

AN EVALUATION OF EARLY CODIFICATION ATTEMPTS OF THE LAWS OF WAR AND THE INFLUENCE OF CIVIL WAR

Yrd.Doç.Dr. Joseph Zand*

Abstract:

The laws of war were the first part of international law to be codified. Until the mid-nineteenth century the laws of war had existed in different form as today namely; in custom, in broad principles, in military manuals and the national laws as well as religious teachings. Although the laws regulating the conduct of hostilities were recognised in many early cultures, the theories of the laws of war are essentially considered “Eurocentric.” As a result of the creation of modern European state system in the seventeenth century the laws of war were the first branch of international law to be developed in any depth. Multiplicity of factors led to their re-statement and development in the second half of the nineteenth century. However, this article argues that contrary to the popular belief the development of this branch of international law was also influenced by some major civil wars too. The topic of civil war will be dealt with in chronological order with references made to some of the most important conflicts such as the American Civil War which have contributed to development of rules and regulations governing internal armed conflict and as a consequence to the laws of war.

Keywords: International Law, Codification of Laws of War, the Influence of Civil War.

* Faculty of Law, Inonu University, Malatya, Turkey; Joseph.zand@inonu.edu.tr.

SAVAŞ HUKUKU VE İÇ SAVAŞIN ETKİLERİNE YÖNELİK İLK YASAL DÜZENLEME GİRİŞİMLERİNİN DEĞERLENDİRİLMESİ

Özet:

Savaş hukuku, uluslararası hukukun kodifiye edilen ilk kısmıdır. Savaş hukuku Ondokuzuncu Yüzyılın ortalarına kadar varlığını bugünkünden farklı olarak; gelenek, genel ilkeler, askeri kılavuzlar ve ulusal kanunlar, hatta dini öğretiler olarak sürdürdü. Düşmanca hareketleri düzenleyen hukuk kurallarının birçok erken kültürde varlığı bilinse de, savaş hukuku teorilerinin “Avrupa Merkezci” olduğu kabul edilir. Modern Avrupa devlet sisteminin oluşturulmasının bir sonucu olarak savaş hukuku, uluslararası hukukun geliştirilen ilk dalıydı. Birçok faktör Ondokuzuncu Yüzyılın ikinci yarısında yeni söylemlere ve gelişmelere sebep oldu. Ancak bu makale, genel anlayışın aksine, uluslararası hukukun bu dalının bazı büyük iç savaşlardan da etkilendiğini savunuyor. Makalede iç savaş konusu, silahlı iç çatışmaya ilişkin kural ve düzenlemeler ile savaş hukukunun oluşmasına katkısı bulunan Amerikan iç savaşı referans alınarak kronolojik olarak tartışılacaktır.

Anahtar Kelimeler: Uluslararası Hukuk, Savaş Hukukunun Yasalaştırılması, İç Savaşın Etkisi

Introduction

Emmerich de vattel the Swiss jurist in the eighteenth century wrote:

‘It is a question very much debated whether a sovereign is bound to observe the common laws of war towards rebellious subjects who have openly taken up arms against him? A flatterer, or a prince of a cruel and arbitrary disposition, will immediately pronounce that the laws of war were not made for rebels, for whom no punishment can be too severe’¹.

The above quote encapsulates the traditional attitude by sovereigns towards rebellious subjects and civil war². In contrast to regulations

¹ Emmerich De Vattel, ‘Law of Nations: Principle of Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns’, J. Chitty & E.D. Ingraham, Published by T. & J.W. Johnson, 1867 original from Harvard University Digitized, Aug 24, 2007, Book III, pp. 421-428.

² Oeter, S., “Civil War”, in ‘Encyclopaedia of Public International Law: Use of Force; War and Neutrality; Peace Treaties’, vol. 4, Bernhardt, R. (ed.), North Holland, 1982, pp.

regarding international law the legal rules concerning internal armed conflict are relatively late in origin³. Some observers have noted that before any civil conflicts could be considered as true wars, a crucial conceptual step was necessary to be taken to somehow place insurgents on a legal par with the government they were rebelling against, at least in matters relating to the conflict itself⁴. The genesis of this doctrine could be traced to the Islamic law which took a long step in that direction in the Middle Ages, with its distinction between *Bughat* and ‘ordinary criminals – with *Bughat* referring to persons who fought as a patriot for a cause than mere personal enrichment⁵.

The development in the laws of war in the second half of the nineteenth century was brought about mainly because of an era of great belief in human progress in general⁶. This also heralded the birth of an era of multilateral treaties setting out principles in this area of international law for states to follow⁷. The most important aspect of this period was the passion the international community developed for codification of rules and regulations of the laws of war⁸.

597-603. For a study of some rebellions, see Russell, D.E.H., ‘Rebellion, Revolution and Armed Forces, London, 1974.

³ Castren, E., ‘Civil War’, SUOMALAINEN TIEDEAKATEMIA, 1966, pp. 38-96.

⁴ Neff, S., ‘War and the Laws of nations: A General Story’, Cambridge University Press, 1st ed., 2005, p. 251.

⁵ Generally see Marcel Boisard, ‘On the probable influence of Islam on western public and international law’, *International Journal of Middle East Studies*, Vol. 11, 1980, pp. 429-50; Majid Khaduri, ‘War and Peace in the Law of Islam’, The Law Book Exchange Ltd., 1st ed., 2006, pp. 65-66, 74-80; Khaled Abou El Fadl, ‘Rebellions and Violence in Islamic Law’, Cambridge University Press, 2001, p. 32; Joel L. Kraemer, ‘Apostates, Rebels and Brigands’, *Israel Oriental Studies* 10 (1980): p. 34-73.

⁶ Schindler, D., Toman, J., ‘The Laws of Armed Conflicts’, 3rd ed., Martinus Nijhoff Publishers/Henry Dunant Institute, Dordrecht/Geneva, 1988, p. VII; also see Coker, C., ‘War and the 20th Century: A Study of War and Modern Consciousness’, University of Michigan Press, 1994, p. 5.

⁷ also see Rwelamira, M.R., ‘The Significance and Contribution of the Protocols to the Geneva Conventions of August 1949’, pp. 227-236, in Swinarski, C. (ed.), ‘Studies and Essays on International Humanitarian Law and Red Cross Principles’, In Honor of Jean Picet, ICRC, Geneva, 1984, p. 8.

⁸ Greenwood, C., ‘Historical Development and Legal Basis’ in Fleck D. & Bothe, M., ‘The Handbook of International Humanitarian Law’, Oxford University Press, 2007, pp. 15-27.

In order to follow this important element of international law the following historical references will act as a catalyst to promote appreciation of developments and values of the laws of war, which like so much else in international law derive originally from Roman law⁹. We will follow its chronological development from inception starting with the 1856 Paris Declaration on Maritime Law which was duly followed by the 1868 St Petersburg Declaration through to the two Hague Conventions (1899 and 1907), which arguably made the greatest contribution to elucidation of the laws of war in the nineteenth and the early twentieth century, in particular, the vital issue of who should be considered as a lawful combatant. In the latter part we also consider how much of influence major civil wars in the nineteenth century had on the shaping of the laws of war.

Historical Background

For centuries war had been the standard method of settling disputes between nations and satisfying their ambitions, territorial or otherwise¹⁰. For many millennia the concept of humanity in land warfare was a rarity and did not play a part in the evolution of mankind. The captured soldier was aware that the fate that awaited him was either death or enslavement. From the time of primitive caveman to biblical times and the following centuries, the winner in war helped himself not only to the material belongings of the vanquished but also his women and children. At the end of each battle the victor could treat them as they saw fit, the Roman motto of '*Vae Victis*' – Woe to the conquered, perfectly encapsulating this predicament¹¹. Ever since history has registered the activities of organised groups, war has been one of its principle preoccupations¹². All civilizations have fought wars according to rules designed to make them

⁹ See Bederman, D.J., 'International Law in Antiquity', Cambridge University press, 2nd ed., 2002.

¹⁰ See Edmunds, S.E., 'The Laws of War: Their Rise in the Twentieth Century and Their Collapse in the Twentieth', 15 *Va. L. Rev.* 321-349.

¹¹ The maxim '*Vae Victis*' implied that a vanquished nation or individual could expect little or no mercy, Detter, I., 'the Law of War', Cambridge University Press, 2nd edition, 2000, p. 151.

¹² Archer, C.I., 'History of Warfare', Unp - Nebraska, 2002, p. 9.

marginally less bloody. During the reign of Cyrus the first king of Persia (7th century BC) agreements to treat prisoners of war existed and he is best remembered for his unprecedented tolerance and magnanimous attitude towards those he defeated¹³.

The history of alleviation of suffering of war could also be traced to ancient Chinese and Indian civilisations¹⁴. Sun Tsu, back in the fourth century AD, writing in his much referred to book 'The art of war'¹⁵ and the Manu Smriti¹⁶ (laws of Manu), dating between 200BC and 200AD in India, both prohibited the slaughter of prisoners of war as well as presenting an alternative of absorbing the captured prisoners into the ranks of one's own army¹⁷.

Furthermore, the civilisations of antiquity are to be credited with serious attempt to observe some restraint during state of war and even to subject it to the rule of legal principles. Thucydides refers to war as "most lawful act when men take vengeance upon an enemy and an aggressor."¹⁸ Throughout its history, the laws of war were heavily influenced by religious and philosophical notions. The evidence of which could be found in the literature of the religious leaders and philosophers, in agreements and treaties, and articles of war issued by military commanders and in the rules of chivalry. It is believed that the first code of military conduct was devised by Saracens based on the Koran¹⁹. In

¹³ Holland, T., 'Persian Fire: The First World Empire, Battle for the West', Little and Brown Publications, 1st ed., 2006.

¹⁴ Amerasinghe, C.F., 'History and Sources of the Law of War', 16 *Sri Lanka J. Int'l L.* 263 2004; Wright, Q., 'The Outlawry of War and the Law of War', 47 *Am.J. Int'l L.* 365 1953.

¹⁵ Sun Tsu, 'The Art of War', Translated by S. B. Griffith, Oxford University Press, 1971.

