

**CODE AND CONDUCT: AN ANALYSIS OF THE  
MODERN LAW OF ARMED CONFLICT**

**BY**

**BRADLEY DUNCAN McALLISTER**

**A Thesis  
Submitted to the Faculty of Graduate Studies  
for the Degree of**

**MASTERS OF ARTS**

**Department of Political Studies  
University of Manitoba  
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**A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University  
of Manitoba in partial fulfillment of the requirements of the degree  
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**Bradley Duncan McAllister©1998**

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## Table of Contents

	<b>Page</b>
<b><u>Abstract</u></b>	2
<b><u>Introduction</u></b>	3
<b><u>Chapter One</u></b>	
<b>The Nineteenth Century: Trinitarian Warfare and the Custom of Restraint.</b>	5
<b>Clausewitz and the State</b>	19
<b>Expansion and Codification of the Law</b>	49
<b><u>Chapter Two</u></b>	
<b>Rebuilding the Trinity: Total War and the New Restraint</b>	60
<b>Total War and the Loss of Restraint</b>	65
<b>Jus In Bello Nova</b>	86
<b>International War</b>	87
<b>Nuclear War</b>	94
<b>Non-international War</b>	97
<b><u>Chapter Three</u></b>	
<b>Law and Disorder: Non-International Conflict and the Failure of Applicable Rules of Conduct</b>	115
<b>Law and the Character of Intrastate War</b>	123
<b>Intrastate War: The Ethnic-Nationalist Perspective</b>	132
<b>The Uncertain Future</b>	142
<b>Conclusion: Inconsistencies and Evaluations</b>	148
<b><u>Appendix</u></b>	
<b>Relevant Articles of Law</b>	161
<b><u>Bibliography</u></b>	196



## **Abstract**

The problem studied in this thesis is the dilemma of the modern international law of armed conflict, in its application to contemporary forms of warfare. Wars being fought today occur predominantly on an intrastate level. Meanwhile, the bulk of relevant international law applies mainly to inter-state forms of armed conflict. The discussion of this problem examines the emergence of the politically motivated mass army in the early nineteenth century. Older customary restraint in war broke down in favour of international legal codification. The impact of total war in the first half of the twentieth century broke down the effectiveness of the law of war. Reconstruction of the law created a greater distinction between non-combatant and combatant, in order to protect non-combatants from the effects of war. The modern law of war remains predominantly concerned with international armed conflict. This has created serious problems when attempting to apply laws of restraint to civil war. International organizations such as the Red Cross have emphasized the humanitarian value of the law of armed conflict in hopes of finding a means of applying law to intrastate warfare. As intrastate war surpasses international armed conflict in frequency, international law is again in danger of breaking down. As armed violence transcends the borders of the sovereign state, the state may be impeding efforts to apply effective international law to armed conflict.

## Introduction

*"Interesting, you Earth people glorify organized violence for forty centuries, but you imprison those who employ it privately."*

— Mr. Spock

This thesis is a discussion of the applicability of the modern law of armed conflict to contemporary forms of warfare. The law of war emerged out of the just war tradition, understood through two main concepts: the *jus ad bellum* and the *jus in bello*. The formation of the law of war is based on assumptions that conform to a trinitarian concept of war.

The format of this thesis is broken down into three chapters. Chapter One is a study of nineteenth century Europe. The nineteenth century was the period in which, for the first time, wars were fought with armed forces composed of citizens of states. This is in contrast to armed forces that had been composed entirely of professional soldiers, however recruited, prior to this time. Citizen armies produced a change in the politics of going to war and how it was fought.

Chapter Two discusses the breakdown of the law of war under the impact of total war. This chapter also details the reconstruction of the law following World War Two. In that reconstruction, greater legal attention was paid to the

status of non-combatants. That status was challenged by the rise in frequency of intrastate conflict during the Cold War era.

Chapter Three, the final chapter, addresses the attempt to shift the emphasis of the law of war to a more humanitarian approach. This is done in an attempt to find a means of applying the law to intrastate warfare. This attempt highlights the inapplicability of the modern law of armed conflict to warfare today. Inapplicability is apparent in a number of inconsistencies permeating the structure of the law.

## **Chapter One**

### **The Nineteenth Century: Trinitarian Warfare and the Custom of Restraint**

*"All inhabitants of the country are born to  
bear arms."*

— Prussian Commentary, 1714.

As with virtually all political theories and ideas, the perceptions of, and methods for, the conduct and the interpretation of many aspects of warfare, from its philosophical and normative underpinnings, to the actual, legally defined and codified rules and laws, which govern the prosecution of this somewhat infamous side of the political process, relies on the existence of a specific model or paradigm. The particular model that is generally referred to when analyzing war, or one of its motifs, is one that was constructed in the nineteenth century, out of centuries of historical, political, philosophical, and extremely violent experience. This model is still relied on, to a very great extent, when approaching war in general, or when seeking to make policies and directives concerning specific disputes in the world. However, the twentieth century has witnessed a dramatic change in the way one of humanity's more basic tendencies is directed. Despite this change, the nineteenth century model of warfare has remained relatively *unchanged* in its conceptual and organizational approach to the state.

Theorists such as Clausewitz and his contemporaries, working in and around the law of war, sought to explain war by defining its heavily interconnected components in a more separate fashion than they existed in reality. While not denying the fact of their being intertwined, they were explained separately so as to better understand how they fit together.

War meanwhile, developed over time beyond the nineteenth century, along with other social phenomena such as technology, rising social consciousness, and population increase. The connection between the societal groups with regard to war became stronger and more complex. So much so, that the ability to understand war and the needs of it, and thereby legislate it became more difficult in terms of separating out specific groups within it. Best argues that the law of war exists in an environment which prevents observance of the law in any way but partially and imperfectly.<sup>1</sup> The nature of war allows for no more because of such factors as cultural connections, psychological attractions, social and political uses for it and the potential abuse of it, the unpredictable content, and the wide range of emotions felt amongst its participants.

The key to understanding war in the nineteenth century was to distinguish between sets of actors involved in war. The value and relative effectiveness of the law of war could then be laid out according to the moral and social needs of states

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<sup>1</sup> Best, Geoffrey. Humanity in Warfare. New York: Columbia University Press. 1980. p. 83.

in conflict. The turn of the nineteenth century witnessed the birth and entrenchment of the national army, in which soldiers were willing to go to war for greater, although more abstract, concepts of national states rather than as the employees of a reigning monarch. The nineteenth century was also the period in which Europe shifted from a concept of the just war and/or natural law foundation to a legal positivist one in international law which the twentieth century was to inherit.<sup>2</sup>

Study of just war doctrine has long been concerned with two principle characteristics. These characteristics are defined as the *jus ad bellum* and the *jus in bello*. They are distinct from one another, but together they largely define the just war tradition. The *jus ad bellum* specifies the conditions under which war might be undertaken. Resorting to war should only be done for a just cause. The just cause had historically been connected to requirements of self-defense, restitution, or retribution. The one to determine these requirements relative to the political community has been the sovereign head of state, who possessed the legitimate right to declare war. The declaration of war can only be made by a legitimate authority. The legitimate authority in European political culture had long been the sovereign prince. The *jus ad bellum* served only to regulate wars between those princes.

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<sup>2</sup>Draper, G.I.A.D. "Wars of National Liberation and War Criminality." Restraints on War: Studies in the Limitation of Armed Conflict. Michael Howard, ed. Oxford: Oxford University Press. 1979. p. 136.

The *jus in bello* concerns ideas of proportionality and discrimination. These concepts establish boundaries on the level and nature of force that may be used in war. The general stipulation of *jus in bello* is that the war should not contribute more harm than good. The selection of targets of war should be done in accordance with a comprehensible moral principle which has predominantly been the condition of combatancy.<sup>3</sup>

There exists a tangible connection between these two ideas that has created a duality in the theoretical and juridical approaches to the moral reality of war.<sup>4</sup> *Jus ad bellum* and *jus in bello* join together in a sense of continuity between ends and means. A war that is fought for certain values that give war a just cause should express those ideals in the conduct of its participants.

Conversely, the idea of the just war has maintained that only one party to the conflict can have a just cause. Given that argument, the party waging the just war should not be limited in the means available to it to pursue its justice. Excessive scruples of conduct may constrain the waging of just war, and they risk the victory of the unjust. The importance of just cause in war was such that throughout history leading to the seventeenth century, the preoccupation with who

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<sup>3</sup> Clark, Ian. Waging War: A Philosophical Introduction. Oxford: Clarendon Press. 1988. p. 35.

<sup>4</sup> Walzer, Michael. Just and Unjust Wars: A Moral Argument with Historical Illustrations. New York: Basic Books. p. 21.

had the greater right to go to war delayed the development of a substantial body of *jus in bello*.<sup>5</sup>

The approach to the idea of international law and the state was pioneered by a number of theorists. Their studies covered a number of areas including such aspects as the role of the sovereign power within the state, the duty of the citizens or subjects to their ruler(s), and the unrestricted right of the sovereign power to resort to war with other states. In addition to these rights and duties was an idea of what may be permitted in war.

According to Vitoria (1486-1546), the reason for going to war is the peace and security of the community. That being the case, the ruling body, as representative of the community and the holder of authority in it, has the power to decide when and how the community responds to an offense against it. Vitoria argues this position with the following: "the prince holds his office by the election of the people, and he is therefore its representative and wields its authority, so that where there are lawful princes in the state, all authority resides in them, and no public business may be done without them, in war or peace."<sup>6</sup> Whether that ruling body has attained power by birth, election, or force of arms does nothing to change that level of authority and representation.

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<sup>5</sup> Draper, G. "The Idea of the Just War" *The Listener*, 14 (August 1958) p. 222.

<sup>6</sup> Hamilton, Bernice. *Political Thought in Sixteenth Century Spain*. Oxford: Clarendon Press. 1963. p. 138.



The positions of the soldier and the civilian for Vitoria are that they have no place in the government's council of state and are not bound to determine the cause of a war. Rather, they are to rely on their superiors to make such determinations. It would neither be possible nor desirable to explain all acts of state to its citizens. Even were the people to determine that a war was unjust, they would be in no position to stop it. Writes Vitoria, "... the fact that the war is being waged after public counsel and by public authority is enough proof of its justice [for the common man]."<sup>7</sup>

The above discussion has concerned limitations of participation within the state, with a particular concern for the right to wage war. The view toward limited means depends entirely on the ends that are sought in war. According to Vitoria, the defense of a particular state's perception of the common good is paramount. Any means that can aid in this defense is acceptable. During a war, no action taken against an enemy is unjust if the end sought is a lawful one. The only exception to this is the deliberate killing of the innocent. But this too has its exceptions.

Everyone fit to bear arms is dangerous to an enemy in war, therefore it is right to assume they are defending their king. They may therefore be killed unless it is obvious they are in fact harmless. When essential for victory, it is lawful to kill the innocent members of an enemy population. Vitoria's example is of the

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<sup>7</sup> Ibid., p. 148.

incidental death of the innocent from the bombardment of a population centre during the normal course of war.<sup>8</sup> Decisions that involve the deaths of innocents or ‘non-combatants,’ must not result from the initiative of the soldiers in the field.<sup>9</sup> Rather, the responsibility for such actions must lie with those in command. Furthermore, soldiers should at least make an effort to spare non-combatants if possible.

One theorist best known for the study of moderation in conflict was Hugo Grotius (1583-1645). The core of his work on war concerned itself mainly with the possibility of moderation in conflict. He believed in the possibility despite continual action to the contrary on the part of military forces. Grotius believed in several general principles that tended to be opposite to the view expressed by Vitoria regarding the non-combatant in relationship to armed conflict.

The non-combatant is certainly ‘innocent’ regarding the issues of the conflict. Including non-combatants in the conflict cannot bring advantage to the combatants, and excluding them does not damage the chances for success of either combatant. Non-combatants serve a purpose to the health of society. Hurting them does not improve that health. In matters of the spirit, attacking non-combatants displays a viciousness that brings no credit. Sparing them displays a temperament of decency and compassion that commands gratitude, affection and

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<sup>8</sup> *Ibid.*, p. 152.

<sup>9</sup> *Ibid.*, p. 154.

admiration. Ethically, a military force has everything to gain from respecting the non-combatant. There are no practical military reasons in not respecting him. Military efficiency is not usually diminished as a result of respect for the non-combatant. Even in some circumstances where it does interfere with that efficiency, Grotius finds greater Christian virtue in the acceptance of the loss.

Grotius understood that although states inhabit an international society, often their separate interests were liable to come into conflict. War became a normal means of resolving such conflict. This is acknowledged as a realist perspective in Grotius' work.<sup>10</sup> The idealist approach drew attention to Grotius' consideration of the community of interest regarding culture. The relationship of states on this level becomes more of an international community. That community would naturally possess certain normative values surrounding the event of conflict between members, inducing caution and self-control in their engagement. These two viewpoints are illustrated in the debate between those that argue that in war all things are lawful, and those who contend that nothing is lawful in war.

Associated with ideas of limited warfare was the notion of non-combatant immunity. In this, there were two main assumptions: that warmakers are in principle willing and able to separate military considerations from economic and political ones, and that persons that are to be distinguished as non-combatants

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<sup>10</sup> Best, Geoffrey. War and Law Since 1945. New York: Clarendon Press. 1994. p. 29.

appear so on an objective level to enemy forces or third parties.<sup>11</sup> Like Vitoria, Grotius' outlook on the state was absolutist, and gave the sovereign the right to do as he wished with the "contracted" rights of his subjects. It was the sovereign who defined what their freedoms were to be.

Despite the principle of separating military considerations from other aspects of society, it was understood by Grotius that in the reality of war, the end to be attained (i.e. general peace and security) is most important. Actions necessary to reach that end are permissible even though it may mean the deliberate death of non-combatants. Harming non-combatants should be avoided in general, yet it is acceptable if the goal in war requires it. Best argues that this was the basis for the beginning of the development of the modern *jus in bello*, as Grotius' insights were picked up on and turned more towards the humanitarian side as the years went on.<sup>12</sup>

This development also turned Grotius' *jus gentium* ideas into modern international law, creating a much less ambiguous system of rules. Grotius' theories of international law tended to cover the relations between individuals who exist within the community of humankind as a whole, as well as the relations of states with one another. The development in the direction of international law since Grotius has been to restrict the application of the law exclusively to the

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<sup>11</sup> Remec, Peter Pavel. The Position of the Individual in International Law according to Grotius and Vattel. The Hague: Martinus Nijhoff. 1960. pp. 107-8.

<sup>12</sup> Best, War and Law Since 1945. p. 31.

relations between sovereign states. Through this, the ruling bodies of sovereign states were given the claim of exclusive monopoly on the right to use armed force.<sup>13</sup>

The system of authority and obedience in the political community, of which the state is an example, is instituted in civil society for the intended goal of mutual security for that community. Within the definition of common safety and security, the ruling authority is entitled to operate according to its own judgment and discretion. This is in respect to what it can do and what it can compel its subjects to do. The aspects of this concept of sovereignty are, 'supremacy, unaccountability, monopoly (in one organ), and indivisibility (of function).'<sup>14</sup> This duty of obedience to the sovereign power is secure from challenge by its subjects, provided the rulers stay within the limits of their power.

Pufendorf (1632-1694) established several concepts which formed the general discourse of powers possessed by the sovereign. They are as follows: military, diplomatic, legislative, punitive, judicial and appointive functions; taxation and property regulation; control over the expansion of private wealth; control over opinions relating to the ethical and religious disposition of citizens, meaning educational controls and other forms of censorship of information. The sovereign power controls the liberty of the citizens, and determines which rights and

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<sup>13</sup> Ibid.

<sup>14</sup> Krieger, Leonard. The Politics of Discretion: Pufendorf and the Acceptance of Natural Law. Chicago: University of Chicago Press. 1965. p. 135.

activities fall within the function of the state. The sovereign has an exclusive authority over those rights and activities. Any limitations in sovereignty were to be set up within each sphere of governmental involvement. Despite this wide range of rights and powers, there was flexibility in Pufendorf's view of absolutism. He saw value in finding a balance between law and practice in the way that the sovereign related to the individual.<sup>15</sup>

Sovereigns were represented their states on the international stage. As such, they interacted with one another as would individuals. In their case however, they interacted without the existence of a larger authority governing their behavior. As a result, there is no legal status to international relations. On that level, there is a reliance on the consensual, voluntary and "natural law of humanity" for guidance in and regulation of sovereign relations. To Pufendorf, a legal basis to international "law" is not possible.<sup>16</sup> To have such a system of rules would create a situation in which the sovereign was no longer the supreme authority relative to his subjects and to other sovereigns. Their authority would in effect be superseded by a higher authority. That is not supposed to be possible, given the amount of legitimacy state sovereigns are granted as rulers. There is a distinction between what is allowable to an individual and to a state. This is especially so in government and war.

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<sup>15</sup> *Ibid.*, p. 141.

<sup>16</sup> *Ibid.*, pp. 168-9.

According to Vattel (1714-1767), the society of humanity is generally governed by the natural law, which describes certain behavioral characteristics for interaction on the individual level. The law of nations, however, is more an artificially constructed system of rules governing the interaction of states -- through their rulers -- as representatives of specific groups of people.<sup>17</sup> These people have been organized into the artificial construct of the state. As such, states require an appropriate set of rules for their interaction, because the natural law describes a system of relations that has no application among states. States are abstract entities that have no characteristics of their own. The laws of war, as part of the law of nations, in effect, describes the permissibility of states to go to war, excluding the "outward application and sanction of the law of nature." Yet, in the conduct of war, the individuals involved and responsible for it are still governed by natural justice, which encourages moderation in warfare.

Codified law was intended only to restrict the *jus ad bellum*, with the *jus in bello*, as custom, being largely a matter of human conscience. A declaration of just cause under the law of nations implied a certain level of permitted violence.<sup>18</sup> Violence that exceeded that level threatened the validity of the just cause being fought for since justice would not demand a greater wrong to atone for the original affront. As the development of international law after Grotius moved away from natural law in favor of positive law, the aspects of the *jus in bello* began to shift in

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<sup>17</sup> Remec, p. 108.

<sup>18</sup> Ibid., p. 110.

context toward positive law as well. The conscience of humanity need no longer be relied on as a natural process, since conscience regarding the conduct of war was becoming legislated. Vattel's further development of the Grotian appeal to restraint followed a course into the secular world where repentance became substituted with restitution or reparation under the rule of law.<sup>19</sup>

In the Grotian system, wars between states were not national wars. They were wars between rulers and the state structures that they controlled. Subjects of the rulers should therefore be removed from war beyond their active involvement in the fighting. It was not necessary that people should hate one another just because their rulers chose to quarrel. Beyond the state, people were members of the larger community of humankind (which Grotius had also alluded to). As such, it was apparent to Jean-Jacques Rousseau (1712-1778) that the "rights of man" outweighed the "rights of rulers."<sup>20</sup>

War presupposes the existence of organized communities. States fight, or ought to fight, to vindicate their rights against other states. To Rousseau, the legitimacy of war depended on its end, which he believed only could be the preservation of the existence of the state and the assertion of its equality relative to other states. The use of "barbaric" methods in war, as Hinsley argues with reference to Rousseau, confuses the body politic of the state with the individuals

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<sup>19</sup> Tadashi, Tanaka. "Temperamenta (Moderation)." *A Normative Approach to War*, Onuma Yasuaki, ed. Oxford: Clarendon Press. 1993. p. 279.

<sup>20</sup> Best, *War and Law Since 1945*, p. 32.



who compose it.<sup>21</sup> In war, the only legitimate object of hostility is the state itself, physically represented by the soldiers in combat. Any acts which are not directly involved in achieving the purpose of war have no place in it. Conflict between individuals outside state control is only violence and murder, not war.

The concept of non-combatant immunity appealed to every area of European and North American law of war as it developed.

‘Respect for women in particular and for the helpless in general struck an ancient chivalric chord. So far as the *jus in bello* came from Christian just war doctrine, that too enjoined respect of ‘innocent’ persons. ...Dedication to commerce and belief in progress bred a sense of relief that religious wars, notoriously given to massacre and mayhem, seemed to be things of the past, and [people] rejoiced -- as was possible to from 1714 to 1793 and again through much of the nineteenth century -- that ‘limited war’ had become the fashion.”<sup>22</sup>

Becoming embedded in natural law, by the time of the transition to positive law in the nineteenth century, these attitudes of restraint inevitably found their way into documentation and codification as political theorists and international law-makers sought to give customary law a distinct judicial significance. This was a worthy effort in philosophy and principle, but in practice the law of war still fell victim to the necessities of war.

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<sup>21</sup> Hinsley, F.H. Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States. Cambridge: Cambridge University Press. 1967. p. 50.

<sup>22</sup> Best, War and Law Since 1945. p. 34.

The nineteenth century became a period in which the distinction between society or the "nation" and the state began to erode. Even if individuals did not join the military, they nevertheless became agents of the state through an ever more extensive political and emotional participation in national affairs. Regarding war, this blending of nation and state meant that the traditional concept of separating civil society from the military carried much less weight. "No military victories, however spectacular, were likely to be decisive so long as civil society retained the will and the capacity to carry on the war."<sup>23</sup>

With the greater involvement of the people, just cause began to be less important because the nation in arms represented the potential for greater and more unrestrained violence. In a war of nation against nation, the side allegedly pursuing the just cause would pit its entire political body against that of another. This would force the armed forces of a nation to take on the goal of destroying the entire national will to resist in order to attain the just cause being fought for.

### **Clausewitz and the State**

The prime representative of the nineteenth century paradigm of war is Carl Von Clausewitz (1780-1831). He was the first to clarify the trinitarian view of warfare in the most comprehensive way. Although he died within the first half of

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<sup>23</sup> Howard, Michael. Restraints on War: Studies in the Limitation of Armed Conflict. Oxford University Press. 1979. p. 10.

the century, Clausewitz's theories regarding war went on to shape the way in which most military thinkers perceived the world of war. *On War*, published posthumously, provided a philosophical approach which became a basis for military thought well into the twentieth century. In the 1870s the work was praised by Moltke, whose strategies brought success during the wars of German unification. The work was also studied by Engels, Marx, and Lenin. In the twentieth century, *On War* was an interest of Hitler and Eisenhower. Western civilization has treated it as "the greatest work on war and strategy ever written."<sup>24</sup> Clausewitz's influence in this century has been felt on both the side of the former Soviet Union and the United States of America during the Cold War, making his impact on war truly significant. Although it has become dated, *On War* provides the best foundation for studying the classic nineteenth century style of war.

One of the main, and largely inarguable contentions of Clausewitz, is that war is a social activity. Clausewitz asserted that the conduct of war was determined by the nature of societies. The so-called "times and prevailing conditions" of Europe had changed in a fundamental manner from the aristocratic societies of the *Ancien Regime*. During the Age of Napoleon, the "people" became a participant in war, throwing the entire nation into the conflict. Military activity became more intense, and escalated towards more unrestrained violence. International law and custom that had been so highly prized in the eighteenth

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<sup>24</sup> Van Crefeld, Martin. The Transformation of War. Toronto: MacMillan, 1991. p. 34.

century era of limited, formal, “gentlemanly” war, became nothing more than self-imposed limitations called “international law.”<sup>25</sup> For all that they were referred to as law, there was little or no legal duty to follow them. Jurists and philosophes wrote a great deal about restraints in war, and by the late Enlightenment their views constituted an intellectual consensus. Yet in practice, commanders of the *Ancien Regime* had been as ruthless as those who would come later. Any restraints that did exist were often abandoned when military necessity required it.<sup>26</sup>

The size of the armies in the field was increasing creating more destruction and violence out of sheer volume. However, the armies of the nineteenth century were just as likely to act with restraint as the “gentlemen” of the seventeenth and eighteenth centuries were likely to act without it. Theorists of the seventeenth and eighteenth centuries created a customary approach to war and its rules of restraint that was based entirely upon the political reality of their time. This was the era of the absolute monarchy in which the ruler held a sovereign claim over a given territory. His word was law within that state, and none of the citizens had the right to challenge that word. In fact, the outlook of the period saw the sovereign ruler and the state as one and the same, politically. When sovereigns interacted, so too were states interacting. Sovereigns declared war, and their armies took to the field as defenders of the sovereign/state.

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<sup>25</sup> Rothenberg, Gunther. “The Age of Napoleon.” The Laws of War: Constraints on Warfare in the Western World. Michael Howard, George J. Andreopoulos and Mark R. Shulman, ed. New Haven: Yale University Press. 1994. pp. 86-7.

<sup>26</sup> *Ibid.*

Armies had been composed of a special breed of men as distinct, in their own way, as the aristocracy was. They lived and died by their own code or system of rules that shared common traits with that of an enemy force, permitting them to act with restraint to some degree when fighting a war -- the proverbial line that is seldom crossed. However, this army was very ill-equipped to meet the challenge it faced at the turn of the nineteenth century. During the Revolutionary and Napoleonic Wars, it was widely accepted that military necessity permitted the breaking of normal rules and customs.<sup>27</sup> Military necessity would be invoked when supplies were low or when prisoners became a burden or commanders considered them a threat to their own troops.<sup>28</sup>

At the Katzbach and Waterloo, Prussian soldiers clubbed and bayoneted wounded French soldiers that they came across in the field. During the siege of Genoa in 1800, approximately 3,000 Austrian prisoners were left to starve on barges in the harbor. At Bailen in 1808, after receiving assurances that French prisoners would receive safe conduct to France, the Spanish broke their word. Some senior officers were allowed to leave, but the rest of the troops were mobbed, robbed and murdered by Spanish soldiers and civilians. Following the 1812 battle of Borodino, exhausted Russian prisoners who were unable to keep up

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<sup>27</sup> Best, Humanity in Warfare, pp. 18-9, 49-50.

