

# Anglo-American Dissent From the European Law of War: A History with Contemporary Echoes

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## I. INTRODUCTION

The United States remains one of the few nations that has not ratified Additional Protocol I (“AP I”) to the Geneva Conventions.<sup>1</sup> That

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1. The 174 current parties include Russia, China, North Korea and all NATO members except the United States. The United Kingdom ratified only in 1998—after more than two decades of hesitation or deliberation—and submitted additional reservations to its ratification in 2002. For a list of current states adhering to AP I (with accompanying reservations), see DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT, A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 785–818 (Martinus Nijhoff, 2014) [hereinafter *THE LAWS OF ARMED CONFLICT*].

convention, the most comprehensive treaty on the law of armed conflict, has been open for signature since 1977.<sup>2</sup>

Prominent legal commentators insist that most of the specific prohibitions in AP I have by now become part of “customary international law,” binding as such on the United States and all nations.<sup>3</sup> The United States does not fully subscribe to this view.<sup>4</sup> The Statute of the International Criminal Court<sup>5</sup>, completed in 1998, incorporates almost all the provisions of AP I, but the United States has never ratified the ICC Statute. In fact, it is one of the only western countries that has not done so.<sup>6</sup> During the administration of George W. Bush, disputes about the law of armed conflict fueled debates about American detention policies at Guantanamo Bay as well as American military operations in Afghanistan and Iraq.<sup>7</sup> Energetic resort to drone strikes against suspected terrorists sparked new debates about American compliance with international law under the Obama administration.<sup>8</sup>

Largely forgotten, amidst these recent disputes, is that the United States dissented from prevailing European doctrines on just war long before the world wars of the Twentieth Century. Instead, the United States generally followed opposing views maintained by British authorities. Britain and America had both been outliers in international debates on the law of war throughout the Nineteenth Century and down to the First World War.<sup>9</sup>

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2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 711–61 [hereinafter Protocol I].

3. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 340–51 (2005) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW].

4. John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 INT’L REV. RED CROSS 443, 444 (2007).

5. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1309–74.

6. The 122 current parties include all NATO members other than the United States, all members of the European Union, as well as 34 African states and 27 states in Latin America and the Caribbean region. For a current list, with accompanying reservations, see THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1382–95.

7. For a highly polemical compilation of such claims, see MICHAEL HAAS, GEORGE BUSH, WAR CRIMINAL? (2008), which devotes by far most attention to “Crimes Committed in Treatment of Prisoners” —113 pages out of 202 on “Identification of War Crimes.” For a survey of Bush administration responses to such charges, see generally JOHN YOO, WAR BY OTHER MEANS (Atlantic Monthly Press, 2006).

8. For survey of the debate, see Ryan Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y (2011).

9. See *infra* §§ IV–V.

What they disputed was not a technicality or a peripheral policy issue, but instead what AP I calls the “Basic Rule” of humanitarian law; that military “operations” must aim at legitimate “military objectives” and not at civilians or “civilian objects.”<sup>10</sup> Commentators call it the “principle of distinction” and often depict it as the “core principle” of the law of armed conflict.<sup>11</sup> The most widely consulted commentary on AP I—sponsored by the International Committee of the Red Cross (“ICRC”), which convened the 1974-77 drafting conferences for AP I—claims that this principle rests on centuries of western military practice.<sup>12</sup> The principle may have been frequently disregarded amidst the world wars of the Twentieth Century, but it remains (in this view) the time-honored principle.<sup>13</sup>

The actual historical record, however, shows that this principle was openly disputed by commentators in England and America, both before and during the world wars.<sup>14</sup> The dissenting commentators in the English-speaking countries were not swaggering retired generals, but the leading Anglo-American publicists of international law. They did not reject the notion of humanitarian constraints in the conduct of war, but they did argue, quite explicitly and cogently, that humanitarian constraint did not require the immunity of civilian property from military attack.

In the Nineteenth Century, the dispute focused on the seizure of private property at sea, which British and American commentators, defended but Europeans, especially Germans, denounced. The severity of the Anglo-American view, even in land warfare, is evident in the harsh tactics adopted by Union forces in the American Civil War. Anglo-American severity was later displayed in still harsher measures pursued in the world wars, including a food blockade by sea and bombing of cities from the air. But the contrary view, most fully embraced by Germany,

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10. Protocol I, *supra* note 2, art. 48.

11. See, e.g., GARY D. SOLIS, *THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW IN WAR* 250–57, 269–71 (2010) (“distinction” as one of four “core principles” of LOAC); MARCO SASSOLI & ANTOINE BOUVIER, *HOW DOES LAW PROTECT IN WAR* 67 (ICRC, 1999) (distinction between “civilians and combatants” listed as first of the “basic principles” of “International Humanitarian Law”); GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 115–24 (2012) (identifying “military necessity” and “humanity” as “cardinal principles,” then characterizing “distinction” and “proportionality” as “implementation principles”).

12. INT’L COMM. OF THE RED CROSS, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, 585–87 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds., 1987) [hereinafter COMMENTARY].

13. *Id.*

14. See *infra* §§ IV and V.

led to far more brutal measures in land warfare. German war measures were denounced as “savage” and “barbarous” by Anglo-American commentators, who viewed such brutalities as morally quite different from Allied war tactics.<sup>15</sup>

These episodes in the history of international humanitarian law deserve to be recalled. They may challenge contemporary dogmas. They remind us that, just below the surface, claims for “humanitarian” principle remain disputable and uncertain, even in today’s world. What “everyone agrees” may not be right. It may not even be what everyone—even everyone of relevant experience and moral seriousness—actually agrees upon.

The exposition here proceeds in six parts. Part II describes the contemporary setting of the legal issue, in the “Basic Rule” of Additional Protocol I, highlighting that this rule has no counterpart in earlier conventions on the law of war. Part III describes the historic roots of this doctrine, in theories originally advanced in Napoleonic France, claiming the authority of Rousseau, then developed and “codified” by German commentators in the mid-Nineteenth Century. Part IV describes the arguments advanced in opposition to this doctrine in the late Nineteenth and early Twentieth Centuries by legal commentators in Britain. Part V describes the evolution of American views in the Nineteenth and early Twentieth Century, starting from a position not all that far from the British view, in principle, then driven to embrace very far-reaching applications of the British view in the stress of all-out war. Part VI describes the evolution of German views, showing connections between the seemingly idealistic formulas of German legal commentators in the Nineteenth Century and the brutalities of German war tactics in subsequent practice. Part VII shows that the historic Anglo-American view was invoked to defend British and American tactics in the world wars and argues that this traditional view remains quite relevant to contemporary debates over humanitarian limits on military action.

## II. THE NOVELTY OF THE BASIC RULE

Contemporary treatises on the law of armed conflict give prominent place to what is called the “principle of distinction”—the doctrine that lawful armed attacks may only aim at legitimate military targets.<sup>16</sup> AP I gives special status to this “principle” or “rule” by naming it the “Basic Rule.”<sup>17</sup>

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15. See *infra* § V.

16. See examples cited, *supra* note 11.

17. Protocol I, *supra* note 2, art. 48.

AP I is the most comprehensive and detailed international convention on the law of armed conflict that has ever been adopted. Regulations limiting military tactics in land warfare had been negotiated at the Hague Peace Conference in 1899,<sup>18</sup> then slightly revised at the Second Hague Peace Conference in 1907.<sup>19</sup> There was much dispute about how well these conventions respected in the ensuing world wars.<sup>20</sup> Steering clear of such controversies, the Geneva conference of 1949 launched four new conventions, but all focused on rather specialized (and somewhat peripheral) humanitarian concerns: protections for wounded soldiers,<sup>21</sup> protection for shipwrecked sailors,<sup>22</sup> protection for prisoners of war,<sup>23</sup> and protection for civilians in wartime occupation zones.<sup>24</sup> Though styled as a “protocol” or addendum to these 1949 conventions, AP I actually elaborates on earlier Hague conventions as well as these more specialized Geneva rules.<sup>25</sup>

The resulting convention is far longer than any previous convention on the law of war,<sup>26</sup> far more precise on many issues, and far more

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18. See Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899 [hereinafter Hague Convention II], *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 55–90.

19. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, October 18, 1907, 187 CTS 227, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 55–82 [hereinafter Hague Convention IV].

20. GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 224–28 (Columbia Univ. Press, 1980).

21. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 459–80.

22. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 485–503.

23. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 507–65.

24. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 575–627.

25. AP I devotes considerable attention (arts. 48–71) to the conduct of military operations, as by seeking to impose limits on permissible targets for “attack.” Rules on this subject appear in the 1899 and 1907 Hague Regulations but not at all in the 1949 Geneva conventions.

26. See ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 59 (Oxford Press, 3rd ed., 2000). In this edition, the Hague Regulations on land warfare

demanding in its terms.<sup>27</sup> While previous drafting conferences produced complete conventions in a matter of weeks or months, AP I required an additional three years of high-level meetings.<sup>28</sup> These were meetings attended by a far larger number and range of countries than at previous conferences on the law of armed conflict.<sup>29</sup> With the participation of new nations that emerged from decolonization in Africa and Asia in the 1960s, there were nearly twice as many states represented at the Geneva conferences in the 1970s<sup>30</sup> as in the 1949 Geneva conference.<sup>31</sup> That total was nearly a five-fold increase from the gathering at the Hague in 1899, which drew only 26 states.<sup>32</sup>

With all this diplomatic activity, the new convention spoke with confidence. Article 48 articulates what it calls the “Basic Rule” in these sweeping terms:

In order to assure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>33</sup>

Subsequent provisions spell out the implications. Lawful “attacks” can only be “directed at a specific military objective.”<sup>34</sup> Even “attacks” directed at otherwise lawful military targets are prohibited, however, when they “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.”<sup>35</sup> Legitimate “military objectives” include “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.”<sup>36</sup>

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are reproduced in 9 pages, the 1949 Geneva Convention on Prisoners of War—the longest of the 1949 conventions—in 54 pages, while Additional Protocol I takes up 71 pages.

27. The Hague Regulations cover the conduct of military operations in 6 articles (arts. 22–28), occupying little more than one full page in Roberts and Guelff, *Documents*. The corresponding provisions in AP I require 19 articles (arts. 48–67), occupying 14 pages in this collection.

28. *Id.* at 419.

29. *Id.*

30. *Id.* (124 states were represented in the 1970s).

31. *Id.* at 195 (64 states were represented at Geneva conference in 1949).

32. *Id.* at 59 (26 states were represented at the Hague in 1899).

33. Protocol I, *supra* note 2, art. 48

34. *Id.* art. 51, ¶ 4(a).

35. *Id.* art. 51, ¶ 5(b).

36. *Id.* art. 52, ¶ 2 (emphasis added).

The Red Cross *Commentary* highlights the reasoning behind these restrictions.<sup>37</sup> The “basic principle” of “distinction” between military objectives and civilian life and property is, it insists, “the foundation on which the codification of the laws and customs of war rests.”<sup>38</sup> That seems to be the assumption behind AP I. The Preamble states that the convention is motivated by belief in the need to “reaffirm and develop” earlier treaty provisions and to “supplement” and “reinforce their application.”<sup>39</sup> The very term “Protocol” implies that the new material merely extends an existing foundation in prior treaties.<sup>40</sup>

An alert reader might notice that the *Commentary*, which is normally prolific with citations, actually offers little precedential support for its claim about the “Basic Rule.” The earliest source it cites is the 1868 St. Petersburg Declaration, which stipulated, “[T]he only legitimate objective which States endeavor to accomplish during war is to weaken the military forces of the enemy.”<sup>41</sup> The *Commentary* itself acknowledges, however, that this admonition was “concerned with preventing superfluous injury or unnecessary suffering to *combatants*” (emphasis added).<sup>42</sup> The Declaration sought to prohibit use of explosive bullets against soldiers in battle and “was not aimed at specifically protecting the civilian population.”<sup>43</sup> In fact, nothing so sweeping as the “Basic Rule” had appeared in any previous treaty.<sup>44</sup>

The 1907 Hague Convention on Land Warfare, for example, includes no general statement comparable to the “Basic Rule.” Instead, the accompanying regulations set out specific rules governing particular situations.<sup>45</sup> The regulations do enjoin signatories not to “destroy or

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37. COMMENTARY, *supra* note 12, at 598.

38. *Id.*

39. Protocol I, *supra* note 1, Preamble.

40. JOHN P. GRANT & J. CRAIG BAKER, ENCYCLOPEDIA OF INTERNATIONAL LAW 487 (Oxford, 3rd ed., 2009) (“protocol . . . usually denotes a treaty amending, or supplemental to, another treaty . . .”).

41. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Signed at St. Petersburg, Nov. 29, 1868, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 91–93.

42. COMMENTARY, *supra* note 12, at 598.

43. *Id.*

44. See Horace B. Robertson, *The Principle of the Military Objective in the Law of Armed Conflict*, 72 INT'L L. STUD. SER. US NAVAL WAR COL. 197, 197 (1998).

45. Hague Convention IV, *supra* note 19. Substantive prohibitions appear in the annex to the Convention, styled “Regulations.”

seize the enemy's property,"<sup>46</sup> but this prohibition might be read as a special admonition to occupying armies (which could choose whether to "seize" or to "destroy" property) rather than an all-encompassing rule, applying even to targets still in enemy hands.<sup>47</sup>

Subsequent provisions in the Hague Regulations confirm this view. The Regulations prohibit "bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended,"<sup>48</sup> implying that localities or structures which *are* defended (and therefore cannot simply be seized by troops on the ground) *may* be lawfully bombarded. The immediately following provision admonishes the commander of an attacking force to "warn the authorities" on the defending side "before commencing a bombardment."<sup>49</sup> That phrasing seems to indicate that, if they do not take the opportunity to flee, civilians harboring in civilian buildings *may* be lawfully placed at risk. The next provision stipulates that in "sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes," along with "historic monuments, hospitals and places where the sick and wounded are collected."<sup>50</sup> The implication is that, when it comes to ordinary civilian structures, commanders are not under the same obligation to take precautionary measures against doing harm. Even for buildings and monuments devoted to special purposes, moreover,

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46. *Id.* art. 23(g). Even this prohibition contains an exception: "unless such destruction or seizure be imperatively demanded by the necessities of war." *Id.*

47. At the Hague Conference in 1899, the drafting committee "proposed to omit this clause as it seemed to it useless in view of the provisions further on prescribing respect for private property." Art. 46 stipulates that "private property can not be confiscated" and Art. 47 declares "pillage" to be "formally forbidden." These later provisions occur in a section devoted to rules for "established" authority in occupied territory which "can be exercised" routinely (Sec. III, starting at Art. 42). The clause prohibiting armies to "destroy or seize the enemy's property" (23g) was restored at the prompting of a Belgian delegate, who argued that it might apply to some situations involving ongoing "hostilities," the subject of the section where Art. 23 appears. He seems to have been thinking of situations where an enemy army was in control of a particular town but its general occupation authority not fully "established" or fully "exercised" (as Art. 42 requires). The German delegate insisted that in such settings, the prohibition in Art. 23g "certainly ought not to be taken to prohibit the destruction of any buildings whatever and by no means when military operations rendered it necessary." According to the official report on this session, "This remark met with no objection . . ." 1 JAMES BROWN SCOTT, PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, CONFERENCE OF 1899, at 424 (Oxford 1921) (Report on Second Commission, Meeting of July 5).

48. *Id.* art. 25.

49. *Id.* art. 36.

50. *Id.* art. 27.



the Hague Regulations make the special-care obligations conditional on these sites “not being used at the time for military purposes.”<sup>51</sup>

The somewhat equivocal character of these prohibitions was underlined by the statement of purpose in the preamble that the regulations aimed to “diminish the evils of war, *as far as military requirements permit*” and to “serve as a *general* rule of conduct” (emphasis added).<sup>52</sup> The Preamble then falls back on this notably vague disclaimer: “in cases not included in the Regulations, the inhabitants [of conflict zones] and the belligerents remain under the protection of . . . the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.”<sup>53</sup> Whatever these cloudy formulations were intended to illuminate, they do not read as first drafts of AP-I’s “Basic Rule.”

The same Hague conference that approved these rules on land warfare in 1907 also approved a convention on “Bombardment by Naval Forces in Time of War.”<sup>54</sup> Among other things, that Convention forbids “bombardment of undefended ports, towns, villages, dwellings or buildings,”<sup>55</sup> but offers exceptions. One exception states that after warnings to the inhabitants, “a naval force may destroy with artillery” not only “military or naval establishments, depots of arms or war materiel,” but also “workshops or plant which could be utilized for the needs of the hostile fleet or army.”<sup>56</sup> Further, the Convention expressly authorizes “bombardment of undefended ports, towns, villages, dwellings or buildings”—again after warning—in order to force “local authorities” to “comply with requisitions for provisions or supplies.”<sup>57</sup> Thus, for the sake of coercing civil authorities rather than disarming an opposing

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51. *Id.* art. 27. This proviso is categorical—immunity for such special settings is entirely forfeited when used for military purposes. By contrast, AP I admonishes that states must not “direct the movement of the civilian population . . . to shield military objectives from attacks,” but then immediately provides that “violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians. . . .” Protocol I, *supra* note 2, art. 50, ¶¶ 7, 8.

52. Hague Convention IV, *supra* note 19 at Preamble.

53. *Id.*

54. Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 205 C.T.S. 345, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1079–83.

55. *Id.* art. 1.

56. *Id.* art. 2.

57. *Id.* art. 3.

military force, the Convention authorizes intentional destruction of civilian property, though not deliberate killing of civilians.

In the mid-1950s, a more specialized Hague Conference launched a “Convention for the Protection of Cultural Property in the Event of Armed Conflict.”<sup>58</sup> It committed signatories to respect a zone of “special protection” for “cultural property,” defined to include “monuments of architecture, art or history” and “works of art, manuscripts, books and other objects of artistic, historical and archeological interest.”<sup>59</sup> However, the Convention made this “special protection” conditional on the “cultural property” being “situated at an adequate distance from any large industrial centre.”<sup>60</sup> This limitation seems premised on the assumption that “any large industrial centre” might be, in itself, a reasonable target for attack in wartime, along with categories it itemizes separately as targets constituting an “important military objective.”<sup>61</sup> The entire Hague Convention on Cultural Property would seem superfluous if signatories were already bound to limit their attacks solely to “military objectives.”

There is, then, no intimation of anything so sweeping as AP I’s “Basic Rule” in earlier conventions. Where did the “Basic Rule” come from, then? The Red Cross *Commentary* suggests that the rule was so taken for granted in earlier times that it did not need to be stated as such.<sup>62</sup> The *Commentary* does explain how Atlanta became a “combat zone” in the American Civil War nor how Paris came to suffer massive bombardment during the Franco-Prussian War.<sup>63</sup> Quite a lot gets left out in the way the Red Cross tells the history of war.

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58. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 999–1012.

59. *Id.* arts. 1, 8.

60. *Id.* art. 8, ¶ 1a.

61. *Id.* “There may be placed under special protection . . . moveable cultural property . . . monuments and other immovable cultural property of very great importance, provided they: (a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication.” *Id.*

62. COMMENTARY, *supra* note 12, at 598 (“Up to the First World War, there was little need for [treaty provisions to clarify] the practical implementation of this customary rule [exempting civilians and civilian objects] as the population barely suffered from the use of weapons unless it was actually in the combat zone itself.”).

63. On bombardment of Paris, *see* ROBERT TOMBS, *The Wars Against Paris*, in ON THE ROAD TO TOTAL WAR 541 (Stig Forster & Jorg Nagler, eds., Cambridge Univ. Press, 1997). On burning of Atlanta, *see* JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 809 (Oxford Press, 1988).

The *Commentary* does offer another explanation, however: “The custom of war acquired a more humanitarian character . . . as a result of the influence of thinkers and jurists.”<sup>64</sup> Only one actual “thinker” or “jurist” is mentioned in this strangely truncated account: the Swiss-born legal scholar, Johann Caspar Bluntschli,<sup>65</sup> who ended up as professor of law at Heidelberg in the era of Bismarck.<sup>66</sup> As the Red Cross summarizes the history of humanitarian law, the views of Professor Bluntschli illustrate the main line of historical development, which reached its ultimate—perhaps logically irresistible, perhaps even predestined—culmination in the Basic Rule of Additional Protocol I.

This citation does offer a window into actual debates of the late Nineteenth and early Twentieth Centuries. Bluntschli was indeed an active participant in those debates.<sup>67</sup> All prominent British commentators on international law, before the First World War, cited and rejected Bluntschli’s reasoning, all in very emphatic terms.<sup>68</sup> The U.S. government at times deprecated the British naval attacks on civilian commerce while British commentators defended the practice.<sup>69</sup> Still, on the fundamental principle—how to understand the underlying legal implications of war—all the major American treatises on international law endorsed the basic British view.<sup>70</sup>

Bluntschli’s theory deserves continuing attention. It did win support from the majority of Continental European commentators by the early Twentieth Century, but that theory was firmly resisted by British and American commentators.<sup>71</sup> It might seem of some relevance, moreover, that compared with Continental states supporting the Bluntschli doctrine, Britain and America played a much more decisive role in the actual military practice of the Twentieth Century.

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64. COMMENTARY, *supra* note 12, at 585.

65. *Id.* at 586 n.3 (citing *Das moderne Kriegsrecht der civilisirten Staaten* [Modern Law of War in Civilized States] (1874), *Das moderne Völkerrecht der civilisirten Staaten* [Modern International Law in Civilized States] (1878), and *Das Beuterecht im Krieg und das Seebeuterecht insbesondere* [The Law of Prize in War and Especially Law of Prize at Sea] (1878)).

66. For a contemporary appreciation of Bluntschli’s career, see HERBERT B. ADAMS, *BLUNTSCHLI’S LIFE-WORK* (John Murphy & Co., 1884).

67. See *infra* § III.

68. See *infra* § IV.

69. See *infra* § IV.

70. See *infra* § V.

71. See *infra* §§ IV, V.

### III. ROOTS OF THE “BASIC RULE”

Bluntschli’s treatise on international law lays down the principle in very clear language, “War is a relation between states, not between individuals.”<sup>72</sup> In ancient times, warring armies “confounded the citizens of the enemy state with the state itself.”<sup>73</sup> Though the modern understanding took many centuries to become accepted, it was “prepared by the order of Christ, ‘Love your enemies’” and then developed by “the science and practice of modern governments.”<sup>74</sup>

Bluntschli’s account does not indicate which teachers developed this understanding after Jesus. He offered one contemporary exemplar, however—his own monarch, Kaiser Wilhelm I.<sup>75</sup> As King of Prussia in 1870, Wilhelm had issued a proclamation insisting he was making war on French soldiers, not French citizens.<sup>76</sup> This same proclamation is mentioned by the ICRC *Commentary*, the only concrete episode of a European war which is mentioned before the world wars.<sup>77</sup> Neither Bluntschli nor the *Commentary* troubles to consider whether the Prussian army actually adhered to this lofty aim in its conduct of the war. The point in these accounts is the stated principle—as proclaimed at the outset of the war. The Prussian ideal, as an initial statement of intentions, is left to speak for itself.