¹⁶ Manu Smriti is regarded as an important work of Hindu and ancient Indian society.

¹⁷ This practice was followed by Mao Tse-Tung's Communist army after the defeat of the Chinese nationalists under the command of Chiang Kai-Shek in 1949, and by Kim Il-Sung's Communist troops in North Korea during their early successes in the Korean War in 1950.

¹⁸ Fitzgerald, A., 'Peace and War in Antiquity' Scholartis Press London), 1st ed., 1931, pp. 11.

¹⁹ The following statement concerning the treatment of prisoners could be found in the Koran, 'When you meet in battle those who have disbelieved, smite their neck, and after the slaughter tighten fast the bonds, until war lays aside its burdens.' Then either release them as a favour or in return for ransom.' The Koran, Surah xlvi, paragraph 4; also see, Khadduri, M., War and Peace in the Law of Islam 83-137 (1955).

recent years much has also been written about laws of war which can be identified in African customary traditions²⁰.

The Judeo-Christian Influence

It remained to the Christians to give material content to the formal concept of *justum bellum* (the doctrine of war) of the Romans, through Christian tradition of St Augustine which forbade attacks on women and the wounded, and influences of heralds on medieval city states²¹. In early days, the institution of war and its legitimacy was challenged by the early church, since war was held to be a consequence of the original sin and the church was of the opinion that once the world had converted to the faith; perpetual peace would be achieved²². The Christians assertion on ‘the existence of a residual or background condition of peace in world affairs’ was based on ‘a powerful strain of radical pacifism inherent in Christian doctrine ...’²³. According to Brownlie, ‘the early Christian Church refused to accept war as moral in any circumstances and until A.D. 170 Christians were forbidden to enlist²⁴. As Christianity and the influence of the church grew, it became essential for it to deal with the *Realpolitik* of war, hence, the stigma which the originally pacifist spirit of the church had attached to war gradually disappeared²⁵. Consequently, the concept of ‘just war’ was developed by St Augustine, 5th Century North African bishop in which under certain conditions, war was recognised in accordance with the precepts of the new religion²⁶. To achieve this, St

²⁰ Bello, E., ‘African Customary Humanitarian Law’, Oyez Publishing, 1980, pp. 1-62.

²¹ Russell, F. H., ‘The Just War in the Middle Ages’, Cambridge University Press, 2nd ed., 1977, 292-308.

²² O. Engdal & P. Wrangle (eds.), ‘Law of War: the Law as It Was and the Law as it should be’, Brill, 2008, P. 23.

²³ Neff, ‘War and the Law of Nations’, *op. cit.*, p. 31.

²⁴ The period of extreme pacifism lasted for three centuries after Christ. Brownlie, I., ‘International law and the Use of Force by States’, Clarendon Press, Oxford, 1963, p. 5

²⁵ Friedman, L., (ed.) ‘the Law of War: A Documentary History’, Greenwood Publishing, 1972, p. 7.

²⁶ Von Elbe, J., ‘The Evolution of the Concept of the Just War in International Law’ 33 *Am. J. Int’l L.* 665 1939 p. 667.

Augustine developed an argument based on his education in Roman and Greek philosophy and law²⁷.

Nevertheless, it is claimed that early Christian writers were heavily influenced by Greek and Roman beliefs; and to a lesser extent to the laws of war accepted by other and older civilization.²⁸ Some scholars have noted that early Christian writers embraced many of the biblical restraints on the conduct of war contained in the Old Testament and discussed by early Jewish scholars²⁹. In fact, analysis of Jewish law and scholarly writings reveal that modern accepted principles on the conduct and regulation of war are remarkably similar to early Judaic concepts of rules restraining or proscribing certain conducts during war³⁰.

The Euro-Centric Nature of the Modern Law

Hugo Grotius, the prominent early 17th century scholar and theorist largely referred to as the father of international law is credited with the greatest contribution to collection and examination of the various laws and customs of war³¹. He, in fact, adopted much of *neo-scholastic* doctrine and throughout his work explicitly cited the Spanish *neo-Scholastics* Navarro and Covarrubias, even more explicitly following the Spanish scholastic of the sixteenth century, including highly influential Dutch

²⁷ Nussbaum, 'A Concise History of the Law of Nations', Revised Edition, Macmillan London, 1962, p. 35.

²⁸ See Phillipson, C., 'The International Law and Custom of Ancient Greece and Rome 166-384', Macmillan, London, vol. II, 1911. Viswanatha, S., 'International Law in Ancient India', Longmans Green, Bombay, 1925, 108-200; Wells, H., 'Ancient South East Asian Warfare', London: Bernard Quaritch, 1952.

²⁹ See Wilkes, G., 'Judaism and Justice in War', in Robinson, P.F., 'Just War in Comparative Perspective', Ashgate, pp. 9-23.

³⁰ Roberts, G. B., 'Judaic Sources of and Views on the Laws of War' 37 *Naval L. Rev.* 221 1988; Solomon, N., 'Judaism and the ethics of war' *International Review of Red Cross* Vol. 87 No. 858 June 2005

³¹ Draper, G.I.A.D. (1990) "Grotius' Place in the Development of Legal Ideas about War", In "Hugo Grotius and International Relations, Bull, H., et al., Clarendon Press, 1992, pp 177-207; also generally see Onuma Yasuaki (ed.), 'A Normative Approach to War: Peace, War and Justice in Hugo Grotius', Oxford university Press, 1993.

Jesuit Leonardus Lessius (1554-1623)³². Grotius published a book entitled *De Jure Belli ac Pacis (On the Laws of War and Peace)*³³, mainly as a reaction to religious wars of the sixteenth and seventeenth centuries, probably the most devastating European conflict since the fall of the Roman Empire, that constitutes the most dominant event of that era which was concluded by the Peace of Westphalia, much cited as a land mark in the development of international law³⁴.

Grotius considered what principles which should governed the behaviour of nations towards each other. However, the text was concerned as much with causes as to the conduct of war; spelt out in the convenient technical language of *jus ad bellum* and *jus in bello*. Not only was Grotius concerned with the question of how men should behave in the heat of the battle but he also dealt specifically with the question of whether they should be fighting at all in the first place. In other words for Grotius, the rights and wrongs of engaging in war at all was as much a concern as how the war should be conducted. It is also crucial to remember that Grotius had no doubt that waging war could be necessary and virtuous as long as it was conducted by the fighting men whose business it was to bring the war to its military conclusion without inflicting undue harm to non-combatants. Some scholars have even cited the work of Grotius as:

‘...Of special importance in the story of mankind’s endeavour to restrain warfare, because his contribution to it was set in rock as solid as the idea of civilisation itself,... the work as a whole is often regarded as a landmark not simply in the development of the laws of war but, beyond that, of public international law in general and of the idea of society of states which sustains it’³⁵.

³² Chroust, Anton-Hermann, ‘Hugo Grotius and the Scholastic Natural Law Tradition’ *New Scholasticism*, Vol. 17: 101-133, printed in Dunn and Harris (ed.) Grotius, Edward Elgar Publishing, 1st ed., 1997.

³³ Grotius’ book is considered the inaugural text of the law of nations. Hugo Grotius, ‘The Laws of War and Peace (*De Jure belli ac Pacis*)’, New Translation, Published for classic club by W. J. Black (1949).

³⁴ Gross, L., ‘The Peace of Westphalia 1648-1948’ 42 *AJIL*, 1948, p. 20.

³⁵ Best, G., ‘War and Law since 1945’, Oxford University Press, 1st ed., 1994, p. 28-29

It was during this period that legal scholars gradually turned their attention to the issue of civil war. However they would not accept that insurgents could be on legal par with the legal sovereigns whom they were trying to overthrow or secede from. Even Grotius, a loyal Dutchman who had lived through the Dutch war of independence from Spain conceded that civil wars were not true wars. He was of the opinion that subjects of a sovereign had no right to wage war or challenge the legitimacy of his power no matter how good their cause for their discontent. Nonetheless, he made a series of qualifications in this regard; for instance he suggested that a foreign sovereign may wage war on behalf of those subjects in removing the oppressive ruler. The furthest he went in including civil wars in the general framework of the laws of war was to describe them as “mixed wars”, a conflict involving a government on the one side pitted against a private party on the other³⁶.

In this regard, Thomas Hobbes was at the forefront of elucidating another approach towards a sovereign and his subjects in that a subject’s loyalty to a sovereign persisted as long as the sovereign reciprocated that loyalty³⁷. In other words, if the ruler was to turn from a protector to an oppressor he automatically forfeited his duties as a sovereign, hence, releasing his subjects from any duty of loyalty by the operation of the law³⁸.

The notable exponents of this new approach to civil war were the Swiss natural law writer Jean Jacques Burlamaqui and the German scholar Christian Wolff. Burlamaqui stated that civil war was a true war in which

³⁶ H. Grotius, ‘Of the Right of War and Peace’, *op. cit.*, p. 91

³⁷ Indeed, in the years that followed, this idea found its way into the main general stream of natural-law and inspired many legal scholars in the eighteenth century in Europe. See Thomas Hobbes, Richard Tuck (ed.), “Leviathan”, Cambridge University Press, 2nd ed., 1996

³⁸ On this crucial point Heirbaut states that it would be an error to interpret this process merely as a contract between a sovereign and his subjects because in his opinion the true position is that Hobbes merely presented it as a forfeiture of his duties towards his subjects on the part of the ruler. Heirbaut, D., “The Belgian Legal tradition: Does it Exist?” in “Introduction to Belgian Law”, Bocken, H. & De Bondt, W. (ed.), The Hague: Kluwer Law international, 2001, p. 20; Neff, S.C. ‘War and the Law of Nations’, *op. cit.*, p. 254.

the oppressed subjects should be able to obtain justice, since in such a situation they were no longer in the relation of sovereign and subject but on the contrary they were ‘in a state of nature and equality, trying to obtain justice by their own proper strength, which we understand properly by the term ‘war’³⁹. Wolff on the other hand articulated the difference between a mere rebellion and a civil war by suggesting that the difference existed in presence or absence of a *Justa Causa* which was at the heart of this distinction⁴⁰. In other words, in his opinion a civil war could be described as a just struggle of subjects against their sovereign obtaining justice whereas a mere rebellion lacked that legitimacy⁴¹.