<sup>28</sup> J.M. Bulloch and E.E. Cope. "British Prisoners in France, 1803-1813." Notes and Queries 174 (1938), pp. 92-96, 114-19; 175 (1938), pp. 76-8, 202-3, 256-58; and Rothenberg, The Art of Warfare in the Age of Napoleon. London: Batsford. 1977. p. 90, 218-19.

with the column were shot by their French captors. When the others became a burden during the retreat from Moscow, many of them were killed. In England in 1811, approximately 55,000 French prisoners were confined to prisons and barges where well over half died of malnutrition and disease. For the most part, the treatment of prisoners on all sides of a conflict during this era may have conformed to established standards, despite incidental evidence to the contrary; but as Rothenberg concludes, the established standards were unsatisfactory.<sup>29</sup>

The years 1789 to 1815 changed everything for the army and the state. The French Revolution had signaled the end of the *Ancien Regime*, and the birth of popular sovereignty. The state was no longer strictly a political structure, containing a sovereign power. Rather, it was fast becoming a structure that held a nation: a population that, in its ideal form, represented an equal brotherhood of citizens. In this form, states would interact with one another as political representations of sovereign people.

Traditionally, armies had been the battlefield representation of the king-at-war. The French Revolution and the rise of Napoleon had changed what the sovereign was. Since the army represented the sovereign, it now represented the people. Since the people now professed to represent themselves, it was inevitable that the people and the army would become more strongly intertwined.

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<sup>29</sup> Rothenberg, p. 90-2.

In a very significant way, popular involvement with the military was an attack on the pride and the distinctiveness of the professional soldier. Part of being a soldier was the code he followed. As Rothenberg states, "while no international treaties existed, a customary law of war, *jus in bello*, was widely recognized. To maintain discipline all armies adopted certain rules and regulations limiting certain practices, especially plundering and looting, and evolved codes of conduct."<sup>30</sup> There was an understanding among military men that Grotius and others wrote about. This was the custom of war that did not prevent massive destruction and violence against the undefended, but did provide for some degree of limitation in a more general sense.

The customs of war were a virtual hallmark of the professionalism of the soldier. War demanded a very specific set of skills and knowledge.<sup>31</sup> Strategy and tactics were methods by which the army performed its task. Proper strategy and efficient tactics helped bring victory in war with the least cost in manpower and equipment.

With the arrival of mass conscription, the doors to the army were opened to the civilian population as never before. It could not have been a pleasant prospect for men like Clausewitz. The sheer numbers of men that could conceivably be thrown into a conflict made the limitations of traditional methods of

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<sup>30</sup> *Ibid.*, p. 87.

<sup>31</sup> *Ibid.*, p. 88.

war impossible. To overcome larger numbers of men would require higher levels of violence and destruction.

To supply such enormous armies would require the entire society of the nation to be geared toward warfare. War became the object unto itself -- a totally unacceptable condition. The nature of war was not to be an end, but a means *to* an end. It was a medium of interaction among political entities of a certain description. Therefore, as Clausewitz concludes, war is politics by other means.

Clausewitz acknowledged that various impediments existed in war to prevent it from achieving its absolute state. Such "friction" would inevitably slow the progress of warfare. Yet, the danger of these changes to the nature of the state and the army were very real as far as the magnitude of war was concerned. The limited nature of war was primarily the result of objective factors: limited manpower, economic, and agricultural resources. When these limitations disappeared toward the end of the eighteenth century, more intense and prolonged wars became possible.<sup>32</sup> Having come through the Napoleonic Wars, Clausewitz saw the process of this change firsthand. There was no turning back from the irrevocable evolution of how war would be fought. Instead, Clausewitz sought to provide moderation through his description of the trinitarian character of war.

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<sup>32</sup> McNeill, William. The Pursuit of Power. Chicago: University of Chicago Press. 1982. pp. 144-6.



Clausewitz had been possessed by the idea in war of a "... 'remarkable trinity,' in which the directing policy of the government, the professional qualities of the army, and the attitude of the population all played a significant part."<sup>33</sup> Even as these factors came together in the development of nationalism throughout the nineteenth century, a much more ancient dichotomy of aristocratic-peasant maintained an awareness of distinction between the soldier and the civilian that continued to influence government policy domestically and internationally well into present day. With such deeply ingrained aristocratic influences in the nature of the military in European countries such as France and Prussia, the origins of Clausewitz's definition of the separation between the army and the civilian population becomes more clear. It made sense to the ruling nobles that the soldiers be commanded by aristocratic officers loyal to the royal families governing the states.

One of the primary interests of an aristocracy was its continuation. The nature of its existence depended upon the domination of a lesser class of people based on a history of rights granted by wealth, birth, law, and God. Supplying their military needs with soldiers recruited from the lower class, made aristocratic officers fully aware of the danger that existed with the arming of peasants; the power of the nobility being maintained for centuries through the use of force over them -- threatened as well as actual.

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<sup>33</sup> Howard, Michael. Clausewitz. Oxford: Oxford University Press. 1983. p. 20.

The social conditions of states themselves and their relationship to each other both give rise to war and also act to moderate it. Political objectives form the primary purpose for war in “civilized” nations. Political objectives are expressed through policy. Clausewitz states that these political aims are strictly the business of governments.<sup>34</sup> Armies fighting to achieve a political purpose in war, are fighting to achieve the will of the state. In a circular fashion, governments are attempting to realize the objective stated in policy through the use of armies. To do this, they must be in control of the army. Assuming that all states pursue similar activity and are reasonably alike in nature, then armies are bound to clash. The conflict between armies, as the tools of state policy, is what Clausewitz considered to be war. It is therefore accepted as a given, according to van Crefeld, that organized violence is only war when and if waged “by the state, for the state, and against the state.”<sup>35</sup> States did not always possess a monopoly on violence, despite the fact that international law proclaimed their monopoly. When, on occasion, non-governmental groups sought to wage war on their own, they faced brutal retaliation by state forces for stepping out of bounds. As Vattel states, “The sovereign demands justice, or makes reprisals, not only for his own concerns, but also for those of his subjects, whom he is bound to protect, and whose cause is that of the nation.”<sup>36</sup>

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<sup>34</sup> Clausewitz, Carl Von. On War. Princeton: Princeton University Press. 1976. p. 89.

<sup>35</sup> Van Crefeld, p. 36.

<sup>36</sup> Vattel, Emmeric de. The Law of Nations. London: G.G. and J. Robinson. 1797. p. 285. This attitude concerning the sovereign’s determination of justice for his people was also expressed by Vitoria in the sixteenth century.

When analyzing the armies of both Prussia and France before 1789, they are described in similar ways: as instruments of absolute monarchies.<sup>37</sup> These instruments had in fact been developmentally linked to the states that they served. They had given state authority a sense of permanency domestically and a greater influence abroad. Meanwhile, their financial, economic, and human needs were growing enormously and gave the state a powerful impetus toward the growth of governmental expertise, as well as the expansion and proliferation of its agencies and controls. The armies were also aristocratic institutions, playing an intrinsic part in the *raison d'être* of the nobility. Outside of the officer class, the rank and file were largely composed of hired mercenaries or forcibly recruited men from the poorer class. The gulf between the two bodies was large and rarely bridged.

Until the end of the 1700s, the monarchical rulers of Europe waged war with small, long-service armies. Their rank and file were usually composed of a good proportion of foreign troops. Command was a mixture of aristocrats and free-lance professionals. The army fought in compact formation. Performance in combat depended partly on how well soldiers were drilled to perform maneuvers and fire their weapons almost automatically. By the mid-eighteenth century, professional soldiers were becoming somewhat dissatisfied. Posen suggests that this dissatisfaction stemmed from the stagnation of customary military practices.<sup>38</sup>

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<sup>37</sup> Paret, Peter. Clausewitz and the State. New York: Oxford University Press. 1976. p. 25.

<sup>38</sup> Posen, Barry R. "Nationalism, the Mass Army, and Military Power." in Perspectives on Nationalism and War, John L. Camaroff and Paul C. Stern, ed. Amsterdam: Overseas Publishers Association. 1995. pp. 135-185. p. 143.

Restraint in war was equally customary since military practices appeared to have become almost standardized in their usage. There was less need to resort to tactics that would be considered unbecoming, such as deliberate assaults on non-combatants. In a sense, the structure of eighteenth century warfare generated an almost natural restraint.

Disillusionment in military thought was combined with various problems on the battlefield. The combination of pre-war drill, improved firepower technology, and battlefield leadership was making actual combat too costly in manpower and finances. Casualty rates of 20% per battle became common from the Seven Years War onward, while the length of wars allowed for several of these battles.<sup>39</sup> Casualties among the infantry could not be replaced as fast as they were lost, due to the expensive, long-term training of professional troops. Even by the eve of the Revolution, military thinkers in both France and Germany had already begun to complain of the limited motivation of the soldier, and the particular importance of his loyalty to the state.<sup>40</sup> State financial and administrative abilities were strong enough to remain at war for several years. As such, the monarch's resort to war became almost a routine means of conducting relations with other kings, leaving the soldier a political pawn with no glory to earn.

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<sup>39</sup> Weigley, Russell F. The Age of Battles. Bloomington: Indiana University Press. 1991. pp. 179-195.

<sup>40</sup> Palmer, R.R. "Frederick the Great, Guibert, Bulow: From Dynastic to National War," in Peter Paret, ed., Makers of Modern Strategy: from Machiavelli to the Nuclear Age. Princeton: Princeton University Press. 1986. pp. 107-108.

No matter what form of government may have existed, monarchy, republic, or empire, armies were those organizations which served those governments. Throughout much of European history until the end of the *Ancien Regime*, armies were considered uniquely distinct from the civilian population. Members were conscripted into service and formally discharged when their careers were over. Military leaders discouraged contact between soldiers and civilians. Troops were often recruited from foreign countries, or were moved constantly from one region of the country to the next, so that strong relationships would form with more difficulty.

Armies were distinct from other forms of population by the use of separate customs (e.g. drill, salute, and honor and the duel for officers). Military personnel were governed by their own laws separate from civilian law, and were publicly distinguished by their uniforms. By the late eighteenth century, soldiers were no longer billeted in civilian homes. Rather, their separation from civilians was even more greatly encouraged through the use of barracks. They were also trained to carry themselves differently. Erect posture and efficient movement displayed a particular pride in their station. Pride of this sort went far to insure loyalty; an important consideration when men such as these were armed to the teeth virtually twenty four hours a day.

Line troops being virtual mercenaries, paid for by the Throne, denoted a highly specific labor force whose skills were not easily learned by the peasantry. That in itself creates an immediate separation between the population and the army in service to the state. This division becomes even more distinct by the officer corps of these forces being the domain of landed aristocrats. The experience of Clausewitz's father provides an example of how impermeable the barrier to officer ranks was.<sup>41</sup> Out of necessity, Frederick the Great lowered the barriers to the Prussian officer corps. The crisis of the Seven Years War had given some members of the middle class the opportunity to advance in rank. When the crisis had passed, the officer corps was reduced to its original members from the *Junker* class. Clausewitz's father was retired out of the corps by Frederick soon after.

Barriers such as this were virtually impermeable. When soldiers were recruited from the civilian population, the separation was even more distinct. Soldiers knew full well that the possibility for advancement only went so far. This was a fact of their existence. The division between nobility and peasantry was intrinsic to European history to the extent that even by the nineteenth century, the army was viewed by all as being removed from the rest of society in the continent.

The recognition of the key elements of the state at war and their distinction from one another was necessary to limit the destruction war was likely to have on society and the state. Changes in the ruling body of the state from absolutism to

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<sup>41</sup> Howard, Clausewitz. p. 5, 12.

republican democracy, or at the very least a less absolute king, should not change the fact that international relations between states is conducted by their governing bodies. These bodies determine whether or not recourse to war is necessary. When war is declared, the army engages its enemy at the behest of the government. The final factor to be considered when the state is at war, is the people (i.e. the non-combatants or civilian members of the state). The civilians reap the benefits of victory or pay the material and spiritual costs of defeat. They may supply the material needs of the army, as well as a portion of the financial cost of the war to the government. As for the actual fighting itself, that was left to the army. The French Revolution would alter this balance between the three elements of Clausewitz's trinity.

According to Kedourie,<sup>42</sup> the educated students of a developing middle class emerged from universities, particularly in France, to discover that their low social standing within the class structure of the state would not allow them to put their education to use. They remained subject to exclusion from government and leadership by the nobles and aristocrats whom they considered less educated than themselves. Unable to employ their knowledge, many of these highly capable people became extremely frustrated and disillusioned by this exclusionary society.

The academic and intellectual ceased to approach society and politics from a contemplative standpoint, taking a much more active and public role; "... erudite

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<sup>42</sup> Kedourie, Elie. Nationalism. New York: Frederick A. Praeger. 1960. pp. 43-44.

philologists, or abstruse and complicated economists became the acknowledged founders of powerful political movements.”<sup>43</sup> An incidental accompaniment to these developments is an ideological style of politics. Thus was born the nationalism that was a key to the French Revolution and the success of Napoleon’s army later on. Nationalism or national identity became a social and political representation of that much-sought-after universal consciousness within the state. It was represented by the three word slogan: *liberté, égalité, fraternité*.

As king, Louis XVI had opted out of the social contract, essentially denying himself citizenship. The argument in the king’s favor was that in not being bound by contract, the king cannot be judged in civil law. However, according to the Jacobin St. Just, a king outside the confines of a social contract, ruled without consent. To rule without consent is usurpation and tyranny.<sup>44</sup> Walzer sums up these rationalizations with the following: ‘By ruling irresponsibly, the king had excluded himself from the body of citizens and therefore from the enjoyment of civic rights.’<sup>45</sup> ‘A man who reigns ... can only be overthrown by revolutionary war.’<sup>46</sup> What these statements entail, is that the king was never elected, therefore cannot be voted out of office. He may not be brought to trial under civil law, because he does not acknowledge or consent to the restraints surrounding and leading to that judgment. ‘Common law’ by its nature cannot be applied to a king,

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<sup>43</sup> Ibid., p. 50.

<sup>44</sup> Ibid., p. 16.

<sup>45</sup> Walzer, Michael. Regicide and Revolution: Speeches at the Trial of Louis XVI. London: Cambridge University Press. 1974. p. 63.

<sup>46</sup> Ibid., p. 64.



simply because the position as king transcends commonality. Therefore, should it be determined by the ruled that the ruler is unjust in his practices toward them, their only recourse for justice and accountability is to wage a war of revolution against the Crown. This vengeful judgment of the king acts to ensure the accountability of the republic that would replace the monarchy and prevent the corruption that led to revolution from resurrecting again.

Revolutions occurred inside specific states; however, state leaders and policy-makers believed that revolutions by their nature did not respect borders, but were actually transnational phenomena.<sup>47</sup> Liberal and nationalist ideas were incompatible with the ancient political institutions of Europe, and trinitarian war by its very nature, does not allow for revolutionary or "national liberation" movements. The structure of state, army, and people precludes it. The European monarch's aversion to revolutionary activity was understandable considering that those revolutionaries sought to create republics where the rule of law, based on the power of the people, would put an end to the rule of monarchs.<sup>48</sup> The obedience of the people was in the form of support for laws to which the citizens had given their consent. The organization of the civilian population into a military force, separate and in opposition to the state's army was abhorrent to the idea of sovereign leadership. Such movements opposed an entire method of international organization.

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<sup>47</sup> Best, Humanity in Warfare. p. 85.

<sup>48</sup> Arendt, Hannah. On Violence. New York: Harcourt, Brace & World. 1969. pp. 40-1.

The French Revolution gave Europe its first modern mass army. This mass army depended on nationalism for its combat power. Those who subsequently imitated the mass army were also forced to imitate its nationalism.<sup>49</sup> The *levée en masse* in France produced an army of considerable size and power. When the time came to challenge the French, the other states, Prussia in particular, had no choice but to conscript troops in a similar fashion. As Posen states,

“The mass army is a successful practice from the point of view of state survival in international politics. The mass army makes land powers much more capable of aggression. It is difficult to oppose a mass army without a mass army. Once the French Revolution, and later Napoleon, proved the efficacy of this pattern of military organization, others who valued their sovereignty were strongly encouraged to imitate this example. It is this imitation, ... that helped to spread nationalism across Europe.”<sup>50</sup>

The essence of the mass army is its ability to maintain its size in the face of the rigors of war: attrition exacted by the unhealthy conditions, the temptation to desert, and the firepower of the enemy. The mass army must also be able to maintain its combat power. To succeed, recruits must arrive with a certain willingness to become soldiers, a certain “educability,” and a commitment to the outcome of the battle. Necessary for these results is first a political motivation, and ultimately, literacy.

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<sup>49</sup> Posen, p. 145.

<sup>50</sup> *Ibid.*, p. 137.

In Clausewitz's time, the general population was highly uneducated, and would not be privy to most -- if not all -- of the body of philosophy and analysis surrounding the customary law that dictated how soldiers fought.<sup>51</sup> The works of Grotius, Vitoria or Pufendorf would be available only to the more educated ruling class. In a sense, philosophical study of the political provided a true justification for maintaining an international legal structure devoted entirely to the conduct of soldiers when at war with other soldiers. The law at this time, did not contain reference to the conduct of participants in domestic violence, since civil conflict was not a legitimate form of warfare. The civilian population did not have the right to dictate terms to the ruling body of the state through violence or other direct actions.

An example of Clausewitz's attitude toward the separation of the government from the people is in his reaction to a petition in 1817, reminding the king of Prussia of the constitution which had been signed by many judges and officials throughout the country. Clausewitz did not approve of the petition because the signatories were self-appointed spokesmen.<sup>52</sup> Clausewitz believed that the people must never personally approach the throne. Rather, they should declare their opinion through the press or through representatives in the government itself. For Clausewitz, direct contact between king and subjects in this manner was no better than mob rule in terms of legitimacy. Despite the assurance

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<sup>51</sup> Best, Humanity in Warfare. p. 76.

<sup>52</sup> Paret, Clausewitz and the State. p. 262-3.

Clausewitz felt as to the honorable content of the petition, there was still no justification for such a revolutionary step of private citizens advising or criticizing the king. His attitude regarding political reform was that change must come from above, not below. Prussia's position in the early years following Waterloo was weak, and Clausewitz believed as others did that a strong central authority was essential if Prussia was to continue to exist as equal to her neighboring states.<sup>53</sup>

Considerable debate existed over Prussia's policy in 1812 concerning the coming war. Clausewitz, together with Gneisenau and Scharnhorst, proposed a guerrilla campaign waged by regular forces and an armed population. They would be backed by Russian armies. The argument against this idea was that society would be ruined by it, thereby destroying the state itself. Believing that no nation should be dependent upon another, Clausewitz argued that since Napoleon was poised to dictate Prussia's fate, they were as good as lost anyway. Clausewitz, through his efforts, displayed a sense of national belief in what it meant to be Prussian. Paret's study of Clausewitz's *Bekanntnisdenschrift* alludes more to an emotional and untenable quality ever-present in the fervor of patriotism. The borders of the Prussian state were merely the container for these qualities found in Clausewitz, and later among others influenced by his writing.<sup>54</sup> The rise of nationalism over the course of the nineteenth century is illustrative of the point that the relationship between the three elements of the trinity had been transformed. It

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<sup>53</sup> Ibid.

<sup>54</sup> Paret, Clausewitz and the State. p. 216.

was not just the fact of the people being involved, but that their involvement served to manifest an emotional factor which made the link between war and politics much less clinical (ie. analytical or dispassionate). As evidenced by Clausewitz and others opposing Napoleon in battle, in defiance of their own king's wishes, their national beliefs -- as well as their hatred of Bonaparte -- superseded government directives.

The growing magnitude of warfare at the turn of the century required the rapid expansion of personnel size in the European armies. The Prussian example of enlargement led to changes in the army's place in society. Reformers such as Clausewitz and Scharnhorst questioned the concept that the soldier was the king's man to the exclusion of other concerns.<sup>55</sup> Scharnhorst had eliminated foreign recruitment of soldiers in favor of creating a "national people's army" -- a directive put in place at the moment of the revolt of February, 1813.<sup>56</sup> By March of that year, Prussia had increased its troop levels to 130,000 from 60,000 three months earlier. This was made possible through the removal of former exemptions from military service. Universal conscription was now law, and its success resulted in a force of 270,000 men by the fall campaign of 1813.

It can be reasoned that following the disastrous campaign to take Moscow in 1812, that France had essentially dragged Prussia into, the meaning of

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<sup>55</sup> Ibid., p. 235.

<sup>56</sup> Delbruck, Hans. History of the Art of War: Within the Framework of Political History, vol. 4. London: Greenwood Press. 1985. p. 451.

Clausewitz's beliefs became clear to the majority of the population of the country. The campaign to take Russia had been harsh enough, but the retreat was even worse. Napoleon's defeated army measured the long march back to France with many casualties. Weakened from a lack of supplies and dying from exposure and repeated assaults from Cossack horsemen, it became clear that an alliance with Napoleon was not a successful route for the Prussian people. Fighting to preserve Prussian independence from France was certainly a cause the country as a whole could embrace, given the experiences in Russia, known by all. Napoleon had become a danger to the stability of the nations of Europe, and Prussian reformers used this to generate as much support for their position as possible.

The middle classes and members of formerly exempt cities objected to conscription, preferring to continue contributing to the war effort through the payment of taxes. Members of the nobility did not approve of conscription either, because it detracted from their authority over the peasantry and shifted the focus of service from their inherent right to rule to a new awareness of national affiliation. As Paret states, 90% of the 30,000 volunteers who joined the army between 1813 and August, 1814 were a combination of workers, peasants, and "subaltern officials."<sup>57</sup> The majority of the population however, remained passive to these efforts. The reality of these reactions strongly suggests an overestimation of the level of patriotism in Prussia on the part of the reformers. Nationalism as a social and political force had barely begun to emerge in European society.

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<sup>57</sup> Paret, Clausewitz and the State. p. 236.

Nevertheless, despite the antagonistic nobility, the unsympathetic bourgeoisie, and a largely uncomprehending population weighing against them, the reformers efforts to conceptualize their meaning of state and society had created an emergence of new attitudes that would find purchase in later years, despite the inevitable failure of Scharnhorst and his associates.

France, and Prussia both experienced the use of the military as the school of the nation, developing this approach through universal conscription. This had followed the Revolution of 1789 which had given birth to a greater sense of national awareness. ‘The military arm -- the army and navy -- prepares all Frenchmen for national defense and is at once an instrument and an end of the propagation of national sentiment among the inhabitants of France.’<sup>58</sup>

Despite the drawbacks on the personal level, conscription represented the amalgamation of state interests with those of the individual, bringing together the obligations and rights of civilian society and the military. The effect of these changes on the bourgeoisie and artisans of France was similar to that which would occur among the Prussian middle class. Yet, to the growing number of poor and uneducated members of society, the leaders and symbols of the Grande Nation worked to center their thoughts and feelings on public affairs, the ideals of which, made for a great country.

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<sup>58</sup> Hayes, Carlton J.H. France: A Nation of Patriots. New York: Columbia University Press. 1930. p. 35.

In France and Prussia, those who could justify it and afford to, could of course buy their way out of service. The greater majority of the population did not have that option and so were made to serve. Prussia, the other German states, and France all emerged from the Napoleonic era under the principle that universal military service was a duty owed to the government by society. Nevertheless, the ideal of universal service did not go as far as those such as Scharnhorst had wanted. Success would come later, as military demands were reconciled with the interests of the propertied and educated classes.<sup>59</sup>

In 1859, a service law was passed by the parliament of the North German Confederation to be imposed on the territories under Prussian rule at that time.<sup>60</sup> It required conscripts to serve three years with the line, four years in active reserve, and an additional five years in the volunteer militia, known as the *Landwehr*. The army took on new significance as an institution of popular education, since it would inevitably take up 12 years of a person's life. A young man in his late teens, conscripted to serve in the army, would find himself subjected to nationalist indoctrination throughout his twenties. By the time he was free to enter Prussian society as a civilian, he would be nearly 30 years old, and possessed a distinctly "German" outlook. In fostering patriotism in the country, it

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<sup>59</sup> Paret, Understanding War: Essays on Clausewitz and the History of Military Power. Princeton: Princeton University Press. 1992. p. 47.

<sup>60</sup> Craig, Gordon A. The Politics of the Prussian Army 1640-1945. Oxford: Clarendon Press. 1955.. p. 178.



benefited from an increased importance in Prussian social awareness.<sup>61</sup> The Franco-Prussian War was the third consecutive victory for the German military since the end of the Napoleonic Wars.<sup>62</sup> From the spring of 1870, there was a pronounced support among the German population for the army. These victories had produced the successful unification of several German states into the empire of Wilhelm I. Under such grand support, the military was able to become the driving force in the development of a larger German nationalism.

The politically-motivated mass army in Prussia/Germany was a particular response to the size of their counterpart: the French military force. The utility of skirmishers began to be debated as an alternative to the long, tightly-controlled lines typical of European tactics. This debate eventually came around to the question of controlling dispersed infantry on the battlefield. The early successes of the French revolutionary armies were studied in Prussia after 1795. Their use of dispersed infantry or skirmishers became a central issue, leading to an understanding of the connection between this tactic and the nature of the soldier.

Command and control of dispersed infantry has been a difficulty since the modern inception of the tactic. Dispersed individuals on the battlefield risk their lives in a frightening, lonely environment while cooperating to take the lives of others. Keeping them in the field proves to be a serious challenge for command.

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<sup>61</sup> Posen, p. 139.

<sup>62</sup> Ibid. p. 217.