Bluntschli’s treatise did offer more background, however, on the earlier history of this ideal. It was, by his account, originally a French ideal, connected with the new ideas that emerged with the Revolution in France. In 1801, as Bluntschli reports, Napoleon’s Councilor of State, Jean-Etienne-Marie Portalis, gave a speech celebrating the inauguration of the new French prize court (for assessing the legality of French seizures of enemy ships and cargoes at sea).<sup>78</sup> Portalis was one of the chief compilers of the new *Code Civil*, popularly known as the Napoleonic Code.<sup>79</sup> Decades earlier, he had published a book on the philosophy of

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72. JOHANN CASPAR BLUNTSCHLI, *DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN ALS RECHTSBUCH DARGESTELLT* 297 (Nordlingen, 1878) (hereinafter *MODERNE VÖLKERRECHT*); JOHANN CASPAR BLUNTSCHLI, *LE DROIT INTERNATIONAL CODIFIÉ* 299 (M.C. Landy, trans., Libraire Germer 5th ed. 1895) (Fr.) [hereinafter *LE DROIT INTERNATIONAL CODIFIÉ*].

73. *Id.* at § 530.

74. *Id.*

75. *Id.* at 298, 299 (§ 531).

76. *Id.*

77. *COMMENTARY*, *supra* note 12, at 585–86.

78. *MODERNE VÖLKERRECHT*, *supra* note 72, at 297; *LE DROIT INTERNATIONAL CODIFIÉ*, *supra* note 72 at 299.

79. For the career of Jean-Etienne-Marie Portalis, see entry in *ENCYCLOPEDIA BRITANNICA* (11th ed.) or the earlier and more complete account (in French) in

Jean-Jacques Rousseau.<sup>80</sup> In his prize court speech, Portalis set out the principle articulated by Rousseau in *The Social Contract*: that war is a relation between states, not between individuals. From this premise, Portalis drew the conclusion that civilian commerce should not be an object of attack in war.<sup>81</sup>

Rousseau offered his formulation—war is solely a relation between states—to show why conquest does not give the conquering army the right to enslave its defeated enemies.<sup>82</sup> *The Social Contract* actually says nothing about war measures affecting civilian commerce,<sup>83</sup> but the extrapolation by Portalis was well received in the midst of an ongoing war with Britain.<sup>84</sup> A few years after Portalis laid down the new doctrine, his emperor issued a decree banning British ships from continental ports.<sup>85</sup> In the preamble, Napoleon emphasized the unique barbarism of British naval practice; “considering that England does not admit the law of nations universally followed by all civilized peoples, that she reputes as an enemy every individual belonging to the enemy state and consequently makes the crews of merchant ships prisoners of war . . .”<sup>86</sup>

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MICHAUD, 34 BIOGRAPHIE UNIVERSELLE ANCIENNE ET MODERNE 135 (Mme Desplaces, 1862) [hereinafter BIOGRAPHIE UNIVERSELLE].

80. BIOGRAPHIE UNIVERSELLE, *supra* note 79.

81. For Bluntschli’s account, see MODERNE VOLKERRECHT, *supra* note 72, at 298.

82. JEAN-JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT AND OTHER POLITICAL WRITINGS 15–16 (Christopher Bertram ed., Quintin Hoare trans., Penguin Classics 2012) [hereinafter *The Social Contract*]. “War is by no means a relationship between one man and another but a relationship between one State and another, in which individuals are enemies only accidentally, not as men or even as citizens, but as soldiers; not as members of the Fatherland, but as its defenders. For any State may have only other States as enemies, not men, considering that no real relation may be fixed between things of differing nature.” *Id.*

83. Rousseau offers an apologetic explanation at the end of the *Social Contract*: “[E]xternal relations, including the right of nations, commerce, the right of war and conquest, public right, leagues, negotiations, treaties, etc” form “a new subject” which cannot be covered in this work. *Id.*

84. The First Lord of the Admiralty at the outset of both world wars in the next century, also a distinguished historian, described Napoleon’s predicament this way: “The British blockade wrapped the French Empire and Napoleon’s Europe in a clammy shroud. No trade, no coffee, no sugar, no contact with the East, or with the Americans! And no means of ending the deadlock!” WINSTON S. CHURCHILL, THE AGE OF REVOLUTION 314 (Dodd, Mead, 1957)

85. The episode is described in WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 485 (Oxford Press, 8th ed. 1924) (1884).

86. *Id.*

That outlook proved to have more staying power than Napoleon's empire. In 1856, at the peace conference following the Crimean War, European powers issued the Declaration of Paris, holding that privateering (wartime attacks on commercial shipping by government-licensed raiders) should be considered unlawful.<sup>87</sup> Some Europeans urged a more comprehensive measure. In 1859, city officials in the great trading ports of Hamburg and Bremen urged recognition of the principle that merchant ships and civilian cargo at sea should not be targets of military attack, regardless of their origin or ownership.<sup>88</sup> At the outset of the 1866 war between Prussia and the Austrian Empire, both sides agreed that they would abstain from attacks on each other's commercial shipping.<sup>89</sup> Then, at the start of war with France in 1870, Prussia offered to abstain from attacks on French shipping if France would reciprocate.<sup>90</sup> When France declined the offer and then seized a few Prussian merchant ships, Bismarck ordered that French officials seized on land be held hostage to force the release of German merchant sailors in French hands.<sup>91</sup>

It was Britain, however, that had the largest navy.<sup>92</sup> Naturally, it was Britain that received the main burden of criticism for asserting the right to seize enemy merchant ships as prize of war.<sup>93</sup> In the mid-Nineteenth

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87. Declaration Respecting Maritime Law, Signed at Paris, 16 April 1856, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1055–56. For background on the negotiations leading to the Declaration, *see* MARTIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING 57–95 (Palgrave, 2014).

88. *Id.* at 100–10

89. HALL, *supra* note 85.

90. *Id.*

91. Bismarck's retaliation is described—with disapproval—in *General Theory of the relation of Subjects to War* in JOHN WESTLAKE, THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 268–69 (L. Oppenheim ed., Cambridge Univ. Press, 1914) [hereinafter COLLECTED PAPERS]. *Cf.* Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, art. 6 (“Regulations Regarding the Crews of Enemy Merchant Ships Captured by a belligerent: The captain, officers and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war.”). This convention seemed, at the time, to be altering earlier practice. *See* DOCUMENTS ON THE LAW OF WAR, *supra* note 26. Allied practice in the world wars reverted to holding enemy merchant crews as prisoners of war, which has “diminished the significance of the Convention in that respect.” *Id.* Current U.S. policy is that “officers and crews of captured enemy merchant ships . . . may be made prisoners of war.” COMMANDER'S HANDBOOK § 8.2.2.1, *reprinted in* 64 INT'L L. STUD. 467–77 (Horace Robertson, ed., 1991).

92. *See* LAWRENCE SONDHAUS, NAVIES IN MODERN WORLD HISTORY 10, 34 (Reaktion, 2004) (In 1815, Britain's Royal Navy was “the largest navy the world had yet known” and from then until the start of the First World War, “no navy dared challenge the British to battle at sea”).

93. LEMNITZER, *supra* note 87.

Century, the Prussian jurist August Wilhelm Heffter, a judge in Berlin and member of the upper house in the Prussian Landtag, delivered a sharp attack on the British practice in his treatise on international law.<sup>94</sup> Naval war remained “more cruel and more murderous than land warfare” because it had never acquired “precise rules, due to the disequilibrium of naval powers” (i.e., British predominance at sea), so it had “retained down to our own times more or less the character of sheer plundering.”<sup>95</sup>

The British government remained unmoved. In 1874, a conference was convened in Brussels to formulate basic principles of restraint in war.<sup>96</sup> Britain refused to participate unless naval war was excluded from the discussion.<sup>97</sup> British participants took the same position when scholars assembled at Oxford in 1880 to propose more detailed rules of limitation.<sup>98</sup> Even then, the British government rejected proposals to embody the recommendations of these conferences into formal, binding treaties, doubting that even standards of land warfare could be formulated in precise rules.<sup>99</sup>

In an article published in one of the leading European journals on international law of that era, Bluntschli wrote about the dispute as if it were the central issue in the progress of civilization:

Unfortunately, the great progress in the law of war has only been achieved for law on land, England insisting on this condition to participate [in negotiations on humanitarian standards]. Thus, while on land, the taking of booty and pillaging are prohibited as barbarous practices, the maritime powers of the most civilized continent regard such practices as lawful on the sea. It is considered legitimate to take enemy merchandise when on the high seas, while it is forbidden to take the same merchandise while it rests on the enemy's docks or warehouses. . . . The moral and juridical contradiction that exists between these two kinds of outlook and practice is too flagrant to persist indefinitely. Or rather, the principle that is recognized as necessary, just and salutary in one set of facts will come, through the progress of civilization, to triumph overall. Or else, if barbarism is maintained in war at sea, it will end by being revived in war on land and bring back to us the brutishness of primitive times. This last

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94. See AUGUST WILHELM HEFFTER, *DER EUROPÄISCHE VÖLKERRECHT* (E.H. Schroeder, 1867) (Ger); see also AUGUST WILHELM HEFFTER, *LE DROIT INTERNATIONAL DE L'EUROPE* (J. Bergson, trans., Cotillon 4th ed. 1883) (Fr). (Rabkin translation)

95. *DER EUROPÄISCHE VÖLKERRECHT*, *supra* note 94, at 201–02; *LE DROIT INTERNATIONAL DE L'EUROPE*, *supra* note 94 at 261–62.

96. BEST, *supra* note 20, at 156.

97. *Id.* For text of the Brussels Declaration and brief background on the conference, *THE LAWS OF ARMED CONFLICT*, *supra* note 1, at 21–28.

98. For text of the Oxford Manual and brief history of its origins, see *id.* at 29–40.

99. Letter from the Earl of Derby [Foreign Minister] to Lord A. Loftus [British ambassador to Russia, which had sponsored the Brussels conference] (Jan. 20, 1875), in 66 BRITISH AND FOREIGN STATE PAPERS 443, 451 (William Ridgway ed., 1882).

alternative is impossible, because it is in opposition with the law of progress that governs humanity. . . . history shows us the naturally right which is subject to a gradual evolution, which attests the consoling truth that evolution is steadily progressive and that humanity, from barbarism, advances insensibly toward a juridical condition that is always more noble and more humane.<sup>100</sup>

The argument was embraced by commentators in other European countries<sup>101</sup> and by Calvo and others in South America.<sup>102</sup> Paul Pradier-Fodere, a French legal scholar who accepted a chair in public law in Peru in the late Nineteenth Century, is a notable example. His multi-volume treatise endorsed Bluntschli's doctrine.<sup>103</sup> Fodere then added his own gloss: the continuation of older practices allowing seizure of private property in wartime was "a stain on the civilization of the Nineteenth Century and appears more and more unreasonable as the sentiment of solidarity and justice develops among peoples; but it is also necessary that these [older] theories, which have come to be exposed for what they have been, must be vigorously and victoriously fought by those of liberal and generous spirit."<sup>104</sup> He railed against British commentators who would make private citizens "responsible for the deeds of their government, which they are obliged to obey and which they may often not have approved," a doctrine "that is the height of iniquity."<sup>105</sup>

The book in which Bluntschli argued the point at greatest length was cited by the Red Cross *Commentary*, as among the works that helped

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100. Johann Caspar Bluntschli, *Du Droit de Butin en General et Specialement du Droit de Prise Maritime*, IX REVUE DE DROIT INT'L 508, 512–13 (1877) [hereinafter *Du Droit de Butin*].

101. PASQUALE FIORE, INTERNATIONAL LAW CODIFIED 621 (Translation by Edwin Borchard, 1918) (Italian original: IL DIRITTO INTERNAZIONALE, 1890) ("According to the proper laws of war, the property (ships or cargo) of private persons of the enemy should be deemed inviolable in naval as well as land war and it is the duty of all civilized states to make this rule obligatory . . ."); FRANTZ DESPAGNET, COURS DE DROIT INTERNATIONAL PUBLIC 1071 (Recueil Sirey, 1910) (Fr) ("This inviolability [of enemy private property] results from the fundamental principle according to which war is a relation between state and state . . . Why is this rule, accepted without difficulty in war on land, contested in relation to war at sea, when juridically they are absolutely parallel?"). (Rabkin translation) For extensive compilation of the "great number" of European "publicists" endorsing such views, see HENRY BONFILS, MANUEL DE DROIT INTERNATIONAL PUBLIC § 1300, at 914–15 (Librairie Rousseau 7th ed., 1914) (Fr).

102. IV CHARLES CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRACTIQUE 18 (1896) (Fr): ". . . if the abolition of prize taking at sea is not yet established in express and formal terms in the law of nations, it is at least indicated implicitly and there is every ground to hope that the day is approaching when the inviolability of private property at sea will be recognized altogether definitively, without challenge or reservation." (Rabkin translation).

103. P. PRADIER-FODÉRÉ, TRAITÉ DE DROIT INTERNATIONAL PUBLIC EUROPÉAN ET AMÉRICAIN (1897) (Fr).

104. *Id.* at 471 (Rabkin translation).

105. *Id.* at 476.



change opinion toward the ideal of embracing civilian immunity from war.<sup>106</sup> The *Commentary* does not call attention to the debate about sea power. It does not acknowledge the tradition of differing rules for law at sea, even in commenting on the AP I provision which clarifies that the “Basic Rule” does not generally apply to naval warfare.<sup>107</sup> The actual dispute was not what the ICRC wanted to notice. What the ICRC embraced was the abstract principle and the very abstract doctrine supposed to be grounding it.

#### IV. THE BRITISH RESPONSE

When Nineteenth Century European commentators advanced their claims about the proper limits on war, British commentators published emphatic rebuttals. First, they invoked the authority of the leading commentators of earlier times. In the 17th Century, the Dutch jurist Hugo Grotius and the Italian émigré scholar in England, Alberico Gentili had clearly endorsed taking enemy ships and cargoes as prize of war.<sup>108</sup> Additionally, in the 18th Century the Dutch jurist Cornelius Bynkershoek, the Swiss diplomat Emer de Vattel, and the Swiss philosopher J-J Burlamaqui all believed in taking enemy ships and cargo as prize of war.<sup>109</sup>

All these eminent commentators wrote before efforts to codify international practice in general or “legislative” treaties, subscribed by most nations. Consequently, these early commentators expounded international law by reference to the most generally accepted practices, which they often identified in turn with the law of nature.<sup>110</sup> All these

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106. JOHANN CASPAR BLUNTSCHLI, *DAS BEUTERECHT IM KRIEG UND DAS SEEBEUTERECHT INSBESONDERE* [The Law of Prize in War and Especially the Law of Prize at Sea] (1878). *COMMENTARY*, *supra* note 12, at 586.

107. Protocol I, *supra* note 2, art. 49 (“Scope of Application”: “The provisions of this Section . . . apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.”). Whether this provision limits blockade tactics which might be viewed as aimed at “objectives on land” is a matter of dispute. *See* ELMAR RAUCH, *PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS, REPERCUSSIONS ON THE LAW OF NAVAL WARFARE 90–94* (Duncker & Humbolt, 1984).

108. HALL, *supra* note 85, at 86 (providing extensive citations to 17th and early 18th Century treatises).

109. *Id.* (concluding, “[T]o all it was a matter of course that the subjects of an enemy state were themselves individually enemies”).

110. For background on the outlook of commentators before the Nineteenth Century, *see* Patrick Capps, “Natural Law and the Law of Nations” and Randall Lesaffer,

eminent authorities treated the practice of seizing enemy commerce on the seas as consistent with the law of nature.<sup>111</sup> The great Eighteenth Century Continental treatises, by Vattel and Burlamaqui, featured the “law of nature” in their titles, while associating that law with the principles of the modern Enlightenment.<sup>112</sup> Both were cited with approval by the American Founders.<sup>113</sup>

British commentators did not deny that states had embraced additional humanitarian constraints on the conduct of war. What they denied was that these additions derived from a single, underlying principle—a “master principle”—which could be extended by mere logic. William Edward Hall put the point this way:

Springing originally from limitations upon a right [i.e., the right to deploy force to coerce enemies], which in its extreme form constitutes a denial of all other rights, and developed through the action of practical and sentimental considerations, the law of war cannot be expected to show a substructure of large principles, like those which underlie the law governing the relations of peace . . . It is, as a matter of fact, made up of a number of usages which in the main are somewhat arbitrary, which are not always very consistent with one another, and which do not therefore very readily lend themselves to general statements.<sup>114</sup>

Hall argued, in effect, for a common law of war formed by gradual accretion and adjustment rather than extrapolation from abstract first principles.<sup>115</sup>

The Cambridge scholar John Westlake echoed Hall’s views. Westlake dismissed Rousseau’s doctrine of war as a set of “arbitrary assertions” exercising on Europeans “the fascination which extreme doctrines seem

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“The Classical Law of Nations” in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW (Alexander Orakhelashvili, ed., Edward Elgar, 2011).

111. For classic 18th Century accounts, see 3 EMMERICH DE VATTEL, THE LAW OF NATIONS 271 (Charles G. Fenwick ed., Carnegie Institution 1916) (right to seize private property even from neutral vessels when it may help the enemy). *Id.* at 291 (general right to seize enemy property to reduce enemy capacity to continue fighting). JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 475 (Liberty Fund, 2006) (lawfulness of reprisal against enemy commerce to compensate for enemy attacks).

112. 1 EMER DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE AUX AFFAIRES DES NATIONS ET DES SOUVERAINS [THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW, APPLIED TO THE CONDUCT OF THE AFFAIRS OF NATIONS AND OF SOVEREIGNS] (1758); JEAN JACQUES BURLAMAQUI, PRINCIPES DU DROIT NATUREL [PRINCIPLES OF NATURAL LAW] (1748).

113. See, e.g., JAMES WILSON, COLLECTED WORKS OF JAMES WILSON (Kermit L. Hall & Mark David Hall, eds., Liberty Fund, 2007) (the index shows 12 references to Vattel, 10 to Burlamaqui, 18 to John Locke, and 3 to JJ Rousseau.) Wilson was an influential figure at the Philadelphia Convention in 1787 and subsequently among the first justices of the U.S. Supreme Court.

114. HALL, *supra* note 85, at 84.

115. *Id.*

to possess, especially when an end is to be served by them.”<sup>116</sup> He insisted that Rousseau’s account simply could not be taken seriously.<sup>117</sup>

The claim that civilians must be exempt from war made little sense in principle, according to Westlake, because the purpose of war is not to defeat an opposing army, but to “compel the enemy State to accept such terms of peace as is desired to impose on it and as a means to that object to paralyze the enemy State—that is, to make all action impossible for it unless and until it accepts the terms desired.”<sup>118</sup> Even on land, the “immunity of civilian private property is . . . only admitted so far as it does not interfere with any operations deemed to be useful for putting pressure on the enemy.”<sup>119</sup> The commander of an invading force “would not allow the unoccupied part of his enemy’s territory to be enriched or strengthened by railway traffic into it from the part which it has occupied or [allow] goods lying in the unoccupied part, unproductive for want of transport [to be] brought to market by the railways which he controls.”<sup>120</sup> On land, commanders were acknowledged to have the authority to “requisition” supplies from civilian inhabitants—including food, horses, clothing and other things necessary to the invading army—imposing extreme hardship on local inhabitants.<sup>121</sup>

An Anglo-Indian legal scholar, Alma Latifi, a student of Westlake, published a short treatise on the subject, *Effects of War on Property* before the First World War.<sup>122</sup> The book strongly disputes the claim of Continental writers that seizing enemy merchant ships in wartime was “inhuman and unworthy of civilized nations.”<sup>123</sup> To the contrary, he argued, naval war was more humane than land war. “The enormous armies of the great Continental powers are like flights of locusts that eat up the occupied territory. They find plenty and leave desolation behind them.”<sup>124</sup> The “legacy of war on land” was likely to be “acute individual distress and widespread social disorder,” as armies smashed their way

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116. “General Theory of the Relations of Subjects to War,” from *Chapters on International Law* (1894), reprinted in COLLECTED PAPERS, *supra* note 91, at 266–67.

117. *Id.* (“The levity of mind displayed by such a passage is extraordinary, even for a man of Rousseau’s character.”).

118. *Id.* at 614 (from an essay on “Belligerent Rights at Sea”).

119. *Id.* at 615.

120. *Id.* at 616.

121. *Id.* at 615–16.

122. ALMA LATIFI, *EFFECTS OF WAR ON PROPERTY* (Macmillan 1909).

123. *Id.* at 123.

124. *Id.* at 123–24.

through whatever private dwellings or installations fell in their way.<sup>125</sup> By contrast, “property at sea” generally belongs to “the mercantile community” and “is intended to earn profits.<sup>126</sup> If not interfered with, its owners hope to be richer by the adventure than they were before, otherwise they would not expose their property to the risks of sea when it would be safer at home.”<sup>127</sup> Precisely because ocean cargo aimed at commercial gain, “every ship and cargo afloat in time of war is insured and the effects of capture by the enemy are spread over the whole community of merchants and ship owners who pay war premiums.”<sup>128</sup> Meanwhile, however, commerce also provides revenue to states.<sup>129</sup>

British commentators also pursued a deeper issue. What is “the state” if not the vehicle for expressing the interest or will of its members? Westlake protested that the theory of continental writers assumed that citizens could disclaim responsibility for their own government:

It cannot be too strongly stated that in natural justice there is no power for individuals to form themselves into a group and disclaim responsibility for the actions of that group. The individuals who form the groups called states are not authorized by natural justice to disclaim responsibility attaching to the actions of those states and there is no [international] authority over them to impose regulations which such a disclaimer would render necessary [to protect victims of the corporate action]. Their own consent as states may take the place of legislation [in establishing international standards] but such consent has not been given to the assertion that individuals are foreign to a war.<sup>130</sup>

While decrying “the legal fallacy” of exempting individuals from the consequences of their own government’s actions, Westlake acknowledged that approach might have seemed more plausible in earlier times:

The legal fallacy would not have deceived so many if there had not been a time when wars were often made by sovereigns from motives of personal or dynastic ambition, which found little echo in subject populations. The memory of that time has helped to cause the notion that individuals are foreign to a war to become almost a democratic principle. But since 1815 there have been no wars in Europe which were merely those of ruling persons or families and not those of respective combatant nations. The wars have not necessarily been approved by the numerical majority, though this has often been the case, but always they have been approved by such a part of the population in each combatant state as by its own numbers and influences combined, must for all practical purposes, external as well as internal, be regarded as representing the nation. . . . External as well as internal affairs are more and more directed by the popular will. . . . the popular will brooks resistance abroad as little as at home and when it

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125. *Id.* at 124.