But it was only during the age of the enlightenment that something recognizable like our modern international law took shape, in that it found its way into the common discourse of the ruling elites of the whole European state-system⁴². This has mainly attributed to the literature produced by the philosophers and thinkers of the time such as Jean Jacques Rousseau who was an ardent advocate of citizen-soldier and national self-determination, some of the most influential ideas in creating the French revolutionary ‘nation-in-arms’ launching it into total war⁴³.

In 1772, in ‘*Le Contrat Social*’ he wrote:

‘War then is a relation, not between man and man, but between state and state, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as member of their country, but as its defender....’⁴⁴.

³⁹ Jean Jacques *Burlamaqui*, ‘The Principles of Natural Law and Politic Law’, Trans. Thomas Nugent (ed.), Indianapolis, Liberty Fund, 2006, Chapter III: of Different Kinds of Wars, p. 173, Available at: <<http://oll.libertyfund.org>>.

⁴⁰ C. Wolff, ‘*Jus Gentium Methodo Scientifica Pertractatum*’, vol. II (translation), J.B. Scott (ed.), Classics of International Law, Carnegie Endowment for International Peace, 1934, p. 514.

⁴¹ *Ibid.*

⁴² Starkey, A., ‘War in the Age of Enlightenment: 1700 – 1789’, Praeger Publishers, 2003, p. 214.

⁴³ Hoffman, S., and Fidler, P., ‘Rousseau on International Relations’, Oxford University Press, 1st ed., 1991

⁴⁴ Rousseau, J.J., ‘*Le Contrat Social*’, English Translation by Maurice Cranston, Penguin Classics, 1968, Book 1, Chapter 4.

This played an important part in the emergence of humanitarian considerations which he referred to as an admixture of reason and sentiment.⁴⁵ The object of war then according to Rousseau is merely the destruction of a hostile state and the integrity and protection of non-combatants and combatants should be guaranteed and their status clearly distinguished⁴⁶.

But it was left to the Swiss jurist and philosopher, Emmerich de Vattel to make the most telling contribution in refining these rules. He devised a three-fold classification, namely: rebellion, insurrection and civil war which later became the legal basis for further deliberation in the nineteenth century⁴⁷. To de Vattel a rebellion was an unlawful uprising which lacked a just cause and the rebels were considered as criminals⁴⁸. Thus it was within the right of the established government to treat captured participants as ordinary criminals. Secondly, insurgents involved in an insurrection had 'some cause' for their taking up arms against the sovereign but crucially did not challenge the legitimacy of the sovereign to rule over them. Insurrectionist therefore in de Vattel's words, only 'wanting in patience rather than in loyalty'⁴⁹. However the third category of de Vattel's classification, 'civil war' has proved the most troublesome especially in the nineteenth century in which the subjects intended to overthrow and supplant the central government or alternatively secede and form a separate state as illustrated by creation of states which came into existence as a result of the crumbling of the Ottoman Empire during that period⁵⁰. De Vattel's legalistic rational was based upon the fact that in the case of a civil war he considered both the insurgents and the central

⁴⁵ Draper, G.I.A.D., 'The Status of Combatants and the Question of Guerrilla Warfare', 45 Brit. Y.B. Int'l L. 173 1971, p. 175.

⁴⁶ Generally see, Allen Rosas, 'Rousseau and the Law of Armed Force', in 'Law at War: the Law as it was and the Law as it should be', Martinus Nijhoff Publishers, 2008, 219-230.

⁴⁷ De Vattel, 'Law of Nations', *op. cit.*, pp. 421-428.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Finkel, C., 'Osman's Dream: the Story of Ottoman Empire 1300-1923', John Murray Publishers, 1st ed., 2006, p. 531. Also see Yapp, M.E., 'The Making of the Modern Near East', London and New York: Longman, 1987.

government as two distinct ‘*de facto*’ nations in which case the conflict between them becomes equivalent of a war between two sovereign nations:

‘When a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, the very respect as a public war between two nations’⁵¹.

The Traditional classifications of Civil Conflict

De Vattel’s three-tiered approach in civil war formed the guideline in international law according to which the international community dealt with the issue of civil war⁵². Traditional international law has always acknowledged a distinction between international and civil war (or its contemporary guise: internal armed conflict)⁵³. This dichotomy is based upon the core legal principle of state sovereignty which has been the cornerstone of international order since the Peace Treaty of Westphalia in 1648⁵⁴.

Therefore, the only condition for rebels or insurgents to be recognised as lawful combatants was to be recognised either by the central governments they were fighting against or other states especially regional or great world powers, in other words to become a legal fact⁵⁵. The phenomenon of civil war has never been an entirely domestic issue mainly due to inter-relatedness of world economic and political life, it is such that

⁵¹ De Vattel, ‘Law of Nations’, *op. cit.*, p, 427.

⁵² For general information see G.I.A.D. Draper, ‘Humanitarian Law and Internal Armed Conflicts’, *GA. J. Int’L & Comp. L.* 253 (1983); Moir, L., “The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949”, *47 Int’l & Comp. L. Q.* 337 1998.

⁵³ For example see Baty, T. and Morgan, J.H., ‘War: Its Conduct and legal Results’, Murray, 1915, p. 289 and Walker, W.L. and Grey, F.T., ‘Pitt Cobbett’s Leading Cases on International Law, 5th ed., Sweet and Maxwell, 1937, vol. II, p.6.

⁵⁴ Shaw, M.N., ‘International Law’, (5th ed., Cambridge University Press, 2003), p. 25; see also Moir, L., ‘Towards the Unification of International Humanitarian Law?’ in ‘International and Security Law: Essays in Memory of Hilaire McCoubrey’ edited by Burchill, White and Morris, Cambridge University Press, 2005, pp. 108-128, p. 109.

⁵⁵ Levie, H.S., ‘History of the Law on Land’, *International Review of Red Cross* No. 838, pp. 339-350.

more often than not governments tend to be rather sceptical about change of regime in other countries mindful of encouraging dissent at home⁵⁶.

However, in western thoughts, there has been a long tradition of regarding civil conflict as fundamentally distinct from true war⁵⁷. This attitude was prevalent in internal conflicts of considerable dimensions occurring in the period of the eighteenth to the nineteenth century in which insurgents were without any rights⁵⁸. In spite of the state-centric nature of international law civil wars were not completely forgotten by classical international law. But the laws of war were not automatically applicable to internal armed conflict even as way back as the nineteenth and early twentieth centuries internal conflicts and uprisings were believed to be purely internal matters of sovereign states⁵⁹.

But crucially, during the nineteenth century civil war was given a different legal perspective into something resembling the mainstream of legal analysis, mainly due to the crumbling of older conceptions of legitimacy and realization by many peoples in that period of democracy and self-determination.⁶⁰ Abi-Saab has noted that in that period a dramatic change in international context mainly due to stabilization of the global balance of power and the rise of positivist doctrine of the states both in municipal and international law led to crystallization of the traditional separation of internal and international wars⁶¹. He points to the fact that the legal dichotomy between internal and international conflict was not observed as rigorously in practice, he notes:

‘one can cite numerous instances, both before, and particularly after Napoleonic wars, of intervention by major European powers against

⁵⁶ Falk, R.A., ‘the international Law of Civil War’, The Johns Hopkins Press, 1st ed., 1971, p. 1.

⁵⁷ Green, L., ‘The Contemporary Law of Armed Conflict’, Manchester U.P., 3rd ed., 2008, pp. 26-65.

⁵⁸ J.J. Reid, ‘the Crisis of the Ottoman Empire: Prelude to Collapse 1839-1878’, Steiner, 2000, p. 109.

⁵⁹ Draper, G.I.A.D., ‘Implementation and Enforcement of Geneva conventions’, 1 *Receuil des cours* 1979 III, p. 26.

⁶⁰ Cassese, A., ‘Self-Determination of Peoples: A Legal Reappraisal’, Cambridge University Press, 1998, p. 32.

⁶¹ Abi-Saab, G., ‘Conflicts of a Non-international Character’, in ‘International Dimensions of Humanitarian Law’, UNESCO, Martinus Nijhoff Publishers, 1988, p. 218

democratic uprisings in Europe, not to speak of their increasing interest in conflicts arising in different parts of the Ottoman Empire, and in the extra-European spheres of influence as a prelude to their formal colonization; or of the intervention of the United States in the frequent internal upheavals in Latin America'⁶².

Therefore, a body of law on the recognition of belligerency was devised by the international community to deal with the so-called 'insurgency'⁶³. This attitude emerged in the European law and practice manifesting itself through the recognition that insurgent forces could be and should be regarded as *de facto* entities as long as they met certain conditions namely; control of the territory as well as discharging of the governmental functions; carrying out their military operation according to the laws of war; and circumstances exist that make it necessary for third states to make their stance clear by recognition of belligerency⁶⁴.

Thus under one condition the laws of war were applicable to internal armed conflicts in case of recognition of belligerency; which depended very much on the government facing an rebellion on its territory and if the government was prepared to unequivocally declare its intention to observe the laws of war in relation to the rebels⁶⁵. But as long as the onus of recognition of belligerency was firmly upon the central government, it had very little chance of occurring which according to Cassese:

'The whole approach of international law to civil war rests on an inherent clash of interests between the 'Lawful' government on the one side (which is interested in regarding insurgents as mere bandits devoid of any international status) and rebels on the other side (eager to be internationally legitimized). Third states may, and actually do, side with

⁶² *ibid.*

⁶³ Menon, P.K., 'the Law of Recognition in International Law, Lewiston, N.Y., 1994, pp. 109-137.

⁶⁴ Draper, 'Humanitarian Law and Internal Armed Conflicts', *op. cit.*, p. 275; see also Lauterpacht, H., 'Recognition in International Law', Cambridge University Press, 1947, p. 176.

⁶⁵ See Roth, B.R., 'Governmental Illegitimacy in International Law', Oxford university Press, 1999.

either party, according to their own political and ideological leanings, and this of course, further complicates the question⁶⁶.