Related to this challenge, is the matter of replacing the high number of casualties and the existence of so many men in the field. The deliberate sponsorship of both cultural and ideological components of nationalism was perceived by many to be a critical element of the solution. The better these ideas are promoted, the more competitive a state's army would likely be over others.

After 1870, the French adopted the same approach as Prussia with conscription and the nationalist instruction that accompanied it. France also copied the Prussian example whereby the elementary school system had begun to collaborate with the army in providing national-oriented instruction. The education system and the national military worked in conjunction to train the French to be patriotic national citizens under a common training system in a single language throughout the country under political control of the government. That government was in control of both the schools and the military and so directed the course of French national consciousness.<sup>63</sup> The Frenchman, once educated in the history and nationality of the French state, carried this learned sense of identity with him into military service and for the rest of his life. Through military training, the French were taught to be, "... the guardians of internal peace and repellers of foreign invasion."<sup>64</sup> The *Manuel du Gradé d'Infanterie* of 1927 contains two sections in it devoted to nationalistic pride. Explanations of both the flag and fatherland of France express a sense of historical pride to be instilled in all

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<sup>63</sup> Hayes, pp. 35-8.

<sup>64</sup> *Ibid.*, p. 64.

members of the service.<sup>65</sup> This early twentieth century nationalism was a direct result of universal education and training begun in the latter half of the nineteenth century and administered by the entrenched bureaucracy of the nation-state. What grew from this system of education from child to adult was a uniform use of a single language in the public life of both the French and the Germans. Prior to this, by example, a typical uneducated individual in a southern province of Germany would have little ability to communicate with his counterpart in a northern province. Under nationalist development came a more uniform sense of German cultural values.

By the mid-nineteenth century, the armies of Europe were of an entirely different sort than those of the previous century. Massive numbers of men, unheard of in the 1700s had formed the "nation in arms" in both Prussia and France. Although there was a relaxation in the domestic political energies in France and Prussia following Napoleon's defeat, the principle of homogeneous national armies was retained. The importance of education and literacy became clear to those interested in military development. A law passed in France in 1818 based promotion to officer rank on how well one could read and write. The army in France had been keenly concerned with physical fitness, tactical training, and marksmanship. Combat effectiveness had deteriorated due to the heavy losses of

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<sup>65</sup> *Ibid.*, p. 77.

experienced personnel during Napoleon's campaigns and their replacement with hastily raised, teen-aged recruits.<sup>66</sup>

Prussia meanwhile, had developed an increasingly effective education system for male members of the population. 80% of children were enrolled by 1837. By 1850, 80% of the population could read and write. Military interest in education was sustained throughout this period also. It was suggested in 1844 that retired army NCOs be recruited as primary school teachers to ensure the promotion of national duty at an early age. From 1866 to 1870, Prussian military leaders expressed concern about the education level and political attitudes of conscripts. Up until that point, the education system in Prussia had been geared more toward teaching obedience to the aristocracy than fostering national consciousness.<sup>67</sup> Following the victory over the French in 1870, the emphasis in public education was shifted to generate greater national awareness.

The growth of nationalism continued through 1889, when the inequities of social status had been removed from service in the army.<sup>68</sup> The culmination came as the crisis of 1914 arose. By then, nationalism and military obligation had finally achieved unity in French and German societies. Thousands volunteered or were conscripted as the European countries prepared to meet the first great challenge of

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<sup>66</sup> Chandler, David G. The Campaigns of Napoleon. London: Weidenfeld and Nicolson. 1967. pp. 333-334.

<sup>67</sup> Craig, Gordon A. Germany 1866-1945. New York: Oxford University Press. 1978. pp. 186-187.

<sup>68</sup> Paret, Understanding War. p. 49.

the twentieth century. The state was now identified with the nation as a unified political and social construct, changing the face of international relations.

Scharnhorst and his associates believed that Prussia could reestablish itself as a state if it could defeat France. To do so required both unity and manpower. The isolation of the army had to be removed in favor of a collective assertion of the Prussian state, "making war the business of everyone."<sup>69</sup> Conscription helped to create and spread certain attitudes among society: loyalty to a cause, hatred of the foreigner, and patriotism -- the zealous support of the country's authority and interests among its individual members. Conscription became a medium through which ideas, feelings and energies flowed to give substance to a new outlook on the nature of the state and the concept of nationalism. Clausewitz's view of the state did not necessarily conform to the attitude of Prussian officials. They believed that the essence of the state lay in its educational function as a political construct possessing an efficient and progressive administration. According to Clausewitz, the state was too caught up in the realities of power and political interest to be defined in such a way. The balance of power between states functioned as a machine of political interaction through which war became only one manifestation.<sup>70</sup>

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<sup>69</sup> Ibid., p. 68.

<sup>70</sup> Ibid., p. 171.

Prior to the nineteenth century, Clausewitz observed that armies, as vocational, paid servants of the Crown, were subject to certain limits as far as finances were concerned. Popular participation in war served to decrease the awareness of the strengths and limitations of one's enemies, because of the relatively greater size and strength of one's own force. Moreover, it also cast doubt upon the idea of limited aims in military activity. Without such limits, the likelihood of total ruin was not so impossible any longer. The world after the French Revolution was one in which the energy that could be released in the waging of war was far greater than anything seen before. The other states of Europe had no choice but to meet force with force, or be completely overrun. These changes, as they were observed by Clausewitz, were certainly cause for regret over the involvement of the people in the business of war. The tone of Clausewitz's writing is suggestive of that regret. "War, untrammelled by any conventional restraints, had broken loose in all its elemental fury. ... once barriers -- which in a sense consist only in man's ignorance of what is possible -- are torn down, they are not so easily set up again."<sup>71</sup> He also had little choice but to acknowledge that war in the nineteenth century was like no other form that had existed before. Any perceptions and understandings about war that had been formed in the past were of little use in the present. If Clausewitz is correct -- and this conclusion is not disputed here -- then perceptions and understandings about war in the nineteenth century belong in the nineteenth century. This new era, at the end of the twentieth century, reflects Clausewitz's argument that every era,

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<sup>71</sup> Clausewitz, p. 593.

'has its own kind of war, its own limiting conditions, and its own peculiar preconceptions."<sup>72</sup>

The trinity of war, describes its character accurately until Napoleon's time. The nature of each element changed in the nineteenth century. Governments, armies, and populations were all affected by the changes the century brought. Technology advanced and industrial production increased and became more efficient affecting when the army was sent to fight, and how it fought.

As the people became more educated, they began to rely on more intellectual approaches to society. An intense reliance on and a more refined formulation of the written law began to govern the function of the state and its society. The nineteenth century was an era of taking control of the world. The dominance of science in the nineteenth century eliminated the influence of natural law of the Enlightenment. Science rationally and dispassionately seeks to provide concrete and quantifiable explanations for the characteristics of the world and humanity's place in it. Universality imposed an order on the world, giving man a belief in the control over events, even through mere explanation. This was the fundamental basis for the establishment of written law in war. Jurists and theorists of the time believed that they could scientifically impose an order over the process of armed conflict. Eventually, an attempt to gain control over the chaos of war was undertaken intellectually and manifested itself in the laws of war.

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<sup>72</sup> Ibid.

## Expansion and Codification of the Law

In the seventeenth and eighteenth centuries, just war theory became more secularized as it became, in practice, part of the language of international law. Changes of that period saw a transformation in the content of that law, and in just war ideas as well. These transformations also show the disintegration of the medieval ideal of a unified Christian Europe, to a secular one divided into sovereign states. Emerging military powers in these new state structures required some form of codified moderation; customary rules were insufficient in restraining the behaviour of soldiers. Paradoxically, the nature of the new system in Europe, while creating the need for new codes of restraint, was complicating the search. Under a system in which each state has ideally unrestricted right to govern as it saw fit, how was international law to be constructed so as to have universal norms governing a world which was beginning to revel in diversity? A solution was found in the “voluntary law of nations” which came to dominate the practice of the nineteenth century state system.

The intention was for all participating states to agree to follow the same rules concerning the external world outside their borders. The translation of ideas of just war into positive law led to a gradual shift away from the *jus ad bellum*, and towards *jus in bello*. It became more important into the nineteenth century



that the correct legal rules were followed by parties engaging in war, rather than a greater worry over whose cause was just when entering a war. With the end of natural law, there existed a dilemma between the objective and the subjective over the issue of justice. Objectively, it may have been easy to identify which party was just. Subjectively, *both* sides might have felt that their cause was just, and would undoubtedly have challenged any third party declaration of the opposite. The conduct of participants in war then became the test of who was the "better man." Only the sovereign state could pronounce the justice of its cause.

International lawyers of the period were dealing explicitly with the conduct of war. Their prime concern was proportionality; to ensure that the means employed conformed to the scale of war and to the objectives sought. Moreover, it was held that the costs of war should not exceed the value of the objective. Limitations were sought to control the reach of battle. Lawyers suggested immunity for those who were not capable of offering armed resistance; those whose place in society did not include them in the war effort. It was realized that there was virtually no way to ensure that these rules would remain absolute. The fact was that civilians *were* going to get killed in war. It was justifiable as long as the good intended or derived from the military activity that caused their deaths outweighed the evil.

The question was how to ensure that opposing forces at war with one another will cooperate enough to keep mutual good faith and abide by the rules of war. If one was at war, it made implicit sense to employ any option conceivable in order to succeed. However, it was argued that it was better for all concerned to abide by limitations. This would prevent an escalation to greater cruelty. The sad reality of combat is that despite the articulation of specific rules and codes, soldiers are going to do what they must; first to survive, and second, to achieve victory.<sup>73</sup>

Another approach argues that a state of war was no excuse to abandon all moral imperatives. War is a social activity and as such, it is governed by norms and values. Accepting that the true object of war, beyond victory, is to restore a just condition of peace, it made sense that restrictions or limitations be placed on the activity. The ultimate condition of surrender by one side at the end of a war must be taken on trust that the winning side will be safe from a renewed attack afterward. Mutually obeying the same regulations during the war would serve to reinforce a lasting peace in the end.

The theory and philosophy behind the notion of trinitarian war functioned through a series of international agreements between 1850 and 1907. Through these agreements, the ideas of government, army, and people were codified into positive law, in order to distinguish war from criminal activity. Soldiers were not

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<sup>73</sup> The opinion expressed by Lieutenant-Colonel Steve Anema, Commanding Officer of the Queen's Own Cameron Highlanders, during an interview conducted at the Minto Armory, Winnipeg, Manitoba on March 8, 1995.

murderers, but were personnel legally permitted to engage in armed violence on the state's behalf. As such, privateering was outlawed. Soldiers had to be registered, marked, and controlled, able to fight only when in uniform, carrying arms openly. They obeyed a commander who was accountable for the conduct of the men under his command.

By the eighteenth century, laws and customs of war in European regional practice were embedded in every country's military tradition, helping to form the attitudes of all ranks of men. This view had been impeded by the nature of armies to which consideration and generosity toward enemies -- military or civilian -- seemed an unnatural idea. The training of soldiers relied heavily on what Best describes as a "xenophobic mentality."<sup>74</sup> Although mercy and brotherhood were fundamental notions of religion and culture nearly everywhere, the progress of rules of restraint was limited by divisions of race, religion, nation or caste. Desires for revenge could also be formidable; however, the laws of restraint were generally carried out due to the largely unwritten spirit of culture.

Soldiers complied with the rules because their religion and social norms made it an imperative that they do so. However, ideas of implementation varied among armies which created inconsistencies and misunderstandings. In addition, the overriding concern for military necessity forced armies to break *ad hoc* customs of restraint whenever necessary. A verbal agreement between

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<sup>74</sup> Best, War and Law Since 1945. p. 39.

commanders not to bombard villages without sufficient warning might be broken should the key to victory lay in surprise. Actions of this sort led to allegations of bad faith among other complaints, especially when the strategic significance of a particular village was in dispute. The process of codification into full-fledged, treaty-registered international law has its origins in the wish to silence these allegations.

Codification began with the regulation of maritime commerce in war time. The Declaration of Paris in 1856 created a uniform doctrine regarding blockades, contraband, and privateering.<sup>75</sup> Other main branches of the law of war began to be codified in the 1860s. The Lieber Code was established in 1863 in the United States. It was a codification of basic principles and rules of war on land.<sup>76</sup> This was the time of the American Civil War, and the previous conduct of the Union soldiers against Native Americans and Mexicans would not be acceptable against their southern counterparts. Conduct in the war was believed to be important for the restoration of peace. This was followed in 1874 by the International Declaration concerning Law and Customs of War, and the manual: *The Laws of War on Land* in 1880.<sup>77</sup> Both were derived from the Lieber Code.

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<sup>75</sup> Roberts, Adam and Richard Guelff, ed. Documents on the Laws of War. Oxford: Clarendon Press. 1989. pp. 24-27.

<sup>76</sup> Schindler, Dietrich and Jiri Toman, ed. The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents. Dordrecht, Netherlands: Martinus Nijhoff. 1988. pp. 3-23.

<sup>77</sup> *Ibid.*, pp. 25-48.

In 1899, the Hague Convention, Laws and Customs of War on Land, became the codification in international law of Lieber's work. Later confirmed in 1907, the Hague rules provided the legal basis for land warfare ever since. The Hague regulations introduced several prohibitions requiring precautions to be taken relative to persons and objects that are not directly involved in the conflict. Armed forces must not destroy or seize enemy property unless "imperative military necessity" demands that it be done.<sup>78</sup> They are prohibited from attacking or bombarding undefended towns, villages, dwellings or buildings. The commanding officer of an attack force must do all in his power to warn of an impending bombardment, except in cases of assault, in which surprise is essential to success. The attacking military force is also required to take all necessary measures during siege or bombardment to spare, as much as possible, buildings dedicated to art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are being collected *unless* these structures are being used for military purposes.<sup>79</sup>

In 1868, the St. Petersburg Declaration forbade the use of explosive bullets.<sup>80</sup> Though not expressly mentioned, the importance to non-combatants lay in its implications. The Declaration affirmed that the necessities of war must yield as much as possible to the requirements of humanity. The only legitimate goal in

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<sup>78</sup> Rogers, L.P.V. Law on the Battlefield. New York: Manchester University Press. 1996. p. 48.

<sup>79</sup> See Article 27. Schindler and Toman, p. 84.

<sup>80</sup> Schindler and Toman, pp. 101-103.

war was to weaken the *military* forces of the opposition, that implied the removal of civilians as much as possible. That said, any involvement of civilians in conflict was perceived to be at their own risk.<sup>81</sup> Interest in the impact of war on non-combatants had wavered in its degree of importance to law-makers and theorists alike for many years. Nevertheless, from the 1860s onward, its presence in international law became a permanent fixture.

In the aftermath of the Napoleonic Wars, the impact of the law of war was more widely assessed in Europe. Pacifism began to gain ground and, internationally, became the source of continuous criticism of the institutions, habits and consequences of war.<sup>82</sup> At this time, the nature of war was largely relieved of the discomfort of having to respond to the difficult arguments of the peace movement. The codification and general popularization of the new international law of war suggested that the ugliness of war could be tempered and that non-combatants could, for the most part, be kept out of it.

Public opinion and political pressure began to have an impact on the process by which the substance of the international law of war was determined and affected its advancement. The comfort such law created in the minds and consciences of those in the field of international law was complicated by advances in military science that was creating more destructive and indiscriminate weapons.

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<sup>81</sup> *Ibid.*, p. 43.

<sup>82</sup> *Ibid.*, p. 45.

National politics created greater public participation in both government and military service, influencing both when to go to war and how many soldiers would be in the field. It was becoming more and more difficult for the purpose of the law to be achieved.

The emergence of positivist theories of the law of warfare placed limitations on human targets who might be legitimately attacked in war. The focus was on innocence and non-combatancy. Prior to 1945, the law of war held very little pertaining to the disposition of non-combatants, particularly civilians. Civilians in general did not figure into the business of war before the twentieth century. The laws of war therefore, existed to protect soldiers first and foremost. Civilian protection lay in the much less enforceable area of custom, the cursory applications of the St. Petersburg and Hague Conventions notwithstanding. In the twentieth century, a blurring between combatants and non-combatants led to considerations over the legitimacy of attacking any human target. In the matter of protection, the law has made the two equal in terms of their right to proper treatment.<sup>83</sup>

The rules of the battlefield had to be extended as the battlefield itself penetrated deeper into the non-combatant domain. The combatant/non-combatant distinction had originally served the interests of the soldier by protecting him from

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<sup>83</sup> Clark, Ian. Limited Nuclear War: Political Theory and War Conventions. Princeton: Princeton University Press. 1982. p. 40

pillage and mistreatment by his enemies after a battle. Wars were supposed to be waged by lawful participants -- soldiers -- for the sake of justice. All others had no business in war. For a just war to remain just, it had to be conducted properly. This meant that it could only be waged against other soldiers. Although non-combatants were rapidly becoming a much more noticeable factor in war, attacking them was still considered unjust. Therefore, since an unjust war should not be fought at all, there was no need to specify that non-combatants should not be attacked.<sup>84</sup>

This attitude could be found in both the religious and secular ideas of the just war and the *jus in bello*.<sup>85</sup> As Gentili states, "... war is a contention of arms and therefore there can be no war with unarmed men."<sup>86</sup> Notwithstanding the reality of non-combatant casualties in war, *jus in bello* gave non-combatants little regard, for the simple reason that non-combatants were not relevant to war. If rules or limitations were to be imposed on armed conflict, their protection should naturally be directed toward the combatants.

Clausewitz's trinity of war sought to reinforce the combatant/non-combatant distinction in light of the change in the nature of armies in Europe, which were composed of citizens beginning with the French Revolution. The

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<sup>84</sup> Russell, F.H. The Just War in the Middle Ages. Cambridge: Cambridge University Press. 1975. p. 186.

<sup>85</sup> Clark, Limited Nuclear War. p. 51.

<sup>86</sup> *Ibid.*, pp. 51-2.



greater connection between civilian and military aspects of society distorts the intention of the law, which had given no priority to the position of the non-combatant. As the government directed the state toward greater national consciousness, policies of conscription worked to further draw the civilian population into the realm of the soldier.

As Clausewitz understood it, the potential for wars to become absolute exists because of the greater involvement of the people in warfare. Through national motivation, they will become more heavily involved in the *casus belli* (the reason for going to war). His distinctions were established because it was important that one recognize the difference between a soldier and a civilian, as well as a government directing the state's course. It was hoped at the time, that these distinctions would serve to restrain those at war from deliberately destroying everyone who was a member of the enemy state. The absolute destruction of the enemy to a man, would not serve the purpose of war: the continuation of political discourse between countries. The soldiers can be killed, the government can be overthrown, but if everyone was annihilated, there could be no state, there could be no nation, hence, no politics. War is a tool of politics, therefore it must never be allowed to supersede politics as a motivation in itself.

Gradually, a change of emphasis began to shift the approach of the law of war toward a greater consideration of the involvement of the non-combatant in

waging war. The trinitarian nature of warfare in nineteenth century Europe was largely driven by moral, economic and social imperatives to retain the immunity of non-combatants as much as possible, despite the increasingly invasive nature of modern, industrialized warfare. Clausewitz may have regretted the involvement of the people. However the progress of nineteenth century society made it unavoidable; a fact he would likely have realized.

## Chapter Two

### **Rebuilding the Trinity: Total War and the New Restraint**

*"What does it all mean, this surging tide of  
armed men?"*

– Phillip Gibbs, journalist, 1914

Rules of conduct for soldiers did not contain a great deal of relevant code concerning the treatment of civilians as specific victims caught in the middle of international conflict. Necessity would force soldiers to attack civilians deliberately, either to obtain supplies in the event of emergency, or to eliminate them as a source of supply for the enemy.<sup>1</sup> As for the people specifically, it was up to them to get out of the way if they wanted to survive. A greater awareness of humanitarianism appeared into the nineteenth century as an aspect of official self-interest on the part of military and government elites. Non-combatants were of greater value to armies if left unmolested and allowed to continue their contribution to their society and economy. As Best states, "they were of more value to armies because you could get more out of a civilian populace by regulated requisitioning than by wasteful looting and vengeful destruction, which moreover was bad for discipline besides provoking resistance."<sup>2</sup>

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<sup>1</sup> Best, Geoffrey. "Restraints on War by Land Before 1945." Restraints on War: Studies in the Limitation of Armed Conflict. Michael Howard, ed. Oxford: Oxford University Press. 1979. p. 27.

<sup>2</sup> Ibid.

The function of the law of war is, first and foremost, to protect the armed forces themselves. Although war may be the most confused, uncertain, painful and chaotic event in mankind's existence, it is at the same time, the most organized. For armed conflict to succeed, it must have the trained cooperation of many individuals working as a team. Coordination and organization can only exist if all members subject themselves to a common code of behavior. The separation of war from indiscriminate or mob violence is the understanding among participants who may or may not be killed, why this is so, under what circumstances, and by what means.<sup>3</sup>

World War One, shortly after the turn of the century, changed the attitude of soldiers regarding the civilian population of states involved in conflict with one another for several reasons. Although the bulk of the war centered around interaction between soldiers, this war was different from any other previously fought. It was the first war in human history to reach such a sophisticated level of mechanization. A truly industrialized war, it was fought with advanced weaponry whose sheer destructive power was unheard of and relatively unexpected by those involved. It was understood that the soldiers were relying heavily on supplies of munitions and other equipment from civilian members of their countries working in factories to mass produce these supplies. As such, the civilians had become involved in warfare in a more direct way than ever before. Although Napoleon

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<sup>3</sup> Crefeld, Martin Van. The Transformation of War. New York: MacMillan. 1992. p. 89.

had commanded civilians sew uniforms and provide supplies of food, blankets and other items amid the *leveé en masse*, resorting to deliberate attacks on civilians was not very realistic. On the contrary, the magnitude of the conflict in World War One was unlike anything that had been seen on the planet prior to 1914. What had been thought of as a means of quick, decisive action, mechanization and industrialization produced a stalemate in the trenches. Strategists sought any means of breaking it, to the extent of exploring ways to cut off the supply of munitions and other equipment. An obvious means was to destroy the factories that produced these goods for the soldiers. These factories were occupied by civilians. Naval blockades had provided some effectiveness in stopping the supply of materiel from neutral countries such as the United States during the World War One. However, there was little practical means of halting the domestic production of the enemy's supplies. The air force, which would prove much more effective in the following war, was in its formative stages at this time, and neither side on the ground possessed the mobility to strike behind enemy lines to such a distance.

The twentieth century brought with it a need to consider the matter of attacking those who, while part of the enemy's state, had seldom been considered a legitimate target for military operations. This fact was combined with a growing sense of human rights and the place of the individual in society. The League of Nations and the Geneva Conventions prior to 1939, had gone to great lengths to guarantee the safety of all peoples from the ravages of conflict such as that

witnessed during World War One. Yet, when the Second World War began, it was an accepted reality that industrial mechanization was now with the world in both war and peace, and must be considered in the planning and operation of tactics and strategy in war. In order to cut off supplies, the factories of the enemy would have to be directly targeted for destruction. These strategists rationalized the deaths of thousands of civilians by attempting to limit the destruction to industrial regions only, and exclude residential areas, excepting accident and an overall inaccuracy in aerial bombardment. So long as civilians were at home, they would not be considered directly involved in the conflict. While at work, however, they were as much a contribution to the war as the soldiers were in the field, and therefore were legitimate targets.

A greater awareness of the psychological impact of industrialized warfare also emerged out of World War One as a function of the greater involvement of the third component of Clausewitz's trinity. The era of absolute monarchies had past, and representative democracies now existed, at least on the part of the Allied powers. The support and morale of the people was an important factor to be considered by those conducting the war effort.<sup>4</sup> As a function of the greater involvement of the civilian element of Clausewitz's trinity, it was important for the people to believe in their country's decision to send troops to fight. Equally important, was that those troops knew that their country's population was behind them in their efforts. Clausewitz himself had recognized the importance of such

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<sup>4</sup> Howard, "Temperamenta Belli: Can War be Controlled?" Restraints on War, p. 10.

factors as psychology and morale a century prior to this time.<sup>5</sup> Although he did not consider them within the context of popular support on behalf of the nation's inhabitants, Clausewitz also did not witness the tremendous impact of technological development on the prosecution of war; technological development which required civilian support at home in order to confront the enemy adequately. The potential benefit of breaking such a bond of support among the enemy became as important as destroying supply lines. The Allied bombing assault on Germany in 1944 was partly directed at these important factors.<sup>6</sup> In the end, the magnitude had again been strongly felt by all involved.

The major wars of the twentieth century would obscure the line between the armed tools of the state and the unarmed body of the nation. While states sought to re-order themselves relative to one another, in the now traditional sense, the line between unarmed nation and military state continued to degrade. The emergence of total war transformed armed conflict so dramatically that the earlier paradigm was no longer workable.

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<sup>5</sup> Clausewitz, Carl von. On War. Princeton: Princeton University Press. 1976. p. 185; Howard, Michael. Clausewitz. Oxford: Oxford University Press. 1983. p. 26.

<sup>6</sup> Webster, Charles and Noble Frankland. The Strategic Air Offensive Against Germany, 1939-1945: Volume III: Victory. London: Her Majesty's Stationary Office. 1961. pp. 53-4.

## **Total War and the Loss of Restraint**

On the surface, there appears to be little difference between total war and Clausewitz's concept of absolute war. The difference is in a more fundamental way, in that Clausewitz's theory was much more abstract. He had argued that the goal in war was to defeat one's opponent. In an absolute war, there would be nothing to prevent the *absolute* devotion of a state to the destruction of its enemy. Total war was a much more reality-based concept, the magnitude of which in the twentieth century would render the trinitarian distinctions of the nineteenth century irrelevant. It shared many qualities with absolute war in the level of mobilization and direction of the state's energies toward war that eventually came to be seen in all the major parties to both world wars. The natural limitations of real war still applied even to these efforts, preventing the absolute state of war from emerging. Total war attests to the practical, while absolute war largely falls under the philosophical.