126. *Id.* at 125.

127. *Id.* at 125.

128. *Id.* at 124.

129. *Id.* at 126 (“The most important consideration in modern warfare is that of money . . . On what does a country rely more for the sinews of war than on commerce?”).

130. COLLECTED PAPERS, *supra* note 91, at 617.

decides on war it will insist as much or more than any monarch on every means being employed to win success.<sup>131</sup>

English and American writers were not the only ones who embraced this traditional view. Paul Boidin, a professor at the French military academy, published a book in 1908 on the implications of the Hague Peace conferences. He makes no mention of war at sea, but protests at length against the principle of Rousseau:

We cannot associate ourselves with this view [FN: “even if that means going against the preponderance of scholarly opinion in France”]. The state is nothing but the gathering of all the individuals who compose it. So when one says, France has declared war on Germany, one means to say that all the French have become enemies of all the Germans. France is formed of all its citizens. In a war of survival, it will call on all. Some, who have the physical capability, will serve as combatants, the army at hand; the others, too weak or too old, will render service in accord with their capacities, the scientists with their inventions, the writers with their writings and patriotic discourses. . . . It will not do to have two sorts of citizens, one destined by nature to get themselves killed, the others as mere spectators to the misfortune of the first group. There can only be one kind: Frenchmen who are ready to sacrifice their goods and even their lives for the triumph of their country. If all have the moral obligation to contribute according to their means to the success of military operations, it follows that all must, logically, share in the suffering of the war.<sup>132</sup>

Lassa Oppenheim’s treatise, *International Law* first appeared in 1906, then in a second edition in 1912—and remained in print, with emendations by successive editors down to the late Twentieth Century.<sup>133</sup> Its tone was considerably less flamboyant, but no less emphatic in its rejection of the Continental view. Oppenheim, a German émigré to Britain, eventually succeeded Westlake to the chair of international law at Cambridge. His treatise acknowledged that “the majority of European continental writers” had “for the last three generations . . . propagated the doctrine that no relation of enmity exists between belligerents [states] and private subjects [of opposing states in war],” a doctrine he traced—like the Continental

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131. *Id.* at 618.

132. PAUL BOIDIN, *LES LOIS DE LA GUERRE ET LES DEUX CONFÉRENCES DE LA HAYE* [THE LAWS OF WAR AND THE TWO HAGUE CONFERENCES] 37 (A. Pedone ed., 1908) (Fr.) (Rabkin translation).

133. L. F. L. OPPENHEIM, *INTERNATIONAL LAW, A TREATISE* (2d. ed., Longmans, Green, 1912) For a survey of Oppenheim’s career and scholarly legacy, see OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1152–55 (Bardo Fassbender & Anne Peters, eds., Oxford Univ. Press 2012) [hereinafter OXFORD HANDBOOK]. The 9th edition of Oppenheim’s treatise (annotated by contemporary scholars, Robert Jennings and Arthur Watts) was published by Longmans in 1996.

writers—to Rousseau.<sup>134</sup> Yet, he countered, “British and American-English writers [i.e., not Latin American authors] have never adopted this doctrine” and concluded, “[I]f the facts of war are taken into consideration without prejudice, there ought to be no doubt that the British and American view is correct.”<sup>135</sup>

Latifi saw colder calculation behind the display of humanitarian sentiment:

The movement towards abolition of the right to capture private property at sea has been supported by many men whose humanitarian motives it is impossible to doubt, but the moving springs of the policy of nations are deep-based in their solid self-interest. They are not to be found in the abstract principles preached by professors or embodied in the resolutions of peace congresses.<sup>136</sup>

There is a succinct term today for such appropriation of “humanitarian” postures by self-interested states: “lawfare.”<sup>137</sup>

The movement towards abolition of the right to capture seemed to gain momentum at the Second Hague Peace conference in 1907 and still more with the Declaration of London in 1910, promising restrictions on interference with civilian commerce.<sup>138</sup> They did not survive in the ensuing world war.

## V. AMERICAN VIEWS CONVERGE WITH BRITAIN’S

In the late 19th Century, Bluntschli and other European commentators sometimes claimed the United States as a supporter of the Continental perspective. As these commentators noted, the United States had persistently urged restraints on seizure of enemy property in war at sea, beginning with a treaty negotiated by Benjamin Franklin with the King of Prussia in 1785.<sup>139</sup> That treaty was celebrated by a Red Cross commentator in the 1980s as “the most remarkable document” of its era, “containing provisions which rise to the level of principle . . . .”<sup>140</sup> The Red Cross *Commentary* on AP-I depicts the Union Army’s law of war

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134. OPPENHEIM, *supra* note 133, at 63–64.

135. This edition cites Boidin’s work as authority for the claim about “the facts of war.” *Id.* Oppenheim, acknowledging various treaty and customary restrictions on spoiling enemy property in war, concludes (regarding the Bluntschli doctrine as applied to land warfare), the “point is unworthy of dispute, because it is only one of terms without any material consequence.” *Id.* at 64. He was much more of a positivist than his predecessors.

136. LATIFI, *supra* note 122, at 143.

137. The current usage of the term seems to have begun with General Charles Dunlap, *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Harvard Univ. Press 2001).

138. For overview of debates on these measures, see CALVIN D. DAVIS, *THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE* 303–26 (Duke Univ. Press 1975).

139. See *Du Droit de Butin*, *supra* note 100, at 533–35, 549–50.

140. JEAN PICTET, *DEVELOPMENT AND PRACTICE OF INTERNATIONAL HUMANITARIAN LAW* 21 (Henry Dunant Institute ed., 1985).

“code” in the Civil War as a landmark on the path to the international conventions of the Twentieth Century, culminating in AP-I.<sup>141</sup> The Civil War Code, largely the work of the Prussian émigré scholar, Francis Lieber, was in fact cited with approval by Bluntschli and other European scholars in the Nineteenth Century.<sup>142</sup> American diplomats, down to the mid-20th Century, sometimes did present the United States as more idealistic in its view of war than the older powers of Europe.<sup>143</sup>

There is less to this story, however, than might appear from such opportunistic citations. On the whole, what is striking is how much American doctrine on war paralleled British claims.

From the very outset, the American Declaration of Independence spoke of conflicts between peoples rather than states: “Nor have we been wanting in attentions to our British brethren . . . . We must, therefore . . . hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.”<sup>144</sup>

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141. COMMENTARY, *supra* note 12, at §1823.

142. See, e.g., MODERNE VOLKERRECHT, *supra* note 72, at § 598; LE DROIT INTERNATIONAL CODIFIÉ, *supra* note 72, at 295.

143. A.D. White, leader of the American delegation at the first Hague Peace Conference, July 5, 1899: “Europeans generally suppose that the people of the United States is a people eminently practical. That is true; but it is only one half of the truth; for the people of the United States are not only practical; they are still more devoted to the ideal. There is no greater error, when one regards the United States, or when one deals with it, than to suppose that its citizens are guided solely by material interests. . . . Americans . . . are idealists also as regards the question of the inviolability of property on the sea; this is not merely a question of interest for us; it is a question of right, of justice, of progress for the whole world, and so my fellow countrymen feel it to be.” PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, CONFERENCE OF 1899, at 49 (James Brown Scott, ed., Oxford Univ. Press 1921).

144. What precedes this statement, in the Declaration’s penultimate paragraph, is a protest against the British crown for “waging war “through acts of “cruelty and perfidy scarcely paralleled in the most barbarous ages,” for deploying “foreign Mercenaries to complete the works of death,” and for inciting “the merciless Indian savages, whose known rule of warfare, is an undistinguished destruction of ages, sexes and conditions.” The Declaration takes for granted that “the Head of a civilized nation” has a moral obligation to enforce rules of restraint in the conduct of war—without denying that war is a relation between whole peoples. In fact, attacks on British commercial shipping were an important element of American strategy in the ensuing War of Independence. See Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MARIT. L. & COMM. 221 (2009) (experience during the War of Independence proved to Framers of Constitution that privateering had significant military value).

Fifty years later, James Kent published *Commentaries on American Law*, which quickly came to be regarded as the American counterpart to Blackstone's *Commentaries*.<sup>145</sup> Kent held firmly to the traditional view:

When war is duly declared, it is not merely a war between this and the adverse government in their political characters. Every man is, in judgment of law, a party to the acts of his own government and a war is between all the individuals of the one and all the individuals of which the other nation is composed.<sup>146</sup>

For Kent, this followed from the premise that, "Government is the representative of the will of all the people and acts for the whole society."<sup>147</sup>

The logical conclusion, in Kent's view, was that governments at war had a right to seize property belonging to the enemy, even private property, though they might by mutual agreement forego some of these claims.<sup>148</sup> Some fifty years later, a 12th edition appeared, with editorial notes by a young Oliver Wendell Holmes.<sup>149</sup> His annotation simply alerted the reader that the reasoning had applied to the American Civil War, though it was not a declared war between two internationally recognized states.<sup>150</sup>

The same doctrine was embraced by Henry Wheaton's *Elements of International Law*, which first appeared in 1836.<sup>151</sup> Like Kent's *Commentaries*, it was kept in print for the rest of the century.<sup>152</sup> Wheaton had been court reporter for the Supreme Court (his name appears on volumes of the U.S. Reports) and a later edition of his treatise quoted a warm endorsement of Wheaton's scholarship by Chief Justice John

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145. See, e.g., J.G. MARVIN, LEGAL BIBLIOGRAPHY 437–39 (T & J.W. Johnson, 1847) (quoting comparisons with Blackstone by English as well as American scholars). A 15th edition of Kent's *Commentaries* (in four volumes) was published between 1997 and 2002.

146. I JAMES KENT, COMMENTARIES ON AMERICAN LAW 55 (12th ed., Little, Brown, 1873; reprinted by Fred B. Rothman & Co., 1989).

147. *Id.*

148. *Id.* at 56–60.

149. See *id.* at vii–viii.

150. *Id.* at 55, n.1.

151. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (Philadelphia: Carey, Lea & Blanchard, 1836)

152. Only thirty years after the original publication, a new edition appeared in 1866, edited by Richard Henry Dana—already the eighth edition of the work. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (Boston: Little, Brown, 1866). Subsequent editions appeared in 1880 and 1916. The 1866 edition was reprinted by Oxford University Press in 1836, in its series (sponsored by the Carnegie Institution), "Classics of International Law," putting Wheaton in company with Grotius, Pufendorf, Vattel and other European classics. The Oxford-Carnegie edition was reprinted by Hein & Co. in 1995. French and German editions of Wheaton's treatise appeared in his lifetime.



Marshall.<sup>153</sup> Wheaton was unflinching in his embrace of the traditional view:

All the members of the enemy state may lawfully be treated as enemies in a public war. . . . From the moment one State is at war with another, it has, on general principles, a right to seize on all the enemy's property, of whatsoever kind and wheresoever found. . . .<sup>154</sup>

Wheaton acknowledged that modern practice had “tended to soften the extreme severity of the operations of war by land” but still sanctioned—on the old principles—the “indiscriminate capture and confiscation” of the “private property of the enemy taken at sea. . . .”<sup>155</sup> The post-Civil War edition carried an extended footnote by the editor—Richard Henry Dana, who had prosecuted Union prize claims during the Civil War—<sup>156</sup> defending the practice of seizing enemy merchant ships and cargoes as a legitimate tactic of war, because it was less likely to cause extreme hardship to civilians than seizures on land.<sup>157</sup>

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153. For Wheaton's career and scholarly legacy, see OXFORD HANDBOOK, *supra* note 133, at 132–36. The sixth edition of WHEATON, *ELEMENTS OF INTERNATIONAL LAW* (Little, Brown, 1855) includes a long introductory essay by William Beach Lawrence (who provided updating annotations for that edition), which excerpts endorsements of Wheaton's scholarship by John Marshall at lv.

154. *ELEMENTS*, *supra* note 152, at 362–63.

155. *Id.* at 378.

156. Dana is better known for his sailing memoir, *TWO YEARS BEFORE THE MAST* (1840), but as a U.S. Attorney during the Civil War, he took part in arguments before the Supreme Court in what are now known as *The Prize Cases*, 67 U.S. 635 (1863).

157. “War is the exercise of force by bodies politic for the purpose of coercion. Modern civilization has recognized certain modes of coercion as justifiable. This exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. . . . The humanity or policy of modern times have abstained from the taking of private property not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property from things almost sacred, to those purely merchantable; the difficulty of discriminating among the varieties; the need of much of it to support the life of the non-combatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among non-combatants. But on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are purely merchandize. Merchandise sent to sea is sent voluntarily, embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field; and it is the usual object of revenue to the

Just on the eve of the Civil War, Henry Halleck's *International Law* followed the same doctrine: war "makes all subjects of the one state the legal enemies of each and every subject of the other" and "this results from political ties and not from personal feelings and personal antipathies; their status is that of legal hostility."<sup>158</sup> Halleck's treatise was so congenial to English views that second and third editions were prepared by a London publisher, with annotations by a British barrister.<sup>159</sup> The editor found nothing to complain of in Halleck's treatment of war—a main theme of the treatise. Halleck had taught at West Point and returned to active service as a senior commander of Union armies in the West at the outset of the Civil War.<sup>160</sup>

It was Halleck who commissioned Professor Lieber to draw up the famous code, issued to the army in the spring of 1863 as General Order 100, "Instructions to the Army in the Field."<sup>161</sup> The code offered a number of admonitions regarding necessary restraints in war by nations that are not "uncivilized."<sup>162</sup> It explained that "protection of the inoffensive citizen of the hostile country is the rule"<sup>163</sup> and specifically denounced "wanton violence" and "all robbery, pillage or sacking, even after taking a place by main force."<sup>164</sup> It also admonished that "private property, unless forfeited by crimes or offenses of the owner, can be seized only by way of military necessity," but then defined "necessity" as anything conducive to the "support or other benefit of the army or of the United States."<sup>165</sup>

At the most basic level, the code embraced the traditional view that under conditions of "civilized existence . . . men live in political, continuous

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power under whose government the owner resides." HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 378–79, n.171 (Richard Henry Dana ed., 1866).

158. HENRY WAGER HALLECK, *INTERNATIONAL LAW* 411 (Bancroft, 1861).

159. See HENRY WAGER HALLECK, *INTERNATIONAL LAW* (Sir Sherston Baker, ed., K. Paul, 3d ed. 1893).

160. For background on Halleck's career and his early relations with Francis Lieber, see JOHN FABIAN WITT, *LINCOLN'S CODE, THE LAWS OF WAR IN AMERICAN HISTORY 188–92* (Free Press 2012).

161. "Lieber Code," reprinted in *THE LAWS OF ARMED CONFLICT*, *supra* note 1, at 3–20. On the origins of the code, see Witt, *supra* note 160, at 226–47, acknowledging that "Abraham Lincoln took no role in commissioning the code" nor did he "participate in editing or revising the code" but he "approved the code because . . . it expressed a view of military necessity very close to that which Lincoln had been developing . . ." For background on Lieber's own career and scholarly influence, see *OXFORD HISTORY*, *supra* note 133, 1137–41.

162. Art. 24–25: Contrasting practice of "barbarous armies" and "uncivilized people" with "modern regular wars of the Europeans and their descendants in other portions of the globe," where the latter provide "protection to the inoffensive citizen of the hostile country" as "the rule."

163. LIEBER, *supra* note 161, art. 25.

164. *Id.* art. 44.

165. *Id.* art. 38.

societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together in peace and war.<sup>166</sup> The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war.”<sup>167</sup>

So far, from exalting protection of “civilians”—a term it does not ever use—Lieber’s Code noted that the “more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”<sup>168</sup> The penultimate provision advises the military commander to “throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to stricter police than the noncombatant enemies have to suffer in regular war” and for this purpose “he may expel, transfer, imprison or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.”<sup>169</sup>

Barely a year after the issuance of this code, General William T. Sherman marched his troops from Atlanta to the sea. They seized food as they marched, deliberately devastated farms and equipment, tore up railroad tracks in a zone of destruction fifty miles wide and three hundred miles long.<sup>170</sup> Sherman’s March was denounced as a descent to “barbarity”—in the South.<sup>171</sup> Almost at the same time, General Philip Sheridan devastated farms in the Shenandoah Valley of Virginia.<sup>172</sup> In both cases, commanders seem to have cautioned against direct attacks on civilian persons, even while wrecking property.<sup>173</sup>

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166. *Id.* art. 45.

167. *Id.* arts. 20–21.

168. *Id.* art. 29.

169. *Id.* art. 156.

170. MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 63, at 808–11.

171. MARK GRIMSLEY, *THE HARD HAND OF WAR, UNION MILITARY POLICY TOWARD SOUTHERN CIVILIANS 1861–1865*, at 211 (Cambridge Univ. Press 1995).

172. *See* MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 63, at 778–79.

173. Modern historians acknowledge that devastation of infrastructure was conducted with a good deal of continuing restraint. *See, e.g.*, GRIMSLEY, *supra* note 171, at 222–25; BEST, *supra* note 20, at 211 (“Upon the whole, a proper distinction was preserved between property and persons; which, after all, from the viewpoint of the law of war, was the main thing.”); J.H. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 431 (2d ed. 1966). Major northern newspapers saluted humanitarian restraint: in its August 8, 1864 edition, *The New York Times* praised a Union commander leading a raid in northern Alabama for attacking “a depot of rebel stores and a factory. These were very properly burnt, but the adjacent houses of the citizens were saved by the personal exertions of the General and his soldiers—the latter putting their own wet

In post-war memoirs, both Sherman himself and General Grant (in overall command of all armies by the time of Sherman's Georgia campaign) insisted that instances of rape and murder were rare and often the work of local bandits rather than Union soldiers.<sup>174</sup> Grant and Sherman did not at all deny, however, that these operations had aimed at destroying private property. Sherman included in his memoir a report he sent to Halleck, acknowledging that the purpose of his march was not solely to rob the enemy of resources:

I attach much more importance to these deep incursions into the enemy's country, because the purpose of this war differs from European wars in this particular: we are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies. I know that this recent movement of mine has had a wonderful effect in this respect. Thousands who had been deceived by their lying newspapers to believe that we are being whipped all the time now realize the truth, and have no appetite for a repetition of the same experience. To be sure, Jeff. Davis has his people under pretty good discipline, but I think faith in him is much shaken in Georgia, and before we have done with her, South Carolina will not be quite so tempestuous.<sup>175</sup>

General Halleck, the former treatise writer who had commissioned Lieber's code, congratulated Sherman on his performance in Georgia and suggested that still more destruction would not be condemned, as Sherman's troops marched into South Carolina.<sup>176</sup> Sheridan also acknowledged the political implications of his devastation in the

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blankets on the roofs." The general, as the *Times* noted, was L.H. Rousseau—though it made nothing of the name, still not one for Americans to reckon with, when thinking about war. GRIMSLEY, *supra* note 171, at 181.

174. MEMOIRS OF W.T. SHERMAN 659 (2d. ed., 1885) (reprinted by Library of America, 1990) ("No doubt, many acts of pillage, robbery and violence were committed by [the army's] parties of foragers, usually called 'bummers;' for I have since heard of jewelry taken from women, and the plunder of articles that never reached the commissary; but these acts were exceptional and incidental."). PERSONAL MEMOIRS OF U.S. GRANT 646 (1885) (reprinted by Library of America, 1990) ("Georgia . . . even liberated the State convicts under promise from them that they would serve in the army. I have but little doubt that the worst acts that were attributed to Sherman's army were committed by these convicts and by other Southern people . . . who took advantage of their country being invaded to commit crime.").

175. MEMOIRS OF W.T. SHERMAN, *supra* note 174, at 705 (letter from Sherman to Halleck dated Dec. 24, 1864).

176. *Id.* at 700 (letter from Halleck to Sherman dated Dec. 18, 1864) ("Should you capture Charleston, I hope that by some accident the place may be destroyed, and if a little salt should be sown upon its site, it may prevent the growth of future crops of nullification and secession."). Sherman acknowledged the suggestion: "I will bear in mind your hint as to Charleston and do not think 'salt' will be necessary. . . The truth is, the whole army is burning with an insatiable desire to wreak vengeance upon South Carolina. I almost tremble for her fate, but feel that she deserves all that seems in store for her." *Id.* at 705.

Shenandoah Valley: “This may not be war but rather statesmanship.”<sup>177</sup> Lieber expressed private misgivings about looting and vandalism by Sherman’s army, but praised Sherman’s overall strategy.<sup>178</sup> The aim was not to seize and hold territory, but to impose a cost on Confederate populations away from the main theaters of conflict and to deny resources from these regions to the main armies.<sup>179</sup>

The Lieber Code explicitly sanctioned harsh tactics, using civilian suffering as leverage on the enemy: “It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.”<sup>180</sup> Civilians could, in effect, be held hostage: “When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful though an extreme measure, to drive them back, so as to hasten on the surrender.”<sup>181</sup> When planning to “bombard a place” with non-military residents—threatening lives as well as property—commanders were advised to “inform the enemy of their intention . . . so that noncombatants, and especially the women and children, may be removed before the bombardment commences.”<sup>182</sup>

The same provision, however, immediately acknowledged that “it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.”<sup>183</sup> The Code then follows this local, tactical rule with the very general, abstract reflection—as if it were a justifying principle—that the “constituents” of “states or nations” must “bear, enjoy, suffer, advance and retrograde together” and the “citizen . . . of a hostile

177. 1 PERSONAL MEMOIRS OF P.H. SHERIDAN 267 (1888) (“Death is popularly considered the maximum punishment in war, but it is not; reduction to poverty brings prayers for peace more surely and more quickly than does the destruction of human life, as the selfishness of man has demonstrated in more than one great conflict.”).

178. Witt, *supra* note 160, at 280 (summarizing Lieber’s letters discussing Sherman’s March: “Here at last was a Union commander who seemed to grasp the nature of Lieber’s fierce thinking about war.”).

179. On the general strategy behind such “raids,” see GRIMSLEY, *supra* note 171, at 162–70 (comparing Sherman’s March in Georgia to destructive raids in the Shenandoah Valley and elsewhere, designed to deprive the enemy of agricultural resources and transportation links).

180. LIEBER, *supra* note 161, art. 17.

181. *Id.* art. 18.