Hence, in traditional international law, an armed and violent challenge which pitted insurgents against the established government within a state was divided into three different stages according to the scale and intensity of the conflict with different legal consequences flowing from each namely; rebellion, insurgency and belligerency⁶⁷.

The American War of Independence

The American war of independence of 1775-83, provided an early example of an internal conflict with inter-state characteristic⁶⁸. Certain actions taken by both sides contributed greatly for the rebels to achieve *de facto* status⁶⁹. First, there was a Declaration of the Causes and Necessity of Taking up Arms in July 1775, released by the leaders of the rebellion in which they stated their grievances, effectively declaring war on their British colonial rulers⁷⁰. Indeed, the rebels carried out their military operations in a state-like manner, with organised, uniformed and disciplined army⁷¹. On the part of the British government the recognition of belligerency came in a shape of a statute adopted by the British parliament in 1777, granting the rebel forces status to a state army⁷².

This pattern also continued in the early nineteenth century in relation to many rebellions in the South American colonies of Spain, rebels buoyed by their North American predecessors' success organised themselves in the same manner as disciplined European armies⁷³.

⁶⁶ Cassese, A., 'International Law', Oxford University Press, 2nd ed., 2004, p. 429.

⁶⁷ Wilson, H., 'International Law and the Use of force by National Liberation Movements', Oxford, 1st ed., 1988, pp. 22-29

⁶⁸ Kalyvas, S.N., 'The Changing Character of Civil Wars, 1800-2009, in H. Strachan & S. Scheipers, 'The Changing Character of War', Oxford University Press, 2011, pp. 202-219, p. 206.

⁶⁹ French, D., 'the British Way in Warfare: 1688-2000', Routledge, 1st ed., 1990, p.62.

⁷⁰ See Perry, R.L., (ed.), 'Sources of Our Liberties', New York: McGraw-Hill, 1959, p. 295-300

⁷¹ Neff, "History of war", *op. cit.*, p. 255.

⁷² *Ibid.*

⁷³ See generally H. Herring, 'History of Latin America from the Beginning to the Present', Knopf Publications, 3rd ed., 1968; M.C. Burkholder & D.S. Chandler, 'From

Significantly, their belligerency was also recognised by the Spanish government through a series of written agreements with the rebel groups in which both sides agreed to abide by the laws of war⁷⁴.

Nevertheless, in spite of its history the process of bridging the gap between the early customary rules of war to present day codification of the laws of war has not been easy. The road towards universality was potholed with regional, cultural, and class exclusiveness⁷⁵. As for the European regional practice, by the eighteenth century the laws and customs of war were deeply imbedded in every major state's military practice, from noblemen and generals down to professional officers and common soldiers⁷⁶. This unwritten code became the byword of officers and gentlemen, not because their respective nations had signed treaties which bound them but it was their religious belief that compelled them to do so⁷⁷. However, the birth of modern warfare is attributed to industrial developments in the nineteenth century and rapid technological advancement of the great European armies⁷⁸. Hence mindful of this the great powers turned their attention to the need for codification of laws of war which gained considerable momentum in the latter part of the nineteenth century.

As early as dawn of industrial revolution and technological advancements, allied to the growth of international economic relations, there began to be heard an increasingly strong voice to demand for making war less barbarous and cruel, less destructive and ruinous⁷⁹. As a consequence of this the topic of the laws of war became one of the main concerns of jurists in the nineteenth century to protect the so-called "government of laws", under the pretext that everyone is equal, and the

Impotence to Authority: Spanish Crown and the American Audiencias, 1687-1808', University of Missouri Press, 1st ed., 1977.

⁷⁴ Columbia-Spain, Convention of Truxillo, 26 Nov. 1820, 71 CTS 281

⁷⁵ See Howard, M., 'War in European History', Oxford University Press, 2001.

⁷⁶ Coker, C., 'War and the 20th Century: A Study of War and Modern Consciousness', Michigan U.P., 1994, p. 5.

⁷⁷ Ibid.

⁷⁸ Archer, 'World History of Warfare', *op. cit.*, p. 422.

⁷⁹ Trainin, I. P., 'Question of Guerrilla Warfare in the Law of War' 40 *Am. J. Int'l L.* 534 1946.

power of the state rests with “neither to the rich nor to the poor “ but to all citizens⁸⁰.

The Nineteenth Century and Codification

The nineteenth century saw the ideas which had gained acceptance in regards to the laws of war in the late eighteenth century given practical effect⁸¹. In the second half of the nineteenth century international conferences dedicated to the codification of laws and customs of war became more frequent and it was during this period that the issue of the people in time of war in the form of hostile uprisings and guerrilla warfare was also raised by the international community⁸². The development in the laws of war in the second half of the nineteenth century was brought about because of an era of great belief in human progress in general⁸³. This heralded the birth of an era of creating multilateral treaties setting out principles in this area of international law for states to follow.

Starting with 1856 Paris Declaration on Maritime Law was duly followed by a series of very important declarations in the latter part of the nineteenth century. The very first multilateral treaty in regards to laws of war was the Declaration of Paris though intended to end the Crimean War (1853-1856), it also included a Declaration of ground rules for maritime economic warfare, signed by France and Great Britain, the great maritime powers. Both states recognised that they would not confiscate enemy goods or neutral goods on enemy vessels. This was largely due to the dominance of the issue of regulation of maritime commerce in wartime which had long been the subject of deplorable disputes between major European powers. Most states complied with the Declaration, barring the United States which withheld its formal adherence based on the belief that there had to be a complete exemption of private property from capture at

⁸⁰ *ibid*

⁸¹ Nabulsi, K., ‘Evolving Conceptions of Civilian and Belligerents: One Hundred Years after the Hague Peace Conferences’ in ‘Civilians In War’, Chesterman, S., (ed.), Lynne Rienner Publishers, 2001, p. 15.

⁸² In fact, during the period of 95 years (between 1815 and 1910), there were 148 different international meetings. Ten of those meetings were held in the first half of the nineteenth century, and ninety in the first ten years of twentieth century.

⁸³ Schindler & Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p. VII.

sea⁸⁴. This was also followed by other main branches of the laws of war which were codified in 1860s.

The Phenomenon of Guerrilla Warfare

The Franco-Prussian war of 1870-71 brought about a disquieting new trend in warfare to the attention of generals and statesmen conflicts involving guerrilla and partisan fighters⁸⁵. This mainly came about due to civilians taking the initiative to take up arms against an invading army and fighting in irregular manner, certainly a far cry from professional model armies. The issue of *levee en masse*⁸⁶, the local citizens rising up in their own immediate area to pick up arms in order to resist invaders became a source of debate amongst international lawyers and diplomats⁸⁷. In this regard the legal scholar Droop states:

‘All that can be learnt from the precedents of Napoleon’s wars is that each belligerent, when invaded, appealed to the peasantry to rise and expel the invader, without caring how much they suffered, provided they did some harm to the enemy; but when the same nation became in its turn an invader it did not scruple to treat the enemy’s peasants as brigands’⁸⁸.

It is worth mentioning that in successive peace conferences in the latter part of the nineteenth century the idea of *levee en masse* and its legitimacy was mostly supported by smaller European states such as Belgium, Switzerland and the Netherlands, however, at the time did not meet universal approval especially by more powerful states such as

⁸⁴ *ibid*, p.787.

⁸⁵ Howard, M., ‘the France-Prussian War: the German Invasion of France, 1870-1871’, London, new edition, 1979.

⁸⁶ *Levee en Masse* is a distinct type of resistance, the collective uprisings, revolt, and insurrection against occupying force. Although, the scope of the concept was later truncated by diplomats but its practice by civilian populations was less controllable; for an historic appraisal of *Levee* see: Rousseau, C., ‘*Le Droit des Conflicts Armes*’, Paris, 1983; Lytle, S., ‘Robespierre, Danton, and the *Levee En Masse*’, *The Journal of Modern History*, vol. 29-30, 1957, pp. 325-337.

⁸⁷ See Nabulsi, K., ‘Tradition of War: Occupation, Resistance and the Law’, Oxford University Press, 2nd ed., 2005.

⁸⁸ Droop, H., ‘On the relations between invading army and the inhabitants, and the conditions under which irregular troops entitled to the treatment as regular soldiers’, *Transactions of the Grotius Society* (London: Macmillan, 1911), 722 cited in Nabulsi, ‘Traditions of War’, *op. cit.*, p.17.

Germany⁸⁹. Yet, ironically the greatest contribution to the laws of armed conflict was made by an expatriate Prussian across the Atlantic as a result of a civil war in the United States⁹⁰.

The American Civil war & the Importance of the Lieber Code

This contribution was made by Franz Lieber, an eminent immigrant Prussian professor of law at Columbia College (now Columbia University), who was commissioned by President Lincoln's Union government to produce for its armies a codification of basic principles and rules of war on land. Lieber's background was steeped in military tradition⁹¹. He was a veteran of combat in Europe whose own family had been divided by the American civil war. He, as a youth of fifteen, had fought against Napoleon in *Ligny* (close to Waterloo) and participated in the Greek war of independence⁹². Due to political persecution in his native Prussia initially he left his homeland for London in 1826, from there he then immigrated to the United States in 1827. In 1835 he became a professor of History and Political Science at South Carolina College, subsequently he was appointed professor of History and Political Science at Columbia College (now Columbia University) in 1857⁹³. A vehement abolitionist, from the beginning of the American civil war, during what some historians consider to be the first war of the modern era, Lieber backed the Union army and in 1861-62, he advised them on issues ranging

⁸⁹ Nurick, L. & Barrett, R.W., 'Legality of Guerrilla Forces Under the Laws of War', 40 *Am. J. Int'l L.* 563 1946, pp. 565-6.

⁹⁰ See generally Hoffman, M.H., 'the Customary Law of Non-International Armed Conflict', 30 *Int'l. Rev. Red Cross* 322 (No. 277, July-August 1990).

⁹¹ Johnson, J.T., 'Lieber and the Theory of War' in 'Francis Lieber and the Culture of the Mind', Mack, C.R., & Lesesne, H.H., (ed.), University of South Carolina Press, 2005, pp. 61-68.

