history has two important implications for restraint in war. The first is that warfare will not necessarily become more humane as civilization advances. Though he believed reason could guide war between civilized people, this need not be the case; even so-called “civilized people” can be swept up in hatred for the enemy. He witnessed the transformation of the limited wars of the 18th century to the political mass army of the Napoleonic age and realized that the increased role of the people increased war's means and its irrational element. Nor was technology a solution to what was essentially a political problem: “The invention of gunpowder and the constant improvement of firearms are enough in themselves to show that the advance of civilization has done nothing practical to alter or deflect the impulse to destroy the enemy, which is central to the very idea of war” (W 76).

The second implication of Clausewitz's historicism is that it leads him to reject the conclusion that warfare realized its ultimate form under Napoleon and that all wars in the future would approximate absolute war. He realizes that governments have learned that the "heart and temper of a nation" can make a large contribution to "the sum total of its politics, war potential and fighting strength" (W 220). Now that governments are aware of this resource, they will likely tap into it (W 593). However, to argue that all wars in the future will be total wars is to ignore historical evidence. The majority of wars in history have been limited wars; they have been "more a state of observation than a struggle of life and death" (W 488). If Clausewitz's theory is to be empirically accurate, it must compensate for the fact that future wars may be wars of different types. As always, the dominant characteristics of the age govern real war.

Therefore, since Clausewitz is a proponent of restraint in war, moderation is best when it is possible. However, one must be prepared to meet unrestrained measures with an unrestrained response. This is why he is able to admire both Frederick the Great and Napoleon; two men with very different policies. According to Clausewitz, Frederick showed his acumen by acting in accordance with the spirit of his age in his campaign of 1760 (W 179). Napoleon's situation was different given the increased role of the people in warfare. He exploited the potential of this armed force while the Prussian and Austrian response was to fight a war of limited objectives with limited means leading to disaster (W 584). In the end, political leaders must continually appraise the situation and balance ends with means.

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