182. *Id.*

183. *Id.* art. 19.

country is thus an enemy . . . and as such is subjected to the hardships of war.”<sup>184</sup>

President Lincoln’s Emancipation Proclamation was also justified as a war measure.<sup>185</sup> It was, by the law of that time, a confiscation of private property, by far the largest in American history.<sup>186</sup> If confiscation were a punishment for supporting the rebellion as congressional confiscation acts indicated,<sup>187</sup> why shouldn’t loyal slave owners have their property returned, even if they happened to live in states that had voted to secede? Former Supreme Court Justice Benjamin Curtis of New Hampshire argued that point with much earnestness in an 1863 pamphlet.<sup>188</sup>

Depicting the liberation of slaves as a war measure made it much easier to defend. In the first year of the war, Union commander Benjamin Butler, holding a Union base at Hampton, Virginia, had to decide what to do with runaway slaves. He described them as “contraband,” which could lawfully be withheld from owners on the same theory that military supplies would be blocked from delivery to enemy territory in wartime.<sup>189</sup> President Lincoln, himself, emphasized that emancipation was a military measure, depriving the rebel states of manpower.<sup>190</sup> He implicitly conceded that it might involve physical danger, cautioning, in the final version of

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184. *Id.* arts. 20, 21.

185. BURRUS M. CARNAHAN, *ACT OF JUSTICE, LINCOLN’S EMANCIPATION PROCLAMATION AND THE LAW OF WAR* 117–33 (Univ. Press of Kentucky 2007) (“The Proclamation as a Weapon of War”). For further background, *see* STEPHEN NEFF, *JUSTICE IN BLUE AND GRAY* 139–42 (Harvard Univ. Press 2010).

186. The Lieber Code, *supra* note 161, confidently asserted that when slaves escaped to territory held by the Union army, they could never be returned to slavery since that “would amount to enslaving a free person and neither the United States nor any officer under their authority can enslave any human being.” (art. 43) Others found the issue much less clear, perhaps recalling pre-war federal legislation requiring federal marshals to seize and return escaped slaves to their masters. NEFF, *supra* note 185.

187. CARNAHAN, *supra* note 185, at 83–92 (on congressional “confiscation” legislation).

188. *See* BENJAMIN CURTIS, “Executive Power” in *UNION PAMPHLETS OF THE CIVIL WAR* (Frank Freidel ed., 1967) (“This penalty [of confiscation of slaves] . . . is not to be inflicted [exclusively] on those persons who have been guilty of treason . . . . It is not, therefore, as a punishment of guilty persons, that the commander-in-chief decrees the freedom of slaves. It is upon the slaves of loyal persons, or of those who, from their tender years or other disability, cannot be either disloyal or otherwise, that the proclamation is to operate if at all . . . so far as I know, *no source of these powers other than the authority of the commander-in-chief in time of war, has ever been suggested.*”) (emphasis added).

189. NEFF, *supra* note 185, at 131–33.

190. CARNAHAN, *supra* note 185, at 134–38 (citing Lincoln’s reply to a critic, “Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemies? . . . Civilized belligerents do all in their power to help themselves or hurt the enemy, except a few things regarded as barbarous or cruel. Among the exceptions are the massacre of vanquished foes, and non-combatants, male and female.”).

the Proclamation that affected slaves should “refrain from all violence, except in necessary self-defense.”<sup>191</sup>

Lincoln had started the war by repudiating calls to abolish slavery. He personally countermanded actions by local commanders to liberate slaves in specific theaters.<sup>192</sup> Only after a year and a half of inconclusive battles did Lincoln agree to deploy this measure of “hard war.”<sup>193</sup> Even then, Lincoln resisted calls to extend emancipation to states not in rebellion or areas that had already submitted to Union control before January 1, 1863, when Emancipation went into effect.<sup>194</sup> A wider emancipation, in his view, could not be justified as an exercise of unilateral presidential war powers and so could only be accomplished by a constitutional amendment.<sup>195</sup> Still, it was Lincoln’s exercise of that war power against regions still in rebellion that made the Thirteenth Amendment politically feasible by war’s end.<sup>196</sup>

In some ways, the Lincoln administration had prepared the ground for such measures in the first weeks of the war. At the outset, it imposed a naval blockade on southern ports and announced that it would be conducted in accord with international standards—effectively designating the conflict with the Confederacy as something akin to “war.”<sup>197</sup> One object of the blockade was to prevent rebel states from importing military supplies (designated by writers on the law of nations as “absolute contraband”).<sup>198</sup> Another aim, quite openly avowed, was to prevent the

191. Final Emancipation Proclamation, Jan. 1, 1863, in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859-1865, at 425 (1989) (“And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence . . .”). There was no counterpart to this injunction in the Preliminary Emancipation Proclamation, issued Sept. 22, 1862. *Id.* at 368.

192. CARNAHAN, *supra* note 185, at 71–78 (suggesting Lincoln made a deliberate display of hesitation in order to give credibility to the later claim of military necessity); NEFF, *supra* note 185, at 128–39 (emphasizing genuine doubts about legal authority to liberate slaves by executive order).

193. GRIMSLEY, *supra* note 171, at 121–41 (associating Emancipation with abandonment of earlier policy aimed at conciliation of the South).

194. NEFF, *supra* note 185, at 140.

195. For background on legal debates, *see generally* NEFF, *supra* note 185, at 128–49; CARNAHAN, *supra* note 185, at 137–38.

196. NEFF, *supra* note 185, at 144–49 (tracing legal uncertainties about effects of Emancipation even after adoption of 13th Amendment). CARNAHAN, *supra* note 185, at 139–42 (defending Emancipation Proclamation as bridge to “Radical Recognition of Freedom”).

197. NEFF, *supra* note 185, at 32–34.

198. *Id.*

South from exporting cotton and other commodities to foreign markets, so as to starve it of revenue.<sup>199</sup>

The blockade was supposed to close all the ports of all the states in rebellion.<sup>200</sup> The accepted view, at least among European governments, was that a blockade could only close an enemy port by stationing enough warships outside to stop any other ships from entering or leaving.<sup>201</sup> This was not a traditional blockade. The Confederate coastline stretched some 3,500 miles from the Potomac to the Rio Grande, with 189 harbors where cargo could be landed.<sup>202</sup> When the Union declared its blockade, it had only twelve warships on hand to enforce it.<sup>203</sup> Merchant ships, particularly smaller and faster ones, always had good odds of “running” the blockade; slipping in and out of southern ports before they could be detected or stopped by the Union navy.<sup>204</sup> Not until the last year of the war did the Union Navy catch even a bare majority of blockade running ships.<sup>205</sup>

Even sporadic Union naval patrols could hope to deter foreign ships from running the risks of interception, if such interception carried a high price. From the outset, therefore, ships caught trying to run the blockade were not merely diverted or detained, but claimed as prize of war,<sup>206</sup> with the government taking half the proceeds and the naval crews who made the seizures taking the rest, as incentive for vigilance.<sup>207</sup> Despite protests from foreign governments,<sup>208</sup> commerce with southern ports dwindled.

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199. MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 63, at 383–87 (describing initial Confederate attempt to coerce foreign intervention by embargoing shipments of cotton, thus tightening Union grip on Confederate exports).

200. “Proclamation of Blockade,” 19 April 1861, *reprinted in* 2 LINCOLN 233.

201. According to the 1856 Declaration of Paris, issued by the powers assembled to conclude peace after the Crimean War, “Blockades, to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.” Declaration Respecting Maritime Law, April 16, 1856 [hereinafter Declaration of Paris]. On French objections to the legality of the Union blockade, given the disproportion between Union naval strength and the extent of the Confederate coast, *see* LEMNITZER, *supra* note 87, at 117–21.

202. JAMES M. MCPHERSON, *WAR ON THE WATERS, THE UNION AND CONFEDERATE NAVIES, 1861-1865*, at 25 (2012).

203. *Id.*

204. MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 63, at 380 (reporting estimates that nine out of ten blockade runners evaded Union patrols in 1861 and perhaps five of six over the course of the war).

205. *Id.*

206. NEFF, *supra* note 185, at 187–90.

207. MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 63, at 378.

208. NEFF, *supra* note 185, at 199 (protests from France and Prussia); LEMNITZER, *supra* note 87, at 117–21, 139–43 (British acquiescence).



Exports of cotton—the South’s great source of revenue—shrank to less than ten per cent of pre-war levels.<sup>209</sup>

In the North, the main controversy was not whether this approach was consistent with international law, but whether international law actually applied, given that the Union did not recognize the Confederacy as an independent state and was fighting to prevent it from becoming so.<sup>210</sup> When challenges to the seizure of naval prizes came before the Supreme Court in 1863, the majority affirmed the seizures as consistent with the law of war:

The right of one belligerent . . . to cripple [the enemy’s] resources by the seizure or destruction of his property is a necessary result of a state of war. Money and war, the products of agriculture and commerce, are said to be the sinews of war and are as necessary in its conduct as numbers and physical force. Hence it is that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy by capturing his property on the high seas.<sup>211</sup>

The United States had not always relied on prevailing international standards. In 1785, Benjamin Franklin negotiated a treaty with emissaries of Frederick the Great, by which both countries agreed to forswear privateering attacks on each other’s commerce in time of war.<sup>212</sup> More

209. MCPHERSON, *WAR ON WATERS*, *supra* note 202, at 225. Somewhere between half a million and a million bales of cotton were exported from Confederate ports in the last three years of the war, compared with ten million in the last three years before the war. *Id.* Because blockade runners had to be small and quick and insurance rates on bulky equipment skyrocketed, the South could still import smaller items, like rifles and gunpowder, but not bulkier products, like railroad equipment and machinery—at a time when keeping rails lines operating was especially important, as the Union blockade interfered so much with coastal shipping; McPherson concludes from recent economic studies that “without a blockade, the Confederacy might well have prevailed” in the war. *Id.* The Navy not only interrupted normal commerce but tried to stop Confederate efforts to replace imports: when it could not import salt from abroad—a crucial commodity for preserving meat and tanning hides—the Confederates tried to recover salt from seawater, but Union gunboats “raided hundreds of saltworks” which “helped drive the price of salt in the Confederacy to unimaginable heights and exacerbated the inflation that almost wrecked the Confederate economy.” *Id.* at 183.

210. NEFF, *supra* note 185, at 32–34.

211. Prize Cases, 67 U.S. at 671. Even the four dissenters accepted that seizures of ships and cargoes would be proper, under a lawful state of war; they objected to seizures undertaken solely on the authority of presidential proclamation, before Congress had formally authorized blockade measures.

212. Treaty of Amity and Commerce, Sept. 10, 1785, Art. XX, WILLIAM MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909*, at 1483 (1910). On Prussia’s motives, *see* Letter from Baron Thulemeier to the Commissioners (May 3, 1785), *in* 2 *DIPLOMATIC CORRESPONDENCE OF THE UNITED*

than a century later, a prominent European commentator saluted this treaty as the work of “a philosopher king and a prince among philosophers.”<sup>213</sup> At least the spirit of Franklin’s treaty continued to be embraced in America. Only a few decades after Franklin’s negotiations with King Frederick, President James Monroe urged a general convention against privateering as a measure, which the “friends of humanity” would recognize as an “essential amelioration to the condition of the human race.”<sup>214</sup>

The United States was not prepared to forego privateering, however, so long as foreign navies retained the right to raid merchant shipping on the high seas. Two years after the treaty with Prussia, the framers of the new Constitution included the power to issue “letters of marque and reprisal”—authorizing private attacks on enemy commerce—among the powers of the new Congress.<sup>215</sup> Within the first decade under the new Constitution, Congress did exercise this power, authorizing letters of marque to attack French commerce in the ‘quasi war’ of the late 1790s.<sup>216</sup> The United States then unleashed privateering attacks on British commerce in the war of 1812.<sup>217</sup> In the next decade, American negotiators secured a new treaty with Prussia that dropped all mention of repudiating privateering.<sup>218</sup>

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STATES FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE TO THE ADOPTION OF THE CONSTITUTION 304 (1833). The foreign minister for Frederick the Great acknowledged that this was an easy concession for Prussia: The king “flatters himself that the United States . . . will perceive the desire of his Majesty to give them proofs of friendship, inasmuch as he does not equip cruising vessels, and that consequently his subjects are not enabled to make prizes at sea.” *Id.*

213. Statement of the Russian delegate, Prof. Fyodor Martens (while presiding at the plenary session), Second Hague Peace Conference, July 17, 1907, 3 PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, CONFERENCE OF 1907, at 823 (James Brown Scott, ed., 1921). Martens seems to have intended the characterization as a caution against giving that treaty too much weight as historical precedent: these philosophical negotiators, he went on to remark, “had few illusions concerning the practical effect of the agreement; for they both knew that war between their countries was very unlikely.” *Id.*

214. James Monroe, Seventh Annual Message to Congress (Dec. 2, 1823), 2 MESSAGES AND PAPERS OF THE PRESIDENTS 779 (JAMES RICHARDSON, ed., 1897).

215. U.S. CONST. art. I, § 8, cl. 11.

216. ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDERCLARED WAR WITH FRANCE 124–30 (Scribner 1966).

217. NATHAN MILLER, THE U.S. NAVY, A HISTORY 71–72 (Naval Institute Press, 3d. ed., 1997).

218. Treaty of Commerce and Navigation, U.S.-Prussia, art. XIII, May 1, 1828, Malloy, *Treaties*, 1496. This new treaty was negotiated in Washington under the watchful eye of President John Quincy Adams, who came to office with more diplomatic experience than any of his predecessors (as Secretary of State, he had drafted the Monroe Doctrine and negotiated the acquisition of Florida and the extension of American territorial claims to the Pacific Northwest). *Id.* The terms of this treaty (extended to the entire German empire) remained in effect into the Twentieth Century. *Id.* Its one departure from standard trade treaties was its stipulation (Art. XIII) that in wartime, ships of each state would not be

At the peace conference following the Crimean war, European powers issued the Declaration of Paris, which proclaimed privateering unlawful.<sup>219</sup> The United States declined to subscribe to the declaration, insisting that so long as attacks on commerce were still permitted to regular navies, “the dominion of the seas will be surrendered to those powers which adopt the policy and have the means of keeping up large navies.”<sup>220</sup>

The Civil War put the whole dispute in a new light. The Confederate government announced that it would authorize naval raids on commercial shipping of the Union, as a tactic of war.<sup>221</sup> A handful of Confederate raiders did manage to sink several dozen American merchant ships in waters off the coasts of Britain and France.<sup>222</sup> The Lincoln administration belatedly notified European powers that the United States would endorse the ban on privateering in the Declaration of Paris. The administration also announced its readiness to treat Confederate privateers as pirates, arguing that if privateering was no longer a lawful war measure, practitioners were guilty of sheer piracy.<sup>223</sup> Since piracy was punishable by death,<sup>224</sup> it was a quite serious threat. The Confederate government then announced its readiness to retaliate by executing Union prisoners in its custody.<sup>225</sup> Efforts to impose criminal sentences on captured Confederate sea raiders were quietly abandoned.<sup>226</sup>

What was not abandoned was the ever-tightening blockade of southern ports. The United States thus insisted that it was wrong to attack merchant

seized by the other’s navy while enforcing a blockade—unless the blockade breaker ignored an initial warning to go back.

219. For the diplomatic and political background of the provision on privateering, see LEMNITZER, *supra* note 87, at 57–95 (stressing European eagerness to secure American commitment to the privateering ban, to the extent that some described it as a “moral league of nations against the U.S.”).

220. Letter of Mr. Marcy, Secretary of State to Mr. Mason, (Jul. 29, 1856), *reprinted in*, DIGEST OF INTERNATIONAL LAW OF THE UNITED STATES, § 385, 488 (Francis Wharton, ed., 2d ed. 1887).

221. MILLER, *supra* note 217, 133.

222. *Id.* at 134–37.

223. Secretary of State Seward argued that if the United States subscribed to the Declaration of Paris, European powers would be obligated to treat Confederate privateers as pirates. When Britain not only rejected this view but allowed Confederate agents to secure a raiding ship from British ship-builders, the Lincoln administration gave serious thought to unleashing Union privateers on British commerce. LEMNITZER, *supra* note 87, at 134–38.

224. NEFF, *supra* note 185, at 20.

225. *Id.*

226. *Id.* at 23–24.

shipping on the other side of the world, certainly wrong when the attackers did not exercise the force of a regular navy. At the same time, however, the United States asserted the right to blockade the enemy's own ports and coasts and enforce this blockade by seizing blockade runners and their cargoes as prize of war.<sup>227</sup> The distinction was even more tenuous because in the course of the Civil War, the United States claimed the right not only to seize ships trying to make for Confederate ports, but also ships bound for nearby ports (as in Mexico) from which goods might be taken overland to the Confederacy.<sup>228</sup> The United States also claimed the right to interfere with shipping at a greater distance, if cargoes might be "trans-shipped" to blockade runners from neutral ports in the Caribbean.<sup>229</sup>

These distinctions might seem somewhat legalistic or dubious, but the United States continued to pursue them in later years. In 1898, President McKinley proposed to initiate negotiations for an international treaty to outlaw wartime capture of private property at sea.<sup>230</sup> At the very time he made that proposal, the United States Navy was seizing commercial ships as prize of war in the course of enforcing a close blockade of Cuba in the war with Spain.<sup>231</sup>

At the first Hague Peace conference the following year, the United States urged the delegates to consider a convention "extending to strictly private property at sea the immunity from destruction or capture by belligerent powers which such property enjoys on land."<sup>232</sup> The American proposal did not, however, seek to ban blockades. It did not even oppose seizure of contraband—that is, goods that could be seized in wartime

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227. *Id.* at 189.

228. *Id.* at 197–99.

229. *Id.* at 199–200. The aggressiveness of American naval measures provoked protests from the French and Prussian governments, but British criticism was more muted, as specialists in prize law realized that precedents established by the U.S. Navy might prove quite advantageous to Britain's navy in the next war. *Id.* When the United States protested the reach of British blockade measures in the first years of the First World War, British authorities duly cited these precedents in response. MCPHERSON, *WAR ON WATERS*, *supra* note 202, at 21. It seems to have been British prompting in the first place which persuaded the Lincoln administration to declare an international blockade of the entire Confederate coast rather than closing of specific ports (implying they were otherwise under Confederate control). *Id.*

230. William McKinley, Second Annual Message to Congress (Dec. 5, 1898), *reprinted in* 15 MESSAGES AND PAPERS, *supra* note 214, at 113–14.

231. See *Pacquete Habana*, 175 U.S. 677 (1900) (made famous, at least to law students, from the subsequent prize proceedings over the commercial fishing boat which the Supreme Court ordered returned to owners—not because it was civilian but because, as the Court concluded, there was a special rule recognized in international law, exempting local fishing boats from blockade measures.). For background on U.S. proposals in that era, see JOHN BASSETT MOORE, *THE PRINCIPLES OF AMERICAN DIPLOMACY* 61–68 (HARPER & BROS., 1918).

232. *Id.* at 62.

because consigned to enemy ports and likely to be of direct benefit to the enemy's war efforts.<sup>233</sup>

The United States also pointedly rejected the doctrine urged by European commentators, that attacks on commerce were inherently contrary to the humanitarian principles of war because aimed at private property. At the first Hague Peace Conference in 1899, the chief American delegate, Andrew Dickson White, did advocate a ban on seizing civilian commerce on the seas.<sup>234</sup> He insisted that previous advocates had hurt the case for such a measure, by tying it to untenable abstract doctrines.<sup>235</sup> History had proven, he said, that such seizures of enemy shipping did not have a decisive effect on the outcome of war, though they could impose severe hardship on particular ships or shippers.<sup>236</sup> White was talking, however, about attacks on American merchant ships by Confederate raiders—not about the Union blockade. He described “the maintenance of a blockade” as the “only effective measure” for winning a war “by the action of a navy.”<sup>237</sup>

By recognized rules of naval war at the time—and by Union practice in the Civil War—“blockade” enforcement also allowed seizure of ships on the high seas, if they were carrying “contraband” goods to the enemy. What goods could be treated as “contraband”? White specifically disclaimed any interest in having the conference decide whether “coal, breadstuffs, also rice” could be designated as “contraband of war.”<sup>238</sup>

The pattern was confirmed at the Second Hague Conference in 1907. The new leader of the American delegation, Rufus Choate, gave a long and learned speech in favor of outlawing attacks on enemy commerce on the seas—but with the caveat that this prohibition would not apply to

233. *Id.* at 62; *see also* CALVIN DEARMOND DAVIS, *THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE* 127–36 (CORNELL PRESS 1962) (behind the scenes, the naval expert in the U.S. delegation, Captain Alfred Thayer Mahan—already famous as a theorist of “sea power”—actually opposed limits on capture of private property at sea, which seems to have made White—a former history professor and diplomat—more cautious in pressing for wide-ranging constraints on naval action.)

234. Speech of A.D. White at Plenary Conference, Fifth Meeting (July 5, 1899), *reprinted in* PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, TRANSLATIONS OF THE OFFICIAL TEXTS, THE CONFERENCE OF 1899, at 48 (James Brown Scott, ed., Oxford Press 1920).

235. *Id.* (“[M]ore harm than good has been done by some of the arguments which have likened private property at sea to private property on the land in time of war.”)

236. *Id.* White insisted that “all the world knows that this use of privateers [by Confederates in the Civil War] had not the slightest effect in terminating or even shortening the war”—something he could not have said about the Union blockade.

237. *Id.*

238. *Id.*

blockade measures.<sup>239</sup> When the American proposal encountered opposition from Britain and other leading naval powers, Brazil proposed a simpler expedient: amending the provision in the Hague rules on land warfare which prohibited destruction or seizure of private property, so it would apply equally to such acts on the seas as on land.<sup>240</sup> On this proposal, the United States joined Britain, France, Russia and others in opposition—though Germany, Austria-Hungary, Italy and a majority of others supported it.<sup>241</sup> The U.S. delegation did vote for a Belgian proposal that would have allowed merchant ships to be seized on condition that they be returned at the end of hostilities.<sup>242</sup> This compromise proposal—successfully opposed by Britain and other naval powers—could gain American support, because it expressly exempted from its coverage those ships seized “by virtue of the rules concerning blockade or contraband of war.”<sup>243</sup>

The Second Peace Conference made little progress in resolving the main disputes about limits on naval warfare. A convention on naval seizures imposed modest restraints to protect mail delivery and the crews of merchant ships.<sup>244</sup> It was quickly ratified by most participating states. There was much more resistance to a proposed convention that would have established an international prize court to judge the legality of seizures of neutral ships or cargoes.<sup>245</sup> A proposed Declaration of London,

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239. III PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, TRANSLATIONS OF OFFICIAL TEXTS, CONFERENCE OF 1907, at 752–67 (James Brown Scott, ed., Oxford Press 1921) (reproduced in small print on fifteen large pages) (Second Meeting of Fourth Commission, June 28, 1907). By abolishing raiding of enemy commerce on the high seas, Choate argued, “fleets will be left to their proper duty of maintaining blockades.” *Id.* at 763. But as a British delegate later warned, the “abolition of the right of capture necessarily involves the abolition of commercial blockade. For the object of both measures is to hamper the commercial activities of the enemy and to deprive him, so far as possible, of the supplies which are indispensable to this economic life.” *Id.* at 822 (Fourth Commission, July 17). Choate had been a successful trial attorney before entering the U.S. Senate as Daniel Webster’s successor. Mark Twain said Choate’s head “was full of history and some of it was true, too.” A leading history of the conference notes that if he had heard this speech, Twain “would have been convinced he had told the truth about Choate.” CALVIN DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE 228 (Duke Univ. Press 1975).