⁹² Carnahan, B. M., 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity', 92 *Am. J. Int'l L.* 213 1998, at 214; Frank Friedel, *Francis Lieber: Nineteenth Century Liberal*, Baton Rouge: Louisiana University Press, 1st ed., 1947, pp. 408-9.

⁹³ The range of Lieber's writing is exceptional, he made important contribution to military law, U.S. Constitutional law, international law, political science, penal law and educational policy. Through his international law essays he advocated the importance of international arbitration and international copyright. See Francis Lieber, 'the Miscellaneous Writings of Francis Lieber: Reminiscences, Addresses and Essays (1881)', Nabu Press, 2010.

from treatment of Confederate prisoners and other related issues⁹⁴. His argument was based on the rationale that by allocating the Confederate soldiers the status of combatant for humanitarian reasons, it would crucially not recognize the legitimacy of their government. Hence, resolving a difficult problem for Lincoln's government which was conscious of not recognising the *de facto* government of the south. Eventually, Lieber and four general officers who were lawyers in their civilian lives were appointed to a commission to oversee the draft for "a code of regulations for the government of armies in the field, as authorized by the laws and usages of war"⁹⁵.

This codification was issued as 'General Orders No. 100, Instructions for the Government Armies of the United States in the Field', more commonly known as the "Lieber Code"⁹⁶. This constituted the first comprehensive codification of the rules and regulations concerning land warfare which expressly protected the civilian population⁹⁷. It is also worth noting that the main reason for Lincoln to commission such a codification was that he was rather concerned about his army's inexperienced officers and the men in charge of the Union's militias compare to the more experienced officers on the Confederate side. This was primarily due to the rapid expansion of the Union's army in which thousands of newly recruited inexperienced officers were in dire need of some instruction when faced with legal issues ranging from the drafting of court martial charges to conditions upon which parole of prisoners of war could be administered. So the code became a useful guidance to all the

⁹⁴ For General information on the American Civil War see, David J. Eicher, 'The Longest Night: A Military History of the Civil War', Simon & Schuster, 2002; Thomas E. Greiss, 'American Civil war', (West point Military History Series), Avery, 2000.

⁹⁵ U.S. War Department, Special Orders No. 399, Dec. 17, 1862, para. 5.

⁹⁶ See, e.g., Davis, G. B., 'Doctor Francis Lieber's Instructions for the Government of Armies in the Field', 1 *Am. J. Int'l L.* 13 January and April 1907; Meron, T., 'Francis Lieber's Code and Principles of Humanity', 36 *Colum. J. Transnat'l L.* 269 1998; Paust, J. J., 'Dr Francis Lieber and the Lieber Code', 95 *Am. Soc'y Int'l L. Proc.* 112 2001; Shepard, W. S., 'One Hundredth Anniversary of the Lieber Code', 21 *Mil. L. Rev.* 157 1963;

⁹⁷ Richard S. Hartigan, 'Lieber's Code and the Laws of War', Transaction Publishers, 1985, pp.48-52.

officers and military personnel serving in the Union army. The most outstanding contribution of the Lieber Code to the U.S. army has been noted by Carnahan, that notes, ‘this unsatisfactory situation stimulated various reforms, including raising the status and expanding the powers of the Army’s chief legal officer (the Judge Advocate General) and deploying judge advocate officers to the staffs of field commanders’⁹⁸.

That is why President Lincoln was of the opinion that all volunteers and serving officers were in need of all the help they could get to fight the war in a more civilised manner⁹⁹. This is significant in light of the fact that at the beginning of the civil war the leaders of the North were of the opinion that the conflict might be resolved by peaceful constitutional means and were very anxious to keep the option of future peace and reconciliation alive¹⁰⁰. Like many of his successors President Lincoln also intended to leave a lasting legacy by which he could be remembered¹⁰¹.

Nevertheless, the Lieber Code’s greatest theoretical contribution to the modern laws of war was identification of military necessity as a general legal principle to limit violence in the absence of any other rule¹⁰². The Lieber Code distinguishes the applicability of the rules of land warfare in both international and internal armed conflicts:

‘When humanity induces the adoption of the rules of regular war towards rebels, whether the adoption is partial or entire, it does in no way whatever, imply a partial or complete acknowledgement of their government, if they have set up one, or of them, as an independent and sovereign power.... Nor does the adoption of the rules of war towards

⁹⁸ Carnahan, ‘Lincoln, Lieber and the Laws of War’, *op. cit.*, p. 214.

⁹⁹ More importantly, the President was determined to found his policies on human reason and conduct the hostilities with all possible propriety, consequently raising any avoidable obstacle for future restoration of peace and harmony in the whole of the United States. Best, ‘War and Law’, *op. cit.*, p. 41.

¹⁰⁰ Epperson, J.F., ‘Causes of the Civil War’, OTTN Publishing, 2005, p. 64

¹⁰¹ So it is fair to conclude that not only may the Lieber Code be considered the crowning glory of the nineteenth century movement to humanize war through the application of reason but also a lasting legacy for President Lincoln. See Paludan, P.S. ‘The Presidency of Abraham Lincoln (American Presidency Series), University of Kansas Press, 1st ed., 1994.

¹⁰² Carnahan, ‘Lincoln, Lieber and the Laws of War’, *op. cit.*, p. 213.

rebels imply an engagement with them extending beyond the limits of these rules.... Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented a legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty'¹⁰³.

Although the Code was a national document, not applicable to other countries, it soon achieved international recognition and it became one of the sources of international trend which were to follow. The main reason for its universal acceptance was the fact that Lieber drew most of his inspiration from his past military experience in Europe and also the culmination of his long interest in the history of the laws of war. In other words, the final draft of the Lieber Code very much reflected an articulation of theories put into practice by the great European military forces and their officers in the first half of the nineteenth century. Kalshoven notes:

‘Although technically a purely internal document written to be applied in a civil war, the Lieber Code has served as a model and a source of inspiration for the efforts, undertaken later in the 19th century on the international level, to arrive at a generally acceptable codification of the laws and customs of war. It thus has exerted great influence on these subsequent developments’¹⁰⁴.

In the meantime, enthused by Lieber’s work international lawyers in Europe came to the conclusion that what was good for the Union army across the ocean was also useful for them¹⁰⁵. Indeed, this prompted a considerable number of international lawyers to establish themselves as a distinct profession and turned their attention to the subject of the laws of

¹⁰³ ‘Instructions for the Government of the Armies of the United States in the Field’, General Order 100, War Department, Adjutant General’s Office (Washington, April 24, 1863), Paras. 152, 153, 154.

¹⁰⁴ Kalshoven, F. and Zegveld, L., ‘Constraints On the Waging of War: An Introduction to International Humanitarian Law’, International Committee of Red Cross, 2001, p.20

¹⁰⁵ Kurtz, L.R., Turpin, J.E., ‘Encyclopaedia of Violence, Peace and Conflict’, Academic Press Publishing, 1999, p. 326.

war and its subsequent codification¹⁰⁶. As a result, this had a profound influence on most of the military manuals that were prepared around the same time mainly in Europe¹⁰⁷. It is also worth mentioning that in the 1870-90s, due to brutality of modern warfare in the age of technology (as exemplified in the American Civil war and the France-Prussian war) progressive lawyers, statesmen and military practitioners turned their attention to humanizing the concept of war.

The Geneva Convention of 1868

While Franz Lieber was hard at work on the first codification of the laws of war, a year earlier in 1862, Henry Dunant had published *Un Souvenir de Solferino*¹⁰⁸, an eye-witness account of extreme suffering endured by wounded soldiers on the field during the Austro-Italian war, which inspired a small group of citizens of Geneva to establish the very foundation of the International Red Cross movement in 1863 which was eventually followed by the first Geneva Convention on treatment of the sick and wounded in 1864¹⁰⁹. In fact, this reflected a general trend in the second half of the nineteenth century in which time there was a greater emphasis on codification of the laws of war in the shape of treaties. As stated above, in 1864 reacting to an initiative by the Swiss government 16 countries attended a conference held in Geneva to draw up a Convention for Amelioration of the Condition of the Wounded in armies in the Field¹¹⁰. The Additional Articles of 1868 were also adopted at a diplomatic Conference organized by the Swiss Federal Council in order to clarify some of the provisions of 1864 and also to extend the scope of this Convention to naval forces. Although the Convention never came into

¹⁰⁶ Friedman, L., (Compiled by), 'The Law of War: A Documentary History', Greenwood Publishing Group, 1972, p. 192.

¹⁰⁷ Raymond, G.A., 'Lieber and International Laws of War', in 'Francis Lieber and the Culture of the Mind', Mack, C.R., & Lesesne, H.H., (ed.), University of South Carolina Press, 2005, pp. 69-78.

¹⁰⁸ Henry Dunant, 'A Memory of Solferino', International Committee of Red Cross, English Translation, 1986

¹⁰⁹ Gallatin-Love, A., 'the Geneva Red Cross Movement: European and American Influence on its Development', Medical Field Service School, 1942, p. 26.

¹¹⁰ Ibid.

force and never was ratified during the Franco-Prussian war of 1870-71 and the Spanish American war of 1896 the parties to the conflicts agreed to observe their provisions¹¹¹.

The St Petersburg Declaration 1868

The St Petersburg Declaration of 1868 played an instrumental role in development of the laws of war¹¹². Nevertheless, the first inter-state agreement aimed at alleviating the undesirable effects of war was drawn up at the end of the Crimean War by the signatories of the peace treaty marking the end of that war in 1856¹¹³.

Russia's defeat in the Crimean War in 1856 convinced her that some reforms also urged by other European powers were necessary to alleviate the scourge of war¹¹⁴. The invention of a type of a bullet manufactured by the Russian Imperial Army in 1863 that exploded on contact with any hard surface which was subsequently modified in 1867 to allow the bullet to explode and shatter even on contact with soft targets such as soldiers inflicting particularly serious wounds. Ironically, this prompted the Russian government to call for an international conference, since it deemed the use of such weapons to be inhumane¹¹⁵. In fact, the St Petersburg declaration, which proclaimed 'renouncing the use, in time of war, of explosive projectiles under 400 grams in weight contains the famous statement of principles: 'the only legitimate object which states should endeavour to accomplish during war is to weaken the forces of the enemy state'¹¹⁶. Although this sentence on the surface seems rather simple, it has been found to be quite problematic in the twentieth

¹¹¹ Schindler and Toman, 'The Laws of Armed Conflicts', *op. cit.*, p. 285.