Clausewitz's presentation of war as something made by armies began to be undermined in the latter half of the nineteenth century. Von der Goltz's 1883 publication: *Das Volk en Waffen* (The Nation in Arms) challenged Clausewitz's view of war. Modern technology, particularly the telegraph and the railway, was enabling the greater integration of society and its resources. By 1910, Germany had a total of 59,031 kilometers of railway and 45,000 telegraph offices spread



throughout the country.<sup>7</sup> The railway itself had been laid out for military purposes. Both it and the telegraph were placed under the control of the General Staff during war in 1864, 1866, and 1870-71 respectively. As Von der Goltz argued, the ability of modern technology to integrate the resources of an entire country meant that collectively, the entire nation could direct its efforts toward waging war.

Organizationally, Clausewitz's assertions that both civil and military power should rest in the authority of the ruling body was fast becoming obsolete. The modern state had become highly complex and required a tremendous amount of administrative structure. It was no longer possible for the head of state to manage both the military in war and the government of the country. Czar Nicholas II for example, spent most of his time during the World War One in the field, to the detriment of Russia's domestic situation. Unable to allow others to manage his executive duties, the Czar allowed his attention to slip. The war went badly for Russia and monopolized Nicholas's time, who would be blamed for most of the country's failures against Germany. As a result, tensions at home were not properly addressed, and Nicholas was eventually executed following the Revolution of 1917.

Rather than see war made subordinate to politicians, Von der Goltz argued that war was an opportunity for the military to assert itself over the commercial

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<sup>7</sup> Speier, Hans. "Ludendorff: The German Concept of Total War." Makers of Modern Strategy. Edward Meade Earle, ed. Princeton: Princeton University Press. 1971. p. 310.

and industrial bourgeoisie which, as Von der Goltz saw it, had used economic power to gain greater social importance over the officer corps. Contemporary military values perceived war as a proving ground for nations in the ultimate Social Darwinian sense.<sup>8</sup> Countries were competing for survival and dominance over each other. Nothing else could be of greater importance. Under these conditions, it made no sense to the military mind not to devote every bit of the country's resources and energy to this struggle. Romantically, this struggle should be led by the armored king, not the suit-wearing politician.<sup>9</sup> Although at first, these concepts were more like the imaginings of militarism, the outbreak of World War One transformed them into reality, with commanders such as Erich Ludendorff seeking to wage total war.

Clausewitz had been of the opinion that the French Revolution had removed many of the limitations of the *Ancien Regime* that had prevented war from assuming its absolute state. During the *Ancien Regime*, wars were waged by professionals and mercenaries, whereas following the Revolution, entire nations were involved. The energies of the Revolution had changed the typology of war. Clausewitz attributed this change to politics, linking how war is fought with the structure of the political community waging it. Ludendorff's challenge to Clausewitz's conclusions was of a strongly technocratic character. For Ludendorff, war was an expression of a racial will to survive (Ludendorff stated as

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<sup>8</sup> Gat, Azar. The development of Military Thought: The Nineteenth Century. Oxford: Clarendon Press. 1992. pp. 79-80.

<sup>9</sup> Van Crefeld, p. 44.

much in his work, *Meine Kriegserinnerungen*, published in 1919).<sup>10</sup> Rather than political structure, total war had a greater basis in demographics and technological development. Larger populations and more efficient destructive capability of weaponry *created* the totality of war. Politics became absorbed by the enormity of total war, and has little impact on it. In that regard, there was little use in granting politicians authority over the waging of war. It would be up to the supreme military commander to judge the means needed to attain the goal in war. Since the goal in total war was the ultimate survival of the nation/race, any means believed necessary became acceptable.

With the distinctions between government, army, and people eliminated, a “war state” could be formed with all members acting as a giant army, each serving in one form or other. All were to be dedicated to the survival of the state. For Ludendorff, international politics consisted of Germany’s advancement through warfare. Anyone opposing their nation’s course was to be eliminated. One leader was to exercise absolute power, and because of the length of time needed to prepare for modern conflict, this one leader should maintain a permanent position and not be subject to electoral restraints.

The problem with restraint in war, is that such rules are developed out of past experiences. World War One did not become the “war to end all wars” until after it was over, and the death toll and amount of destruction left behind made the

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<sup>10</sup> Speier, p. 317.

Allies stop and think. The objectives of war can certainly change over its course, and can be dependent on the manner in which it is fought. States have displayed tendencies to rationalize losses in war by expanding their aims, that they can use as justification for the losses already taken. Ludendorff had published the series of communiqués between the members of the General Staff and the Supreme Command in order to make it clear that there was no other way but war for Germany in 1914.<sup>11</sup> It was Ludendorff's intention to blame various segments of German society for the loss of the war due to their level of support being much less than 100% during wartime.<sup>12</sup> Included in this list were the owners of industry and railroad, employees in industry who were not working hard enough, and the numbers in the army not being high enough to have provided a proper defense against the predicted three state offensive from France, England, and Russia. There was also some question over propoganda and a lack of national pride in Germany.<sup>13</sup> It appears that Ludendorff did not see from his vantage point that since the Allies were matching blow for blow, any greater mobilization from Germany would likely have been matched. Nevertheless, Ludendorff's arguments laid the groundwork for the character of the next war.

The theatre of war extends over the entire territory of the belligerent nations. There is an active participation of the whole population in the war effort.

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<sup>11</sup> Ludendorff, Erich Von. The General Staff and its Problems: The History of the Relations between the High Command and the German Imperial Government as Revealed by Official Documents, volume 1. New York: Books for Libraries. 1920. p. v.

<sup>12</sup> *Ibid.*, pp. 20, 211-12.

<sup>13</sup> Ludendorff, The General Staff and its Problems, volume 2. pp. 403-6.

To effectively pursue total war required that the economic system of the country be adapted to the purpose of waging war. With the participation of large masses of people in war, it is important that morale be retained both at home and on the battlefield. In this, propaganda becomes a valuable tool. It may also serve to weaken the political cohesion of the enemy nation. It is important that the preparation for total war begins before the outbreak of hostilities. Even when at peace, the nation should be readying itself on all levels for the next conflict by essentially "working for war."<sup>14</sup> In order to achieve an integrated and efficient war effort, total war must be directed by one supreme authority -- the commander-in-chief.<sup>15</sup>

The range of the theater of war comes as a result of the technical progress of the means of war as well as the increasing interdependence of modern countries in Europe. Technological progress also allowed for blockades and deprivations behind actual fighting zones like never before. The entire nation was in a sense besieged, "... so total warfare implements the military assault upon the armed forces of a nation by the use of non-military weapons directed against the non-combatant parts of the enemy population."<sup>16</sup> One finds less significance in the combatant/non-combatant distinction.

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<sup>14</sup> Geyer, Michael. "German Strategy in the Age of Machine Warfare, 1914-1915." Makers of Modern Strategy: From Machiavelli to the Nuclear Age. Michael Howard, ed. Princeton: Princeton University Press. 1986. p. 538.

<sup>15</sup> Speier, p. 307.

<sup>16</sup> *Ibid.*, p. 315.

Mechanized warfare brought a deterioration in the methods of waging war. Old restraints began to lose their influence in an era of long-range weapons and air bombardment. The battlefield was no longer limited and defined, but was everywhere. It was occupied by civilians and soldiers alike. On one level, it is argued that both the gain and loss of status and security and even death and survival were in the hands of fortune.<sup>17</sup> The nature of total war can be seen in the impact that it had on the political, economic, and social fabric of the countries involved.

Peacetime limits on the powers of government gave way to an increased centralization of authority. Even where parliament or representative government continued there were restrictions. Decision-making became more concentrated in a small executive group or in one person. This had been the experience during both world wars. The centralization of power in totalitarian states such as Germany, Italy and the Soviet Union had already occurred before 1939. Democratic states in Europe had laid plans for emergency powers in the event of war. The existence of "war cabinets" is evidence of the centralizing influence of total war on political structures. In Britain, the governing of the country was increasingly influenced and dictated to by the Chiefs of Staff Committee, formed before 1939, while in the United States, the same occurred with the Joint Chiefs of

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<sup>17</sup> Wright, Gordon. "The Impact of Total War." Western Civilization: Recent Interpretations from 1715 to Present. C. Stewart Daly, ed. New York: Thomas Y. Crowell. 1973. p. 557.

Staff, established in 1942.<sup>18</sup> Together, these two organizations directed nearly all of the Anglo-American military planning and operations, with the powers of government resting almost entirely in the hands of Churchill and Roosevelt.

Another example was Germany during the World War One. Total war was exemplified by the virtual dictatorship of the high command.<sup>19</sup> Military predominance in government meant nearly all the functions of the state were directed toward maintaining the army's utility on the battlefield. In World War Two, Hitler and his officers of the OKW (*Oberkommando der Wehrmacht*) would take control of all military operations and all policy-making of the German government and, by 1942-43, directed everything toward the war effort.

During the pre-1914 arms race, just over 4% of national income of the Great Powers had been spent on armaments. Under the condition of total war, these governments took command of industry, labor and finance. It was then that their national expenditure on armaments rose 25-33%<sup>20</sup> (see Table 1). In Great Britain, defense expenditures reached £1,956,000,000 by 1918, representing 80% of total government spending and 52% of GNP.<sup>21</sup> The condition of total war was further accentuated by complaints of shortages in materiel in 1914-1915. These

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<sup>18</sup> Huntington, Samuel P. *The Soldier and the State: The Theory and Politics of Civil-Military Relations*. Cambridge: Harvard University Press. 1957. pp. 317-18.

<sup>19</sup> Wright, p. 560.

<sup>20</sup> Kennedy, Paul. *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000*. New York: Random House. 1987. p. 262.

<sup>21</sup> *Ibid.*, p. 267.

complaints spurred the politicians to avoid the negative effects of failing to provide the needed goods, by entering into an alliance with business and labor for the purposes of production. This tied the economies of the countries at war more and more closely to the war itself. These countries functioned because of the need for industry to provide for the needs of the military. "Technocratic planners, businessmen and unions combined in a national effort to produce as many shells, heavy guns, aircraft, trucks, and tanks as possible."<sup>22</sup> In France particularly, factories employed women, children, and veterans for industrial output representing an overall militarizing of society.<sup>23</sup>

The long strain of the World War One demanded an intense social discipline, a greater regimentation of civilian life, and greater emphasis on military values. In Germany during 1914-1918, the military was in control of almost every aspect of domestic life, from political decision-making, industrial production, food rationing, labor policy, to the control of public information and censorship. This would change after 1939, when the armed forces were excluded from all such functions. The social direction of the country was controlled by the political/military elite of the OKW, who were unwilling to share power with a

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<sup>22</sup> Ibid., p. 265.

<sup>23</sup> Women in France made up one quarter of all personnel in war factories totalling 362,879 out of 1,580,459 workers. One third of the work force in metallurgical industries were women. The expansion of female labour in metalworking was on the order of 900%. See McMillan, James F. "World War I and Women in France." Total War and Social Change. Arthur marwick, ed. London: MacMillan Press. 1988. pp. 1-15.



potential rival such as the German officer corps, the history of which had shown its assumption of a dominant role in past wars over that of civilian political leaders.

**Table 1.**  
**War Expenditure and Total Mobilized Forces,**  
**1914-1919<sup>24</sup>**

	War Expenditure at 1913 Prices (billions of dollars)	Total Mobilized Forces (millions)
British Empire	23	9.5
France	9.3	8.2
Russia	5.4	13
Italy	3.2	5.6
United States	17.1	3.8
Other Allies	-0.3	2.6
Total Allies	57.7	40.7
Germany	19.9	13.25
Austria-Hungary	4.7	9
Bulgaria, Turkey	0.1	2.85
Total Central Powers	24.7	25.1

Total war produced a "flattening of the social pyramid."<sup>25</sup> In Britain during the Second World War, there was an intensified state concern for the health and morale of the whole population. From early on in the war, the government ordered a broadening of social services provided to all citizens, regardless of class or military status, in the birth of the modern welfare state. Meanwhile, consumer rationing after 1940 imposed a universal austerity on the entire population of the state, noticeably obscuring social stratification. Finally, there was a distinct

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<sup>24</sup> Kennedy, p. 274.

<sup>25</sup> Wright, p. 565.

manipulation of the intellectual and cultural life of all the states at war toward boosting public morale and support.

The legal position of civilians at the end of the nineteenth century was virtually non-existent. For non-combatants, the only ones who qualified were prisoners of war and wounded soldiers, who had been directly involved with the fighting and subsequently removed from combatant status. World War One witnessed further limited direct involvement of civilians in conflict. Massive numbers in the army and action in the battlefield made for deplorable conditions for both prisoners and wounded. Effects of weapons and tactics created horrendous physical and psychological wounds.

There is a great deal of incidental evidence over the course of World War One that had served to generate a need among the states of Europe to take steps to avoid a conflict of that magnitude after 1918.<sup>26</sup> In France, the nineteenth century-style formation of regiments stood before the destructive power of the machine gun. Advancing in full view, entire companies were forced to fall back without ever engaging the enemy. More than 40,000 French soldiers were killed in the first four days of the German invasion, 27,000 of them alone on 22 August, 1914.

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<sup>26</sup> The Great War and the Shaping of the Twentieth Century. narr. Salome Jens, prod. Carl Byker, dir. Carl Byker, exec prod. Stephen Kulczycki, PBS, WCET/BBC, Los Angeles. 11-14 November 1996.

Russian soldiers fighting in World War One were poorly trained and badly led. Russian military ideas were outdated and the officers were unprepared for the brutality of industrialized, mechanized warfare. The effects of machine guns and artillery were even more pronounced on the Russian forces at Tanenburg than in France. 100,000 Russian soldiers were taken prisoner and 30,000 were killed.

The German forces outnumbered the British by 3 to 1 at Mons, Belgium on 23 August 1914. By the end of the battle, the British forces had been almost completely wiped out. Nonetheless, soldiers on all sides were exhausted from the fighting, and Germany was forced to stop 25 miles outside of Paris. The subsequent Battle of the Marne on 6-8 September, involved over 2,000,000 men. The German offensive was halted as the stalemate began. The weapons used forced the soldiers to dig trenches and keep under cover. The tactics of open warfare were largely abandoned in favor of trench warfare. Over the next 5 months, 400,000 French would be killed with comparable fatalities on the German side.

At Verdun, Nivelle's planned offensive promised victory for France in 48 hours.<sup>27</sup> The battle that began on 16 April 1917, would cost the lives of 700,000 French and 600,000 Germans over the next several days with no breakthrough. A 6 mile advance had been required by the plan; however only 600 yards had been

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<sup>27</sup> Ibid.

attained by the end of the first day.<sup>28</sup> 1,500,000 French had now been killed since 1914, and two weeks after the Verdun offensive began, the French soldiers went into full-scale mutiny. By the cease-fire of 11 November 1918, the death toll from the war in combatants and non-combatants had reached 9,000,000.

The approach of the League of Nations had less to do with limiting battlefield conduct, than it did the act of war. The technological and military changes that had occurred in industrial society could not have been stopped or prevented. The mechanization of war had become an extension of that industrialization. It was unrealistic to expect armies of the future not to use the technology available to them, despite its destructive potential. The solution to this dilemma was to outlaw the resort to war, and make disputes subject to international arbitration instead. The intellectual climate of Interwar Europe was shaped by the fear that any future war was likely to be worse than World War One. The prevailing view of this time was that it was far more important that war be prevented than moderated or “humanized.”<sup>29</sup>

The end of World War One resulted in much more of a change in the *jus ad bellum* requirements rather than attention to conduct, as the unrestricted sovereign right to wage war was limited to wars of self-defense. The goal of the League of

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<sup>28</sup> Horne, Alistair. The Price of Glory, Verdun 1916. London: MacMillan & Co. 1962. p. 322.

<sup>29</sup> Roberts, Adam. “Land Warfare: From the Hague to Nuremberg.” The Laws of War: Constraints on Warfare in the Western World. Michael Howard, George J. Andreopoulos and Mark R. Shulman, ed. New Haven: Yale University Press. 1994. p. 128.

Nations was to outlaw war entirely. By making it illegal to start a war, the first state to do so would become a criminal. The only legal war was a defensive one, in that fending the country's military advances off would be the only just cause. The only major changes to the *jus in bello* were the 1925 Geneva Protocol on gas and bacteriological warfare and the Geneva Conventions of 1929 that demanded greater protections and conditions for the prisoner of war and the wounded and sick.

The conventions developed in the Interwar Period have been described as "dispersed and spasmodic,"<sup>30</sup> in that there was very little in them that made a significant impact on the *jus in bello*, despite the horrors of World War One. The 1925 gas prohibition was essentially a distillation of the goals sought by a conference, best summed up by its title: The International Conference on the Control of the International Trade in Arms, Munitions, and Implements of War. The end result of the Protocol was simply another prohibition on use similar to the Hague Declaration of 1899. One significant difference came in the form of two reservations introduced by France upon ratifying the Protocol in 1926. These reservations are as follows:

1. The said Protocol is only binding on the Government of the French Republic as regards States which have signaled or ratified it or which may accede to it.
2. The said Protocol shall ipso facto cease to be binding on the Government of the French Republic in regard to any

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<sup>30</sup> Ibid., p. 127.

enemy State whose armed forces or whose Allies fail to respect the prohibitions laid down in the Protocol."<sup>31</sup>

Other states that ratified the Protocol in subsequent years, made the same type of reservations, giving the Protocol the character of a no-first-use agreement, backed up by threats of retaliation if its terms were violated.

Reservations such as these reflect the prevailing ideas of international law at this time. The League of Nations Covenant sought to outlaw the initiation of war in a similar fashion. The Covenant essentially entailed a no-first-use agreement regarding war itself. While an army that employs gas as a means of waging war may be subject to the consequence of a similar retaliation, so a state that commits an act of war upon another may be subject to retaliatory attack by the defending state. Article 16(1) and (2) of the Covenant states as follows:

"Should any Member of the League resort to war in disregard of its covenants ... it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League."

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<sup>31</sup> Roberts, Adam and Richard Guelff, ed. Documents on the Laws of War, 2nd ed. Oxford: Oxford University Press. 1989. pp. 144-5.

Further support for this position is found in Article 10(1) and (2) of the Protocol for the Pacific Settlement of International Disputes:

“Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor. Violation of the rules laid down for a demilitarized zone shall be held equivalent to resort to war.

In the event of hostilities having broken out, any State shall be presumed to be an aggressor, unless a decision of the Council, which must be taken unanimously, shall otherwise declare.”

In general, the *jus ad bellum* changes proposed by the League Covenant created an atmosphere in which the difficult questions concerning the ethics of weapons of great destruction were dealt with only cursorily, if not avoided outrightly.

Whether in pursuit of the illegally aggressive policies of the criminal state or in the lawful defense against such aggression, there was no reason for the soldiers to suffer any more than was necessary. Again, the legal position of civilians was not a central issue. However, the mobilization of society for the war effort in 1914-1918, set a precedent for the deliberate attack on civilians during 1939-1945.

In the Second World War, civilians were directly involved in the conflict. The nature of this conflict was more mobile and industrialized than World War One had been. Motorized ground transport was much more efficient and reliable

than in the previous war, although it put pressure on the military to maintain a constant supply of fuel, lubricant, and spare parts. The material needs of armies (e.g., munitions, vehicles, replacement parts, firearms, food, clothing) were large. Civilian workers were required to meet these needs with production line speed and efficiency.

The character of total war was modified to some extent by the addition of air power, as referred to 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>32</sup> Cutting off enemy supplies at the source, suddenly and definitively, was viewed as a way of avoiding the level of battlefield destruction witnessed during 1914-1918. The slow process of blockade had done very little to interrupt the massive conflict.

Aerial bombardment had the possibility of circumventing the siege behavior of blockades and avoiding the need to wear down one's opponent through attrition. Unfortunately, reality did not measure up to this hypothesis. Aerial bombardment had only limited effectiveness, due in part to a general inaccuracy of targeting. What it did do more than in World War One, was place the civilian factory worker/urban resident in a direct line of fire to a greater extent. The

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<sup>32</sup> MacIsaac, David. "voices from the Central Blue: The Air Powers Theorists." Makers of Modern Strategy, 1986. p. 628.



inaccuracy of aerial bombardment destroyed residential and cultural areas. The deliberate destruction of civilian areas was also a psychological strategy. Theoretically, demoralized civilians would not work and would not support the government and army's commitment to the conflict. Weakening the stamina and morale of the enemy made them easier to defeat. Not only was total war demanding the mobilization of civilians for the war effort, but it was now opening them up to physical harm from the effects of combat like never before.

Civilian involvement also occurred in the form of resistance movements in Europe. The nineteenth century law in existence at that time had no place for armed civilians. They were not a legitimate factor in war, even though civilian resistance had occurred in the previous war.<sup>33</sup> During World War Two, resistance movements formed in nearly every European country.<sup>34</sup> Movements and organizations became active in France, Czechoslovakia, Poland, Denmark, Norway, the Netherlands, Belgium, Luxembourg, Yugoslavia, Greece, the Baltics and the Ukraine. They were composed of soldiers, remaining in the country after the occupation, and civilians who were unwilling to allow the Nazi occupation to continue uncontested. These groups assisted Allied war efforts through sabotage

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<sup>33</sup> On 4 August 1914, the German Army crossed the border into Belgium and proceeded to overrun the defending military forces. Upon entering the cities, the Germans were faced with a population that was taking an active part in the fighting (the *franc-tireurs*), leading to acts of reprisals against the Belgians.

<sup>34</sup> Duput, Trevor Nevitt. "European Resistance Movements." The Military History of World War II, volume 15. New York: Franklin Watts. 1965.

of rail-lines, bridges, communications, and industrial facilities. They also gathered intelligence and passed information on to the Allies.

Retaliation against civilian resistors by German soldiers was often extremely violent. After the Czech Legion and the Sokol had succeeded in assassinating SS General Heydrich in charge of the Czech Occupation, German soldiers destroyed the village of Lidice, and its inhabitants who were suspected of supporting the resistance. All men in the village were executed, along with 56 women. Civilian casualties increased significantly because of reprisals carried out, or because of actual combat deaths. In some instances however, the resistance paid off. By 1943, more than half of Yugoslavia had been liberated from the Germans by the Partisans under Tito's command. In nearly every case, assistance had been provided by the Allies through the Special Operations Executive (SOE) in Britain, and the OSS (Office of Strategic Services) in the United States. These organizations provided combat training, strategic assistance, and some provision of supplies.

Conditions of the war left no way to regulate their involvement. At the end of the war, some resistance leaders would eventually form the governments in their countries. General De Gaulle, who led the "Free French" Movement, would return to France as Prime Minister of the Provisional Government. Tito would retain control of Yugoslavia, and formed a Communist government. Recognized by their

citizens and the international community as legitimate because of their patriotic actions during the war, there was no way that the makers of international law could justify denying them their claims to power. Legally, prohibiting civilians from fighting was mostly customary. As in many other areas, customs of war had been ignored by all parties during the conflict.

Reconstructing the legal environment of war required a number of sweeping changes. Since it could be so easily swept aside, custom in war was no longer acceptable as a means of restraint. Civilians and other non-combatants were now directly linked to military forces in war. It was necessary that there be some form of binding legal code relative to them. The Geneva Conventions of 1949 were constructed for that purpose. What was a custom before World War Two was now a specific section of legal code, in as much as the Hague rules were. In the nineteenth century, Clausewitz formulated his trinitarian structure of government, army and people as it existed in largely unwritten custom or tradition. Tradition failed to restrain conflict in World War Two, and caused deliberate death and destruction to military and civilian entities alike. By constructing the Geneva Conventions, the trinitarian structure of war as it was characterized by the nineteenth century traditions was reconstituted into legal documentation.

What this reconstitution failed to take into account was that the very nature of war was no longer the same thing that gave rise to the traditions before the

twentieth century. War was no longer a contest exclusively limited to organized armed forces as participants. Although organized armed forces was still a substantial part of war, all other aspects of the nation were intrinsically linked. Population centers had become legitimate targets for bombardment. Members of the population had the right to resist both invading forces and repressive internal governments. At the same time, occupation forces met with armed resistance of the population had the right to defend themselves, and treated armed resisters as legitimate enemies.

Political, economic, social, military, and technological factors that had led to the collapse of the law during the war were largely ignored. Instead, the International Military Tribunals blamed all of it on the Axis leaders. The leaders were convicted, their armies disbanded, their economic organizations taken apart, and their countries' resources taken as reparations. Although the war crimes tribunals helped to create a number of new juridical concepts such as "conspiracy to break the peace," "waging aggressive war," and the concept of "war crimes," it appears that there was an historic opportunity that was missed. Instead of redefining the concept of war that could possibly account for the loss of the trinitarian structure, their efforts went into restoring a paradigm which had failed during the greatest period of conflict in history.

## **Jus in Bello Nova**

The Geneva Conventions of 1949 consist of four parts. Convention I covers the protection of the wounded and sick armed forces in the field of operations. Convention II entails the protection of wounded, sick and shipwrecked armed forces at sea. Convention III concerns the protection of prisoners of war. It is an update of an earlier Geneva Convention for prisoners of war formulated in 1929. Convention III was to function, to some degree, in conjunction with certain articles of the 1907 Hague Rules of Land Warfare.<sup>35</sup> Finally, Convention IV concerned the protection of civilians during time of war. Two further documents were added to these Conventions in 1977. They are known as the Protocols Additional, and concern the following: Protocol I deals with the protection of victims of international armed conflict, while Protocol II covers the protection of victims of non-international armed conflict. These Protocols entailed a much more specific approach to the effects of armed conflict on unarmed members of the population. Furthermore, a transition in international law from a focus on armed conflict, to a more humanitarian orientation had begun.