240. *Id.* at 828 (Seventh Meeting of Fourth Commission, July 19, 1907).

241. *Id.* (13 delegations supported the Brazilian proposal, while 12 joined the United States in opposition).

242. *Id.* at 829.

243. *Id.* (text of Belgian proposal at 1125).

244. Hague Convention (XI) Relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, signed 18 Oct. 1907, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1087–91.

245. Hague Convention (XII) Relative to the Creation of An International Prize Court, signed 18 Oct. 1907, in THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1093–1104.

negotiated in 1909, sought to clarify limits that the international court would apply.<sup>246</sup> The United States Senate insisted that it would violate the U.S. Constitution to allow appeals from the Supreme Court to an international tribunal.<sup>247</sup> Even without such constitutional arguments to fall back on, critics in Britain's House of Lords questioned the logic of submitting disputes to a tribunal in which small states with no naval power could send judges to vote on issues of special concern to great naval powers.<sup>248</sup> Britain's House of Lords ultimately rejected the Declaration.<sup>249</sup> Given the objections of major naval powers, both efforts to clarify new standards remained in limbo.

In the ensuing war, most earlier notions of restraint were repudiated by the belligerent powers. By 1917, Britain had extended its wartime blockade of Germany to include almost all food and almost all other civilian goods.<sup>250</sup> To ensure that the blockade was effective, Britain extended it to neutral ports in Europe to ensure that goods destined for Germany would not be unloaded elsewhere and shipped by land to Germany.<sup>251</sup> Controls were so comprehensive that neutrals agreed to accept British supervision of cargoes and proposed routes at ports of embarkation (notably in the Western Hemisphere) so that ships would not be subject to inspection by British naval patrols on the high seas.<sup>252</sup>

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246. Declaration Concerning Laws of Naval War, signed at London, 26 Feb. 1909, *reprinted* in THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1113–22. For background on the London conference and its aftermath, *see* DAVIS, SECOND HAGUE CONFERENCE, *supra* note 239, at 303–26.

247. *Id.*

248. Statement of the Earl of Selborne, DEBATES IN THE BRITISH PARLIAMENT, 1911-1912, ON THE DECLARATION OF LONDON AND THE NAVAL PRIZE BILL 634 (1919) (“The great question involved for us in each of these [disputes about the meaning of the Declaration], the principle involved, might be settled contrary to what we believe the true interpretation of international law in this prize court by the casting vote, in the first year, of Colombia or Bolivia, in the second year of Uruguay or Costa Rica, and in the third year of Venezuela or Haiti. That is not a joke but a perfectly true statement of what is possible under the bill.”).

249. *Id.*

250. For a summary of the gradual tightening of Allied blockade measures, *see* DAVID STEVENSON, CATAclysm: THE FIRST WORLD WAR AS POLITICAL TRAGEDY 200–03 (Basic 2004). For an extremely detailed history, *see* A.C. BELL, A HISTORY OF THE BLOCKADE OF GERMANY 221–46 (1961).

251. *Id.*

252. For detailed account of the permit system, *see generally* HUGH RITCHIE, THE “NAVICERT” SYSTEM DURING THE WORLD WAR (Carnegie, 1938).

The United States protested some of the Allied blockade measures in the early years of the war.<sup>253</sup> After the United States entered the war in April 1917, the U.S. Navy was assigned to enforce those measures. Woodrow Wilson insisted on closing loopholes still left under the accumulated patchwork of British shipping restrictions, blocking all exports from the United States to Germany.<sup>254</sup>

German passenger ships, from the civilian-owned Hamburg-America line, had taken refuge in U.S. ports during the period of American neutrality. When the United States entered the war, the U.S. government seized those ships.<sup>255</sup> Nearly half of the American troops brought to France in 1918 were transported on those ships.<sup>256</sup> The United States did not return them at war's end. Nor did the United States ever provide compensation to the original German owners.<sup>257</sup>

## VI. GERMANY'S SPECIAL WAY

As the preceding section shows, the United States, along with Britain, embraced a more hard-edged view of war than that advocated by German legal commentators in the Nineteenth Century. Yet, German military commanders, down to the First World War, deployed much more brutal methods in land warfare. It might seem, then, that all great powers simply adjusted their ideals to the hard challenges faced in actual war.

That is not, however, how Anglo-American commentators saw things at the time. Well before the First World War, English and American observers expressed uneasiness about the strident militarism of the new Germany.<sup>258</sup> Anglo-American legal commentators expressed particular

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253. See generally STEVENSON, *supra* note 250.

254. See C. PAUL VINCENT, *THE POLITICS OF HUNGER, THE ALLIED BLOCKADE OF GERMANY, 1915-1919* 48 (Ohio Univ. Press, 1985).

255. PAUL HALPERN, *A NAVAL HISTORY OF WORLD WAR I* 435 (Naval Institute Press 1994).

256. *Id.*

257. See 2 C.C. HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES*, §§ 621–22, at 237–41 (LITTLE, BROWN 1922). Hyde questioned whether wholesale confiscation of enemy private property was still consistent with international law in the Twentieth Century, but noted that Germany waived any claims for recovery in post-war peace treaties. *Id.* § 765, at 523–24.

258. See JEFF LIPKES, *REHEARSALS, THE GERMAN ARMY IN BELGIUM, AUGUST 1914*, at 563, 564 (Leuven Univ. Press 2007) (reviewing expressions of unease by English and American visitors before the world war at prevailing stridency, belligerence and hyper-nationalism in German culture, both at universities and in ordinary life). Such analyses received more prominence after the outbreak of the war. See, e.g., W.W. Willoughby, *The Prussian Theory of the State*, 12 AM. J. INT'L L. 251 (1918) (asserting that “the real and efficient cause of the war” for Britain and America was “German political ideals and standards of conduct” which “render impossible a comity of life and reciprocal friendliness and cooperation among the nations of the world.”).



concern about the implications of German writings on the law of war. In the midst of the First World War, a prominent legal commentator in England—who had translated Germany’s military manual into English—described the organizers of the German military as “intellectual savages” who “had studied the dress and deportment of polite society but all the while nurture dark atavisms and murderous impulses in the center of [their] brain.”<sup>259</sup>

Yet these later doctrines, as some commentators in the English-speaking world recognized, had roots in the more general theories of Bluntschli and his colleagues.<sup>260</sup> The Nineteenth Century debate about naval war tactics had echoes in later debates about permissible tactics in land warfare.<sup>261</sup> In these later debates, the Anglo-American commentators insisted that German doctrines had lost all touch with a common humanity.<sup>262</sup> Anglo-American commentators could urge restraints in land warfare not in spite of, but precisely because they rejected the German view that war is solely a relation between states.<sup>263</sup>

The political and moral atmosphere of Wilhelmine Germany reflected intellectual trends already quite evident in Bismarck’s time. Looking back, one can see the continuity even with Bluntschli’s work. Before he wrote his treatise on international law, Bluntschli established his reputation with a

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259. See JOHN HARTMAN MORGAN, *GERMAN ATROCITIES: AN OFFICIAL INVESTIGATION* 45–46 (DUTTON, 1916). Morgan (1876–1955) was neither a tabloid journalist, nor a crude jingoist, but a graduate of Balliol College, Oxford who had earned an advanced degree from the University of Berlin before the Great War. He wrote editorials for the *Liberal Manchester Guardian* and was a Liberal candidate for Parliament in 1910. *Id.* Trained as a lawyer, he served as military legal advisor at the Versailles Peace conference and in a variety of international legal advisory roles, culminating in an advisory role at the Nuremberg trials after World War II. Between the wars, he was professor of constitutional law at the University of London. For overview of Morgan’s career, see the entry in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (Oxford Press, 2004).

260. See *infra* notes 283–91 and accompanying text

261. *Id.* See also PIERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* (Chicago, 1908), criticizing doctrine associated with “Rousseau” as contradicted by “the practice of attacking maritime commerce” in war—and by “the rightfulness” of Sherman’s Georgia campaign in the Civil War (at 3, 4)—and then, immediately afterwards, criticizing German military doctrine “which would usurp the place of the laws of war altogether” (at 5).

262. See *infra* notes 302–07, 316–19 and accompanying text

263. See *supra* note 157, and *infra* notes 399–406 and accompanying texts and references.

book on the theory of the state.<sup>264</sup> It is a long, tangled skein of history and philosophy.<sup>265</sup> It dabbles in the racial science of the day, distinguishing the “Aryan” from the “Semitic” races, emphasizing the special gift for government among the former and the political incapacity of the latter.<sup>266</sup>

Bluntschli’s treatise on “the state” rejects the classical liberal view that the state exists to protect the rights of citizens. The state, Bluntschli insists, has a much higher calling; that is, to ensure the “perfection” of the nation, considered as something apart from its individual members.<sup>267</sup> In this, too, Bluntschli was a follower of Rousseau (or of German thinkers influenced by Rousseau’s revolt against classical liberalism).<sup>268</sup>

Unlike Rousseau, Bluntschli defended monarchy, disparaging constitutional arrangements making the monarch dependent on his ministers since that “must lead to the abandonment of monarchy and the introduction of a republic.”<sup>269</sup> At any rate, the pattern of monarchy “varies according to national character,” so it is a mistake to “derive the conception” of monarchy “from the English constitution alone.”<sup>270</sup> With Rousseau, Bluntschli denied there could be any means to enforce constitutional limits on the state: “it is impossible to establish within the State a tribunal before which the nation itself, as a whole, or its representative entrusted with supreme power, can be brought to account.”<sup>271</sup>

When writers like Bluntschli emphasized that war is a relation between states, therefore, they did not mean to deprecate the claims of the state.

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264. JOHANN CASPAR BLUNTSCHLI, *THE THEORY OF THE STATE* (Oxford Clarendon Press, 1885) (English translation from Sixth German edition, *LEHRE VOM MODERNENSTAAT*,). None of Bluntschli’s work on international law was translated into English.

265. *See generally id.*

266. *See id.* at 80–81 (“. . . the Aryan family of nations . . . hold the first place in the history of states and the development of rights . . . On this rests the claim of the Aryan nations of Europe to become . . . the political leaders of the other nations of the earth and so to perfect the organization of mankind . . . Science has too long neglected the important bearing of race on law and morality.”). Speculations about the political implications of race were not confined to Germany in the Nineteenth Century, but no prominent commentator on international law, either in England or America, displayed any comparable interest in racial science.

267. *See id.* at 300 (“[A]ll these objections [to narrower definitions of the state’s purpose] are avoided if we formulate the proper and direct end of the State as the *development of the national capacities, the perfecting of the national life, and finally its completion . . .*”) (original emphasis). Bluntschli goes on to contrast “free legal states” in which “the chief function is considered to be the development of the legal guarantees for national and individual freedom . . . as notably the Swiss cantons and the States of North America” with “national states” in which “the consciousness of nationality gives the chief impulse to public life, when manifestation of national unity seems to be the chief end of the state,” exemplified “in our own day” by “the German Empire.” *Id.* at 303–04.

268. *See infra* note 405.

269. *THEORY OF THE STATE*, *supra* note 264, at 401.

270. *Id.* at 409.

271. *Id.* at 478.

The most immediate implication is that war is reserved for the state. If war is only a relation between states, then civilians seem to have no legitimate claim to participate. That is certainly how German military commanders understood the doctrine.

In 1870, when the Prussian army defeated the regular armies of France, Prussian commanders were outraged to encounter hastily mobilized irregular forces. The Prussians denounced them as *franc tireurs*—civilian snipers.<sup>272</sup> Field Marshal Moltke insisted that war must be confined to opposing armies; war between “whole nations” was a return to “barbarism.”<sup>273</sup> When the city of Paris refused to capitulate to the advancing German army, even after the head of the French state at the time, Emperor Napoleon III, had personally surrendered to the Prussian army, there was fury at Prussian headquarters. The King of Prussia seemed to forget his initial proclamation that he was not making war on the French people.<sup>274</sup> He insisted that the army bombard the citizens of Paris until they surrendered, while also cutting off their food supply.<sup>275</sup> Bluntschli’s

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272. GEOFFREY WAWRO, *THE FRANCO-PRUSSIAN WAR* 238 (Cambridge Univ. Press 2003) (“Worried German mothers demanded that their conscript sons be shielded against ‘evil people wielding knives, bombs and poison.’ Deeming franc-tireurs criminals and not soldiers, the Germans dealt harshly with every incident.”).

273. *Id.* at 309 (When a Prussian patrol took fire from [the village of] Hericourt, an *uhlan* [cavalry] squadron charged into the village and burned it to the ground.” Though snipers inflicted “fewer than 1,000 casualties on German forces and fought badly,” in later years, commanders in that war “propounded the view that the *Franktireurkrieg* [war with civilian snipers] had been a waking nightmare of murder, mutilation and mayhem, and would have to be pitilessly dealt with in future wars.”). See also ROGER CHICKERING, *GREAT WAR, TOTAL WAR: COMBAT AND MOBILIZATION ON THE WESTERN FRONT, 1914-1918*, at 164 (2000).

274. Stig Förster, *The Prussian Triangle of Leadership in the Face of a People’s War: A Reassessment of the Conflict Between Bismarck and Moltke, 1870-71*, in *ON THE ROAD TO TOTAL WAR* 115, 129–33 (Stig Förster & Jörg Nagler eds., Cambridge Univ. Press 1997).

275. Having organized a siege, Moltke was content to let Paris surrender when it ran out of food. Prime Minister Bismarck was anxious for quick results lest a prolonged war risk outside intervention. It was Bismarck who persuaded King Wilhelm to resort to bombardment. One of his trump cards was to present the advice of an American military observer with the Prussian army—General Philip Sheridan, who assured Bismarck that the Union army had resorted to shelling in similar situations, as at the siege of Vicksburg, less than eight years earlier. Also worth noting, however, is that Prussian guns ignored weapons factories to focus on historic districts on the Left Bank of Paris: “Civilians were not being caught up in siege operations owing to the carelessness of the soldiers: They were the ultimate target of those operations, which had no other aim but to intimidate them into political surrender.” Robert Tombs, *The Wars against Paris* 546–48, *supra* note 63.

treatise on international law passed over these episodes in silence, as if they were unworthy of notice.

At the Brussels conference in 1874, the German delegation urged a provision that would have prohibited all civilian involvement in fighting.<sup>276</sup> Delegates from Belgium, the Netherlands and other small countries protested, arguing that civilians must have the right to defend their country in time of invasion.<sup>277</sup> The resulting text acknowledged the right of an occupying power to “take all the measures in his power to restore and ensure, as far as possible, public order and safety,” but left unsettled the question of when “occupation”—as opposed to ongoing conflict—should be recognized.<sup>278</sup> The British government refused to endorse proposals to translate the Brussels text into a formal treaty, since the conference had demonstrated “that the interests of the invader and the invaded are irreconcilable.”<sup>279</sup> Formally embracing the compromise would open the way for invaders to take extreme measures and that would “facilitate aggressive wars and paralyse the patriotic resistance of an invaded people.”<sup>280</sup>

A quarter century later, at the first Hague Peace Conference, Britain and smaller states agreed on slightly modified language, but the German delegates were still unsatisfied. Germany would accept prisoner of war protections for members of militias fighting in uniform and under military discipline, but it rejected any other protective gestures toward civilian resistance.<sup>281</sup> At the Second Hague Peace Conference in 1907, the German delegation tried again to secure a provision in the Convention on Land Warfare that would limit the right of civilian resistance to an invader. Again, Germany failed to persuade other states to endorse its view.<sup>282</sup>

English commentators saw the connection with the larger debate about the meaning of war. W.E. Hall raised the point in his 1880 treatise to

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276. HALL, *supra* note 85, at 618; *see generally* BEST, *supra* note 20.

277. *Id.*

278. Project of an International Declaration Concerning the Laws and Customs of War, art. 2, Aug. 27, 1874 *printed in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 23–28. The preceding provision defined “occupation” as extending only to territory “actually placed under the authority of the hostile army . . . where such authority has been established and can be exercised,” without further defining any of these ambiguous terms.

279. *See* Letter from the Earl of Derby, *supra* note 99.

279. *Id.*

280. *Id.*

281. Col. Von Schwarzhoff agreed that civilians, in territory not yet occupied, might fight against an invader if already in an organized militia: “At this point, however, my concessions cease; it is absolutely impossible for me to go one step further and follow those who declare for an absolutely unlimited right of defense.” JAMES B. SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, CONFERENCE OF 1907, at 420 (1921).

282. DAVIS, SECOND HAGUE CONFERENCE 203–04, *supra* note 239.

underscore his rejection of the claim that war is only a relation between states. “If [civilians] are not enemies, they have no right of resistance to an invader; the spontaneous rising of a population becomes a crime; and the individual is a criminal who takes up arms without being formally enrolled in the regular armed forces of his state.”<sup>283</sup> Hall acknowledged that an invading army could adopt severe measures to suppress civilian resistance, but imposing repressive measures “for reasons of convenience,” he insisted, was “wholly distinct” from propounding a doctrine that would “inflict a stain of criminality” on civilian heroes.<sup>284</sup>

Westlake, writing in 1894, adopted the same view. The doctrine adopted by German commentators, he complained, “brands as criminal [the] acts done by the invaded population or by individual members of it which are only deserving of praise as patriotic.”<sup>285</sup> Westlake also acknowledged that an invading army was entitled to use force against civilians who resisted it.<sup>286</sup> Still, he insisted, “humanity would be better respected if the necessary repression is exercised with a regretful consciousness of the interest in which that is done, than if the invader tries to cover his interest by the pharisaical assumption that he is punishing guilt.”<sup>287</sup>

The German army put the opposite theory into effect in its colony in Southwest Africa where it faced a native revolt in 1904. It burned villages and massacred natives on such a scale that the venture was later described as “genocide.”<sup>288</sup> Nearly 80,000 people of the Herero tribe, somewhere between half or three-quarters of the population—very much including women and children—were killed.<sup>289</sup> In the aftermath, the military commander on the scene told the surviving Hereros that they must leave the German colony or suffer the fate of their slaughtered tribesmen.<sup>290</sup>

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283. HALL, *supra* note 85, at 90–91 (citing, as an example, the Spanish guerrillas who resisted the French army in the Napoleonic wars).

284. *Id.*

285. COLLECTED PAPERS, *supra* note 91, at 268–69.

286. *Id.*

287. *Id.*

288. Three recent books state this claim. JEREMY SARKIN, *GERMANY’S GENOCIDE OF THE HERERO: KAISER WILHEIM II, HIS GENERAL, HIS SETTLERS, HIS SOLDIERS* (2011); CASPER ERCHSEN & DAVID OLUSOGA, *THE KAISER’S HOLOCAUST: GERMANY’S FORGOTTEN GENOCIDE AND THE COLONIAL ROOTS OF NAZISM* (Faber & Faber 2010); JURGEN ZIMMERER & JOACHIM ZELLER, *GENOCIDE IN GERMAN SOUTH-WEST AFRICA: THE COLONIAL WAR (1904-1908) IN NAMIBIA AND ITS AFTERMATH* (Edward Neather trans., Merlin Press 2008).

289. ISABEL HULL, *ABSOLUTE DESTRUCTION: MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY* 88 (Cornell Univ. Press 2005).

290. *Id.*

Contemporary historians see the episode as reflecting a “military culture” already developing in the Nineteenth Century, which revealed its full sinister potential in the European wars of the Twentieth Century.<sup>291</sup>

Colonial wars had always been fought with more permissive rules, but the German army was more brutal than its European counterparts in Africa.<sup>292</sup> It was again more brutal in the 1901 international campaign to repress the Boxer Rebellion in China.<sup>293</sup> Europeans took notice when, in 1914, German commanders implemented their military doctrines against civilians in Belgium and France. In the first weeks of the war, the American ambassador in England, after talking with American and neutral observers in Belgium, cabled the State Department that the German army there had perpetrated “some of the most barbarous acts in human annals.”<sup>294</sup>

As the German army entered Belgium, inexperienced troops seemed to have mistaken stray shots from fellow troopers for a Belgian civilian rising. Commanders on the scene reacted with startling ferocity.<sup>295</sup> As Hall and Westlake had warned decades earlier, the German legal doctrine on war prompted commanders to see civilian resistance as expressions of

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291. *Id.* at 5–90. Though the book covers activities of the German military down to the end of the First World War, the dust jacket features a photograph of a soldier from the campaign in South-West Africa.

292. For detailed accounts of tactics in such wars, see CHARLES EDWARD CALLWELL, *SMALL WARS, THEIR PRINCIPLE AND PRACTICE* 40–42 (Univ. Nebraska Press 1990 reprint of 3d. ed., 1906; original edition, 1890) (recommending “raids on livestock” to quell native rebellions outside Europe, or else “their villages must be demolished and their crops and granaries destroyed” and remembering that “the overawing and not the exasperation of the enemy is the end to keep in view.”).

293. Germany participated with five other nations (Russia, Japan, France, Britain, the United States) in a relief expedition to Peking, to rescue besieged western diplomats there. The episode left one enduring legacy on English terminology, after Kaiser Wilhelm admonished his troops to show no mercy to the Chinese and prove themselves “Huns of the Twentieth Century.” The German forces did behave with exceptional brutality, according to a recent study, “The notion that [Chinese] atrocities ought to be atoned for by counter-atrocities [committed by European armies against the Chinese] did not find general approval [among European military commanders]. The German case was unique in its extreme obsession with prestige.” Sabine Dabringhaus, *An Army on Vacation? The German War in China, 1900-1901*, in *ANTICIPATING TOTAL WAR: THE GERMAN AND AMERICAN EXPERIENCES, 1871-1914*, at 459, 468–73 (Cambridge Univ. Press 1999).