¹¹² Boothby, W.H., 'Weapons and the Laws of Armed Conflict', Oxford University Press, 2009, pp. 141-144.

¹¹³ *ibid.*, p. 787

¹¹⁴ Neumann, I.B., 'Russia and the Idea of Europe: A study in Identity in International Relations', Routledge, 1996, p. 47.

¹¹⁵ Schindler and Toman, 'The Laws of Armed Conflicts', *op. cit.*, p. 101.

¹¹⁶ Roberts, A. and Guelff, G., 'Documents on Laws of War', Oxford University Press, 1st ed., 1989, p. 30-31.

century¹¹⁷. Moreover, the reason the Russian government advocated in the first place a limitation of armaments, was mainly due to financial and other domestic reasons¹¹⁸.

The St Petersburg Declaration, heralds the beginning of a significant chapter in the codification of the laws of war.¹¹⁹ In fact, its significance goes far beyond its proclaimed objective of banning the use between the ‘contracting parties’, of a new and nasty new invention-explosive and/or incendiary bullets. According to Best, not only is it a famous landmark in the long history of ‘forbidden weapons’, its preamble (which was longer than the instrumental part of the text itself), provides a summary of the philosophy of laws of war that has never been equaled by any other document in the history of laws of war ever-since¹²⁰. In a nut shell, the Declaration of St Petersburg provided an impetus for the international community to embark upon adoption of further declarations of a similar nature at the two Hague conferences of 1899 and 1907¹²¹.

The Brussels Conference of 1874

The Declaration of the Brussels Conference of 1874, an international conference organised by the Czar Alexander II of Russia which met in Brussels for the purpose of discussing the practicalities of framing an acceptable code of the laws of war on land¹²². This was the first serious attempt by the international community to define laws of war compulsory to all¹²³. All nations represented in the conference had in recent memory fought one another and had suffered greatly in human

¹¹⁷ Roberts, A., ‘Land Law from Hague to Nuremburg’ in ‘The Laws of War: Constraints on Warfare in the Western World’ edited by Howard, M., et.al., Yale University Press, 1st ed., 1994, p.119

¹¹⁸ Nussbaum, A., ‘A Concise History of the Laws of Nations’, Macmillan, 1st ed., 1947, p. 240.

¹¹⁹ Solis, G.D., ‘the Law of Armed Conflict: International Humanitarian Law in War’, Cambridge U.P., 1st ed., 2010, p. 49.

¹²⁰ Best, ‘War and Law’, *op. cit.*, p. 42; also see Schindler and Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p.101.

¹²¹ Borsinger, N., ‘125th Anniversary of the 1868 Declaration of St Petersburg: Summary of Proceedings’, International Committee of Red Cross, 1994.

¹²² Schindler and Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p. 25.

¹²³ Oppenheim, L. & McNair, A.D., ‘International Law: Disputes, War and Neutrality’, Longmans, Green & Company, 1926, p. 78.

terms¹²⁴. The Conference adopted the draft commissioned by the Russian government which was prepared under the supervision of the chairman of the committee on codification, the Swiss Jurist Johann Casper Bluntschli, with few alterations¹²⁵. But due to a lack of political unanimity amongst the Great European Powers and the fact that they could not accept it as a binding convention it was not ratified¹²⁶.

In reality though, the project marked a major moment by the international community for the codification of the laws of war¹²⁷. From the beginning of the Brussels Conference, it was recognised that in times of war the population of a state is divided into three separate categories: firstly, the regular army; secondly, irregular military units such as militias (irregular forces) which at the time of invasion by the enemy had no time to organise themselves into a regular force; and lastly the civilian population.

However the most controversial topic of discussion was whether the laws of war should extend to irregular units and to members of civil population who had taken part in military activities. This also extended to the right of civilian population to self-defence in occupied territories which attracted particular scrutiny¹²⁸. The most interesting aspect of this discussion was based on the difference of opinion that arose on this question between the patriotic school smaller European states with militia or semi-militia systems¹²⁹ (such as Belgium and Switzerland) and delegates representing the great military powers of Europe which represented the military school, such as Germany which were the most vociferous voice against the idea¹³⁰. At the heart of Germany's legal

¹²⁴ For example, in Crimea, France alone had suffered 90000 casualties.

¹²⁵ Dhokalia, R.P., 'the Codification of Public International Law', Manchester University Press, 1970, p. 49.

¹²⁶ Schindler and Toman, 'The Laws of Armed Conflicts', *op. cit.*, p. 25.

¹²⁷ Oppenheim, L. & McNair, A.D., 'International Law: Disputes, War and Neutrality', *op. cit.*, p. 78.

¹²⁸ Trainin, 'Question of Guerrilla Warfare in the Law of War', *op. cit.*, pp. 542-543.

¹²⁹ For General information about the concept of the Militia system see: Whisker, J. B., 'The Militia', Edwin Mellen Press, 1st ed., July 1992.

¹³⁰ Trainin, 'Question of Guerrilla Warfare in the Law of War', *op. cit.*, p. 543.

argument was the point that by recognising the right of peoples to self-defence against an aggressor it would be “retrogression to barbarism” and would result in chaos and disorder¹³¹. This attitude by Germany stemmed mainly from their experience of the Franco-Prussian War of 1870-1 which had significantly troubled the German (Prussian forces) marching onto Paris. As alluded to earlier, the said war also represents the first major modern conflict in which guerrilla fighters and partisans had taken part¹³². In fact, the Germans delegation maintained that it was admissible within the laws of war to execute captured the so-called *francs-tireurs* as irresponsible armed non-combatants¹³³.

A formal legalistic argument was put forward by Germany, based on the premise that a legal right always emanates from some sovereign state authority and as soon as that former state’s legal authority no longer exists as in the case of an occupied territory, then the legal right which is linked with it loses its force. Hence, the legal rights of the citizens of the former state lose its real substance and the citizen’s of the former state who are mere spectators in the conflict can be deprived of their homeland nationality as a result. However this abstract legalistic argument was rejected by the Brussels Conference, on the basis that no invaded territory is regarded as conquered until the end of the war; until which time the occupant merely exercises in such territory only a *de facto* power and essentially provisional in character. So if the population of which territory were to rise in insurrection it is within the right of the occupying force to suppress it but it must not deny the rights of prisoners of war to the insurgents. Eventually yielding to the will of smaller states with militia systems the Article 9 of the Brussels Declaration states:

‘The laws, rights, and duties of war apply not only to armies; but also to militias and volunteer corps fulfilling the following conditions: (1) that they be commanded by persons responsible for their subordinates; (2) that they have a fixed distinctive emblem recognizable at a distance; (3)

¹³¹ Ibid.

¹³² Neff, S.C., ‘War and the Law of Nations’, *op. cit.*, p. 164.

¹³³ Trainin, ‘Question of Guerrilla Warfare in the Law of War’, *op. cit.*, p. 543.

that they carry arms openly; and (4) that they conduct their operations in accordance with the laws and customs of war¹³⁴.

Significantly, it goes on to say that ‘in countries where militia constitutes the army, or form part of it, they are included under the denomination army’¹³⁵. Clearly the abovementioned article is intended to extend the laws of war not only to regular army but also other irregular forces as long as they meet the four conditions mentioned above¹³⁶. The main reason for this was that the drafters were very much mindful of the military realities prevalent at that time in Europe¹³⁷. This was in light of the fact that indeed all the irregular and volunteer corps would eventually come under the military high command of the respective countries and the drafters did not deem it necessary to create special rules for them.¹³⁸ Moreover, Article 10 of the Brussels Declaration seemingly goes some way to appease states with militia system and deals with specific situations in which the civilian population can take up arms against the invading force, it says:

‘The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war’¹³⁹.

Hence, rejecting the legalistic notion put forward by Germany which in effect would have criminalised the right of self-defence of a people against an aggressor, subject to punishment from the point of view of international law¹⁴⁰. However, the Brussels Conference attempted (under pressure from Germany) to adopted a more restrained attitude towards the issue of guerrilla/partisan forces, in the shape of a draft

¹³⁴ Schindler and Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p. 28.

¹³⁵ *Ibid.*

¹³⁶ Trainin, ‘Question of Guerrilla Warfare in the Law of War’, *op. cit.*, p. 544.

¹³⁷ Trainin, ‘Question of Guerrilla Warfare in the Law of War’, *op. cit.*, pp. 541-542.

¹³⁸ Bailey, S.D., ‘Prohibitions and Restraints in War’, Oxford University Press, 1972, p. 83.

¹³⁹ Schindler and Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p. 29.

¹⁴⁰ Trainin, ‘Question of Guerrilla Warfare in the Law of War’, *op. cit.*, pp. 540.

Article 46 which stated, ‘persons from the local population of an area in which the authority of the enemy is already established, who rebel against it with arms in hand may be brought before a court and are not considered as prisoners of war’¹⁴¹. In spite of its well-meaning intention the final declaration of the Brussels conference was never ratified, however, since not all governments were willing to accept it as a binding agreement.

The Oxford Manual of the Laws and Customs of War, 1880

In the very same year the Institute of International Law, at its session in Geneva commissioned a committee of international jurists led by Gustave Moynier to assess the Brussels Declaration and submit its findings on the subject to the Institute¹⁴². It was an attempt by the Institute of International Law to move the process of codification forward especially in light of the fact that the Brussels Conference Declaration had not been ratified by any of the fifteen European states who had taken part in it¹⁴³. Three years later the end product of this study ultimately led to the adoption of the Manual of the Laws and Customs of War at Oxford in 1880. The Preface states:

‘The Institute too, does not propose an international treaty, which might perhaps be premature or at least very difficult to obtain; but, being bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to governments a manual suitable as the basis for international legislation in each state, and in accord with both the progress of juridical science and the need of civilized armies’¹⁴⁴.