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<sup>35</sup> Convention IV, Annex Section I, Chapter II, Articles 4-20. See Appendix.

## **International War**

Common to the new human rights law and the old law of armed conflict was the concern for the protection of human beings from abuses and misuses of armed power. Ensuring the protection of human beings would become more and more important in the law of armed conflict as time went on. Human rights law would make steady inroads on the law of armed conflict, focusing on the pain and suffering of humankind caused by generally unrestricted use of armed violence in conditions of both war and peace.

The various articles of the Geneva Conventions contain a list of obligations owed by the soldier to the non-combatant and those the non-combatant owes to the soldier. In the form of both limits and freedoms, the Conventions re-established a trinitarian structure in warfare in a more legal form than had existed in prior to 1945. The most important factor to international *jus in bello* became the distinction between combatant and non-combatant. The difference between the military and the civilian population has become much less clear today. However, the humanitarian community has strongly maintained that that difference remains crucial if the law is to continue to be employed for the protection of potential victims of conflict.

Out of the approximately 37,000,000 casualties in Europe, 50% of these casualties were civilian, compared with the 5% killed in World War One. Between 1939 and 1947, approximately 16,000,000 Europeans were permanently displaced from their homelands. 11,000,000 of them were Germans who fled or were driven out of the East between 1945 and 1946. These deaths and displacements serve two purposes relative to this thesis. First, they demonstrate the impact of modern warfare on civilian populations -- far greater than anything witnessed in the modern period before 1939-1945. Second, they reflect the need for greater concern for civilians. The revision of the law, to some degree denied the reality of modern warfare which cannot, in any way, assure the protection of non-combatants from the effects of armed conflict, regardless of whether those effects are deliberate or collateral.

Nineteenth century warfare largely confined the effects of warfare to the battlefield. Although the involvement of the people in warfare created an emotional factor that threatened greater destruction, the majority of that destruction remained within the ranks of the soldiers. The mobility of armies in World War Two and the use of aerial bombardment expanded the range of the battlefield in war to cover all of Europe and the Pacific Rim. One's status as a non-combatant did not entail the limited protection it once did.

The Geneva law hoped to curtail the technological expansion of total war and its effects through the promotion of an awareness of certain specific limitations in warfare among its participants, willing or otherwise. These limitations were established by international consensus among the leading states of the time. Their enforcement was the responsibility of the states themselves that directed the employment of armed force. Infractions were to be addressed both internally -- within the state's military and political hierarchy -- and internationally, since the nature of war was external in character.

The main focus of the Convention for civilians is on the protection of civilians in the hands of the enemy.<sup>36</sup> The Convention sets limits on what enemy forces can do to civilians under their control. At the outbreak of World War Two, only prisoners of war were under legal protection with respect to internment, thanks to the Geneva Convention of 1929.<sup>37</sup> A compromise was needed that would ensure that the civilians under enemy control would be allowed to live as normally as possible, while still allowing an enemy occupier to maintain its presence and security. This compromise reflected the balancing act that had begun in the twentieth century between two sets of rights: those of humanity and those of the belligerent. "The Hague Regulations, it will be remembered, laid down little

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<sup>36</sup> Green, L.C. The Contemporary Law of Armed Conflict. New York: Manchester University Press. 1993. p. 221.

<sup>37</sup> Krill, Françoise. "The Protection of Women in International Humanitarian Law." International Review of the Red Cross, 249 (1 November 1985). p. 12.



law about this [the protection of civilians in occupied territory], partly because by the 'standard of civilization' then believed to prevail, little was thought enough."<sup>38</sup>

There were certain control measures built into the Convention. The limit placed on these measures stopped at the internment of civilians. Internment was acceptable only because the security of the occupation force absolutely demands it. Although occupied territory may be a part of an overall total war battlefield, the Civilians Convention sought to ensure that a condition was created in that territory which allowed the people to maintain their status as civilians, distinguished from soldiers and other combatants attempting to fight off the occupation forces.<sup>39</sup> Civilian non-combatants who had come under the control of an occupying force had been granted a particular status distinguishing them from the armed forces involved in the conflict.<sup>40</sup> That distinction was to remain in place until hostilities cease, or those civilians form an armed resistance.

The law must attend to the reality that a population is most likely to be hostile and resistant to an invading, foreign, military force. The questions concerning this reality are quite important in setting limitations. How much trouble should the occupier put up with? How tough are they allowed to get when the trouble becomes unbearable? Article 5 of the Civilians Convention provides

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<sup>38</sup> Best, Geoffrey. War and Law Since 1945. New York: Clarendon Press. 1994. p. 120.

<sup>39</sup> Convention IV, Part III, Section I, Articles 27 to 34, Section II, Articles 39 to 46, and Section III, Article 49. See Appendix.

<sup>40</sup> See Article 51 in Appendix.

for the right of an occupying state to arrest and hold for trial civilians suspected of spying, sabotage or any other activity hostile to it. Where possible, the "law of the land" should prevail when punishing such individuals falling under Article 5.<sup>41</sup> Should that course prove insufficient (as a result of non-cooperative local authorities or lack of appropriate punishment), the occupying country may enforce its own punitive legislation.

The law establishes a complementary 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 enemy non-combatants. This distinction, and the maintenance of it, is backed up by a list of punitive measures allowed against civilians who violate the rules and against the armed forces occupying the territory.<sup>42</sup> While not necessarily forbidding civilians from committing acts of destruction against occupying armed forces, the articles of the Civilians Convention make it clear that individuals caught and charged with these acts may face punishment as criminals. This is intended as a deterrent against the active involvement of individuals who do not qualify as combatants, yet cannot necessarily be controlled in their unorganized participation in an armed conflict. Through this means, the trinitarian distinctions in war are upheld.

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<sup>41</sup> Green, p. 232.

<sup>42</sup> Convention IV, Part III, Section III, Articles 64 to 70. Article 68 prohibits the use of capital punishment against "protected persons" unless they are guilty of espionage, "serious" acts of sabotage or intentionally causing death to one or more persons. In those cases, the death penalty can only be imposed if it is within the bounds of the law of the occupied territory.

Some measure of armed resistance to occupying powers had to be acceptable, despite the sanctions of Geneva Convention IV, as most European states between 1939 and 1945 had engaged in it.<sup>43</sup> The Axis occupiers had reacted to armed civilian resistance with extreme retribution, prompting a measure of sympathy for it in the humanitarian approach of international law-makers. In addition, some European states were very proud of and owed part of their post-war existence to guerrilla and resistance fighters. This brings to light the issue of lawful combatants, and it was determined that guerrillas were not civilians. Therefore, the legality of guerrillas was left to the Prisoner of War Convention III, Article 4(2).<sup>44</sup>

Convention III, Article 4(2) and (6) establishes that civilians who take up arms to resist invading forces are no longer considered civilian non-combatants, but in fact, constitute an armed force. As an armed force, they are entitled to all the rights granted to them under the Prisoner of War Convention if taken prisoner, and those under the Conventions for the Wounded and Sick on Land and Wounded, Sick and Shipwrecked at Sea.<sup>45</sup> Their status as an armed force also relieves the invading army of the guilt associated with the deliberate killing of civilians.

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<sup>43</sup> Best, *War and Law Since 1945*, p. 127.

<sup>44</sup> See Appendix.

<sup>45</sup> Convention I, Article 13(2) and (6), Convention II, Article 13(2) and (6).

The Civilian and POW Conventions establish a distinct differentiation between the civilian and the soldier, even though as POWs soldiers are as much non-combatants as civilians. The respect for the status of prisoners of war as non-combatants can be seen in two areas of the Convention. Article 23 makes certain that POW camps are not situated near any legitimate military targets, distinguishing the non-combatant by removing him from the battlefield as much as possible. Prisoners, other than officers, may be made to work as long as that work is not of a nature that will humiliate the prisoner or contribute to the protecting power's war effort.<sup>46</sup> This also demonstrates the demand for respect of the military non-combatant, in that his participation in the military effort of the enemy is not only unfair, in terms of the prisoner's affiliation, but forced participation in the war effort may unjustly affect his status as a non-combatant.

Aside from the prisoner of war, the status of non-combatant members of an armed force is also upheld in the two Conventions dealing with the wounded and sick.<sup>47</sup> In like fashion to that of prisoners of war, the wounded and sick are distinguished as non-combatants by their condition, but also by their location relative to the battlefield. The non-combatant status of the wounded and those caring for them is dependent upon the actions taken by both military forces and the non-combatants themselves. While it is demanded that medical care facilities

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<sup>46</sup> The requirements for employing the labour of prisoners of war are listed in Convention III, Section III, Articles 49-57.

<sup>47</sup> Convention I: Wounded and Sick Armed Forces on Land, and Convention II: Wounded, Sick and Shipwrecked Armed Forces at Sea.

remain immune to attack, and are to be established in areas relatively safe from the destructive effects of the conflict,<sup>48</sup> the non-combatant status of those facilities may cease should their establishments or equipment be used for acts that are harmful to the enemy.<sup>49</sup>

### **Nuclear War**

In terms of the indiscriminate effects of war, there is very little, if any, legislation that aims to protect non-combatants from it. The law of war sets out moral norms demanding that those effects should be curbed as much as possible by the combatants. In this, military necessity has superseded the active prevention of non-combatant casualties, that may occur as a result of the indiscriminate effects of certain weapons and tactics. The indiscriminate effects of war during the Second World War, were on a scale greater than any seen prior to 1939. This was largely due to the use of technology that was not available before that time. Military necessity demanded its use, because the technological factor in total war made it an intrinsic part of warfare. It could not be avoided.

The higher the rate of non-combatant casualties became, the weaker the trinitarian distinctions got. The law of war tries to make certain that any non-combatant deaths that occur in war are accidental. However, since the

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<sup>48</sup> Convention I, Article 19.

<sup>49</sup> Convention I, Article 21.

technological factor intrinsic to total war has expanded the battlefield to include non-combatant population centres, just because non-combatant deaths are accidental does not mean that they are acceptable.

Whether implicitly or explicitly, the *jus ad bellum* ideas of resorting to armed force largely governed the strategic landscape of international politics from 1949 on. While the *jus in bello* rules had been founded on the ideal of non-combatant immunity, nuclear weapons made the distinction of combatants from non-combatants irrelevant. The effect of nuclear war would be totally indiscriminate and without defense. All persons, whether civilian, POW, wounded or active participant in hostilities would be killed.

The only clear restriction in international law on the use of nuclear weapons lies in the general prohibition against attacks on civilian populations. The World Court recently issued an advisory opinion directly related to this matter.<sup>50</sup> Its conclusion was that there is neither specific authorization nor universal prohibition of the threat or use of nuclear weapons. The blast radii of nuclear weapons made it impossible to discriminate between military and civilian targets. The reasoning that allows for unavoidable civilian casualties during a military operation apparently operates with nuclear strikes as well, given the accidental nature of non-combatant deaths.<sup>51</sup>

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<sup>50</sup> International Court of Justice. Advisory Opinion. "legality of the Threat or Use of Nuclear Weapons." 8 July 1996. At: <http://www.law.cornell.edu>.

<sup>51</sup> Rosenberg, david Alan. "Nuclear War Planning." The Law of War, p. 165.

There does not appear to be any international law accepted by the nuclear powers that significantly restricts or restrains the use of nuclear weapons, except when blatantly used to initiate hostilities. The World Court's opinion on this matter is that the threat or use of force by means of nuclear weapons must not be contrary to the UN Charter Article 2(4). Moreover, their use is unlawful if it does not conform to the requirements of Article 51 of the Charter.<sup>52</sup> As Rosenberg concludes, nuclear weapons largely reside outside the sphere of international *jus in bello*.<sup>53</sup> It is the nuclear powers themselves that were left to decide whether or not the use of these weapons was warranted in an armed conflict. Furthermore, the World Court, in re-affirming the obligations of the nuclear powers to conclude their current disarmament negotiations effectively places much of the responsibility for these weapons back in the hands of the states themselves. Nuclear weapons therefore, remain firmly planted on *jus ad bellum* ground.

In general, it was concluded by the Court that nuclear weapons are unlawful relative to the international law of armed conflict. The areas of the *jus in bello* that stand out in relation to the consequences of using or threatening to use nuclear weapons, are found in Geneva Protocol I, referred to by the Court. The basic rules of methods and means of warfare seek to guard against excessive injury

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<sup>52</sup> Under the current state of international law, the Court was not able to definitively conclude whether the threat or use of nuclear weapons would be legal or illegal given "an extreme circumstance of self-defence, in which the very survival of a State would be at stake." Presumably, there would be no question of the applicability of Article 51 to such a circumstance.

<sup>53</sup> Rosenberg, p. 166.

and destruction as well as severe damage to the environment.<sup>54</sup> Concerning civilian populations and objects, several articles in Protocol I would appear to be contravened by the threat or use of nuclear weapons. In addition, there are areas of the law covering precautionary measures and zones under special protection from the effects of war,<sup>55</sup> none of which can be guaranteed because of the destructive capability of nuclear weapons. The western nuclear powers -- the USA, UK, and France -- have opposed various attempts to improve or modify the Protocols Additional, fearing that their option to use these weapons may become increasingly snarled in legal code. This strongly suggests that not only would the nuclear detonation physically wipe out the trinitarian distinction in war, but these weapons have also undermined legal attempts to preserve that distinction.

### **Non-International War**

In the early 1970s, the International Committee of the Red Cross (ICRC) addressed the possibility of updating the 1949 Geneva Law. In 1974, the Swiss Government invited the representatives of 122 governments and a given number of representatives from national liberation movements.<sup>56</sup> Their purpose for doing so was to consider the proposals that had been prepared by the Red Cross. The meeting was titled the "Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,"

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<sup>54</sup> Protocol I, Article 35.

<sup>55</sup> Protocol I, Articles 51 to 55 and 60.

<sup>56</sup> Green, p. 48.



and ended in 1977 with the adoption of two Protocols Additional to the 1949 Conventions.

Protocol I made fundamental changes in the law as it had existed in international armed conflicts. It extended the protection given to civilian and non-military objects and forbids action likely to have long term deleterious effects upon civilians.<sup>57</sup> The concept of grave breaches found in the Geneva Conventions<sup>58</sup> is widened in Protocol I.<sup>59</sup>

“Grave Breaches” is defined under two main categories. The first is an understanding of what constitutes a grave breach. In the Geneva Conventions, this includes the willful killing, torture or inhuman treatment of anyone under the protection of the Conventions. Specific acts referred to in the Conventions include, *inter alia*, biological experimentation; the willful causing of “great suffering” or serious injury to body or health; and the destruction and/or seizure of property not justified by military necessity.

The second category defines to whom the protection from grave breaches is to apply. This was largely explained by the categories of coverage in the four Conventions themselves (i.e. the wounded, sick and shipwrecked; prisoners of war; and civilians). Protocol I extended this list to include anyone who had taken part

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<sup>57</sup> Protocol I Articles 52-56.

<sup>58</sup> Conventions I, Art. 50; II, Art. 51; III, Art. 130; IV, Art. 147.

<sup>59</sup> Articles 85-91.

in hostilities (a more general phrasing for modern forms of armed conflict), refugees and stateless persons, medical and religious personnel, and medical units and transports under the control of an “adverse party.”

The list of grave breaches was also extended to include willful 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.”<sup>60</sup> Moreover, all medical practices must conform to “generally accepted medical standards.” Protocol I lists other acts which constitute grave breaches if committed willfully, and causing death or serious injury to body or health.<sup>61</sup>

This Protocol also, for the first time, recognized civil defense as a matter requiring separate acknowledgment in the law of international armed conflict.<sup>62</sup> Important to non-international armed conflict, was the recognition that national liberation movements, fighting in the name of self-determination, are subject to the international law of armed conflict. Reaffirming and developing the 1949 Conventions, it changed the definition of combatants with respect to those fighting on behalf of national liberation movements even though they may not be wearing recognizable uniforms.

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<sup>60</sup> Green, p. 287.

<sup>61</sup> Articles 85(3) and (4).

<sup>62</sup> Articles 61-67.

The purpose of Protocol II was to extend the humanitarian protection of a specific area of the Geneva Law -- that of Common Article 3. That protection was to be directed toward those participating in a non-international conflict. The definition of such a conflict is specifically confined to a civil war situation in which both the government and the rebel forces are in control of part of the national territory. By demanding that an insurgent party be in control of a given amount of territory,<sup>63</sup> the law attempts to eliminate riots and other similar disturbances from legitimacy as insurgent activities. Protocol II was the first major attempt to introduce international legal control of non-international conflicts, but it did something else as well.

Through the means of international legislation, it brings the trinitarian concept of war to internal conflict. The possession of territory requires organization and administration if it is to be maintained. By having an area to serve as a base of operations, the insurgent force is given more of a military legitimacy relative to the state they are challenging. The existence of civilians within the territory is not a requirement, although their presence is acknowledged in the law, in that the entire purpose behind the Geneva Conventions and 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

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<sup>63</sup> Protocol II, Article 1(1).

receive their separation from the administrative and military components of either group. In both, they form the third element of trinitarian warfare.

To bind insurgent parties to these Conventions, it was understood that since the states had committed themselves to the Conventions, they were duty-bound not only to follow them, but to “ensure respect” for them as well.<sup>64</sup> This meant that the populations of contracting states would also be bound to follow the Conventions. Parties to an insurgency are still citizens of their state, therefore they are still bound to follow the Conventions even in the event of a civil war. Insurgents were free to refuse to follow laws imposed by their government, as an aspect of rebellion.<sup>65</sup> It was assumed at the Conference, that insurgents would be inclined to follow the Conventions, in order to ensure humane treatment should they be taken prisoner by government forces, as well as retain a clear conscience.<sup>66</sup>

Protocols I and II had emerged as a result of pressure on the international community from anti-colonial forces to include their conflicts under *jus in bello*. In reality there was less of a concern with the mitigation of human suffering, than with privileging certain politically-preferred belligerencies, particularly those in the name of law and order. The colonial powers naturally resisted these changes, because it gave their opponents the status of belligerents rather than that of outlaws or criminals.

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<sup>64</sup> Common Article I.

<sup>65</sup> Green, p. 305.

<sup>66</sup> Best, War and Law Since 1945. p. 178.

Who the parties to a conflict were was not as important as the recognition of belligerency. There was a threshold of applicability to be considered. This aspect of the law of war entails obligations on the part of the belligerent. Outside powers should, in terms of textbook doctrine, before extending the right of the belligerent to participants in a civil war, should assure themselves that that belligerent can in fact uphold the *jus in bello* laws of war, particularly with respect to non-combatant third parties (i.e. neutrals). However, to grant the privileges, protections, and immunities of the prisoner of war to people who were by all accounts, rebels and criminals by their existence was unacceptable.

The development of belligerent recognition was an off-shoot of the law of neutrality, that was designed to protect the interests of both international belligerents and neutrals. The intention was to inconvenience neutral parties as little as possible by the fact that two countries were going to war. The extension of recognition of belligerency to encompass civil war, implicitly acknowledges that a belligerent has the means and the willingness to act as though they were a regular army of the state with respect to POWs, neutrals, or civilians. However, Protocols I and II do not impose the tests necessary for determining an insurgent's suitability under the law. The laws of war may appear one-sided as a result of these modifications. The reason why it was done in such a manner was because there

was a large UN majority prepared to make a political gesture in support of an ideology of anti-colonialism, without considering other aspects of the issue.

The emergence of national liberation movements reintroduced the concept of *jus ad bellum*. Conflicts became legitimized largely in terms of the cause for which they were fought, over and above the authorities fighting it and the methods they used.<sup>67</sup> This position was validated by the Geneva Protocol I, Article 1(4), in which the provisions of the Conventions were extended to armed conflicts in which people are attempting to throw off foreign domination in favor of self-determination and national sovereignty.

Stemming from the spread of western values and knowledge, a European-style, westernized elite had developed among non-Europeans. For some, aspects of western culture appeared genuinely superior, while for others there was personal advantage to be found in the adaptation.<sup>68</sup> Western concepts such as universal impersonal law, independence, nationalism, democracy, and eventually Marxism gave the members of the elite the ability to achieve separate and independent statehood in the twentieth century. Here was founded a dilemma faced by these elites that the Europeans did not have to deal with, having had a three to four hundred year head-start on western nationhood: how to reconcile

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<sup>67</sup> Andreopoulos, George J. "The Age of National Liberation Movements." The Laws of War. p. 191.

<sup>68</sup> Watson, Adam. "European International Society and its Expansion." The Expansion of International Society. Hedley Bull and Adam Watson, ed. Oxford: Clarendon Press. 1984. p. 31.

these powerful, imported ideas to which they now owed their elevated status, with the traditional and sometimes ingrained methods and values of the majority of their people.

The sovereignty of these states is a formal one, but in reality, their governments had suffered from insecurity because of a lack of legitimacy. Their power did not rest on the loyalty of those they governed as, "private interests were wholly at the mercy of the rulers, and the public interest entirely what the rulers decree."<sup>69</sup> They lacked the strength and self-confidence possessed by those who spoke for well-established bodies-politic. Instability and civil commotion existed and intensified under an ideological style of politics that was not backed up by constitutional restraint and/or guidance.

Through the bureaucratic structure of Western-style government, those in power have been given an extensive system of control over the lives of the ruled. However, the position of these despotic leaders is a precarious one, because there was little or no relation between Western institutions of government and the traditional societies that these new rulers now control. Many traditional societies were fragmented ones in which tribal loyalties and preferences often took supremacy. Attitudes such as these led to the corruption these states were often accused of. Corruption being a Western notion is often hard to understand in

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<sup>69</sup> Kedourie, Elie. "A New International Disorder." The Expansion of International Society. p. 351.

states such as these. In essence, their government is one of laws, public office and public interest, but the social realities are decidedly non-Western. These forms can exist simultaneously but in contradiction, resulting in serious tension. Through ideological mobilization, some of these governments have attempted to force the issue to create a body politic as cohesive as European institutions require. Unfortunately, the ideology was also European in origin, and often only served to make situations worse.<sup>70</sup>

Regimes left behind after the withdrawal of the colonial empires had been viewed by the followers of marxist-leninism as the local recipients of material gain, received at the expense of the indigenous population *en masse*.<sup>71</sup> In order to restore social and economic parity and, therefore, freedom throughout the population, these regimes would have to be removed from power. In this, lay the implicit justice of the cause for which national liberation movements fought.

National liberation movements attained their status in Protocol I, as generally involved in international conflicts, largely because of the attitude that developed toward them during the early 1960s. This development had been spurred on by the Algerian war for independence from French colonial rule.<sup>72</sup> As the FLN (National Liberation Front) had argued, the Algerian people were not

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<sup>70</sup> Ibid., pp. 354-5

<sup>71</sup> Andreopoulos, pp. 192-3.

<sup>72</sup> Best, Geoffrey. Humanity in Warfare. New York: Columbia University Press. 1980. pp. 311-12.



engaged in a rebellion against a lawful government. Rather, their struggle was to regain their independent national status that the French had deprived them of. The FLN believed their government to be legitimate, making them a lawful belligerent and deserving of appropriate international attention. As such, their conflict was an international one, and they were willing to observe the international law of war so long as the French did so as well. It was argued that insurrectionist activity was merely a defensive response to an imperial power's original aggression in taking over a particular country, and maintaining its presence there until the time of insurrection.

For the West, the spread of marxist-leninism in the Third World was interpreted as the proliferation of an ideology that had its origins in the USSR. That ideology led to a political system of oppression and denial of human liberty, that in all good conscience had to be stopped. On another level, the success of left-wing groups to establish regimes in Third World countries had the potential to place enormous natural and economic resources in the hands of a hostile rival. Suspicion of Krushchev's motives was undoubtedly raised when, in 1955-56, he began a massive program of economic aid and technical assistance to such Third World countries as Egypt, Iran, Afghanistan, Cambodia, Laos, North Vietnam and Burma. Actions such as these, caused a number of people to believe that by succeeding in their efforts to gain allies in the Third World, the Soviets could

conceivably overwhelm the West.<sup>73</sup> As a means of resolving this problem, the West, spear-headed by the United States, developed the policy of Containment that had the intention of preventing the spread of Soviet Communist influence. Unfortunately, the level of ideological tension between these two forces overshadowed the importance of what guerrilla movements may have been trying to accomplish.

In the recognition of state sovereignty and political and governmental organization, armed forces often played crucial roles. The people however, did not. Civilian non-combatants had very little to do with these processes. Either that, or their importance to the processes were hardly taken into account. Decolonization and the Cold War reinforced the trinitarian distinction of the non-combatant from the armed forces and the governing body because of the lack of consideration for their position by the Great Powers during this period. It would be left to non-governmental organizations to spear-head the initiative to grant non-combatants greater protection from armed violence in the law of armed conflict.

The error in the Geneva Conventions relative to civilians became apparent once non-international armed conflict began to surpass international forms in frequency. The Civilians Convention demanded, by way of Articles 33 and 34, that civilians not be harassed by the occupying power. Yet, where decolonization

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<sup>73</sup> Craig, Gordon A. and Alexander L. George. Force and Statecraft: Diplomatic Problems of Our Time. New York: Oxford University Press. 1983. p. 121.

and guerrilla movements coincided, the issue became substantially less clear. Was the presence of a foreign military power an occupation? More importantly, if the enemy force cannot be discerned from the civilian population, how are their activities to be effectively curtailed without the detention of suspects and sympathizers? This problem can become extremely troublesome as the American forces discovered in Vietnam when civilians were murdered in the village of My Lai in 1973.<sup>74</sup>

One of the most disturbing and prevalent manifestations of modern conflict that was present in the Algerian conflict and most that came after was the use of terror. The indiscriminate use of violence is often a means of instilling fear in the enemy and of rallying potential supporters to the cause. Terror tactics attempt to expose the inability of the guerrilla's opponent to protect the civilian population, thereby increasing the pressure to agree to a settlement. It can also serve to enhance the stature of the guerrillas and promote the justice of their cause. The much more serious result has been the use of counter-terrorist measures that are equally violent and indiscriminate. A new form of the total war concept emerged under these conditions; a war waged not against the guerrillas but the people as a whole.