294. Telegram from the Ambassador in Great Britain (Page) to the Secretary of State (Sept. 11, 1914), in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1914 SUPPLEMENT THE WORLD WAR* 795, 795 (1928). He cites accounts of “young girls violated by German soldiers,” of “Belgian boys” who had “the tendons” in their “arms and legs cut with swords,” of English soldiers “whose noses were cut off while they lay wounded on the field.” *Id.*

295. JOHN HORNE & ALAN KRAMER, *GERMAN ATROCITIES, 1914*, at 15–18 (Yale Univ. Press 2001).

criminality, banditry—“infamy”—in the repression of which “human lives cannot be spared.”<sup>296</sup>

In the first two weeks of the war, some 20,000 buildings were destroyed; not as collateral damage from attacks on military objectives, but by deliberate purpose to punish civilians for engaging in sniper attacks.<sup>297</sup> In the same period, some 6,000 civilians were shot; not by accident in the midst of fighting, but again as deliberate policy to repress “*franc tireurs*.”<sup>298</sup> Not even German commanders claimed that the civilians executed were those who had actually engaged in sniper attacks. Some had been in custody at the time of the alleged attacks.<sup>299</sup> As it happens, subsequent research—including that by German scholars—indicates that there were probably no sniper attacks at all.<sup>300</sup> However, the response was so ferocious that it was later recalled with relish by Hitler when he talked about necessary measures to repress partisan resistance in Russia during his war.<sup>301</sup>

At the time, German reprisals against civilians in Belgium provoked outrage in western countries, where it was seen as a symptom of unrestrained “militarism.”<sup>302</sup> Decades earlier, before the passions stirred by the actual events of the Great War, English commentators had noticed another disturbing aspect of German military doctrine. In the 1880s, one of the leading German commentators on the law of war, Carl Lueder, had argued that “great and inhuman offenses against international law” might

296. A year after the outbreak of the war, General von Bissing explained the policy to a German audience: “In the repression of infamy, human lives cannot be spared and if . . . entire towns are annihilated, that is regrettable but it must not excite ill-timed sentimentality. All this must not in our eyes weigh as much as the life of a single one of our brave soldiers. The rigorous accomplishment of duty is the emanation of a high *Kultur*, and in that, the population of the enemy country can learn a lesson from our army.” The speech was originally reported in a German newspaper (*Kolnische Zeitung*, Sept. 8, 1914) and evidently did no harm to Bissing’s reputation: he was soon after appointed Governor-General of Belgium. James W. Garner, *The German War Code*, 15 U. ILL. BULLETIN 9 (1918). Resistance to German occupation was classified by German authorities as the crime of “war treason.”

297. John Horne & Alan Kramer, *War Between Soldiers and Enemy Civilians, in GREAT WAR, TOTAL WAR: COMBAT AND MOBILIZATION OF THE WESTERN FRONT, 1914-1918*, at 153, 157 (Roger Chickering & Stig Forster eds., 2000).

298. *Id.*

299. HORNE & KRAMER, *supra* note 295, at 18.

300. *Id.* at 15.

301. *Id.* at 168.

302. ALAN KRAMER, *DYNAMIC OF DESTRUCTION: CULTURE AND MASS KILLING IN THE FIRST WORLD WAR 14-19* (Oxford Univ. Press 2007).

be “justified . . . in cases of real necessity.”<sup>303</sup> John Westlake thought the doctrine was going far beyond any reasonable claim.

As Westlake noted, Lueder expressly endorsed the Bluntschli doctrine that war is solely a relation between states.<sup>304</sup> Here, that premise was stretched to the conclusion that the state’s aims must take priority over every competing concern of humanity, such that winning more quickly could justify almost any abuse. Still, the aim of having all wars “decided by the first year or the first campaign” could not, in Westlake’s view, justify a claim of necessity. That approach would simply favor those most inclined to war: “The most aggressive states and therefore those the least entitled to succeed would generally be the best prepared and therefore the likeliest to succeed.”<sup>305</sup>

Still, in the 1890s, Westlake regarded the whole debate as somewhat academic when he said, “It is not to be greatly feared that Prof. Lueder’s own government will ever give effect to his doctrine by ordering the devastation of a whole region as an act of terrorism.”<sup>306</sup> In a slightly different context, Westlake noted that even a “crime against the world” would be tolerated by “opinion” in outside countries. He offered the example of Union forces in the American civil war “destroying a harbor” to ensure it could not be used—“if there has been no great suffering by individuals to excite pity.”<sup>307</sup> To Westlake, who still saw international law as reflecting deeper principles of “natural justice,” it seemed obvious that calling all the members of an opposing society “the enemy” did not mean that they forfeited all claims as human beings.

What he failed to consider was that the German army was not under reliable civilian control. The German Reich had a legislature elected by universal suffrage, but the chancellor and other ministers served at the pleasure of the Kaiser, not the Reichstag.<sup>308</sup> Even in Bismarck’s time, the military insisted on its own approach, answerable to the Kaiser but not to civilian leaders.<sup>309</sup> Field Marshall Moltke, hero of the war of 1870, wrote to Professor Bluntschli in 1880, criticizing proposals for more humanitarian restraints in war. Moltke even condemned the 1868 St.

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303. Lueder’s essay on the law of war appeared in FRANZ VON HOLTZENDORFF, *HANDBUCH DER VÖLKERRECHTS* 484 (1885). Westlake quotes it at some length (in English translation) *COLLECTED PAPERS*, *supra* note 91, at 246.

304. *COLLECTED PAPERS*, *supra* note 91, at 268.

305. *Id.* at 272.

306. *Id.* at 247.

307. *Id.* at 279.

308. GORDON CRAIG, *THE POLITICS OF THE PRUSSIAN ARMY* 217–55 (Oxford Univ. Press 1956).

309. *Id.*



Petersburg Declaration that prohibited explosive bullets in war, despite the German government's official endorsement.<sup>310</sup>

After the first Hague Peace Conference agreed on a convention regulating the “law and custom of war on land” in 1899, the British, French, and American armies distributed the text of the Hague rules to officers and incorporated them into their national military manuals.<sup>311</sup> After all, the Convention stipulated that signatory states “issue instructions to their armed land forces . . . in conformity” with the Hague rules.<sup>312</sup> In Britain, France and the United States, new manuals tried to conform to requirements in the Hague rules.<sup>313</sup> The German military took a different course. Instead of distributing the Hague rules, Germany's Ministry of War distributed a manual, in 1902, claiming that efforts to codify warfare had “completely failed” and warning officers to be on guard against excessive humanitarian tendencies. It read, “[S]ince the tendency of thought of the last century was dominated essentially by humanitarian considerations, which not infrequently degenerated into sentimentality and flabby emotion, there have not been wanting attempts to influence the development of the usages of war in a way which was in fundamental contradiction with the nature of war and its object.”<sup>314</sup>

Among other things, the German manual dismissed Hague provisions on the treatment of civilian armed resistance as mere “moral recognition” not binding on the German army.<sup>315</sup> Instead, it urged officers to prepare for extreme measures against civilian resistance. The manual openly praised “resort to terrorism” as well as the taking and shooting of civilian

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310. Comte de Moltke, *Letter from M. le comte de Moltke to M. Bluntschli*, 13 REVUE DE DROIT INT'L 80, 80–82 (1881) (criticizing the St. Petersburg Declaration for demanding that war measures focus solely on weakening the armed forces of the enemy). Moltke insisted that it was necessary to attack the “finances, railroads, provisions, even the prestige” with “all the resources of the enemy government.” *Id.* at 81. He emphasized the remaining limitation by remarking, immediately afterwards, that the war with France in 1870 had been prolonged far beyond the initial clash of armies by the resistance of revolutionary forces. *Id.*

311. HULL, *supra* note 289, at 128; Garner, *German War Code*, *supra* note 296, at 3, 4 (1918).

312. Hague Convention IV, *supra* note 19, art. 1.

313. See Garner, *German War Code*, *supra* note 296, at 4, 11, 16, 19, 21, 23, 26–27.

314. WAR BOOK OF THE GERMAN GENERAL STAFF 5 (J. H. Morgan trans., Stackpole Books, 2005, reprint of 1915 Morgan translation) [hereinafter WAR BOOK].

315. *Id.* at 5 (equating formal Hague treaty with the Brussels Declaration); *id.* at 14 (criticizing both Brussels and Hague provisions as inadequate from German viewpoint).

hostages.<sup>316</sup> And yet the manual embraced the traditional German view—which it described as “today the universally prevalent view”—that “inhabitants of the enemy’s territory are no longer to be regarded, generally speaking, as enemies.”<sup>317</sup> It gave respectful notice to opinions of Professor Bluntschli<sup>318</sup> and even praised Benjamin Franklin (along with Frederick the Great) for the same 1785 treaty that so impressed Red Cross commentators.<sup>319</sup> The writers of the manual give little indication that they conceive themselves to have made a sharp break with earlier German doctrines on the nature of war.

Contemporary historians see the German military’s “antipathy to civilian engagement in combat” as reflecting “a conservative suspicion of any blurring of the demarcation between military and civilian sphere and especially of democratic and revolutionary politics that sought to do this.”<sup>320</sup> It also reflected the notion that everything must be subordinated to military aims and military aims subordinated to some ill-defined notion of “victory” for “the state.”<sup>321</sup> German military doctrine stressed the importance of achieving an “annihilating blow” against the enemy as quickly as possible.<sup>322</sup>

In 1914, the German army had insisted on launching its attack on France by way of neutral Belgium, thereby provoking Britain’s entry into the war.<sup>323</sup> In 1917, the army insisted on a return to unrestricted-submarine warfare, even though civilian leaders warned that it would provoke American entry into the war.<sup>324</sup> As late as the spring of 1918, army leaders insisted on throwing all of Germany’s remaining military strength into one last great offensive on the Western Front, which was supposed to enable

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316. *Id.* at 89 (praising Napoleon and Wellington for “resort to terrorism” to quell popular risings—with no specifics or citations). Garner, *German War Code*, *supra* note 296, compares the German manual on the laws of war with counterparts of British, French and American armies, stressing unique German embrace of “terrorism”—including the shooting of hostages—and other extreme measures, sanctioned by no western manual, along with unique German doctrines regarding “necessity.”

317. WAR BOOK, *supra* note 314, at 78.

318. *Id.* at 43–44, nn.22, 26. The Manual also cites the same proclamation of Prussia’s king at the outset of the war of 1870, which so impressed Bluntschli—and the authors of the Red Cross Commentary 94, *supra* note 12.

319. *Id.* at 21.

320. Horne & Kramer, *supra* note 297, at 153, 167.

321. *See generally* HULL, *supra* note 289, at 107–09.

322. *Id.* at 166–67. Schlieffen Plan rested on “*vernichtungsgedanke*,” the idea of complete annihilation of the enemy force. *See also* CRAIG, *supra* note 308, at 278–83.

323. STEVENSON, *supra* note 250, at 256–60 (on military plans to invade Belgium); JOHN KEEGAN, *THE FIRST WORLD WAR* 29–36 (Knopf, 1999) (invasion through Belgium).

324. STEVENSON, *supra* note 250, at 318–20 (decision to resume unrestricted U-boat attacks); KEEGAN, *supra* note 323, at 318–20 (resumption of U-boat attacks).

Germany at long last to dictate the terms of peace.<sup>325</sup> That decision forfeited the last solid chance to negotiate a compromise peace, as urged by President Wilson in January 1918, and then left Germany unable to resist terms imposed by the victorious Allies after the Armistice that fall.<sup>326</sup>

Germany paid a very high price for treating the military as something entirely above and apart from the society that sustained it. Granted, that approach was, at some level, an entirely logical application of the Bluntschli doctrine that war is an exclusive concern of the state and its armed forces.

There was a comparable heedlessness toward humanitarian limits in the conduct of the war. In the course of the war, German commanders conscripted over a hundred thousand Belgian civilians to forced labor. Over 50,000 Belgians were forced to work in factories in Germany in what the American ambassador to Germany protested as “virtual slavery.”<sup>327</sup> Thousands of these workers died.<sup>328</sup> Belgium became not just an occupied territory, but a conquered preserve that could be exploited without limit in the service of German war aims. Germany built a fence on the border between occupied Belgium and neutral Netherlands to keep Belgian civilians from escaping and thereby evading forced labor requisitions.<sup>329</sup>

In occupied territories in Eastern Europe, the German army resorted to even more extreme brutality than in Belgium, conscripting hundreds of thousands to forced labor.<sup>330</sup> By the end of the war, a retreating German army in the West engaged in “pillage and destruction without any military purpose.”<sup>331</sup> Germany’s ally, Turkey, insisted on removing Armenian Christians from the conflict zone with Russia, causing over a million deaths in what Armenians still insist was a “genocide.”<sup>332</sup> German military advisors were on the scene. Far from restraining their allies, they encouraged them to be ruthless in the name of “military necessity.”<sup>333</sup>

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325. STEVENSON, *supra* note 250, at 324–28 (military determination to gamble on last great offensive)

326. KEEGAN, *supra* note 323, at 375–77, 392–94, 412–14 (1999) (last great offensive, spurned Wilson peace terms).

327. KRAMER, *supra* note 302, at 45.

328. *Id.*

329. *Id.* at 42–43.

330. *Id.*

331. *Id.* at 47–50.

332. HULL, *supra* note 289, at 263–90.

333. *Id.*

The view that war is a relation between states not only encouraged extreme views of “necessity”—as anything advantageous to the state—but it also reinforced the view that war is an activity for far higher ends than those that preoccupy ordinary citizens. If the state is the guardian of culture, a war between states might well seem a contest of national cultures, a contest for supremacy between competing worldviews. That is certainly how leading German intellectuals saw the war. In an “Appeal to the Civilized World” published in October 1914, distinguished scholars and professors insisted that Germany was fighting for “kultur,” while the Allies were sullyng Europe with “Negroes and Mongols” in their armies.<sup>334</sup> Even in the opening phase of the war, some German artists and writers embraced such a strange, ethno-nationalist view of “kultur” that they exulted in the willful destruction of French cathedrals.<sup>335</sup>

The military policy did not reflect complete disdain for rules as much as for background appeals to “humanity.”<sup>336</sup> Before the war was a year old, the Germans violated the prohibition in the Hague Declaration against the use of “asphyxiating gases.”<sup>337</sup> The Foreign Ministry insisted

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334. “Appeal of 93 [Scholars] to the Civilized World,” denying claims of German atrocities as “poisonous weapons of lies from the hands of our enemies,” then concluding: “Those who have allied themselves with Russians and Serbs, and who present the world with the shameful spectacle of inciting Mongolians and Negroes against the white race, have the very least right to present themselves as defenders of European civilization . . . Believe that we shall fight this war to the end as a cultured people to whom the legacy of Goethe, Beethoven and Kant are as sacred as hearth and land.” Only German cultural monuments seemed to register as evidence of “culture.” Text of the “Appeal” is available from German History in Documents and Images at: [http://germanhistorydocs.ghi-dc.org/sub\\_document.cfm?document\\_id=938](http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=938).

335. KRAMER, *supra* note 302, at 27–30 (Notes exultation of German writers and artists—not militarists in peacetime—at the destruction of the French cathedral in Rheims and other cultural treasures in France and Belgium: “German intellectuals rejoicing in the destruction of cultural monuments was explicitly linked with their role as national signifiers.” Almost from the outset, the war came to be seen by many Germans as a conflict of competing cultures, on the assumption that “the state” was the custodian of something much beyond the personal security of citizens.)

336. MORGAN, *supra* note 259 (“The subtle danger of the presence of such a nation [of ‘intellectual savages’] in the European comity is that it uses the language of that international society, and yet all the while means something different, and that with every appearance of solemn subscription to its forms and treaties it is making mental reservations and ‘economies’ which strike at the very root of them . . . . In the hands of such a nation an international convention in not merely idle and impotent; the convention itself becomes positively dangerous, simply because it can be perverted. It can be used to invest the most barbarous acts with a specious plausibility, and can be turned against the very people whom it was designed to protect.”)

337. Declaration Concerning Asphyxiating Gases, Signed 28 July 1899, text in THE LAWS OF ARMED CONFLICT, *supra* note 1, at 95–96 (pledging “to abstain from the use of projectiles, the sole purpose of which is the diffusion of asphyxiating or deleterious gases.”). The German reasoning is described in MODRIS EKSTEINS, RITES OF SPRING: THE GREAT WAR AND THE BIRTH OF THE MODERN AGE 161 (1989).

that German gas attacks had not violated international law because the Hague regulations technically referred to poison delivered in “weapons” and therefore did not cover gas released from self-contained canisters, not delivered by projectiles, but simply wafted by the wind.<sup>338</sup> Military leaders were so eager for a weapon to break the stalemate in the trenches that they failed to consider that Britain and France could also deploy poison gas—and the prevailing winds favored the Allies.<sup>339</sup>

German arguments about unrestricted U-boat attacks rested on a similar form of hyper-legalism. The German Foreign Office insisted that Britain and France had violated pre-war agreements regarding the permissible scope of blockades.<sup>340</sup> Therefore, Germany was entitled to respond to unlawful Allied restrictions on shipping with extraordinary measures by way of reprisal. Given British naval superiority in surface ships, Germany could only enforce its own counter measures with U-boat attacks. As the Allies sought to block almost all shipping to German ports, Germany

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338. *Id.*

339. Rolf-Dieter Mueller, *Total War as a Result of New Weapons? The Use of Chemical Agents in World War I*, in GREAT WAR, TOTAL WAR: COMBAT AND MOBILIZATION ON THE WESTERN FRONT, 1914-1918, at 95, 99–100 (Roger Chickering & Stig Forster eds., 2000). German production of chlorine gas, at its peak in October 1918, reached 1,000 tons per month; Britain was then producing 3,000 tons, the U.S. preparing to produce 6,000 tons. WINSTON CHURCHILL, THE WORLD CRISIS 519–20 (1931) (acknowledging that British military planners had thought about the possibilities of “poisonous smoke” and were aware that prevailing winds favored attacks from west to east, but “noxious or poisonous fumes were explicitly prohibited by International Law). We could not therefore employ it ourselves unless and until the enemy himself began.” It is now known that Churchill pressed the army to consider use of chemical weapons to protect troops in the Normandy landings— and was talked out of it by top generals, who insisted it would not be worth the risks involved, diplomatic as well as tactical. RICHARD OVERY, THE BOMBERS AND THE BOMBED: ALLIED AIR WAR OVER EUROPE, 1940-1945, at 198 (Penguin, 2014).

340. At the very outset of war, Britain and France announced their willingness to abide by provisions of the 1910 Declaration of London, regarding definitions of contraband, though it had not been formally ratified or implemented. The subsequent escalation of provocations and reprisals, between German and Allied naval forces (and the foreign ministries), is a very complicated story, which took years to reach the “all-out” character it achieved by 1917. The most detailed account—which is hundreds of pages, with precise citations to relevant legal texts—is in A.C. BELL, A HISTORY OF THE BLOCKADE OF GERMANY (1937). For recent assessment of the blockade’s comportment with prevailing standards of international law, see ISABEL V. HULL, A SCRAP OF PAPER: BRAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR 183–210 (Cornell Univ. Press 2014) (concluding that, with some exceptions, measures taken could be defended under international law at the time and even today).

was entitled to block all shipping into British ports by threatening U-boat attacks on any and all ships heading toward those ports.<sup>341</sup>

There was something to this argument. There was a crucial difference in the conduct of the two sides, however, from the perspective of neutrals and especially from the perspective of the most important neutral before 1917, the United States. British blockade measures imposed serious burdens on American commerce—that is, business losses, but they could be offset by new opportunities to supply the vast needs of the Anglo-French war effort.<sup>342</sup> The U-boat attacks imposed loss of life, which could not be offset. After the sinking of the passenger liner *Lusitania* in May of 1915, President Wilson warned Germany of “strict accountability” for the loss of American lives. In practice, as a contemporary historian notes, the claim of “strict accountability” was “applied to American lives, not to American property.”<sup>343</sup>

It is hard to get past the difference between seizing ships and sinking ships, the difference between diverting wartime trade, on the one hand, and condemning crews and passengers to drowning at sea, on the other. Sinking ships was bound “to excite pity,” in Westlake’s phrase.<sup>344</sup> Conventional blockade measures did not do that, at least to the same extent. That was the crux of the traditional British defense of naval war against enemy commerce: that it was, in practice, less destructive and inhumane than accepted practices in land warfare. To Germans, it looked different, especially as the blockade tightened and came to include restrictions on foodstuffs—hence viewed from Germany as “hunger blockade.”<sup>345</sup>

As early as the spring of 1916, Kaiser Wilhelm dismissed concerns about submarines to the American ambassador and protested “the efforts to starve out Germany and keep out milk.”<sup>346</sup> Less than two years into the

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341. PAUL HALPERN, *A NAVAL HISTORY OF THE FIRST WORLD WAR* 202, 296 (Naval Institute 1994).

342. *Id.* at 291 (“Whereas British and French actions involved property and could be contested in prize courts, the German measures in the submarine war frequently involved loss of life . . . . The British and French therefore had a noted advantage in the propaganda war for the sympathy of the riches and most powerful neutral of them all, the United States. The Germans—at least the naval authorities—however well grounded and legalistic their arguments, seemed never to fully comprehend this.”).

343. C. PAUL VINCENT, *THE POLITICS OF HUNGER: THE ALLIED BLOCKADE OF GERMANY, 1915-1919*, at 43 (Ohio Univ. Press 1985).

344. COLLECTED PAPERS, *supra* note 91, at 279.

345. VINCENT, *supra* note 343.

346. JAMES W. GERARD, *MY FOUR YEARS IN GERMANY* 399–40 (G.H. Doran Co. 1917).

war, the Kaiser concluded, “there was no longer any international law. To this last statement, the Chancellor [Bethman Hollweg] agreed.”<sup>347</sup>

In the aftermath of the German defeat, German opinion embraced the notion that “war crimes” and “laws of war” were a “polemical invention of the victorious Allies.”<sup>348</sup> In the early 1920s, a French army officer named Charles DeGaulle who had spent years as a prisoner of war in Germany, ascribed German defeat to “a lack of balance” and a penchant for extreme, self-glorying action among German officers, who were, he said, too much under the spell of Friedrich Nietzsche.<sup>349</sup> Perhaps the roots of that outlook—in its disdain for the concerns of ordinary citizens in modern commercial societies—were much deeper. By the early 1920s, a distinguished German scholar of religion observed that terms like “humanity” had become “almost incomprehensible” to a German audience.<sup>350</sup> Barely a decade later, one of Germany’s leading legal theorists spelled out the implication: “Not every being with a human face is human.”<sup>351</sup>

## VII. CONTINUITIES AND CONTEMPORARY IMPLICATIONS

In the decades before the First World War, debate over the legal meaning of war centered on commerce raiding on the high seas. British commentators defended the seizure of private enemy property at sea, while most European commentators denounced the practice. The explanation might seem quite simple. Britain was the world’s dominant naval power in that era. The major European states, having invested their resources in building up massive land forces, could not compete at sea.

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347. *Id.*

348. RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* 65 (Penguin Books 2004).

349. CHARLES DE GAULLE, *THE ENEMY’S HOUSE DIVIDED* 2–3, 16 (Robert Eden, trans., Univ. of N.C. Press ed. 2002) (DISCORD CHEZ L’ENEMIE, 1924). The American editor of this work quotes, in his introduction, an unpublished article by De Gaulle, which was composed around 1919 or 1920 and embraced the traditional Anglo-American view as common sense: “It is a commonplace to say that the war just ended—or that appears to have ended—was a war between peoples, and not merely a war between armies.” *Id.* at xxiii.