¹⁴¹ The draft Article 46 was subsequently withdrawn by the Brussels Conference due to sharp protest from smaller European powers such as Belgium, Holland and Switzerland.

¹⁴² Pearce-Higgins, A., ‘the Hague Peace Conferences and other International Conferences Concerning the Laws and Usage of War: Text of the Conventions with Commentaries’, Stevens & Sons, Limited, 1904, p. 29.

¹⁴³ Eyffinger, A., ‘the 1899 Hague Peace Conference: ‘The Parliament of Man, the Federation of the World, Kluwer Law International’, The Hague, 1999, p. 270.

¹⁴⁴ The Laws of War on Land, Manual Published by the Institute of International Law (Oxford Manual), reprinted in Schindler and Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p. 35.

Nevertheless, the most significant aspect of the Oxford Manual is that it is mainly based on the Declaration of Brussels Conference, which specifically deals with the question of occupied territory as discussed above a point of contention between Germany and some of the smaller European powers in the Brussels Conference¹⁴⁵. Both the Brussels declaration and the Manual of the Laws and Customs of War at Oxford in 1880 made great contributions to the codification of the laws of armed conflict culminating in the two Hague Conventions on land warfare annexed to them.

Nevertheless, the issue of irregular forces and the question of the right of peoples to take up arms (*levee en masse*) and self-defence against an aggressor was raised twenty five years later in The Hague Peace Conference of 1899, almost word by word based on the universally rejected Brussels Declaration of 1874¹⁴⁶. Consequently, the efforts to achieve legal limitation of violence in armed conflict between states made great progress during the second half of the nineteenth century, culminating in the two Hague Conventions of 1899 and 1907¹⁴⁷. However, the issue of internal armed conflict remained outside the scope of international law, at least in principle, in spite of its regularity and the great suffering they caused. It is worth noting that prior to the proposal by Count Mouravieff, Russian Foreign Minister for the convening of an international Peace conference, the issue of revision and codification of the laws of war had been on the agenda of international community for more than thirty years¹⁴⁸.

¹⁴⁵ Article 41 of the Oxford Manual of the Laws and Customs of War, 1880.

¹⁴⁶ *Levee en Masse* is a distinct type of resistance, the collective uprisings, revolt, and insurrection against occupying force. Although, the scope of the concept was later truncated by diplomats but its practice by civilian populations was less controllable; Solis, 'The Law of Armed Conflict', *op. cit.*, p.200; for an historic appraisal of *Levee* see: Rousseau, C., '*Le Droit des Conflicts Armes*', Paris, 1983; Lytle, S., 'Robespierre, Danton, and the *Levee En Masse*', *The Journal of Modern History*, vol. 29-30, 1957, pp. 325-337.

¹⁴⁷ Greenspan, M., 'the Modern Law of Land Warfare', University of California Press, 1959, p. 62-64.

¹⁴⁸ Letter of 24 August 1898, the Text of many documents concerning the Conference can be found in the International Peace Conference, Netherlands Ministry of Foreign

The Hague Regulations of 1899 & 1907

It was in the late nineteenth and early twentieth century that attempts to produce an internationally accepted definition of combatant came to fruition, culminating in the two Hague Regulations of 1899 and 1907¹⁴⁹. Although the Peace conferences of 1899 and 1907 were almost entirely concerned with international armed conflicts but the final regulations drew tangible influence from the Lieber Code, which ironically, as stated above came about as a result of the American Civil War¹⁵⁰.

The first Hague Peace Conference of 1899 was organised at the behest of Russia mainly due to its reluctance to keep up with advancement in armament in Western Europe particularly in Britain and Germany. Notwithstanding the fact that some idealistic motives such as limiting the scourge of war as an instrument of national policy played a role in organizing the conference.

It has to be said that both 1907 and 1899 Hague Conventions reflected the attitude of the international community towards war which was considered as an instrument of national policy and the exclusive province of, and a state of affairs between states¹⁵¹. This is best illustrated by international lawyers and military analysts such as Von Clausewitz, wars were fought between organised armies of sovereign states, to the exclusion of their civilian population. It is also worth mentioning that according to the customs and laws of war, combatant status was also granted to militias and volunteer corps (which ultimately came under the states' army high command) as well as *levee en masse*, notwithstanding

Affairs, 1907, Scott, J.B., 'The Hague Peace conferences of 1899 and 1907: A Series of Lectures Delivered Before the Johns Hopkins University in the Year 1908', Published by The Johns Hopkins University, 1909; text available at:

<<http://www.icrc.org/ihl.nsf/INTRO/150?OpenDocument>>;

<<http://www.icrc.org/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6>>.

¹⁴⁹ Ibid.

¹⁵⁰ See Abi-Saab, R., 'Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern' in A. Delissen and G. Tanja (ed.), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Dordrecht: Nijhoff, 1st ed., 1991

¹⁵¹ See Von Clausewitz, C., 'On War', Penguin Classics, 3rd ed., 1982.

the fact that the latter had aroused a lot of controversy in the past. Indeed, this approach was firmly engrained in the notion that war was a political reality and routine means of achieving state policy which could not be eradicated but needed to be regulated¹⁵² In other words, the coercive use of force was the preserve of a sovereign government which held an exclusive monopoly over military and its use of force. In turn, an army answerable to the government went into battle supported by the citizens of that state.

For the purpose of this article we will deal with Convention II and its successor the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (hereafter Convention IV) and the Regulations Respecting the Laws and Customs of War on Land annexed to it (hereafter Regulations). In reality, Convention IV and its Regulations mirror to a large extent the provisions of its predecessor, Hague Convention II of 1899 and its attached Regulations since they were revised in the Second Hague Peace Conference in 1907. According to Schindler and Toman, ‘the provisions of the two Conventions on land warfare, like most of the substantive provisions of the Hague Conventions of 1899 and 1907, are considered as embodying the rules of customary international law¹⁵³. As such they are binding on states which are not parties to them¹⁵⁴. With regard to the importance of the Hague Regulations of 1907 both the Nuremberg International Military Tribunal in 1946, and the International Military Tribunal for the Far East in 1948, regarded them as declaratory of the laws and customs of war recognised by all civilized nations¹⁵⁵.

Although the second Hague Peace Conference of 1907 is of more relevance to this study, the First Hague Peace conference was not without some noteworthy achievements. The most significant of which was an issue on the Laws and Customs of War on Land known as Convention II

¹⁵² M. Van Creveld, ‘The Transformation of War’, New York, the Free Press, 1991, pp. 35-42.

¹⁵³ Schindler and Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p. 63.

¹⁵⁴ Ibid.

¹⁵⁵“Judicial Decisions: International Military Tribunal (Nuremberg)”, reprinted in *AJIL* vol. 41, 1947, pp. 248-9.

and its attached Regulations that for the first time successfully managed to codify the laws of land warfare¹⁵⁶.

As such, Hague Convention II and its attached regulations have been heralded as the most striking accomplishment of the First Peace Conference.¹⁵⁷ As the delegates from forty-four countries including two Muslim states of Persia and Turkey representing the Islamic world gathered in the Hague for the Second Peace Conference from 15 June to 18 October in 1907, one of the main issues on the agenda was to ‘revise the general laws and customs of war, either with a view to defining them with a greater precision or to confirming them within such limits as would mitigate their severity as far as possible’¹⁵⁸.

As a result, the Hague Regulations of 1899 and 1907, for the first time in the history of codification of the laws of armed conflict set out who are to be considered “belligerents”¹⁵⁹. Article 1 specifies that: ‘[t]he laws, Rights and duties of war apply not only to armies, but also to militia and volunteer corps’ fulfilling the four conditions of being commanded by a person responsible for his subordinates; having a fixed distinctive emblem recognizable at a distance; carrying arms openly; and conducting their operation in accordance with the laws and customs of war¹⁶⁰. Furthermore, Article 2, extends the belligerent status to the *levee en masses*, that is to say in situations where the citizens of a country which is

¹⁵⁶ Other important achievements included producing a convention for the Pacific Settlement of Disputes which in turn resulted in the establishment of the Permanent Court of Arbitration; as well as a convention concerning Maritime Warfare.

¹⁵⁷ For general information on the 1899 Hague Peace Conference see C. Greenwood, ‘International Humanitarian Law (Laws of War) – Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899’, in F. Kalshoven, ed., *The Centennial of the First International Peace Conference – Reports & Conclusions* (The Hague, Kluwer Law International 2000, pp. 166-172; Eyffinger, ‘The 1899 Hague Peace Conference’, *op. cit.*, p. 271; William I. Hull, ‘The Two Hague Conferences and their Contribution to international Law, Ginn & Company, Boston, 1908; Reprinted Co., New York, 1970.

¹⁵⁸ Preamble to Convention (IV) Respecting the Laws and Customs of War on Land (1907).

¹⁵⁹ Lesaffer, R.C.H. (ed.), ‘Peace Treaties and International Law in European History: from the Late Middle Ages to World War One’, Cambridge University Press, 2008, p. 410.

¹⁶⁰ Schindler and Toman, ‘the Laws of Armed Conflict’, *op. cit.*, p. 75.

being invaded by a foreign power spontaneously take up arms to stem the tide of the invading army, without having had the time to organize themselves according to Article 1, providing they carry their arms openly and respect the laws and customs of war. The inclusion of the first condition that *levee en masses* had to carry their arms openly was the only alteration to the 1899 Regulations. The significance of Article 1 and 2 of the Regulations were that they very much reflected the state of the customary international law, from which basis the contemporary international regulations of combatant status developed.

As a result, this attitude indicated a clear distinction between who was entitled to use force and who was not, in what the regulations identify as “belligerents” (or the more contemporary terms, combatants). It is also worth noting that this dichotomy between combatants and non-combatants even persisted during the peace time, in which the interaction between private citizens and army as an institution were generally discouraged¹⁶¹. But during the period under consideration the doctrine of distinction was not without its critics, Wheaton states:

‘If the separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of international law, all that need to be said is that the progress of events has nullified the triumph, and that, probably, it is just as well to abolish a distinction, in itself illusory and immoral. The idea of war as affecting only certain elements of the population is probably an incentive to war’¹⁶².