There have been earlier incidents of occupying forces taking civilian hostages in order to punish civilian populations for encouraging or facilitating

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<sup>74</sup> Andreopoulos, p. 196.

guerrilla operations or to deter them from doing so.<sup>75</sup> In Northern China, the Japanese forces were continually harassed by guerrillas during the course of their operations there. One solution was a policy known as *sankō-seisaku*: the physical destruction of all life and property in an area where guerrillas were thought to exist.<sup>76</sup> At the war crimes trials, the plea of military necessity was met with sympathy to some extent, in that the taking of hostages was accepted as a practice to which all armies in occupying positions might need to resort to. Killing hostages may not necessarily have been an approved action, but neither was it absolutely condemned.<sup>77</sup>

The French Army School in its training for Indochina and Algeria during the late 1940s and early 1950s, endorsed a policy of “counter-terrorism” or “anti-guerrilla” activity to forestall casualties and demoralization of regular forces.<sup>78</sup> It was believed that the physical intimidation of civilians would reverse the effects of the guerrillas whom the French believed were receiving support from the civilian population through the use of intimidation. The French would not accept the notion that civilians would support insurrectionist movements of their own accord. Johnson argues that this was a contributing factor to the French defeat in South-East Asia.<sup>79</sup>

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<sup>75</sup> Best, Humanity in Warfare. p. 295.

<sup>76</sup> Johnson, Chalmers A. “Civilian Loyalties and Guerrilla Conflict.” Garrisons and Government: Politics and the Military in New States. Wilson C. McWilliams, ed. San Francisco: Chandler Publishing. 1967. p. 87.

<sup>77</sup> Best, Humanity in Warfare. p. 295.

<sup>78</sup> Johnson, pp. 85-6.

<sup>79</sup> *Ibid.*, pp. 84-5.

Torture of detainees was one of the main instruments that practitioners of counter-insurgency warfare employed to break up the support network of the FLN in Algeria. The argument pursued by the French was that given the guerrillas' ability to conceal themselves among the population so as to blur the combatant/non-combatant distinction, it was in that population that French forces had to focus their efforts to extract the information necessary to determine the location and extent of their enemy's activities. The effect of French efforts to break up the enemy's support network was the antagonizing of the civilians whose assistance was necessary if they were to construct a new order in Algeria that would be supported by the indigenous population. The wider the French efforts to find enemy sympathizers, the more they were forced to use questionable tactics. As a result, more and more support was lost in Algeria for the French cause.

The use of terror violates the laws of armed conflict since it presupposes the most extreme form of an indirect military engagement with the enemy outside the framework of rules governing the conduct of warfare.<sup>80</sup> Some of the more powerful examples occurred during both the Algerian and Vietnam conflicts. During the Battle of Algiers in 1956-57, the FLN used terror tactics consisting of placing bombs in public civilian areas, as well as the assassinations of French officials.<sup>81</sup> This produced a response by the French involving mass arrests, torture

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<sup>80</sup> Walzer, Michael. Just and Unjust Wars: A Moral Argument with Historical Illustrations. New York: Basic Books. 1977. pp. 197-98.

<sup>81</sup> Andreopoulos, p. 208.

and the eventual relocation of entire villages, in an effort to deny the guerrillas access to civilians. Such resettlements, for the same reasons, occurred in Vietnam with the establishment of "free-fire" zones. In these deserted areas, anyone found in them afterward was considered a guerrilla member and therefore a legitimate target. While these relocations may have infringed upon civilian human rights and freedoms, more seriously, as in the case of the regroupment centers in Algeria, the living conditions were reportedly little better than the concentration camps of World War Two.<sup>82</sup>

In the cases of Algeria and Vietnam, foreign soldiers present among an indigenous population were unable to tell hostile from friendly or neutral non-combatants. As a result, soldiers were forced to treat all members of the population with suspicion for their own protection. This pitted the armed forces against an entire nation. At this point, the only way for a war to be fought was by the systematic killing of civilians or the destruction of their society and culture.<sup>83</sup> This conclusion was strongly reminiscent of Clausewitz's description of absolute war.

The guerrilla's refusal to adopt a single identity -- either civilian or combatant -- placed the onus of indiscriminate warfare on their opponents. As Andreopoulos argues, such a strategy subjects the military conflict to a heavy

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<sup>82</sup> Ibid. Andreopoulos refers to a report commissioned by Paul Delouvier, French Delegate-General for Algeria, published in April 1959.

<sup>83</sup> Walzer, p. 195.

politicization that places unsustainable burdens on the shoulders of the guerrilla's opponents -- their armed forces and society.

"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 Algerie-Francaise 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>84</sup>

Inevitably, there would be a telling impact on the law of war.

The principle of self-determination legitimized wars of national liberation under the *jus ad bellum* qualifications. The major criticism to this position was that the legitimization of the national liberation movement's position attempted to shift the focus from the reciprocal obligations of belligerents under *jus in bello* principles to rights weighted significantly in favor of the NLM by means of the just cause. Critics argued that this would permit NLMs certain operational freedoms not available to their opponents, and placed them on an unequal footing.

The efficacy of Protocol I has seriously declined since its inception, largely due to the fact that there are hardly any states that remain to be liberated from

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<sup>84</sup> Andreopoulos, p. 213.

colonial domination. What remains today, are conflicts that emerge out of the effort to maintain sovereignty. All rebellions and civil wars, not coming within the specific meaning behind Article 1(4) of Protocol I are considered non-international and fall under Protocol II. Decolonization has ended, but so has the Cold War with its ideological emphasis on Right vs. Left. No longer overshadowed, the hostility occurring with the emergence of new forms of nationalism or "ultra-nationalism" in Third World regions presents international law with a dilemma that has been produced by the deliberate targeting of non-combatants for questionable strategic purposes. The typology of modern non-international conflict has no basis for exclusion of non-combatants, since the *casus belli* is the very existence of cultural, ethnic or religious groups within a given territory.

The formulation of the 1977 Protocols was done with the expectation that they would receive the same concern and attention regarding internal wars that human rights law sought to generate around international conflicts. That would not prove to be the case. "Non-international Armed Conflicts" under Protocol II were defined so restrictively that most such conflicts would have to continue to rely on the coverage of Common Article 3. Even as the occurrence of international wars took a back seat to civil wars or ones of "mixed status," states were no more inclined to conform to the law of war than they were prior to the Protocol's existence, despite the fact that organizations such as the ICRC spent most of their energies on these types of conflict. In the end, the humanitarian



effort was hobbled by a recurrent obstacle: the right of national sovereignty and the freedom from outside interference, as per the UN Charter Art. 2 paragraphs 1, 4, and 7.<sup>85</sup>

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 Protocols. The law can only function if it is reflective of the reality of the society that gives rise to it. The law fails 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 the laws of war.

Maintaining the legal position of accepting the deaths of non-combatants only in terms of accident or side-effect of operations, rather than as a result of deliberate targeting, becomes meaningless. The nature of warfare has become such that 50% or more of the casualties in a war are likely to be non-combatant. Taking this into consideration, international legislation that demands a distinction between combatant and non-combatant in a trinitarian fashion (which the Geneva Conventions in fact do), is unrealistic and inherently inapplicable.

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<sup>85</sup> Best, War and Law Since 1945. p. 75.

## **Chapter Three**

### **Law and Disorder: Non-International Conflict and the Failure of Applicable Rules of Conduct**

*"It follows that the events of every age must  
be judged in the light of its own  
peculiarities"*

– Carl Von Clausewitz

Modern *jus in bello* specifies a humanitarian content, with particular concern for individuals who are not participating in the conflict at hand. These individuals are described in three main categories. In the first category are civilians or non-military personnel. This category includes any or all inhabitants of an area in which an armed conflict is occurring. The second category consists of all those who have participated in an armed conflict and have been rendered wounded, sick, or shipwrecked as a result of their activities. The third category consists of all members of one military force who have been taken prisoner by the opposing force. Schlogel states, "International humanitarian law starts from the premise that the individual has a legitimate right to be protected and given aid irrespective of the State to which he belongs."<sup>1</sup> The primary regulations governing the maintenance of respect for these individuals are the four Geneva Conventions signed into being in 1949, with two succeeding Protocols added in 1977.

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<sup>1</sup> Schlogel, A. "Civil War." International review of the Red Cross, 10 (March 1970) p. 124.

Other *jus in bello* rules in war exist for the protection of other aspects of society, such as the protection of cultural items and symbols (1954 Hague Convention and Protocol), as well as the means military forces may actually employ on the battlefield with respect to those they engage in combat. The basic source of these rules is found in the Hague Conventions regarding war on land and at sea (signed in 1907), and in the air (signed in 1923). Along with these rules, there are also regulations concerning the rights and duties of parties and individuals who declare themselves to be neutral in a specific conflict.

Article 3, which appears in all four Geneva Conventions, takes into consideration the occurrence of intrastate war. Article 3 stipulates certain restrictions when armed conflict occurs on a non-international basis. These restrictions involve demands that anyone in the area not taking active part in the hostilities are to be safe from assault by those who do take part in the conflict.<sup>2</sup> In addition, allowances for the treatment of the wounded and sick, as well as the involvement of impartial humanitarian organizations such as the Red Cross are to be guaranteed by either side of the dispute. Protocol II, added to the Conventions, further defines the protection to be offered to victims of non-international armed conflict, insuring the humane treatment of those victims, whether civilians caught in the middle or fighters rendered *hors de combat*.<sup>3</sup>

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<sup>2</sup> Roberts, Adam and Richard Guelff. Documents on the Laws of War, 2nd ed. Oxford: Clarendon Press. 1989. p. 172.

<sup>3</sup> *Ibid.*, pp. 449-58.

The rationale behind common Article 3 and the subsequent Protocols, is premised on an understanding that these conflicts, when they occur, involve clashes between the military forces of a government in power within a state and domestic factions motivated by a desire to rid their country of what they perceive as colonialism, racism, or the repression of a quest for national self-determination.<sup>4</sup> Whether that rationale adequately covers the phenomenon of intrastate war or not, the efforts of those formulating what works out to be an international law of non-international armed conflict have an almost entirely humanitarian basis. Kossoy provides a description with the following: "Humanitarian law is the practical application of at least some of the principles of human rights to human behavior in time of armed conflict. Thus, it is evident that -- as opposed to human rights -- such law is a part of *jus in bello* and that its present field of application is limited to armed conflicts."<sup>5</sup>

Referring to international law in terms of humanitarianism, rather than armed conflict, constitutes a major shift in emphasis. It strongly indicates that the "legal community" has begun to favor the well-being of the victims who suffer the effects of armed conflict over and above the occurrence of the armed conflict itself. A change in terminology from the "law of war" to the "law of armed conflict"

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<sup>4</sup> DePue, Captain John F. "The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949 -- Its Impact upon Humanitarian Constraints Governing Armed Conflict." *Military Law Review*, 79 (Winter 1977) p. 72.

<sup>5</sup> Kossoy, Edward. Living with Guerrilla: Guerrilla as a Legal Problem and a Political Fact. Geneva: Librairie Droz. 1976. p. 46.

allowed for the inclusion of organized violence that would not necessarily be described specifically as war. By doing so, the law could be extended to those conflicts, thereby providing its coverage. The goal of that coverage was to ensure that the protections in the law (the *jus in bello*) could be applied, while simultaneously providing a legal basis for the armed conflict itself to proceed (the *jus ad bellum*). The change in terminology yet again, signifies the growing importance of the law's protections over and above the legalities associated with the *jus ad bellum*. The main proponents concerned with the application of law to intrastate conflict have placed the *jus in bello* ahead of other issues and may favor an even greater disassociation of the *jus ad bellum* from the protective function of international law.

There is a precarious balancing act being maintained between the rights of sovereignty and the global responsibility for the protection of human rights. Bedjaoui views this as somewhat paradoxical in that a law that is intended for all of humanity is dependent upon state consent.<sup>6</sup> As the need for humanitarian protection increases in importance, the sanctity of the state more and more is becoming an impediment. Nevertheless, since the state is also a vital requirement for the implementation of humanitarian law, the goals of international law cannot be properly achieved without it.

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<sup>6</sup> *Ibid.*, p. 40.

The main feature of humanitarian law is the conflict between the need to protect the human person and the requirements of the military or police. In this regard, humanitarian law is understood as a main body of legal code that is defined by two aspects: one outlined by the law of war, the other by human rights. These two aspects may be distinguished from each other, but as Bedjaoui argues, are two parts that make up the larger whole.<sup>7</sup>

International law in armed conflicts (i.e. the 1907 Hague Rules and the 1929 Geneva Convention) began to be recognized as a humanitarian body of law, rather than just a "law of war," during the Nuremberg International Military Tribunal. The 1969 Vienna Convention on the Law of Treaties, held twenty years after the almost universal ratification of the 1949 Geneva Conventions, asserted the ultimate importance of humanitarian rules.<sup>8</sup>

In contrast, Lavoyer treats the law of war and humanitarian law as indistinguishable.<sup>9</sup> His study emphasizes a distinction between humanitarian law and human rights law as separate branches of international law. This differs from Bedjaoui's analysis which treats human rights as a main component of humanitarian law and not a separate branch.

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<sup>7</sup> Bedjaoui, Mohammed. "Humanitarian Law at a Time of Failing National and International Consciousness." *Modern Wars: The Humanitarian Challenge*. London: Zed Books. 1986. p. 8

<sup>8</sup> *Ibid.*, p. 11-12.

<sup>9</sup> Lavoyer, Jean-Philippe. "Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC." *International Review of the Red Cross*, 35, 305 (March-April 1995). p. 163.

These somewhat separate viewpoints on the nature of international law, with respect to human beings in the midst of armed conflict, suggests a lack of consensus among scholars over the approach to this issue. A lack of consensus will no doubt slow the formulation and implementation of more comprehensive legal codes or rules. However, it also demonstrates the level of thought being given to the issue of humanitarian protection. Protection needs to be substantial if it is to increase in both effectiveness and applicability. Incidents of violence occur in many parts of the world, some of which do not adequately fit within the parameters of international armed conflict law, even though their destructive and harmful effects are just as palpable to persons directly affected by them.

The murky realm lying between states of peace and war, described in such terms as "hostilities," or "armed conflict," has the effect of freeing the situation from the more "traditional" ideas of war. The change in terminology from the "law of war" to the "law of armed conflict," suggests that the latter term is more specific to various forms of organized violence evident in present time and space.<sup>10</sup> Determining when these rules are to be applied is almost entirely dependent upon the political or ideological goals of those involved.<sup>11</sup>

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<sup>10</sup> Kossoy, pp. 34-40.

<sup>11</sup> DePue, p. 75.

“Law of armed conflict” is wider in scope in order to place modern forms of violence under existing law. This demonstrates an effort to extend a system of legal codification designed for a specific condition of social interaction that may not exist any longer in its previous form. The problem of applying rules to intrastate conflict is summed up by the following: “As international law is always connected with relations between States, there is no place there for rebellion against the established power.”<sup>12</sup> Schwarzenberger also argues for the idea of weakness in international law in its application to intrastate conflict with the following: “...the law may have become so uncertain that it is no longer presentable as a coherent branch of international law. It may even be that the law is reasonably clear, but that the standards of law-abidingness of actual and potential parties to armed conflicts have declined to a point where the applicable law is reduced to a state of utter ineffectiveness.”<sup>13</sup> The qualifications arranged for the relative application of the Geneva Conventions to conflicts of a non-international character are so precise that very little of the violence taking place around the world today has any hope of qualifying.<sup>14</sup>

Common Article 3 presents an unclear definition of who is to be covered. During insurgency activities, “fighters by night frequently become farmers by day, and the civilian population often actively affords logistical or intelligence support

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<sup>12</sup> Schlogel, p. 124.

<sup>13</sup> Schwarzenberger, Georg. “From the Laws of War to the Law of Armed Conflict.” Current Legal Problems, 1968. p. 240.

<sup>14</sup> Green, L.C. The Contemporary Law of Armed Conflict. Manchester: Manchester University Press. 1993. p. 64.



to one side or the other.”<sup>15</sup> Protocols I and II make a much more precise definition of who must be covered by this legislation. However, even the addition of the Protocols fails to resolve a recurring problem between the law and civil war. Intrastate war since the time of Clausewitz has presented a constant challenge to the paradigm of warfare that distinguishes combatant from non-combatant.

Ideally, the government represents the will of its country’s citizens on the international level. In the particular political process known as warfare, the armed forces of the country act to defend and promote their country’s national will against its opponents. In a civil conflict, the actions of the armed forces are often turned inward, against the citizens themselves. The state’s soldiers are in the position of defending themselves and their government from those citizens they had been pledged to protect.

To summarize the more important rules of conduct, people who are not, or are no longer, taking part in hostilities, such as the wounded and sick, prisoners, and civilians, must be respected and protected in all circumstances. Civilians must be treated humanely; in particular violence to their life and person is prohibited, as are all kinds of torture and cruel treatment, the taking of hostages, and the passing of sentences without fair trial. The armed forces must always distinguish between civilians and combatants, and between civilian objects and military objectives. It is prohibited to attack civilians and civilian objects, and all precautions must be taken

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<sup>15</sup> Ibid., p. 86.

to spare the civilian population. It is prohibited to attack or destroy objects indispensable to the survival of the civilian population. The wounded and sick must be collected and cared for; hospitals, ambulances, and medical and religious personnel must be respected and protected. The emblem of the Red Cross or Red Crescent, which symbolizes this protection, must be respected in all circumstances. Any abuse or misuse of these emblems must be punished. Parties to a conflict must agree to relief operations of a humanitarian, impartial and non-discriminatory nature on behalf of the civilian population. Aid agency personnel must be respected and protected. These *jus in bello* rules, are detailed and ordered, yet they fail to adequately restrain those participating in intrastate war. These rules and regulations also do not properly ensure the protection of those for whom they were designed.

### **Law and the Character of Intrastate War**

‘It is generally the rule, rather than the exception, that man destroys what he most hates, and that is usually the rival on his own territory.’<sup>16</sup> Enzenberger’s work is extreme in its negativity. However, it does serve to illustrate the basic ideas surrounding the problems with the existing *jus in bello*. The killing of strangers from another country, who one would hardly ever see face-to-face, has tended to make war more of an abstract concept on the international level.

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<sup>16</sup> Enzenberger, Hans Magnus. Civil Wars: From L.A. to Bosnia. New York: New Press. 1994. p. 12.

Enzenberger makes a point from anthropological and psychological perspectives, in that one cannot truly hate another without a genuine knowledge of them. In that sense, one would know their neighbor better than those from outside their community. Hatred of a stranger would perhaps be less intense, making adherence to a particular *jus in bello*, such as respect for the rights of non-combatants more likely. The level of hostility directed toward those one has a greater familiarity with might, in some cases, preclude abiding by certain laws of restraint.

Enzenberger states that, "... while the classic war-between-states tends towards the monopolizing of power, and by every measure strengthens the apparatus of the state, civil war is characterized by the constant threat that discipline will break down and the militias dissipate into armed bands operating on their own account."<sup>17</sup> Prior to the end of the Cold War, internal conflicts tended to take on an international dimension. *Realpolitik* served to make sure that civil wars were fueled and exploited by external forces. As Schwarzenberger states, "As in the European religious wars of the sixteenth and seventeenth centuries, other Powers become more easily involved as ideological sympathizers. They, therefore, are more inclined to treat such risings as their concern and signify this by limited or full recognition of their ideological *confreres*."<sup>18</sup> During the Cold War, the zero-sum game of the superpowers continually pursued this logic in their efforts to gain an advantage over each other.

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<sup>17</sup> *Ibid.*, p. 15.

<sup>18</sup> Schwarzenberger, p. 254.

With the break-up of the Soviet Union, the costs of supplying one side of a civil war far outweigh the benefits. The interest certain outside powers have had in some parts of the world has declined. Areas that once were of some political and strategic significance no longer are. In places such as Afghanistan, Africa, India, South-East Asia, and Latin America, the Cold War ideologies have dissipated with the end of the Cold War. What is left behind is essentially the armed mob. No longer backed by a powerful industrialized state, guerrillas and people's movements commit violence with relatively unclear goals beyond personal aggrandizement.

Enzenberger argues that until recently, the intentions of those engaging in war, civil or otherwise, had usually been obvious.<sup>19</sup> What is left today, is a brutal chaos of Hobbesian universal war. Such a statement is quite extreme and may not adequately reflect reality. The causes behind many civil conflicts in the world can be widely varied, and often difficult to comprehend fully. Rather than having no purpose at all, from the perspective of the *jus in bello* of the Geneva Protocol, the goals these forces *do* have do not relate to the intention behind the law.

An interesting explanation concerning the development of internal violence was provided by Widner's study of politics among the African states.<sup>20</sup> A crisis can

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<sup>19</sup> Enzenberger, pp. 30-1.

<sup>20</sup> Widner, Jennifer A. "States and Statelessness in Late Twentieth Century Africa." *Daedalus*, 124, 3 (Summer 1995) pp. 148-50.

begin on a level where individuals deny the legitimacy of the established system. As the numbers of these defiant individuals grow, it becomes safe for individuals to act in further defiance. The likelihood or expression of hostility increases with the numbers of people involved. The participation of those drawn into the crisis early triggers those slightly more cautious to become involved. Participants incite each other to join in, further diminishing the prospect of punishment by means of greater numbers.

Causal factors such as these bring about a withdrawal of rights of control from established authority. The motivation for conflict is not necessarily to bring about any particular goal or better way to run the government. Widner refers to Rwanda where rival tribes -- the Hutus and Tutsis -- were engaged in open conflict with little or no regard for any attempts by the Rwandan government to control the situation. No application of the Geneva Convention or the Protocols were made, nor were there any efforts made to safeguard non-combatants. The result was the massacre of thousands of Rwandans, followed later by large numbers of refugees who had been forced to flee the area. Those who were first to participate threatened to kill family members of others in the group unless the heads of households did as they ordered. Once the violence had started, it was therefore hard to contain. This particular conflict stemmed from a general opinion among Hutus pertaining to their alleged disaffection from the Tutsis, who held a higher socio-economic position in Rwandan society.

This example is highly suggestive that an area exists between domestic and international constraints, in which domestic law enforcement is unable to control the situation. The level and direction of violence does not meet the requirements of international law, since the established government is not necessarily involved. It is in this area that distinctions between soldiers and civilians can break down. Ethnic hostility does not have to be "war," as it is defined by Clausewitz.<sup>21</sup> The organization of fighters is along different orders than that which defines a military force compared to civilian members of society. Violent non-state actors such as these are not national liberation movements *per se*, nor do they appear interested in safeguarding non-combatants, to which the Rwandan killings attest. Since the Hutu members were directing their hostility against the Tutsi tribe and not an opposing military force specifically, there was little interest in distinguishing between combatant and non-combatant by the Hutus.

The efforts of Protocol II to reduce the extreme violence that tends to occur in non-international conflicts are limited by the principle of sovereignty and the right of a government to preserve itself.<sup>22</sup> As Bedjaoui states, "... the whole system of control remains subservient to the will of States. The establishment and of course the actual operation of these mechanisms is ultimately subject to State

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<sup>21</sup> Clausewitz, Carl von. On War. Princeton: Princeton University Press. 1976. p. 87.

<sup>22</sup> Green, L.C. Essays on the Modern Law of War. New York: Transnational Publishers. 1985. p. 22.

consent.”<sup>23</sup> The Protocol is entered into force following the ratification of it by two states, as per article 23.<sup>24</sup> It is assumed that one of these states would be the one whose government is under attack by internal forces. Should the affairs in a state deteriorate to the point where a non-international conflict is taking place, the Protocol and its provisions come into effect. However, the application of it is still dependent upon the recognition, by ratification of the Protocol, of an official state of non-international conflict.

In article 10, paragraphs 3 and 4 seek to ensure that medical personnel providing humanitarian relief to victims of non-international conflict will not be obligated to provide information to a party to the conflict concerning those under their care.<sup>25</sup> Information of such a nature may take the form of the location of the wounded, how many, what group in particular they are from, where they were injured, or anything one or more may have said while in the care of the medical personnel, concerning military operations or aspects of them. These paragraphs also state that such freedom from obligation is entirely dependent upon the national laws of the state in which they are operating. Given the limitations of national law, it would be entirely possible for a government to remove or deny protection to medical personnel and relief operations. Protocol II provides for the operation of relief societies in a state suffering from non-international conflict; however external relief activities on behalf of civilians are permitted only as long as

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<sup>23</sup> Bedjaoui, p. 21.

<sup>24</sup> Roberts and Guelff, p. 457.

<sup>25</sup> *Ibid.*, p. 454-5.

the consent of the party to the Protocol is forthcoming. According to Green,<sup>26</sup> these organizations must be exclusively humanitarian and impartial in nature, and conduct their operations without adverse distinction of any kind. Qualifications such as these demonstrate the continued strength of national independence and unrestricted sovereignty. Even if an insurgent group within a state were to make a request that relief organizations care for sick and injured civilians and/or members of their group, the government of that state may deny that care if it so wishes. The government is not required to make the principles of the Conventions or the Protocols known to their would-be opponents. The Protocols only require that its principles be “disseminated as widely as possible.”<sup>27</sup>

Protocol II tends to reinforce national sovereignty even though its provisions work to include rebel or insurgent groups. Protocol II makes no provision for any type of accession or acceptance of its terms by the rebel authorities. This is different from Protocol I, in which an authority representing a non-state entity seeking to challenge the government, may make a declaration invoking the Protocol for the conflict.<sup>28</sup> Difficulty arises when the government of a state has not ratified the Protocol. In a situation such as this, the insurgent group is bound by the Protocol to other parties, yet the government they are challenging is not. Protocol II places an emphasis upon the rights of the persons affected by the conflict, rather than the obligations of those in power.