350. Ernst Troeltsh, *The Ideas of Natural Law and Humanity in World Politics*, reprinted in OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY 1500 TO 1800*, at 202 app. (Ernest Barker trans., Beacon Press ed. 1957) (The “terms ‘Natural Law’ and ‘Humanity’ . . . have now become almost incomprehensible in Germany, and have lost altogether their original life and colour.”).

351. Carl Schmitt, *Das gute Recht der deutschen Revolution*, reprinted in Josef Becker & Ruth Becker, *HITLERS MACHTERGREIFUNG* 301 (1983).

The United States might seem the exception that proves the rule. The U.S. was an early advocate for the European view regarding immunity of private property at sea, but American presidents insisted the United States would not waive its right to authorize privateers to seize enemy property at sea unless all navies embraced this limitation. Then, as it built up a sizable navy in the Civil War, the United States exercised unprecedented claims for blockade tactics. Decades later, having rebuilt its navy, the United States favored only qualified restrictions on naval seizures, before finally embracing and helping to implement Britain's all-encompassing naval blockade strategy in the First World War.

From this perspective, the old debate might seem merely a particular instance of a general pattern in international affairs. States resist doctrines that limit their own comparative advantage, just as they favor doctrines that restrain the relative advantages of their rivals. At the Geneva conference that drafted the text of AP I in the mid-1970s, an African delegate proposed the following rule for the deployment of air power in future conflicts: where one side has the capacity to engage in aerial attacks and the opposing side does not, all attacks from the air should be forbidden.<sup>352</sup>

There was more to the historic debate on the legal characterization of war, however, than a contingent historical episode, more to it, one might say, than mere legal advocacy. As Anglo-American commentators pointed out, all leading treatises on international law before the Nineteenth Century held to the same view on the underlying doctrine: war is a contest between entire political communities, not simply between states and their armed forces.<sup>353</sup> The traditional view had certainly embraced humanitarian constraints, emphasizing that, in most circumstances, lethal force should not be directed at unarmed "enemies" who in themselves present no immediate lethal threat. That general rule, however, applied as much to surrendered combatants as to surrounding non-combatants.<sup>354</sup>

It was not the traditional view that "civilians" must be protected from all harm in war, even as to property and material well-being. The term "civilian" does not appear in Eighteenth Century treatises, let alone in the works of earlier commentators.<sup>355</sup> It does not appear at all in America's Civil War Lieber Code nor in the humanitarian limitations set down in

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352. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 79 (1990).

353. See *supra* §§ IV, V.

354. See Vattel, *supra* note 111 at 282 (sparing women and children), § 149–50, at 284 (captured enemy soldiers should not be "put to death" or treated "harshly").

355. The *Oxford English Dictionary* reports no use of "civilian" in the sense of non-military before the Eighteenth Century and no use of "civilian casualty" or "civilian target" before the Twentieth Century.



the Hague Regulations on land warfare in 1907.<sup>356</sup> European commentators did not dispute that their favored doctrine was at variance with traditional views. They simply argued, in the decades before the First World War, “the progress of humanity” had opened the way to broader protections based on wider ethical perspectives.<sup>357</sup>

Yet the new doctrine did not prevail in the world wars of the Twentieth Century. The First World War spawned a new term, “economic warfare,” summarizing the rationale for ever tightening blockade measures and accompanying financial controls on enemy commerce.<sup>358</sup> Such measures struck at the whole German economy, hence the whole society. The blockade could hardly be conceived as applying only to “the state” and its armed forces. In the Second World War, British analysts characterized air attacks on German factories and then on workers housing as “industrial blockades,”<sup>359</sup> hence an extension of earlier policies. The official history of the British bombing campaign characterized air attacks on German cities as the modern counterpart to attacks on merchant shipping in earlier naval wars.<sup>360</sup>

Thus, the earlier debate remained relevant in later times. Learned and morally serious scholars defended even the more extreme Allied measures in the world wars, seeing them as applications of the traditional Anglo-American approach to war. Hersch Lauterpacht is a notable example. He edited Oppenheim’s treatise and ultimately succeeded Oppenheim as Whewell Professor of International Law at Cambridge.<sup>361</sup> In an article published in 1952, Lauterpacht defended both the wartime blockade measures (extended even to food supplies) and the bombing of German

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356. The one mention in the Hague Regulations is the exception that proves the rule, stating, “civilians . . . entrusted with the delivery of despatches for their own army or for the enemy’s army” should not be “considered spies.” Hague Convention (IV) with Respect to the Laws and Customs of War on Land, art. 29 (1907).

357. BEST, *supra* note 20, at 222.

358. STEVENSON, *supra* note 250, at 201 (sketching differences with earlier blockade practice).

359. OVERY, *supra* note 339, at 56–57.

360. II CHARLES WEBSTER & NOBLE FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY, 1939-1945*, at 26 (1961) (“In the *guerre de course* [raiding at sea] cruisers . . . sought to evade the opposing naval forces and to strike direct blows at the commerce or military communications of the enemy. In the night offensive, Bomber Command sought to evade the opposing fighters and to strike directly at German war industry and morale.”).

361. For survey of Lauterpacht’s career and scholarly legacy, see OXFORD HANDBOOK, *supra* note 133, at 1179–83.

cities.<sup>362</sup> He acknowledged that international law prohibited attacks aimed simply at killing non-combatants, but he insisted that weakening the enemy's military resources was a legitimate aim, even though in a modern industrial economy, one could no longer distinguish "work which is and work which is not of direct military importance . . . ." <sup>363</sup> Lauterpacht then invoked the historic debate: Only the "continental writers," he noted, had "regarded the distinction between combatants and civilians . . . as the most fundamental principle of the law of war," seeing "war as a contest between state and state and between the armed forces of the belligerents. This view was not shared in the United States, in England or in some other countries."<sup>364</sup> Lauterpacht's embrace of the traditional doctrine in this way did not disqualify him from subsequent appointment to the International Court of Justice, where he served from 1955 to 1960.<sup>365</sup>

During the war, the loudest critics of Allied bombing were the Nazi leaders in Germany.<sup>366</sup> Even at Nuremberg, a Luftwaffe commander insisted that Germany had only bombed Warsaw and Rotterdam to clear a path for the entry of German troops and had aimed only at immediate military objectives. Germany's subsequent resort to bombing of English cities, he insisted, was mere retaliation for the bombing of Berlin in 1940.<sup>367</sup> It is undeniable that Britain had begun to build long-range bombers in the 1930s, while Germany never did so.<sup>368</sup> Only two countries equipped

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362. Hersh Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 365–67 (1952).

363. *Id.*

364. *Id.* at 364.

365. See OXFORD HANDBOOK, *supra* note 133.

366. OVERY, *supra* note 339, at 275 (British bombing characterized by German propaganda as device of the "Jewish plutocratic enemy," implementing "the Jews' will to extermination" and "murder"); 310 (wartime German propaganda "always described Allied bombing as 'terror bombing').

367. Testimony of Field Marshal Albert Kesselring, in 9 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 176–78, 214–19 (1947).

368. German bombers could reach English cities by August of 1940 only because they were able to operate from airfields in northern France. British, and later, American bombers could range hundreds of miles from airfields in England to hit cities in southern and eastern Germany. A retired official of Britain's Air Ministry published an analysis during the war, which gloated over Britain's pre-war preparations for long-range bombing and Germany's lack of preparation for it. See J.M. SPAIGHT, BOMBING VINDICATED 10 (1944). He noted that the RAF sponsored development of long range bombers in the mid-1930s, *id.*, and cited extensive German protests at bombing of civilians during the war as reflecting German incapacity to retaliate in kind. "Hitler. . . did not want mutual bombing to go on . . . He knew that, in the end, our air offensive, if it did not win the war for us, would certainly prevent Germany from wining it." *Id.* at 12.

themselves with fleets of long-range bombers in the Second World War: Britain and the United States.<sup>369</sup>

That too has some connection to the debates of earlier times. Surrounded by potential enemies, Germany in the 1930s built a force of fast-moving tank units for *blitzkrieg* (“lightening war”) just as it had planned for short decisive wars in 1914 and in 1870.<sup>370</sup> When initial military campaigns in these wars did not prove immediately decisive, German commanders following German military doctrine responded with murderous brutality against civilian resistance.

Meanwhile, Britain and America did what they could to encourage civilian resistance to German occupation, even armed resistance.<sup>371</sup> They did so on the theory that such efforts might wear down the occupying forces in a long struggle—and were (as Victorian commentators in Britain had insisted) quite legitimate combat forces in a long war.<sup>372</sup>

Britain and America, protected by the seas, had started the world wars with small armies, but uniquely powerful navies, so their military planners and strategists thought about ways to cripple the enemy in a long war.<sup>373</sup>

369. OVERY, *supra* note 339, at 15–32 (preparation for long-range bombing in the 1930s “essentially a British and American story”).

370. CRAIG, *supra* note 308, at 205, 209, 278–83.

371. Churchill organized the “Special Operations Executive” in July 1940, only a few weeks after the German conquest of France and the Low Countries. He seems to have been inspired by memories of how effective the Boer guerrillas had been in the South African war in 1901. JOHN KEEGAN, *WINSTON CHURCHILL* 128 (Viking Penguin, 2002). For an overview of British efforts, DAVID STAFFORD, *BRITAIN AND EUROPEAN RESISTANCE, 1940-1945* (Univ. of Toronto Press 1980). The British military officer who directed these operations through most of the war was initially chosen to organize secret British sabotage and guerrilla resistance efforts to counter the expected German invasion in the summer of 1940. NICHOLAS RANKIN, *CHURCHILL’S WIZARDS* 386–91 (Faber & Faber 2008).

372. On American support for resistance movements, organized by the Office of Strategic Services (OSS), founded in 1942, *see* R. HARRIS SMITH, *THE SECRET HISTORY OF AMERICA’S FIRST CENTRAL INTELLIGENCE AGENCY* (Univ. of Cal. Press 1972). (OSS considered sponsoring Arab revolt against Vichy authorities in North Africa, but abandoned effort in deference to French concerns: at 50; OSS support to resistance efforts within France extended to poorly disciplined Communist groups at 187–96).

373. B. H. LIDDEL HART, *THE BRITISH WAY IN WARFARE ADAPTABILITY AND MOBILITY* (1942) (emphasizing naval support). It is common to contrast the historic orientation of British military strategy—seeking to wear down the enemy with naval power and distant raids—with the head-on attacks, supposedly favored by American generals since Grant. For a version of this contrast, *see* JOHN NAGL, *LEARNING TO EAT SOUP WITH A KNIFE* 35–51 (Univ. of Chi. Press 2002). But such comparisons abstract from the American preoccupation with naval strength, starting with Mahan’s highly influential *The Influence of Sea Power Upon History*. A.T. MAHAN, *THE INFLUENCE OF*

Strangling the Confederacy with a tightening blockade had been central to the Union's strategy in the Civil War.<sup>374</sup> It is hard to doubt that if squadrons of bombers had been available to General Sherman in 1864, he would have made full use of them. Neither Sherman nor his World War II successors, however, thought devastation of property was equivalent to mass murder of civilians.<sup>375</sup>

Whatever later critics might say about Allied practices in the Second World War, the diplomats who negotiated the text of the United Nations Charter in 1945—representing some 60 countries—evinced no hesitation about such tactic. The Charter authorizes the Security Council to undertake “international enforcement action” by deploying “air force contingents” provided by “member states.” In 1945 that would have meant Britain and the United States.<sup>376</sup> The Security Council was then authorized to order punitive bombing to enforce compliance with the Council directives.<sup>377</sup> The relevant Charter provision makes no mention of focusing such “enforcement action” exclusively on “military objects.” Nor does it say that collateral damage to “civilian objects” must never be “excessive in relation to the concrete and direct military advantage” from particular airstrikes.<sup>378</sup>

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SEA POWER UPON HISTORY, 1660-1783 (1890). The United States compelled Japan's unconditional surrender in 1945 largely through air power and blockade and the seizure of strategic islands—without having landed a single American soldier on the Japanese home islands.

374. CRAIG SYMONDS, *THE CIVIL WAR AT SEA* 32 (Praeger, 2009) (Lincoln's blockade proclamation, five days after attack on Fort Sumter, was “virtually the first strategic decision of the war” and eventually engaged 500 ships and 100,000 men, “a total exceeding the number of ships and men committed in all of America's previous wars combined). The blockade was more ambitious than “anything previously attempted” by naval powers, *id.* at 33, enforcing blockade given priority over protecting Union merchant ships from Confederate raiders, *id.* at 51–52, blockade remained the “single greatest commitment” of the Union Navy and “absorbed huge resources [from the North] in both materiel and manpower.” *Id.* at 169–70.

375. Commentators have long argued about whether Sherman should be credited as pioneering techniques of “total war” developed in 20th Century wars. See discussion in GRIMLEY, *HARD HAND*, *supra* note 171, 215–18 (1997). For defense of Sherman's acceptance of underlying humanitarian limits, see BEST, *supra* note 20.

376. U.N. Charter arts. 43 & 45.

377. U.N. Charter art. 45.

378. BRUNO SIMMA, ET AL., *THE CHARTER OF THE UNITED NATIONS* 766 (2d ed., Oxford Press 2002) (Commentary on Art. 45: “The experience of the decisive role of [Anglo-American] air power in the Second World War led [framers of UN Charter] . . . to put *this kind of military force* at the service of the system of collective security that was being created” (emphasis added). The German scholars who prepared this treatise make no mention of limits on the Security Council's use of “this kind of military force.” The requirement that damage to “civilian objects” must never be “excessive in relation to the concrete and direct military advantage anticipated” was introduced in AP-I, art. 52.5(b) in 1977.).

The Charter also authorizes the Security Council to impose total blockade of delinquent states by sea, land, and air.<sup>379</sup> It makes no exception for “civilian” goods, not even for food. When the Council was finally able to find agreement to impose “economic sanctions” in a serious way, it did not go that far, but it did impose severe hardship on targeted states, with civilians experiencing the most severe suffering.<sup>380</sup>

In the meantime, major powers developed arsenals of nuclear weapons, then of long-range missiles to deliver them.<sup>381</sup> Suggestions in the 1960s that nuclear strikes should aim solely at military objects were either derided or, in the case of British and French leaders, denounced as a dangerous threat to deterrence.<sup>382</sup>

From the perspective of actual history, it is AP I’s “Basic Rule” that seems a break with the past. The Red Cross Commentary implies that AP I sought to restore the rules prevailing before the world wars.<sup>383</sup> Given actual disputes in earlier times—and the resoluteness with which earlier Anglo-American doctrines were actually applied in the world wars—it is more reasonable to see AP I as the product of new circumstances in the 1970s. These circumstances include the isolation and confusion of American diplomacy in the wake of defeat in Vietnam, the changed diplomatic balance in international forums with the advent of so many

379. Article 42 of the Charter of the United Nations authorizes the Security Council to direct member states to impose “blockade . . . by air, sea, or land forces” of any state posing a “threat to the peace” or judged to have committed a “breach of the peace, or act of aggression,” pursuant to Article 39. While Article 41 contemplates “complete or partial interruption of economic relations” as “measures not involving the use of armed force,” if these “measures . . . have proved to be inadequate,” Article 42 authorizes the Council to direct “action [including] demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

380. See DAVID CORTRIGHT & GEORGE LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S*, at 47 (Lynne Rienner Publishers 2000). Economic sanctions on Iraq in 1990s estimated to have caused one third increase in infant mortality and tens of thousands of deaths among Iraqi children, *id.* at 46, and economic sanctions on Serbia resulted in fifty percent decline in “real income” under which “vast majority of the population suffered.” *Id.* at 73.

381. David Rosenberg, *Nuclear War Planning*, in *THE LAWS OF WAR* (Michael Howard, ed., Yale Press 1994) (surveys arguments for the legality of the new weapons).

382. Desmond Ball, *The Development of the SIOP, 1960–1983*, in *STRATEGIC NUCLEAR TARGETING* 67–68 (Desmond Ball & Jeffrey Richelson eds., Cornell Univ. Press 1986) (1962 proposal by U.S. Secretary of Defense Robert McNamara to clarify that U.S. nuclear strikes would target Soviet forces, not cities, met by “incredible” response from Western Europe’s leaders, fearing it would remove deterrent effect, especially from small nuclear arsenals).

383. COMMENTARY, *supra* note 12, at 598.

new nations in the wake of de-colonization, a general surge of utopian expectations connected with seeming shifts in the global balance of forces.<sup>384</sup> At the same time diplomats in Geneva were negotiating the terms of Additional Protocol I, diplomats at UN headquarters in New York were passing resolutions calling for a “New World Economic Order,” featuring international commodity cartels to redistribute wealth from affluent western states to “less developed nations.”<sup>385</sup>

The “Basic Rule” in AP I did not emerge out of thin air in the 1970s. It did have a prior history, but in visions advanced by European jurists before the First World War, which did not secure recognition in international conventions before AP-I. Perhaps we should take more seriously the claim advanced by European jurists in the Nineteenth Century and readily accepted their British critics at the time that the doctrine owes its origins to the radical impulses of the French Revolution or at least, to the teaching of the Revolution’s favorite philosopher, Jean-Jacques Rousseau.<sup>386</sup>

That has remained the view of leading commentators on the law of armed conflict even in more recent times. In 1985, Jean Pictet, a leading contributor to the Red Cross *Commentary* on AP I and the main editor of the ICRC’s earlier commentary on the 1949 conventions, published a short book, *Development and Principles of International Humanitarian Law*.<sup>387</sup> It singles out one philosopher: “Rousseau . . . gained the signal honour of having stated, clearly and for all time, the fundamental rule of the modern law of war.”<sup>388</sup> Pictet followed up this volume with a massive work celebrating the historical struggles of American Indian tribes. As

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384. For analysis of the changed political context in the 1970s, see GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 323–35 (Oxford Univ. Press 1994).

385. See Declaration on the Establishment of a New International Economic Order, G.A. Res. S-6/3201, U.N. Doc. A/RES/S-6/3201 (May 1, 1974). The project was inspired by the recent success of the Organization of Petroleum Exporting States (OPEC) in forcing dramatic increases in oil prices. The framers of NIEO viewed the success as a precedent to apply to other raw materials exported from less developed countries on the theory that western nations were so dependent on such materials, they would agree to pay greatly increased prices in return for stability of supply assured by UN-sponsored producer cartels. Nothing of the kind was ever implemented. For survey of economists’ reactions at the time, see JAGDISH BHAGWATIC, *THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH—SOUTH DEBATE XX* (1977).

386. SIMON SCHAMA, *CITIZENS, A CHRONICLE OF THE FRENCH REVOLUTION* 378 (Knopf, 1989) (documenting extensive appeals to Rousseau and Rousseauan doctrine among revolutionaries). For Rousseau’s influence on Robespierre in particular see pages 577, 579, 580, 584. On the eve of the storming of the Bastille in 1789, the most popular exhibit in Paris included a display of J-J Rousseau in waxwork. *Id.* at 378.

387. See generally PICTET, *supra* note 140.

388. *Id.* at 23.

Pictet implicitly acknowledges, *L'Épopée des Peaux Rouges* (“Epoch of the Red Skins”) has a highly “Rousseauian” flavor.<sup>389</sup>

Rousseau’s actual “statement” on the “fundamental rule” of war was so brief, so seemingly off-hand, that it might have been readily overlooked. Rousseau’s claim that war is solely a relation between states appears in *The Social Contract*, not in a chapter on war, but on “slavery.” The passage argues that victory in war does not give the victors the moral right to enslave the defeated.<sup>390</sup> Rousseau says nothing at all about rules for waging war when the enemy is still resisting.<sup>391</sup>

In regard to slavery, however, the English philosopher John Locke had made a similar argument nearly a century earlier in his *Second Treatise of Government*, of which Rousseau was quite aware.<sup>392</sup> Rousseau’s

389. JEAN PICTET, *L'ÉPOPÉE DES PEAUX-ROUGES* [THE EPIC OF THE RED SKINS] (1988). (Fr) Pictet cautions, at the outset, against authors who embrace “the romantic conception of the ‘noble savage,’ dear to Jean-Jacques Rousseau, authors who, in displaying their sympathy for the Red Skins, lose all impartiality.” *Id.* at 20. Pictet’s account puts him squarely in that category. *Id.* “On the moral plane, we recognize the force of soul of the North American Indian, the self-mastery and courage that is the characteristic of all free peoples . . . . He despises material goods, the artificial civilization which others attempted to impose on him along with the empty agitation of the modern world.” *Id.* at 16. “Almost all treaties were violated by the Whites,” he says, while “the Indians, themselves, never violated a single treaty.” *Id.* at 31. The Indians were, he concludes, “Heroes of a new *Iliad*, their memory will be perpetuated from generation to generation, until there are again, under the sun, men committed to the ideal, to courage and to liberty and we will again have the right to dream.” *Id.* at 777. In this account, Anglo-Americans are mostly characterized by greed and violence and racist intolerance. Perhaps the moral of the book is that fighting nobly is more important than winning. *Id.* But it offers almost no details on how Indians actually did fight, though an alert reader might infer (as from occasional glancing references to “scalping”) that they did not always follow Geneva rules. *Id.*

390. *The Social Contract*, *supra* note 82, at 15–16.

391. *The Social Contract* offers no separate chapter “On War.” Actual war with other states remains largely out of view in this work. From what he does say in *The Social Contract*, it is highly unclear that Rousseau would have condemned seizures of enemy property. Rousseau insists that under a true or just social contract, individuals would first submit all their rights (evidently including property interests) to the community and acquire them back only on terms approved by the general will. *Id.* Private property in enemy territory might thus be understood as, in some sense, the ultimate property of the enemy state. *Id.* As a French scholar observes, “the very notion that war is a relation between states, not individuals, loses its power when individuals identify themselves with the state via the general will and patriotism.” Pierre Hasner, *Rousseau and the Theory and Practice of International Relations*, in *THE LEGACY OF ROUSSEAU* 207 (Clifford Orwin & Nathan Tarcov eds., 1997).

392. As no one is free to take his own life, no one can “give another power over it,” so “slavery” is “but the State of War continued, between a lawful conqueror and a

contemporary, Emer de Vattel, had offered similar admonitions against enslaving the defeated in his *Law of Nations*—a work with which Rousseau was also quite familiar.<sup>393</sup>

What the passage in the *Social Contract* added—and what seems to have attracted European commentators in later times—was the mystique of “the state.” The term does not appear at all in Locke’s treatise, which speaks rather of “the society” or “the people” or “the commonwealth.”<sup>394</sup> Vattel speaks most often of “the nation” or of “the sovereign,” meaning the person of the monarch.<sup>395</sup> It was Rousseau who launched the notion of “the state” as a metaphysical entity, so that, as a component of “the state,” each man’s “feelings [are] ennobled, his entire soul soars so high,” he achieves “moral liberty, which alone makes man truly master of himself . . . [as] obedience to the law you have set yourself is [true] liberty.”<sup>396</sup>

This doctrine was so abstract—so entangled in mystery—it could appeal in later generations to socialists as to romantic nationalists. Rousseau’s vision seemed to break with earlier natural law doctrines, which emphasized enduring obligations arising from human nature or from inherent limitations of the human condition.<sup>397</sup> Rousseau’s doctrine opened the way to the very modern view that the only true law is the law

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captive”—exactly Rousseau’s claim in *The Social Contract*. John Locke, *The Second Treatise*, in *TWO TREATISES OF GOVERNMENT*, §§ 23–24, 284 (Peter Laslet ed., Cambridge Univ. Press 1988). In his *Discourse on Inequality*, Rousseau, himself, cites Locke’s argument regarding slavery, with explicit and respectful attribution to Locke. JEAN JACQUES ROUSSEAU, *THE FIRST AND SECOND DISCOURSES* 167 (Roger Masters, trans., St. Martin’s Press 1962).

393. VATTEL, *supra* note 111, at 284 (prisoners of war may not be put to death). *Id.* at 286 (“On no occasion when I may not justifiably put my prisoner to death [because he is “personally guilty of some crime deserving death”] may I make of him a slave.”). *The Social Contract* seems to have originated in a plea from Rousseau’s publisher to provide a counter to Vattel’s treatise. Since *The Social Contract* forgoes any actual discussion of diplomacy and war, Rousseau seems to have been most concerned to challenge the natural law grounding of Vattel’s treatise rather than any particular doctrines regarding international law. See Albert de Lapradelle, *Introduction*, in VATTEL, *supra* note 111, at xxi.

394. So, Ch. VII, distinguishing political from paternal authority, is entitled, “Of Political or Civil Society”—not “the State.” Ch. VIII: “Of the Beginning of Political Societies”; Ch. IX: “Of the Ends of Political Society and Government”; Ch. X: “Of the Forms of a Commonwealth”; “Ch. XII: Of the Legislative, Executive and Federative Power of the Commonwealth” etc.

395. The chapter titles offer a fair survey of Vattel’s usage: “Objects of Good Government” (I, vi); “Second Object of Good Government” (I, xi); “Common Duties of Nations” (Bk II, ch. i); “Mutual Commerce Between Nations” (II, ii); “Dignity and Equality of Nations” (II, iii); “Justice Between Nations” (II, v); “Passage of Troops Through a Neutral Country” (III, vii). The Fenwick translations here faithfully reflect the terms in the original French text.

396. *The Social Contract*, *supra* note 82, at 23–24.

397. *Id.* at 32 (“The general will is always rightful and always tends to public utility”).



men give to themselves.<sup>398</sup> The formalistic character of the doctrine does little to limit its content or application.

In the hands of later German theorists, the premise that war is solely between states led to the conclusion that civilian resistance was a monstrous deviation from proper norms, which could, accordingly, be repressed with limitless brutality. Among many German thinkers, the premise that war is solely between states seems to have encouraged (or reinforced) the view that the claims of “the state” are on a far higher, nobler level than the security concerns of ordinary citizens, so war can be conceived as a contest of world views, where all means of force are permissible.<sup>399</sup>

Given this history, we should be more open to claims that the traditional view was, in important ways, actually more humane. To say that war is a conflict between entire political communities does not deny that members of each community remain human beings. In debates before the First World War, British and American commentators defended seizure of sea-borne commerce on the grounds that enemy nationals were enemies, while simultaneously insisting that seizure of sea-borne property was a more humane tactic than those associated with massive land battles.<sup>400</sup> These commentators took for granted that an “enemy” still had some claim to regard as a fellow human being. As the Lieber Code put it, “Men who take up arms against one another do not cease on this account to be moral beings, responsible to one another and to God.”<sup>401</sup>

Earlier writers embraced the same paradox—if it is actually a paradox: in war, enemies may forfeit many rights, especially rights of property, without thereby forfeiting all claims to concern for the protection of their lives and limbs, as human beings. John Locke actually gave much more attention than Rousseau to the claims of defeated nations in war, even in a “just war” against “aggressors.” Locke insisted that it was wrong to starve defeated enemies and wrong to take land from their descendants.<sup>402</sup> Vattel’s treatise elaborated similar humanitarian restraints at greater

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398. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 286 (UNIV. OF CHI. PRESS 1953) (summarizing the tendency of the argument, as “the general will takes the place of the natural law”).

399. See *supra* notes 334, 335, *infra* note 405 and accompanying text.

400. See *supra* notes 123–28.

401. LIEBER CODE, *supra* note 161, art. 15.

402. Locke, *supra* note 392, at 365–70.

length.<sup>403</sup> These writers characterized war as a contest between entire political communities, but depicted political community as a means to secure the rights of its members.<sup>404</sup> Wars viewed in these terms might be easier to limit than wars fought for “the state,” a mystical entity quite removed from the individual human beings in whose name it claims to act.<sup>405</sup>

The traditional view disfavored acts of vengeance and triumphalism. Hence, the admonitions in the Lieber Code and the Hague convention against “pillage” of conquered towns and cities.<sup>406</sup> In practice, the view that war is between whole communities encouraged the notion of imposing economic “costs” on the opposing community in war, treating the enemy as human actors capable of calculating their own interests rather than as robotic agents of their “state” or as irrelevant bystanders. Imposing “costs” could involve much hardship for civilians, but it seems in a different category from the brutal “terror” tactics embraced by German legal advisors and actual field commanders in both world wars.

Still, the contrast runs in both directions. The Rousseauian premise that war concerns only the state and its agents is so abstract that it can be invoked to support ferocious brutality, but may equally well encourage sentimental illusions. The Rousseauian doctrine that through the general will embodied in the state, man is free to give himself any law he chooses, may elevate “the state” above any larger, moral framework, but it then

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403. See Vattel, *supra* at note 111, at 282–83, for discussions of the obligations to protect women, children, the aged, and the sick, immunities for ecclesiastics, men of letters and others, and protections for peasants and other unarmed people.

404. Locke traces the “power of war and peace, leagues and alliances” in the commonwealth to “the power every man naturally had before he entered into Society.” *Id.* at 65. In that “state of nature,” Locke says each man “is bound to preserve himself” and authorized by the “law of nature” only to use force against an aggressor that is “proportionate to his transgression, which is so much as may serve for reparation and restraint.” *Id.* at 271–72. Vattel starts from Locke’s premise: “Since nations are composed of men who are by nature free and independent and who before the establishment of civil society lived together in the state of nature, such nations or sovereign states must be regarded as so many free persons living together in the state of nature.” *Id.* at 3. Vattel then draws this conclusion: “The right to use force, or to make war, is given to Nations only for their defense and for the maintenance of their rights.” *Id.* at 243.

405. For an account of Nineteenth Century German thought, emphasizing its exaltation of the state—and an extreme moralism regarding the aims of the state—see JOHN DEWEY, GERMAN PHILOSOPHY AND POLITICS 96 (Van Rees, 1942) (“the State, if not avowedly something mystic and transcendental, is at least a moral entity, the creation of self-conscious reason operating in behalf of the spiritual and ideal interests of its members . . . its purpose is the furthering of an ideal community. The same thing is to be said of wars when they are really national wars.”).

406. LIEBER CODE, *supra* note 161, art. 44 (“all pillage or sacking, even after taking a place by main force . . . are prohibited”). Hague Convention IV, *supra* note 19, art. 28 (“pillage of a town or place, even when taken by assault, is prohibited.”).

remains quite open-ended.<sup>407</sup> The least one can say is that the Rousseauian outlook abstracts from much sad, but persistent, reality. It abstracts, one might say, from the natural “course of human events.”

First, the doctrine of war as solely a relation between states hides from view the inescapable fact that behind “the state” are human beings, who make particular choices in particular circumstances. It therefore encourages the very pleasing view that outcomes in war can be determined entirely on battlefields, on the seemingly logical view that the armed forces are the sole instrument of “the state” in war.

It was an attractive view in the late Nineteenth Century because it did seem to accord with recent experience of war in Central Europe. In the war provoked by Bismarck’s diplomatic maneuverings in 1866, the army of the Prussian monarch fought one decisive battle against the army of the Austrian emperor—out in the countryside, away from population centers. The court in Vienna then drew the logical conclusion and quickly agreed on necessary concessions to satisfy King Wilhelm of Prussia. It was known at the time as the Seven Weeks War.<sup>408</sup> The issues in dispute were so soon forgotten that Austria and Prussia could negotiate a long-lasting alliance only a few years later.<sup>409</sup>

Not all wars were like that, however, even in the Nineteenth Century. Long wars can engage whole populations, as was true of the American Civil War and many episodes of the wars against Napoleon. In any longer war, civilians pay the costs one way or another, civilians provide the military’s equipment and supplies, civilians support (or at least obey, thereby enabling) the government that directs the war. All this is obscured by insisting that war is simply a contest of “states.” These facts remain the focus in the Anglo-American view that war is not about defeating

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407. On ambiguities of Rousseau’s general stance toward war, see THOMAS PANGLE & PETER J. AHRENSDORF, *JUSTICE AMONG NATIONS*, 185–90 (1999). On varied responses to Rousseau among subsequent German thinkers, RICHARD VELKELY, *BEING AFTER ROUSSEAU, PHILOSOPHY AND CULTURE IN QUESTION* (Univ. of Chicago Press 2002) (tracing influence of Rousseau’s attack on ‘nature’ through succession of German thinkers, culminating in Martin Heidegger, philosophic advocate for National Socialism).

408. See GORDON CRAIG, *GERMANY 1866-1945*, at 3–7 (Oxford Univ. Press 1978) (on Bismarck’s successful efforts to settle the war by negotiation after the first decisive battle, rather than let the Prussian army march on Vienna and conquer the Austrian capital, as some in Prussian government preferred).

409. *Id.* at 114 (on 1879 alliance with Austria as “a landmark in European history” because the first not to be concluded in the midst of war or on the eve of anticipated war).

armies, but about imposing terms—which means coercing the enemy’s will, not only the enemy’s forces.

A second, related problem with the Rousseauan view of war (or what we might now call, the Red Cross view) is that it abstracts entirely from the nature of the opposing power. Tactics that would be improper in a limited contest with a cautious and restrained opponent might be morally permissible in a long war against a peculiarly brutal opponent. All previous conventions on humanitarian restraint in war made restraining rules conditional on the enemy’s acceptance of them<sup>410</sup> and violations of the rules punishable by reprisal in kind.<sup>411</sup> AP I goes far beyond any previous convention by insisting that its restrictions must be honored in all international conflicts, regardless of whether they are actually honored by the opposing side.<sup>412</sup>

The AP-I approach may reflect the Rousseauan view that man is free to give rules to himself, providing only that they have the form of generality. But what if, by faithfully observing all rules even against an enemy that observes none of them, a nation condemns itself to ultimate defeat? In Rousseau’s theory (or that of his disciple, Immanuel Kant),

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410. The 1899 and 1907 Hague Conventions on the Law and Custom of War on Land stipulate (in art. 2 of both versions) that the accompanying Regulations “do not apply except between contracting Powers and then only if all the belligerents are parties to the Convention.” See Hague Convention II, *supra* note 18; see also Hague Convention IV, *supra* note 19. Each of the 1949 Geneva Convention applies more broadly to “armed conflict . . . between two or more of the High Contracting Parties,” or signatories. In conflicts involving some non-signatories, however, “the Powers who are parties [to the particular convention] shall remain bound by it *in their mutual relations*” and only to a non-signatory “*if the latter accepts and applies the provision thereof*” (emphasis added). See Geneva Convention (I) *supra* note 21, art. 2; Geneva Convention (II), *supra* note 22, at art. 2; Geneva Convention (III), *supra* note 23, art. 2; Geneva Convention (IV), *supra* note 24, at art. 2. Additional Protocol I applies to the “situations referred to” in Article 2 of the 1949 conventions and extends this coverage to “conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes”—without any requirement that any such “people” actually “accepts and applies provisions” of the 1949 conventions or Protocol I in their own conduct. See Protocol I, *supra* note 2, at art. 1.

411. Should a state “contract” to honor the Hague Regulations, but then violate them in practice, the victim of such delinquencies remained free (under prevailing doctrine, not challenged in the Regulations) to retaliate in kind—that is, to act against the violator in the same way. See OPPENHEIM, *supra* note 133, at 248 (“reprisals between belligerents are admissible for any and every act of illegitimate warfare”).

412. The 1949 conventions do prohibit reprisals on protected categories: wounded soldiers and hospitals, shipwrecked sailors and hospital ships, prisoners of war, civilians in occupied territory. But Protocol I includes sweeping prohibitions on reprisals, barring even reprisals against “civilian objects.” Protocol I, *supra* note 2, at art. 52, ¶ 1 (“Civilian objects shall not be the object of attack or of reprisals”). If you cannot even destroy the enemy’s property to penalize violations—such as the murder of war prisoners by the enemy—there is no feasible reprisal.

such consequences may be dismissed as morally irrelevant, as only the embrace of universal rules establishes man's moral freedom.<sup>413</sup> Yet most people have somewhat different moral intuitions. As recently as the 1990s, the ICJ could not find a majority for the view that using or threatening to use nuclear weapons was always wrong; half the judges refused to condemn resort to nuclear weapons in a conflict threatening national existence.<sup>414</sup> What sort of foe would seek to extinguish the competing nation altogether? A common approach to all wars between all "states" is more plausible if one keeps to abstractions without considering what a particular "state" may be prepared to do in a particular conflict.

And what about combatants who do not belong to a state? AP I insists on prisoner of war protections for guerilla fighters, even if not connected by ties of loyalty to an established government.<sup>415</sup> In effect, AP I moves from the idea that war is a contest between states to the view that, when there is no state, war is simply a contest between combatants. Red Cross commentators thus insist that humanitarian law knows only two categories: combatants, eligible for Geneva protections for war prisoners or "civilians," protected by international human rights standards, applicable in peacetime.<sup>416</sup> It may be reasonable in many circumstances to grant the full range of POW protections to guerrilla fighters; it is far less reasonable to extend such protections to participants in terror networks.<sup>417</sup> It may also be

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413. On connections between Rousseau's general will and Kant's categorical imperative and subsequent course of German idealist thought, see DAVID JAMES, *ROUSSEAU AND GERMAN IDEALISM* (Cambridge Univ. Press 2013). On Kant's prescriptions for cosmopolitan law of peace and its dependence "metaphysical postulate" of human freedom, Amanda Perreau-Saussine, "Immanuel Kant and International Law," in *THE PHILOSOPHY OF INTERNATIONAL LAW* (Samantha Besson & John Tasioulas, eds., Oxford Univ. Press 2010).

414. *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J., July 8, 1996.

415. Article 43 demands prisoner of war protections for "members of the armed forces of a Party to a conflict." Article 44 then calls for "protections equivalent in all respects" even for "combatants" who meet none of the requirements imposed in the 1949 Geneva Convention No. III Article 4 on Prisoners of War and do not necessarily belong to a state.

416. Louise Doswald-Beck & Sylvain Vite, *Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94 (1993).

417. In the Vietnam conflict, the United States treated Viet Cong captives according to Geneva rules for prisoner of wars. However, the United States was not willing to apply the same rules for detainees at Guantanamo, partly because the rules make isolation of prisoners from each other from interrogation purposes or to offer inducements to provide difficult information. Securing information was a high priority.

straining military necessities to insist that civilians should incur no costs for aiding and shielding guerrillas.

There are, of course, serious moral challenges in formulating acceptable tactics against guerrilla insurgencies—as against any enemy. The approach in AP I is not obviously the best guide to such challenges. It does not focus on the clearest moral priority for humanitarian law—the protection of human life. AP I gives so much emphasis to the distinction between “civilian” and “military,” that the distinction between threats to life and harm to property fades from view. Instead of emphasizing that unarmed people should not be objects of lethal attack—embracing the surrendered combatant with the civilian—AP I insists on the orthogonal “basic rule,” that civilians and “civilian objects” (i.e., property) must be excluded from attack.

It may seem ironic that the longest and most detailed convention on “humanitarian” law is blind to the moral priority of human life over mere “objects.” But it is also, in a way, logical. AP-I starts by abstracting from who is fighting whom, how they are fighting, and why, in ways that make actual human beings on each side irrelevant. All natural law theorists before Rousseau asserted that human beings cannot live decently (or safely) outside political communities, so membership in a political community is a very basic element of the human condition.<sup>418</sup> Political communities differ, which is one reason there is often conflict among them. A doctrine of war that abstracts from such primal facts is not likely to be a reliable guide—or even a humane guide—to the moral conduct of military action.

Whatever one might say about theoretical premises, two aspects of contemporary affairs assure continued relevance to the historic debate about war. One was foreshadowed in the warning offered by a British delegate at the Geneva conference that drafted AP I: “If standards [are] pitched too high, they might be regarded as unattainable and consequently ignored.”<sup>419</sup> Britain waited more than two decades to ratify AP I and then did so only with numerous reservations, as other English speaking countries did.<sup>420</sup> The United States has never ratified AP I.

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418. HEINRICH ROMMEN, *THE NATURAL LAW* 62–82 (Liberty Fund, 1998, reprinting 1947 translation of German original) (contrasting early modern natural law theorists with Rousseau).

419. OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW (1978), Vol. V, p. 133, par. 34 Plenary Session of March 6, 1974 (statement of Sir Colin Crowe). On Bush administration reasons for excluding the full range of Geneva protections from Guantanamo detainees, see YOO, *supra* note 7, at 128–64.

420. Among other things, these reservations reserved the right to make reprisals in kind for attacks against civilians and civilian objects even though Protocol I purports to prohibit such reprisals. See Protocol I, *supra* note 2, at art. 52. The Manual of the Law of Armed Conflict, prepared by the UK Ministry of Defense, acknowledges that an

Official U.S. military doctrine is, in fact, hard to reconcile with the strictures of AP I. The *Commander's Handbook on the Law of Naval Operations* authorizes—as in the world wars—complete interception of ocean-borne commerce with an enemy state in time of war.<sup>421</sup> When it comes to bombardment, the manual defines permissible targets to include “objects which . . . effectively contribute to the enemy’s war-fighting *or war-sustaining* capability and whose total or partial destruction would constitute a definite military advantage to the attacker at the time of the attack.”<sup>422</sup> It goes on to explain that, “Economic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability may also be attacked.”<sup>423</sup> Some European critics warned that by such loose formulas (“war sustaining”), almost any target could be justified.<sup>424</sup> If the international standard requires that only “military objects” can be attacked, “military objects” will be defined very broadly.

Meanwhile, a second development gives renewed relevance to the old debate. Advances in technology have enabled attacks to be conducted with remarkable precision, whether through drones and bombs guided by electronic navigation systems, or by cyber-attacks targeted on specific computer networks. It is much more realistic now to target “civilian objects” with the expectation that we will cause no immediate harm to human bodies.<sup>425</sup> As it is, we impose economic sanctions to coerce states.

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international tribunal has held that “attacks on civilians by way of reprisal can never be justified,” but insists “the court’s reasoning is unconvincing and the assertion that there is a prohibition [against reprisals] in customary law flies in the face of most of the state practice that exists [i.e., precedents from the actual conduct of states in war]. The UK does not accept the position as stated in this judgment.” MANUAL OF THE LAW OF ARMED CONFLICT 425, n.62 (Oxford Univ. Press 2004).

421. *The Commander's Handbook on the Law of Naval Operations* NWP 9, in 64 INTERNATIONAL LAW STUDIES: THE LAW OF NAVAL OPERATIONS 470 app. (Horace Robertson ed., 1991) [hereinafter *The Commander's Handbook*].

422. *Id.* at 474

423. *Id.* at 475. (emphasis added)

424. *See, e.g.*, Frits Kalshoven, *Noncombatant Persons: A Comment to Chapter II of the Commander's Handbook on the Law of Naval Operations*, in *The Commander's Handbook*, *supra* note 421, at 310 (“to add ‘war-sustaining effort’ is going too far, however, as this might easily be interpreted to encompass virtually every activity in the enemy country.”).

425. For elaboration on the potential of cyber-attacks, *see* Jeremy Rabkin and Ariel Rabkin, *Navigating Conflicts in Cyberspace: Legal Lessons from the History of War at Sea*, 14 CHICAGO J. INT'L L. 197 (2013). For a broader version of the argument, *see* Jeremy Rabkin & John Yoo, *A Return to Coercion: International Law and New Weapons Technologies*, 42 HOFSTRA L. REV. 1187 (2014).

In recent years, for example, western states have imposed severe economic sanctions against Iran, in an effort to compel Iranian leaders to abandon their nuclear weapons program. Harm to the civilian economy is not a byproduct, but the purpose of such sanctions.<sup>426</sup> One may say economic sanctions are not subject to rules about armed conflict since they do not involve “armed force,” but it is hard to see why harms that may be imposed indirectly through sanctions must be regarded as humanitarian violations when imposed directly through “force.”

To hold to a strict view of “distinction” in all circumstances—as AP I and ICRC commentators demand—is to hold to the Rousseauian fallacy that human beings can give themselves a law at odds with naturally occurring challenges, at odds even with reasonable views of natural limits on permissible action in war. The doctrine of AP I does not become more convincing by attributing it to all or most “states”—as if words on paper could establish a supreme moral authority, even when most states do not act in accordance with those words and others have no occasion to show whether they would respect them in practice.<sup>427</sup> It is no more convincing to rewrite history, as the Red Cross *Commentary* does, to make it seem as if the new rules have always been the rules.

At the least, we should remember the greatest natural law document of the Eighteenth Century, which cautioned that the human right to choose new authorities and make new rules must be tempered by the “dictate” of “prudence.”<sup>428</sup>

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426. Economists assessing western sanctions on Iran (to force it to comply with international non-proliferation obligations) found that Iranian oil revenues dropped by 50% between 2011 and 2012, triggering a 50% drop in the value of the Iranian currency, a 20% jump in unemployment and food riots in various cities. Steven Blockmans & Stefan Waizer, *E3+3 coercive diplomacy towards Iran*, CEPS Policy Brief (June 6, 2013), available at [www.ceps.eu](http://www.ceps.eu).

427. The Red Cross insists that almost all provisions of AP-I have now become customary law, binding even on states that have not ratified the convention or ratified it with reservations against particular provisions. But the claim is based on a compilation of what states have said, rather than what they do. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 3; Bellinger & Haynes, *supra* note 4.

428. “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes . . . .” American Declaration of Independence, July 4, 1776. The authors of the Declaration actually took considerable pains to make it conform—or at least, seem to conform—to what they understood as the prevailing law of nations in 1776, thereby practicing what they preached, even at the outset of a revolution. DAVID ARMITAGE, *FOUNDATIONS OF MODERN INTERNATIONAL THOUGHT 198–202* (Cambridge Univ. Press 2013).