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<sup>26</sup> Green, Essays on the Modern Law of War. p. 24.

<sup>27</sup> Protocol II, Article 19. See Appendix.

<sup>28</sup> Protocol I, Article 96.



Sovereignty is given additional support in that Protocol II makes no effort to place rebel groups on an equal footing with governments. Article 3 works preventatively to ensure that the territorial integrity of a sovereign entity will not be violated externally. Article 3(2) goes so far as to imply that even should a government resort to tactics which violate the Protocol's requirements, after having ratified it, external forces may not intervene. Given this potentiality, the Protocol may be functionally negated, and the insurgents may have very little left in their favor beyond moral condemnation of the incumbent government. Green states that Protocol II makes no reference to the possibility of breaches of it, nor does it provide for any means of punishment in general.<sup>29</sup> Green refers to breaches in the context of the medical profession, yet the lack of enforceability is not limited to the medical field.

One of the main underlying problems of the law of armed conflict regarding intrastate warfare, is that there is a fundamental difference between the existence of an inter-state milieu, and a transnational society. The basic organization of these two structures are very different,<sup>30</sup> and the increase in non-international violence has produced a serious confusion and lack of order between the levels of analysis. Whereas the levels of analysis had kept the world of international relations organized into three main categories: the individual, the state, and the

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<sup>29</sup> Green, Essays on the Modern Law of War. 133.

<sup>30</sup> Hoffman, Stanley. Janus and Minerva: Essays in the Theory and Practise of International Politics. London: Westview Press. 1987. p. 85.

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.

“Transnationalism” is defined as a form of interaction and coalition-building across state boundaries involving a diverse set of non-governmental actors.<sup>31</sup> Examples of non-governmental actors that are considered transnational are multinational corporations, religious groups, terrorist networks, and increasingly, ethnic groups which exist within several states at once, maintaining links between them without regard for the supposed inviolability of state borders. Essentially, transnationalism de-emphasizes the state as the primary and unitary actor. Transnational actors pursue violent activities on behalf of a number of causes and motivations. As the nature of transnational society transcends state borders, so too does the violence transnational actors commit.

The organizing principles of the state do not translate well to the transnational level. The basic format of law dealing with the occurrence of intrastate violence provides non-state military forces with certain freedoms and obligations that are designed to act in accordance with similar duties possessed by the state government they are challenging. Those rules were entirely based on the idea that the only reason a group would challenge the government would be

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<sup>31</sup> Viotti, Paul R. and Mark Kauppi. International Relations Theory: Realism, Pluralism, Globalism. Toronto: Maxwell MacMillan. 1993. p. 596.

because they believed it to be dictatorial, unfair, racist, alien, colonial, and immoral with respect to human rights. The only genuinely acceptable aim of these groups would be to reorganize the government into a better, more humanitarian one, but only in the form of another state. This format of law in non-international violence does not truly account for the direction of transnational actors whose goals may be something other than the reorganization of their home state. As a result, international humanitarian law is left with little power of enforcement beyond the aforementioned moral condemnation in a global context.

### **Intrastate War: The Ethnic-Nationalist Perspective**

Why would the law of armed conflict not take ethnicity into account as a motivating factor beyond state insurgency? Moynihan provides two arguments for the Western mind set as it emerged from the nineteenth century: the ‘liberal expectancy,’ and Marxism. Under the liberal expectancy, ethnic identities were primitive hold-overs of the past. The immigrant experience would inevitably amalgamate people nationally. Marxism, in contrast, would break down ethnic barriers as a universal proletarian internationalism produced a classless society among nations.

Neither argument had taken into account the durability of ethnicity. These competing ideologies regarded the class structure as the most important and

dominating factor of societal development. All other factors: religion, ethnic background or race were less important. Under America's melting pot philosophy, the nationalism of the state would eventually overcome all other sources of identity among its inhabitants. Despite their origins, they would all become one people under a common national orientation. Comparatively, Marxism would unite mankind in the common cause of the struggle of the proletariat worker class against the upper class elite. To bring about the classless society of equals, there could be no distinction between religious or ethnic affiliation.<sup>32</sup> In the end, there would again be one people.

Although the end result is largely the same for either philosophy, the means and process were quite different. Both philosophies (or ideologies) were exported beyond Europe and North America and were applied at the domestic as well as the international level. The competition between the two concepts formed a philosophical basis for the Cold War. As this competition progressed, the progenitors and followers of both ideas sought to recruit support for their ideas among the inhabitants of other states. Some civil wars erupted when the competition reached the internal level of particular states. The victor in such a dispute would inevitably be those following one of the two ideologies. That state would then join that side in the bipolar international conflict of the Cold War. During the civil wars to decide directions certain states would take, the leaders of

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<sup>32</sup> Jackson, William D. "Imperial Temptations: Ethnics Abroad." *Orbis* 38, 1 (Winter 1994) p. 3.

both Marxist and liberal expectancy doctrine would become involved to ensure that their followers in that state remained strong enough to keep up the fight.<sup>33</sup>

Eventually, the Soviet/Marxist doctrine failed. According to Moynihan, when Arkady N. Shevchenko, Under-Secretary General for Political and Security Council Affairs in the United Nations, defected to the United States from the Soviet Union in 1978, he revealed a state in which there was no longer any genuine philosophical or national course. The USSR was only a police state, existing mostly to maintain its power.<sup>34</sup> There were manpower shortages due to decreased life expectancy and birth rates, as well as increased infant mortality rates; rates much worse than other countries in the world matching its population size.<sup>35</sup> Added to this pressure, was the failure of Soviet Marxist ideology to overcome ethnicity. The people under Soviet control behind the Iron Curtain had not become one classless people. Religious affiliations persisted in many areas. Soviet Jews had formed a movement to be allowed to emigrate collectively out of the USSR as a religious group. Religion, language, nationality all remained intact under the facade of Marxism, and brought tremendous pressure to bear on the

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<sup>33</sup> Moynihan, Daniel Patrick. Pandaemonium: Ethnicity in International Politics. Oxford: Oxford University Press. 1994. pp. 37-8.

<sup>34</sup> Moynihan, pp. 39-40; Zbigniew Brzezinski. Out of Control: Global Turmoil on the Eve of the Twenty-First Century. New York: Maxwell MacMillan. 1993. pp. 37-8.

<sup>35</sup> Brzezinski, Zbigniew. The Grand Failure: The Birth and Death of Communism in the Twentieth Century. New York: Collier Books. 1990. p. 294.

already over-taxed Soviet system.<sup>36</sup> When the break up finally occurred, it did so along ethnic lines.<sup>37</sup>

The idealized result of the end of the Cold War has been the establishment of general principles of liberal democracy throughout the world.<sup>38</sup> Even if this highly questionable conclusion were true, rather than the victory of the 'liberal expectancy' over Marxist-Leninism, many regions in the world once at the mercy of the struggle between the two have fallen back on ethnicity. Regional party leaders began to stress nationalistic themes after perceiving an erosion of strength in the Communist Party. Beginning in 1989, the growth of ethnic nationalism was given strength by the passing of new language laws in several breakaway regions such as Estonia, Kazakhstan, Kirghizia, and Lithuania.<sup>39</sup> Ethnic divisions within a fairly close geographic proximity led to an anticipation of violence among and between communities.<sup>40</sup>

Violence that is ethnic in nature does not require, nor does it often allow for a distinction between combatant and non-combatant or soldier and civilian. In areas that are culturally or ethnically more diverse and more distant from Russia, Jackson has reported that hostility toward Great Russian minorities in these areas

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<sup>36</sup> d'Encausse, Helene Carriere. Decline of an Empire: The Soviet Socialist Republics in Revolt. New York: Newsday Books. 1979. pp. 273-4.

<sup>37</sup> Moynihan, pp. 41-2.

<sup>38</sup> Fukuyama, Francis. "The End of History." The National Interest 16 (Summer 1989) p. 3.

<sup>39</sup> Jackson, p. 4.

<sup>40</sup> Moynihan, pp. 53-4.

is on the rise. On the part of the Russians, they feel targeted for hostility *as* Russians.<sup>41</sup> The history of Communist-forced resettlements of peoples within the imperial borders of the USSR, prior to its collapse, totaled in excess of 65,000,000 displaced persons.<sup>42</sup> This figure includes 25,000,000 Russians resettled outside of their home territory. Many of these people now find themselves living in highly nationalistic areas of the world in which the threat to life and limb is very high. In addition to the threat of massive numbers of migrations in and out of the Eurasian area, the crisis is given added weight by the very real possibility of large-scale massacres occurring in these areas as well. The violence in the former Yugoslavia can attest to this possibility, in that Serbs had set out to eradicate as many Bosnian Muslims in their territory as they could in acts of "ethnic cleansing." The Geneva Conventions and their subsequent protocols demand an acknowledgment of non-combatants, in order that they might be protected. In conflicts of ethnicity, there may not be an administration capable of making such a distinction, nor does the imperus for the conflict have the best interests of non-combatants at heart. In this regard, civil wars can literally take on the appearance of a blood feud, rather than a continuation of political intercourse.

Under the above conditions, the law of armed conflict has never been adequate in regulating non-state-oriented conflict. Moynihan's example is that of the establishment of the state of Iraq by the British.<sup>43</sup> This act brought together the

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<sup>41</sup> Jackson, p. 5.

<sup>42</sup> Brzezinski, *Out of Control*. p. 157.

<sup>43</sup> Moynihan, pp. 128-9.

historical land of Assyria, Babylonia and Kurdistan in one larger political entity. It also placed Kurds, Shi'ites, and Sunnis under a single Arab government. To the Kurds, this was unacceptable. Also, the Shi'ites were equally unwilling to be ruled by the Arab Sunnis. Islamic sub-groups such as these form ethnic groups which are culturally and religiously opposed to one another, possessing a large degree of mutual hostility, which continues to erupt in violence.

Armed conflict of this nature is not centered around the direction of the state. Where the Arabs have attacked the Kurds, it was not a matter of soldiers fighting soldiers. Rather, it was a matter of Arabs intending to kill Kurds -- any Kurds. Efforts to drive as many of them out of Iraq as possible are also well known, especially in recent years. Enzenberger has gone so far as to state the following: "The instigators of civil war aim beyond so-called ethnic cleansing; their ultimate intention is complete depopulation."<sup>44</sup> Failing to achieve a complete annihilation of their ethnic enemies, these instigators settle for driving them out of the country, creating the masses of refugees and displaced persons around the world, currently estimated to be approximately 25,000,000.<sup>45</sup> Historically, "ethnic terror" such as this had been magnified by the establishment of states by external

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<sup>44</sup> Enzenberger, p. 40.

<sup>45</sup> Lavoyer, p. 178. Lavoyer has described the International Committee of the Red Cross as "the guardian of international humanitarian law." However, punitive actions on the part of the ICRC seem to be little more than moral ones, making public certain abuses and intervening on the part of victims of conflict to provide relief. It appears that in order to make an effort to stop abuse and bring the perpetrators to justice, the ICRC must rely on other agencies for enforcement.



powers, exercising their influence in certain regions, such as the formation of Iraq in 1919.<sup>46</sup>

At the outset of the era of decolonization following World War Two, the former imperial countries sought to establish a means by which the growing chaos in former colonial areas might be brought under a measure of control, and subject to international law. International law of course, was firmly founded on a system of states. Decolonization was leaving in its wake a number of groups and organizations which could not be dealt with effectively on the international level. The political structures of these multi-ethnic regions had no discernible boundaries. Ethnic groups hostile to one another were no longer under the control of an empire. The international system was now founded on a legal basis that ensured the sovereignty of states.

Several different ethnic groups within a single state often produced violent disagreement over its direction. Who would or should form the government that rules? The Kurds in Iraq were not willing to be dictated to by Arabs, nor were Arabs about to relinquish control of the state to the Kurds. Civil conflict ensued, relative to the state.<sup>47</sup> Meanwhile, ideological conflict led the East and the West to seek support in these regions. Given their competing interpretations of democracy, freedom, and nationhood, the international law of armed conflict,

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<sup>46</sup> Kedourie, Elie. The Chatham House Version and Other Middle Eastern Studies. New York: Praeger Publishers. 1970. p. 302.

<sup>47</sup> Moynihan, p. 131.

under which the USA and USSR operated, sought to make war -- civil war included -- strictly a matter for soldiers. The particular soldiers legally involved in war were to be trained military personnel, sponsored by national governments. Those led by an organization ideally capable of forming a new government, should they succeed in their challenge to the incumbent's claim of legitimacy, are the opposing participant in this form of social interaction. The prizes in a conflict of ideologies are the hearts and minds of the people, civilian as much as military. When this conflict erupts into armed violence, war is waged on behalf of those people. The moral imperative under the law of armed conflict is to protect civilians as much as possible from the effects of war.<sup>48</sup>

The Cold War has ended. The East-West ideologies have withdrawn. The ethnic hostility remains. Armed conflict that erupts in these regions is not limited to soldiers. Rather, the targets in war have become the ethnic groups themselves. In fact, they have always been the target, where these groups are concerned. Enforcement of the law of armed conflict in civil war via the involvement of the superpowers, attempted to limit the destruction, as much as possible, to the government and insurgent forces. However, as in the former Yugoslavia, where Serbs are at war with Bosnian Muslims because they are Muslims, it does not matter to the Serb who kills a Muslim whether that Muslim was a soldier, an old man, a woman, or a child.<sup>49</sup> Civilians have become targets in civil wars rather than

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<sup>48</sup> Bond, James E. The Rules of Riot: Internal Conflict and the Law of War. Princeton: Princeton University Press. 1974. p. 81.

<sup>49</sup> Moynihan, p. 144-5.

the cause.<sup>50</sup> They are forced to defend themselves because the state that they had been a part of can no longer protect them; it has lost its monopoly on violence, and the distinction between soldier and civilian has broken down. Once that has occurred, non-combatant protection under the Geneva Conventions can become extremely difficult, if not impossible in some cases.<sup>51</sup> The rules for maintaining order, the law of armed conflict, are not rules that the participants are genuinely interested in following.

In the former Yugoslavia, United Nations forces have been unable to enforce any real measure of *jus in bello* in the conflict. Their only recourse has been larger deployment effectively to keep the Muslims, Croats, and Serbs away from each other. This solution will doubtless prove merely stop-gap in that the law of armed conflict in civil war remains as ineffective as before. The safety of civilians in war continues to be important. However, the law of armed conflict places the state as the end result sought in civil war. Where Bosnia or the Kurds are concerned, the end result that is sought may be genocide. An objective of that nature renders the Geneva Conventions and their Protocols functionally irrelevant to the participants.

Given the legal structure of the states in the international system, the status of an ethnic sub-unit relative to it is also important. On the surface, a possible

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<sup>50</sup> Cohen, Sheldon M. Arms and Judgment: Law, Morality and the Conduct of War in the Twentieth Century. San Francisco: Westview Press. 1989. p. 164.

<sup>51</sup> Enzenberger, p. 42

solution appears in the recognition of political entities as states. There are now almost three times as many states in the world than there were in 1900.<sup>52</sup> To provide an ethnic enclave with official recognition in the name of "self-determination," may place their conflict with another group on an international level. Unfortunately, this only appears to alter the *jus ad bellum* qualifications. So long as one of the objective remains that of "ethnic cleansing," the same difficulties are encountered with the *jus in bello*.

Difficulty exists in accepting a movement away from a state-oriented international system. Moynihan states that "American foreign policy seemed at times incapable of conceptualizing a world in which states break up."<sup>53</sup> The international community recognized an intact Yugoslavia. As long as that was the case, the ethnic conflict between Serbs and other Bosnian ethnic groups was seen as a purely internal Yugoslavian affair.<sup>54</sup> Changing characteristics of international actors are beginning to emphasize the importance of transnationalism over that of the interstate character of world politics, from which international law proceeds. In the context of interstate relations, the law of armed conflict demands that war be fought in a certain manner, even when that war is internal. If the objectives of the participants in a certain conflict are not compatible with interstate relations,

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<sup>52</sup> Crawford, James. The Creation of States in International Law. Oxford: Clarendon Press. 1979. p. 3.

<sup>53</sup> Moynihan, p. 165.

<sup>54</sup> Barkin, Samuel J. and Bruce Cronin. "The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations." International Organization 48, 1 (Winter 1994) p. 129.

they will not be obliged to follow a law seeking to preserve the characteristics of the states system.

### **The Uncertain Future**

Bedjaoui suggests that there is an exaggeration of the increasing number of violations of humanitarian law. The reason for this may be that the rapid increase in global communications media has made existing violations more apparent to a larger number of people than before.<sup>55</sup> He may or may not be correct in this hypothesis. However, it is much more important that humanitarian law itself has been ineffective -- and remains so -- whether the number of violations is increasing or remains static.

Political systems around the globe are being challenged by a growing state of chaos. Ignoring or flouting of legal norms may be due to two problems.<sup>56</sup> One can make allowances for the ambiguity of legal texts, as they apply to situations around the world that lie outside of the historical sources of the law itself. The other is a different perception of law in different parts of the world. The established order may appear unjust to some, and therefore it is unacceptable to observe legal norms which uphold that order.

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<sup>55</sup> Bedjaoui, pp. 23-4.

<sup>56</sup> Ibid., p. 27.

The structure of power in many countries has changed dramatically in recent years. From the perspective of the international system of states, it can be difficult to know with any certainty who is in control in some states. "To survive in such a chaotic environment it is all the more essential to safeguard a set of fundamental principles and to look for the deeper and more durable common features of mankind. ...There is no doubt that humanitarian law needs to be rendered more easily accessible to those who, without special legal training, are required to follow it."<sup>57</sup> DePue, reviewing the Conventions during the drafting of the Protocols states, "... if an instrument governing non-international armed conflicts is effectively to serve the intended purposes, its scope must be enunciated with sufficient precision to preclude self-serving interpretations of ill-defined criteria, and with a threshold that is low enough to extend humanitarian safeguards as broadly as possible to armed conflicts involving organized combatants."<sup>58</sup> DePue's criticism comes a decade earlier than Bedjaoui's, at the time when the Protocols were being formulated. Ten years later, Bedjaoui finds the same weaknesses with the Protocols in place, that plagued Common Article 3.

A statement by the International Committee of the Red Cross drew attention to the present situation regarding the loss of respect for the rule of law in

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<sup>57</sup> *Ibid.*, p. 27-8.

<sup>58</sup> DePue, p. 84.

general and humanitarian law in particular.<sup>59</sup> They reported that at the national level, power structures are presented with two directions as a result of an unsteady economic situation or by ethnic, ideological, or other tensions. Faced with these difficulties, domestic powers either become more rigid or fall victim to chaotic break-ups. In either circumstance, the victims inevitably become the defenseless members of society, regardless of Common Article 3 or Protocol II.

Another difficulty, that accompanies the problems of application and enforcement, is the dilemma of excess. With the passing of Protocols I and II, the body of law concerning *jus in bello* has been increased to over 600 articles.<sup>60</sup> Although the Conventions call for dissemination in as wide a fashion as possible, the process of doing so with that much information is extremely difficult. A possible solution was put forward by the International Committee of the Red Cross in 1977, that sought to simplify the provisions of humanitarian law in armed conflict of any nature, yet allow for the specific understanding necessary for the employment of the law. The ICRC presented the following seven points:

- “1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.

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<sup>59</sup> ICRC, “Respect for and Development of International Humanitarian Law. From Manila (1981) to Geneva (1986): Interim Assessment and Future Prospects.” Geneva, January 1985. p. 18.

<sup>60</sup> “Fundamental Rules of Humanitarian Law Applicable in Armed conflicts.” International Review of the Red Cross 18,206 (September-October 1978) p. 247.

3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *materiel*. The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.
4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives."<sup>61</sup>

These points do not possess the authority of an international legal instrument. Their only purpose is to assist in the dissemination of knowledge of international humanitarian law. Dissemination is not sufficient however, to solve the dilemma of international law regarding the behavior of participants in intrastate war. In making clear the fundamental purposes behind the international law of armed conflict, another important point is made equally clear. There still remains a tendency to maintain a separation of civilians and armed forces. In intrastate war,

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<sup>61</sup> *Ibid.*, pp. 248-9.



this separation is simply too unrealistic to allow for this form of legal codification to have any real power of limitation.

Caution must be taken not to dwell too heavily on the problem of excessive dependence on state consent concerning the application of humanitarian law. The state is the subject of international law, yet the final recipient of international humanitarian law is the individual. In this, we must take into account the growing awareness of the subjectivity of "the State" as a concept. Statehood ultimately depends as much on what people think about the nature of the state, as on its more tangible assets such as legal codification pertaining to, among other things, warfare and the conduct of state-sponsored military personnel.

Considering the state, del Rosso argues: "In a world dominated by the overriding imperatives of the market and the unstoppable diffusion of information, territorial boundaries are viewed by some as largely meaningless."<sup>62</sup> World affairs are increasingly shaped by domestic trends that recognize no frontiers and require collective responses by governments less able to act in a "sovereign" fashion.<sup>63</sup> Yet, despite its many weaknesses, internal stability and protection from foreign hostility among them, a more effective form of political organization has yet to be found. Dialectically, the *nation*-state is a synthesis of statist and nationalist forms of legitimization. "The potential contradictions of these two forms drives a

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<sup>62</sup> del Rosso Jr., Stephen. "The Insecure State: Reflections on 'the State' and 'Security' in a Changing World." *Daedalus* 124,2 (Spring 1995) p. 180.

<sup>63</sup> Brzezinski, *Out of Control*. pp. 91-2.

process in which the content of legitimacy develops in a crisis and changes to favor one form over the other.”<sup>64</sup> What does this mean for the application of *jus in bello* given the widespread existence of intrastate warfare?

These hostilities could merely form a more localized form of the nineteenth century description of war as a continuation of politics. The dissipation of the USSR's influence in the Eurasian regions and elsewhere have left the inhabitants to work out for themselves the time and space characteristics of relatively new states, organized along ethnic and nationalist lines. Unfortunately, for the present time, this process has entailed considerable violence, and it is likely to continue to do so for some time. In the mean time, *jus in bello*, as it presently exists, takes little or no account of the blurring distinction between domestic and international systems. This form of state reorganization -- should it prove to be so -- involves efforts to eliminate ethnic/national opposition by one strong group within a given territory. The members of this perceived opposition are to be either killed off or driven out of the area, in hopes of leaving behind a greater ethnic/national homogeneity. Motivations of this nature have been virtually impossible to stop, and make little distinction between soldier and civilian, combatant or non-combatant. It is this distinction that modern *jus in bello* is *entirely* dependent upon to give it meaning and ultimately, why it fails.

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<sup>64</sup> Barkin and Cronin, p. 115.

## **Conclusion: Inconsistencies and Evaluations**

Intrastate warfare has challenged the validity of the classic strategy of outflanking and cutting off the enemy. The organized army facing guerrilla or terrorist forces finds that these organizations often have no bases or lines of communication. As a result, the traditional tactics of cutting them off do not work. Faced with a difficulty such as this, the combatant/non-combatant distinction breaks down. For the most part, regular armed forces have found that guerrillas and terrorists cannot be clearly distinguished from civilian non-combatants. Unable to operate by the "ordinary" rules of engagement, most of the soldiers will inevitably violate the rules of war.

For the Protocols Additional to work effectively, non-traditional armed forces must agree to conduct their operations in a manner that ensures the protection of non-combatants. Their conduct must make it apparent to their opponents who the enemy is and who it is not. Guerrilla and terrorist forces would have to present themselves as a uniformed, structured, battlefield force. The nature of these forces is such that they are precluded from doing so.

It has been argued that as circumstances change the typology of conflict, existing war conventions become inadequate and new definitions become necessary.<sup>65</sup> In various scientific and technical fields, it is possible to define

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<sup>65</sup> van Crefeld, Martin. The Transformation of War. Toronto: MacMillan. 1991. p. 92.

objectives and conditions so that a theoretical exposition or design can supersede the actual construction. Planning a social construction in this manner is impossible because as Wright states, objectives may be expected to change with experience and the favorable opinion of those involved cannot be predicted to any great extent.<sup>66</sup> The fluidity and unpredictability of warfare has long impeded attempts to devise rational and universal legislation that can be applied no matter what may occur in the real event. Clausewitz recognized this serious limitation in his description of friction. Considering this reasoning, one is able to argue that the law of war regarding conduct, and especially the exclusion of distinct social groups, will always come up short in its pre-emptive measures.

Wright remarks that, "... no large scale social invention can work unless the people affected by it are convinced that it will work before they see it working. Otherwise their skepticism or hostility will kill it."<sup>67</sup> He draws attention to one of the more severe limitations to effective legislation. A social plan, which the law of war qualifies as, must be flexible enough to permit its adaptation to constantly changing social demands. Under such conditions, social or legal constructs can only include broad statements of objectives, conditions to be met, and methods to be used, as well as more detailed descriptions of who is rightfully involved and what lengths they are allowed to go to.

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<sup>66</sup> Wright, Quincy. A Study of War. Chicago: University of Chicago Press. 1964. p. 387.

<sup>67</sup> *Ibid.*, p. 388.

Protocol II, intending to extend the protection of Common Article 3, is in reality, merely a re-write of the Civilians Convention with its application intended for internal armed conflicts. By and large, it becomes apparent that this legislation has not met the needs of restraint in non-international conflict because its "parent" legislation. The Geneva Conventions, only partially succeeded in re-constructing the idea of non-combatant immunity that was all but destroyed with the inception of total war.

All told, the laws of war -- the *jus in bello* in particular -- represent a supreme attempt to ensure that those persons who are not taking a direct and active part in warfare are protected from the effects of war. The ideal that the law strives toward has long been held in check or greatly impaired by inconsistencies in its own composition; necessities in reality that have defeated attempts at restraint; human frailties concerning ethnicity, religion, nationalism or corruption of various sorts.

The laws of armed conflict are in place in respect of the sovereignty of states. The authority in power within the state is the legitimate government. Their acts against insurgents are in defense of that legitimacy. Governments have the right, under international law, to maintain order without external interference. Citizens of the state, under international law, have the right to resist the authority of a government perceived as unjust. This appears to be an acceptable

inconsistency to the members of international society. Should internal armed violence occur within the parameters of this inconsistency, then it is demanded by law that the participants conform to specific rules of conduct. These rules were originally intended for interstate conflict, however additional legislation has dictated that they also be applied to internal conflicts.

In the event that the level of conflict exceeds these rules of conduct, a third party may elect to intervene in order to mediate the dispute on behalf of unarmed civilian citizens of the state. Laws respecting sovereignty become effectively nullified once this occurs. This third party, by intervening to protect the rights of civilians caught in the conflict, has also removed the responsibility from both parties to conform to the rules of conduct. Provided that the warring parties refrain from attacking the civilians protected under the neutral third party, the Geneva Conventions and Protocols become largely emasculated.

Responsibility must be shared between the attacking party, for the death and destruction of civilian people and objects, and the party that is under attack, by exposing the civilians in their midst to the possibility of attack, by means of placing objects or personnel amongst or in the vicinity of civilians.<sup>68</sup> The onus to “respect” civilians in warfare on the part of the attacking party is somewhat greater than the attacked party’s obligation to “protect” civilians, only because of the question of

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<sup>68</sup> Kalshoven, Frits. The Law of Warfare: A Summary of its Recent History and Trends in Development. Leiden: Sijthoff. 1973. pp. 67-8.

sacrificing sovereignty for the sake of saving lives. If the situation comes down to giving up territory for the sake of saving civilian lives or placing artillery or troops in a residential area to defend territory, the choice the military and government is likely to make appears grimly obvious.

Humanitarian organizations deplore the creation of massive numbers of refugees. Millions are displaced from their homes all over the world. On the other hand, although left homeless and often unwelcome, refugees have been largely removed from the scene of warfare. This presents a somewhat superficial inconsistency with the international law of armed conflict which both demands that civilians not be exposed to attack in war as much as possible, and demands that they are not forcibly displaced either. The reality of the refugee issue, however, tends to render debate over this inconsistency somewhat flat. In certain areas, such as several of the African states, government forces have deliberately chased citizens off as part of their internal conflicts. In many cases, the dominant force in one region has pushed out another group -- armed or not -- not for their protection, but because they represent the existence of a hated enemy within their own society. These motives are not something the law of armed conflict can easily address, as the political aspects of them are too difficult to discern or are altogether non-existent.

The protection of children ages 15 and younger is another important aspect of the law of armed conflict. Here too is another example of mutual responsibility that leads to a relative inconsistency when the law meets reality. An attacking party has a duty to respect the rights and life of children under 16 years of age even if those children were taking an active role in conflict. Reciprocally, an armed force, whether attacking or attacked, must take pains to make certain that no children are present in their organization as an armed combatant. The reality of the matter is that children are being made active participants in armed conflicts, leaving an opposing force with little choice in combat but to kill them.

250,000 children, some as young as seven years old, are serving in government armies and armed opposition groups around the world.<sup>69</sup> Many are abused with drugs and alcohol. They have also been forced to commit heinous acts against prisoners, including other children. Training programs were reportedly brutal in the extreme. Although a UN Convention set for January 1997 sought to limit the legal age of induction to 18 years and older for combatants, this law will doubtless be faced with the same challenges of enforcement as other *jus in bello* rules already in existence. This regulation and its inconsistency are both largely applicable whether the conflict in question is international or non-international.

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<sup>69</sup> Brittain, Victoria. "An Army of Children Fight Adult Wars." The Guardian Weekly 155, 19 (1996) p. 3.



In numerous circumstances, Rwanda being only one example, humanitarian law was rendered irrelevant by the specific goal of one military force, involved in a non-international armed conflict, to eliminate through extermination or forced evacuation all armed and unarmed members of a rival group based on racist and ethnic distinctions. Such a goal precludes the recognition of non-combatant, wounded or sick status. Even hospitalized members of the victimized ethnic group were assaulted and killed. On 14 April 1994, Red Cross ambulances in Rwanda were stopped on their way to hospital by armed militias who shot and killed the patients inside. Children were slaughtered at an orphanage in Butare on 1 May. Kigali Central Hospital was shelled on 18 May, causing serious damage and numerous injuries.<sup>70</sup>

Throughout much of 1995, the occurrence of “ethnic reconfiguration” forcibly uprooted minorities in Bosnian Serb-held areas, resettling them according to “ethnic purity.” With the prospect of a peace settlement in October 1995, the process of ethnic cleansing was accelerated. Evictions from Bijeljina, Banja Luka and Prijedor caused massive population displacements. In the case of Srebrenica, some 8,000 men of “fighting age” were prevented from accompanying their families and subsequently disappeared.<sup>71</sup> These illustrative examples are strongly indicative that Van Crefeld is in fact correct.

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<sup>70</sup> ICRC Annual Report. “Rwanda.” 30 May 1995. p. 3. <http://gvalnex1.icrc.org/icrcnews>.

<sup>71</sup> ICRC Annual Report 1995. “Bosnia and Herzegovina.” 31 May 1996. p. 1. <http://gvalnex1.icrc.org/icrcnews>.

‘Insofar as there have always been struggles for existence, doctrines that derive from the Clausewitzian Universe, and that emphasize rationality, the primacy of politics, and cost benefit calculations have always been wrong. Insofar as some such struggles will undoubtedly continue to take place, those theories cannot form a sound basis for thinking about them, and hence for planning a war, waging it, and winning against them.’<sup>72</sup>

The argument by Clausewitz that war is in fact politics by other means can be misleading, because Clausewitz had really only described certain historical and primarily European facts; a recurring problem in the study of war deserving attention. There exist other forms of war that are somewhat less than political in nature, such as religious wars, wars of survival, and those of ‘justice.’ In both Rwanda and Bosnia-Herzegovina, politics was not foremost in the minds of either the participants or the victims.

The likelihood of the continuation of conflicts such as these in the world shows that the nineteenth century paradigm of war will not provide the answers needed for the theoretical and legal study of limitations in war and the protection of non-combatants. Even though politics may exist in the interactions of these groups, it is not a predominant aspect of these conflicts. Politics tends to take up a more ambient role in the violence that is generated. Those involved in the fighting are not interested in the international legal restraints that presently exist, whether applicable to internal war or not. The Clausewitzian perspective and international law have failed to restrain adequately the conflicting parties.

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<sup>72</sup> van Crefeld, pp. 148-9.

Avenues for change are being explored with the latest attempts to bring war criminals to justice. Some domestic transgressions are interpreted as having international remedies.<sup>73</sup> However, issues of sovereignty remain problematic when seeking to protect victims of war crimes. There is little international legislation in place permitting intervention in domestic affairs, other than Chapter VII of the UN Charter. Chapter VII only allows for military intervention or the imposition of sanctions. Nevertheless, the establishment of war crimes tribunals in Bosnia and Rwanda were done under the authority granted in Chapter VII despite objections in favor of domestic jurisdiction.

By maintaining an *ad hoc* status, there is little accountability to specific regulations of authority, which would otherwise be an impediment. Although *ad hoc*, the establishment of these tribunals represents an attempt on the part of the international community to impose a more punitive approach to international law, and move away from the traditional structure of treaty law. As long as they remain *ad hoc*, there is likely to be a recurring question of authority. There still remains a predominant view of domestic or sovereign authority taking general precedence in international law, that will inhibit the desire to make judicial intervention a more permanent aspect of international law.

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<sup>73</sup> Scheffer, David J. "International Judicial Intervention." Foreign Policy 102 (Spring 1996) pp. 34-51.

The Yugoslav tribunal has weakened the traditional distinction between a civil and an interstate war. The tribunal has determined that it has jurisdiction over crimes against humanity and war crimes whether they occur in an internal or international armed conflict. Meanwhile, the Rwanda tribunal has expressly isolated the jurisdiction for crime against humanity from any causal connection with armed conflict.

As evidence of a supposed compatibility between punitive and treaty law, the Dayton Agreement has incorporated into it a list of obligations confirming the tribunal's powers in Bosnia, Serbia and Croatia.<sup>74</sup> Further support for the punitive side of international law are found in the current investigation by the United States of genocide in Cambodia in the 1970s; the support of the Clinton administration for the creation of a commission to investigate the Iraqi government for war crimes against the Kurds in the late 1980s and against Kuwaitis during the 1991 Persian Gulf War, and the 1995 creation of an international commission to investigate the 1993 massacres in Burundi.<sup>75</sup> Like criminal law, no statutes of limitations exist for murder and other violent crimes.

The ultimate goal of these efforts is largely directed toward the establishment of a permanent court of justice to deal universally with violations of International Humanitarian Law. This process has been slow in coming due to a

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<sup>74</sup> Articles 7 and 9 of the agreement and 11 Annexes all deal with the need for a war crimes tribunal.

<sup>75</sup> Scheffer, p. 42.

lack of consensus regarding its specific jurisdiction, in comparison to domestic judiciary systems and other international legal structures (e.g. Chapter VII of the UN Charter). In the mean time, the Security Council lacks enthusiasm for the establishment and financing of tribunals that must be specifically geared toward particular countries costing millions of dollars per year to operate.

Politico-military intervention is likely to remain more common than judicial intervention. Yet, where violence against innocent civilians is common, the rule of law must be rooted firmly in order to protect individual and group rights and to hold people accountable for their crimes. The advantage in terms of the *jus in bello*, is that greater attention to the punitive aspect of law on an international scale may form an effective deterrent against the commission of war crimes and crimes against humanity, and thereby encourage greater restraint in the waging of war. The current laws of restraint do not reconcile easily with the idea of military necessity. The predominance of state sovereignty protects states from outside interference, and leave the recognition of an official state of internal war solely in the hands of the state government. This limits the application of the law of armed conflict. As long as these factors continue to impede the progress of moderation in conflict, the answer to this dilemma may lie in the realm of penal legislation which may circumvent treaty law regarding the conduct of participants.

On a final note, it may be safely stated that armed conflict is bound to become more confused and complex, as an increasingly wide array of disenfranchised groups continue to influence the magnitude of violence around the world. Population growth will top 10,000,000,000 by the mid twenty-first century. Demographically and geographically, this will increase the pressure on the international system significantly, as the majority of them are likely to be economically impoverished. Available land for living space will decrease sharply as well.

Increased population levels will increase the already rapid depletion of natural resources. This is likely to have a two-fold effect. The majority of resource exploitation has had, and will continue to have, damaging effects on Earth's planetary ecosystem. This is likely to have negative effects on the general health and safety of world populations, their arable land and food supply. Moreover, as these resources are depleted competition for them between industrialized nations is likely to become more and more severe.<sup>76</sup>

An increase in the numbers of people facing severe poverty will inevitably produce greater political disaffection among the populations of many nation-states. State governments will receive less and less political legitimacy from their citizens.

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<sup>76</sup> University of Toronto political scientist, Thomas Homer Dixon has argued that runaway population growth and disappearing resources will trigger wars and widespread civil strife early in the 21st century. Laver, Ross. "Looking for Trouble." Macleans 107,36 (September 5, 1994) pp. 18-21.

Systemic pressures such as these are bound to provoke armed conflicts of varying scales. These potential conflicts would possess no guarantees that participants and casualties will be confined to specific groups, as arranged under international law (i.e. the trinitarian concept). The reverse is more likely to become the norm, as combatants and victims will range across the spectrum of classification in international law. Limitations of conduct in the law of armed conflict, as they presently stand cannot satisfactorily address these growing dangers, nor can they fulfill their purpose of alleviating human suffering in war.

## Appendix

### Relevant Articles of Law

#### CONVENTION (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

Signed at The Hague, 18 October 1907.

Annex to the Convention

#### REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

##### SECTION I

##### CHAPTER II

##### Prisoners of War

Art. 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

Art. 5. Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits, but they cannot be confined except as in indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

Art. 6. The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid for at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none



in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

Art. 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

Art. 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

Art. 9. Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

Art. 10. Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

Art. 11. A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

Art. 12. Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the courts.

Art. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

Art. 14. An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

Art. 15. Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

Art. 16. Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

Art. 17. Officers taken prisoners shall receive the same rate of pay as of officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

Art. 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

Art. 19. The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

Art. 20. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

### CHAPTER III

#### The Sick and Wounded

Art. 21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

**CHARTER OF THE UNITED NATIONS**

**Art. 2. The Organization and its members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.**

**1. The Organization is based on the principle of the sovereign equality of all its Members.**

**4. 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.**

**7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.**

**Art. 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.**

**CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF  
THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD**

Signed at Geneva, 12 August 1949.

ENTRY INTO FORCE: 21 October 1950.

**GENERAL PROVISIONS**

Art. 3\* In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

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\* Common to all four Conventions.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Art. 13. The present Convention shall apply to the wounded and sick belonging to the following categories:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Art. 19. Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall

into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

Art. 20. Hospital ships entitled to the protection of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, shall not be attacked from the land.

Art. 21. The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

Art. 22. The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19:

- (1) That the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge.
- (2) That in the absence of armed orderlies, the unit or establishment is protected by a picket or by sentries or by an escort.
- (3) That small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, are found in the unit or establishment.
- (4) That personnel and material of the veterinary service are found in the unit or establishment, without forming an integral part thereof.
- (5) That the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.

Art. 23. In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital zones and localities.

Art. 50. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

**GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA OF AUGUST 12, 1949 (GENEVA CONVENTION II)**

Entry into Force: 21 October 1950

Art. 13 The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws



and customs of war.

- (3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Art. 51. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

#### GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949 (GENEVA CONVENTION III)

Entry into Force: 21 October 1950

Art. 4 A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a

Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

## SECTION II

### Internment of Prisoners of War

#### CHAPTER I

##### General Observations

Art. 23. No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be

marked as such.

**SECTION III****LABOUR OF PRISONERS OF WAR**

Art. 49. The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health.

Non-commissioned officers who are prisoners of war shall only be required to do supervisory work. Those not so required may ask for other suitable work which shall, so far as possible, be found for them.

If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.

Art. 50. Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

- (a) agriculture;
- (b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;
- (c) transport and handling of stores which are not military in character or purpose;
- (d) commercial business, and arts and crafts;
- (e) domestic service;
- (f) public utility services having no military character or purpose.

Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78.

Art. 51. Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

The Detaining Power, in utilizing the labour of prisoners of war, shall ensure that in areas in which such prisoners are employed, the national legislation concerning the protection of labour, and, more particularly,

the regulations for the safety of workers, are duly applied.

Prisoners of war shall receive training and be provided with the means of protection suitable to the work they will have to do and similar to those accorded to the nationals of the Detaining Power. Subject to the provisions of Article 52, prisoners may be submitted to the normal risks run by these civilian workers.

Conditions of labour shall in no case be rendered more arduous by disciplinary measures.

Art. 52. Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.

No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

The removal of mines or similar devices shall be considered as dangerous labour.

Art. 53. The duration of the daily labour of prisoners of war, including the time of the journey to and fro, shall not be excessive, and must in no case exceed that permitted for civilian workers in the district, who are nationals of the Detaining Power and employed on the same work.

Prisoners of war must be allowed, in the middle of the day's work, a rest of not less than one hour. This rest will be the same as that to which workers of the Detaining Power are entitled, if the latter is of longer duration. They shall be allowed in addition a rest of twenty-four consecutive hours every week, preferably on Sunday or the day of rest in their country of origin. Furthermore, every prisoner who has worked for one year shall be granted a rest of eight consecutive days, during which his working pay shall be paid him.

If methods of labour such as piece work are employed, the length of the working period shall not be rendered excessive thereby.

Art. 54. The working pay due to prisoners of war shall be fixed in accordance with the provisions of Article 62 of the present Convention.

Prisoners of war who sustain accidents in connection with work, or who

contract a disease in the course, or in consequence of their work, shall receive all the care their condition may require. The Detaining Power shall furthermore deliver to such prisoners of war a medical certificate enabling them to submit their claims to the Power on which they depend, and shall send a duplicate to the Central Prisoners of War Agency provided for in Article 123.

Art. 55. The fitness of prisoners of war for work shall be periodically verified by medical examinations at least once a month. The examinations shall have particular regard to the nature of the work which prisoners of war are required to do.

If any prisoner of war considers himself incapable of working, he shall be permitted to appear before the medical authorities of his camp. Physicians or surgeons may recommend that the prisoners who are, in their opinion, unfit for work, be exempted therefrom.

Art. 56. The organization and administration of labour detachments shall be similar to those of prisoner of war camps.

Every labour detachment shall remain under the control of and administratively part of a prisoner of war camp. The military authorities and the commander of the said camp shall be responsible, under the direction of their government, for the observance of the provisions of the present Convention in labour detachments.

The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.

Art. 57. The treatment of prisoners of war who work for private persons, even if the latter are responsible for guarding and protecting them, shall not be inferior to that which is provided for by the present Convention. The Detaining Power, the military authorities and the commander of the camp to which such prisoners belong shall be entirely responsible for the maintenance, care, treatment, and payment of the working pay of such prisoners of war.

Such prisoners of war shall have the right to remain in communication with the prisoners' representatives in the camps on which they depend.

Art. 130. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

#### CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

Signed at Geneva, 12 August 1949

Art. 5 Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

**PART III****STATUS AND TREATMENT OF PROTECTED PERSONS****SECTION I****Provisions Common to the Territories  
of the Parties to the Conflict  
and to Occupied Territories**

Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Art. 28. The presence of a protected person may not be used to render certain points or areas immune from military operations.

Art. 29. The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

Art. 30. Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.



Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate, as much as possible, visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

Art. 31. No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Art. 32. The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Art. 33. No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

Art. 34. The taking of hostages is prohibited.

## SECTION II

### Aliens in the Territory of a Party to the Conflict

Art. 39. Protected persons who, as a result of the war, have lost their gainful employment, shall be granted the opportunity to find paid employment. That opportunity shall, subject to security considerations and to the provisions of Article 40, be equal to that enjoyed by the nationals of the Power in whose territory they are.

Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.

Protected persons may in any case receive allowances from their home country, the Protecting Power, or the relief societies referred to in Article 30.

Art. 40. Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.

If the above provisions are infringed, protected persons shall be allowed to exercise their right of complaint in accordance with Article 30.

Art. 41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence, by virtue of a decision placing them in assigned residence, elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.

Art. 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Art. 43. Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the

Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

Art. 44. In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

Art. 45. Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the

outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

Art. 46. In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.

Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.

### SECTION III

#### Occupied Territories

Art. 49. Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Art. 51. The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Art. 65. The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

Art. 66. In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

Art. 67. The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact the accused is not a national of the Occupying Power.

Art. 68. Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced on a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced on a protected person

who was under eighteen years of age at the time of the offence.

Art. 69. In all cases the duration of the period during which a protected person accused of an offence is under arrest awaiting trial or punishment shall be deducted from any period of imprisonment of awarded.

Art. 70. Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF  
12 AUGUST 1949, AND RELATING TO THE PROTECTION OF  
VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

Article 35 - Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 51 - Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - (a) those which are not directed at a specific military objective;
  - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as



indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

### Chapter III

#### CIVILIAN OBJECTS

##### Article 52 - General Protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

##### Article 53 - Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.

#### Article 54 - Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
  - (a) as sustenance solely for the members of its armed forces; or
  - (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
4. These objects shall not be made the object of reprisals.
5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

#### Article 55 - Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

#### Chapter IV

### PRECAUTIONARY MEASURES

#### Article 57 - Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

- (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
- (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;
- (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

#### Article 58 - Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

- (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

## SECTION II

### REPRESSION OF BREACHES OF THE CONVENTIONS

#### AND OF THIS PROTOCOL

#### Article 85 - Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches

of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- (a) making the civilian population or individual civilians the object of attack;
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
- (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
- (d) making non-defended localities and demilitarized zones the object of attack;
- (e) making a person the object of attack in the knowledge that he is hors de combat;
- (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

- (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
- (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- (e) depriving a person protected by the Conventions or referred to in paragraph 2 or this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

#### Article 96 - Treaty relations upon entry into force of this Protocol

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.
3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
  - (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

- (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
- (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF  
12 AUGUST 1949, AND RELATING TO THE PROTECTION OF  
VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS  
(PROTOCOL II)

Article 3 - Non-intervention

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

Article 10 - General protection of medical duties

1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.
3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.
4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

PART V

FINAL PROVISIONS

Article 19 - Dissemination



**This Protocol shall be disseminated as widely as possible.**

**Article 23 - Entry into force**

- 1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.**
- 2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.**

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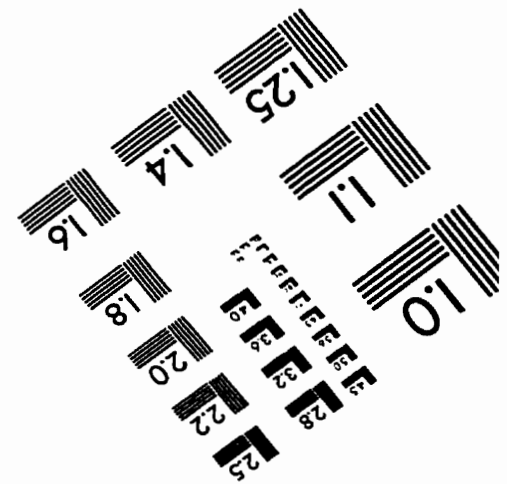
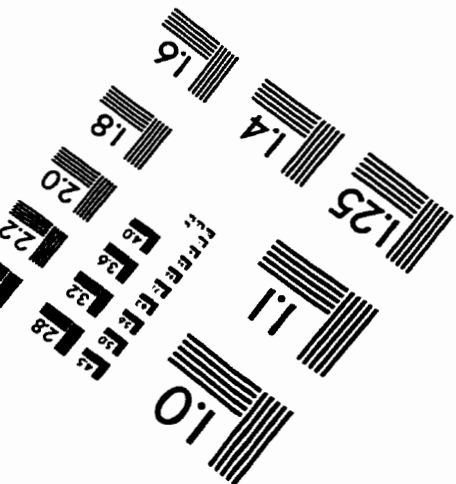
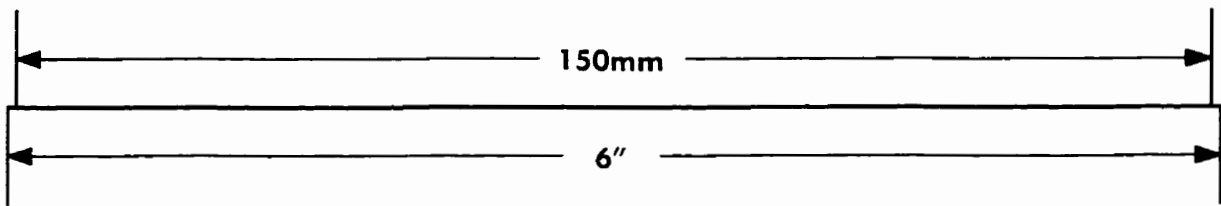
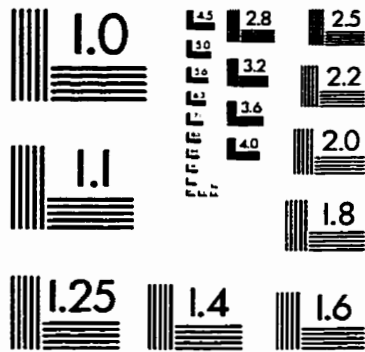
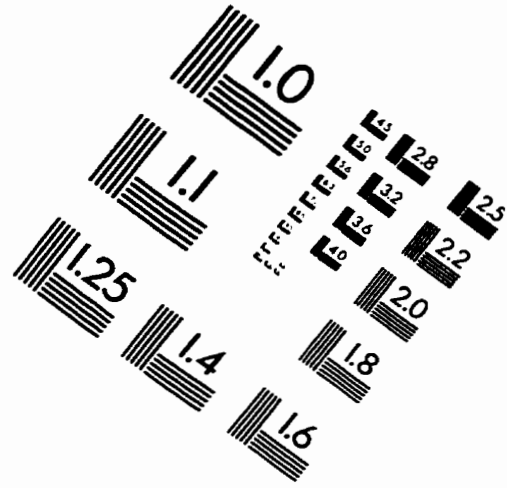
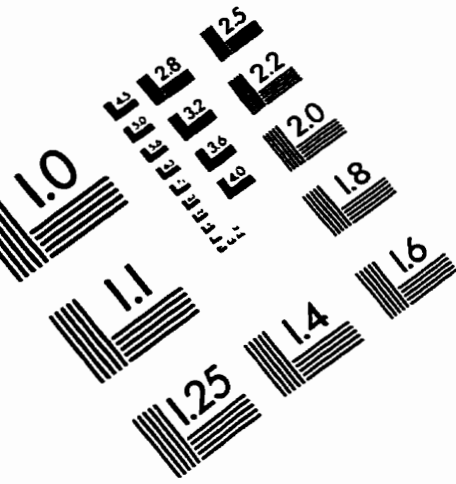
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