However, in the opinion of the majority of scholars and military practitioners of that period only conflicts between states brought *jus in bello* into operation¹⁶³. Thus the issue of internal armed conflict regardless of their intensity remained the concern of sovereign states and rebels were spared no protection and subjected to the domestic legal system of that

¹⁶¹ *ibid.*, pp. 38-41.

¹⁶² Wheaton, H.B., *International Law*, London, 1944 (7th English ed., by A.B. Keith), p. 171.

¹⁶³ *ibid*

state, except by the virtue of recognition of belligerency¹⁶⁴. This was very much reflected by the state practice at the time. As Neff noted:

‘In this area, the inheritance of nineteenth century remained very much in evidence, most notably in the retention of the traditional bias in favour of established governments and against insurgents. Recognition of belligerency and of insurgency was little in evidence, at least on the surface; but it was likely that they were merely sleeping and not dead.’¹⁶⁵

The Martens Clause

Another important development of note in regards to the two Hague Regulations was the so-called Martens Clause which was based upon and took its name from a declaration presented to the first Hague Peace Conference of 1899, by the Russian delegate Professor Von Martens¹⁶⁶. The Clause declares:

‘Until a more complete code of laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from usages established between civilized nations, from the laws of humanity and the requirement of the public conscience.’

He came up with this declaration as a compromise on the issue of treatment of *franc-tireurs* between the great powers such as Germany who advocated summary execution of such individual who had spontaneously taken up arms against an invading army and smaller European countries who advocated that they should be treated as lawful combatant¹⁶⁷. However, some scholars such as Cassese, the clause tantamount to mere

¹⁶⁴ Moir, L. ‘The Historical Development of Humanitarian Law in Non-International Armed Conflicts’, *op. cit.*, pp. 338-350.

¹⁶⁵ Neff, S.C., ‘War and the Law of Nations’, n. 3 above, p. 357

¹⁶⁶ Pustogarov, V.V., ‘Fyodor Fyodorovich Martens: a Humanist of Modern Times’, *International Review of Red Cross*, 312, 1996, pp. 300-314

¹⁶⁷ For the historical background see Pustogarov, V.V., ‘The Martens Clause in International Law’, 1 *J. Hist. Int’l L.* 125 1999.

diplomatic manoeuvring designed to overcome political difficulties in the international arena¹⁶⁸.

Added to this lack of universality, there is also a lack of accepted interpretation of the Martens Clause among international lawyers. The real essence of the Clause is encapsulated by Greenwood who states that at its most restricted, the Clause would act as a reminder of the fact that customary international law continues to apply even after adoption of a treaty norm¹⁶⁹. Nonetheless, it has been noted that although original purpose of the clause was to settle particular disputes¹⁷⁰, but significantly it has subsequently been used in similar versions in later instruments regulation armed conflict¹⁷¹.

This universal aspiration came to an abrupt end by the concept of total war and the advent of more destructive weaponry with the outbreak of the First World War in 1914¹⁷². In the aftermath of the Great War, the international community turned its attention rather to restriction of *jus ad bellum* rather than the development of the laws of war through instruments such as the Covenant of the League of Nations (1919), and the Kellogg-Briand Pact (1928), which condemned recourse to war as a solution for international disputes¹⁷³. In the intervening years between the two World Wars and as a reaction to the First World War, the 1929 Convention for the Amelioration of the Condition of the Wounded and

¹⁶⁸ Cassese, A., ‘The Martens Clause: Half a Loaf of Simply Pie in the Sky?’ *EJIL* (2000), Vol. 11 No. 1, pp. 187-217, p. 217.

¹⁶⁹ Greenwood, ‘Historical Development and Legal Basis’, *op. cit.*, p. 28.

¹⁷⁰ Ticehurst, R., “The Martens Clause and the Laws of Armed Conflict”, *IRRC*, no. 317, 1996, pp. 125-134; see also Meron, T., “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, 94 *Am. J. Int’l L.* 78, 2000.

¹⁷¹ The subsequent treaties which adopted martens Clause include: Preamble, 1907 Hague Convention (IV) respecting the laws and customs of war on land, in Roberts and Guelf, ‘Documents of Laws of War’, *op. cit.*, p. 45; The Four 1949 Geneva Conventions for the Protection of war victims (GC I: Art. 63; GC II: Art. 62; GC III: Art. 142; GC IV: Art. 158), pp. 169-337; 1977 Additional Protocol I, Art. 1(2), p. 390, and 1977 Additional Protocol II, 1980 Weapons Convention, Preamble, p. 473.

¹⁷² Roger, A.V.P., ‘Law on the Battlefield’, Manchester University Press, 3rd edition, 2012, p. 1.

¹⁷³Reydams, L., ‘*A la guerre comme a la guerre: patterns of armed conflict*’, 88 *International Review of Red Cross* 729 (2006), p. 736.

Sick in Armies in the Field was adopted¹⁷⁴. Hitherto the international community had only been specifically concerned with inter-state wars between sovereign states. The abovementioned instruments were almost entirely concerned with international armed conflicts, much of which was subsequently revised and refined through the Geneva Conventions of 1949 and its additional Protocol of 1977. Therefore, the law of war was paradigmatically inter-state law and not applicable to internal armed conflicts in the nineteenth as well as the early twentieth centuries. Some states may have observed them through the doctrine of recognition of belligerency but were mostly done out of self-interest and practical purposes, rather than adhering to international law¹⁷⁵. However in the aftermath of the Second World War, civil wars achieved a more prominent place on the international agenda and it is here that the laws of war have been described at their weakest¹⁷⁶. But the modern approach to 'internal armed conflict' is contained in common Article 3 of the Geneva Convention 1949 supplemented by the Additional Protocol II of 1977¹⁷⁷. This has been described as one of the most significant expansions of the laws of war in the realm of civil war in the second part of the twentieth century¹⁷⁸. The law of war which evolved into International Humanitarian Law is the best example of the humanizing wave that swept through Public International Law after the establishment of the United Nations in

¹⁷⁴ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July, 1929), 47 Stat. 2074, 118 L.N.T.S. 303. The 1929 Convention replaces a previous update of the 1864 Convention adopted in 1906 (Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, (Aug, 22, 1864), 18 *Martens Nouveau Recueil* (ser. 1).

¹⁷⁵ Moir, L., 'The Law of Internal Armed Conflict', 1st ed., Cambridge U.P., 2002, p. 17

¹⁷⁶ This was inevitable because in that period most of the conflicts around the globe were taking place within states as opposed to between states; i.e. From inter-state to intra-state; Greenwood, C., 'International Humanitarian Law (Laws of War)' in 'The Centennial of the First International Peace Conference: Reports and Conclusions' edited by Frits Kalshoven, Kluwer Law International, 1st ed., 2000, p.226

¹⁷⁷ There are also a number of other treaties which also apply to internal armed conflict; see the Hague Convention for the protection of Cultural Property, 1954, Art. 19, the Amended Protocol II to the Conventional Weapons Convention, the Chemical Weapon Convention, 1993 and the Mines Convention, 1997.

¹⁷⁸ For a general survey see Moir, L., 'The Law of Internal Armed Conflict', *op. cit.*, pp. 45-97.

1945. The apparent paradox besetting the Law of War throughout its history could be explained albeit in simplified terms between those who call for it and those who formulate and had to implement it.

Conclusion:

The second part of the nineteenth century heralded the period in which the codification of the laws of war took place. This was mainly as a reaction to rapid developments in armament, massive industrialization and advancement in weaponry in Europe as well as emergence of a more humanist approach in order to limit the scourge of war. Prior to this period, due to the state-centric nature of traditional international law, civil wars had largely been overlooked and remained a tacit concern of sovereign states.

However, due to the political reality of such conflicts and emergence of national liberation movements in Europe and the Latin Americas as a result of crumbling Ottoman and Spanish Empires in the nineteenth century the international community led by the great powers (mainly to protect their own commercial interests), had to devise rules to deal with the phenomenon of civil war in the shape of the three tiered approach according to the intensity of the conflicts, namely: rebellion, insurgency and recognition of belligerency.

The role which civil war played in codification of Laws of war in nineteenth century is somewhat understated. However, as the present author has endeavoured to illustrate the civil wars referred to throughout this article were mostly of high intensity in nature so much so that they resembled inter-state conflicts as in the case of the American Civil War in which both armies were well-organized and disciplined. The Lieber Code devised by the Prussian jurist Francis Lieber which came about as a result of the American Civil War became a major catalyst for the subsequent codification of the Laws of war in Europe. This is rather ironic since in spite of the tangible contribution of the Lieber Code in the codification process in the latter part of the Nineteen century which culminated in the two Hague Regulations, as before, due to the state-centric nature of

international law the issue of civil war in spite of its political reality was largely side-stepped by the international community.

Bibliography:

- Abi-Saab, G., ‘Conflicts of a Non-international Character’, in ‘International Dimensions of Humanitarian Law’, UNESCO, Martinus Nijhoff Publishers, 1988, p. 218
- Abi-Saab, R., ‘ Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern’ in Delissen, A. and Tanja, G. (ed.), Dordrecht-Boston-London, Martinus Nijhoff, 1991, pp. 209-223.
- Amerasinghe, C.F., ‘History and Sources of the Law of War’, 16 *Sri Lanka J. Int’l L.* 263 2004.
- Archer, C.I., ‘History of Warfare’, Unp - Nebraska, 2002.
- Bailey, S.D., ‘Prohibitions and Restraints in War’, Oxford University Press, 1972.
- Baty, T. and Morgan, J.H., War: Its Conduct and legal Results, Murray, 1915.
- Bederman, D.J., ‘International Law in Antiquity’, Cambridge University press, 2nd ed., 2002.
- Bello, E., ‘African Customary Humanitarian Law’, Oyez Publishing, 1980.
- Best, G., ‘ War and Law since 1945’, Oxford University Press, 1st ed., 1994.
- Boisard, M., “On the probable influence of Islam on western public and international law”, *International Journal of Middle East Studies*, Vol. 11, 1980.
- Brownlie, I., ‘International law and the Use of Force by States’, Clarendon Press, Oxford, 1963.
- Burkholder, M.C. & Chandler, D.S., ‘From Impotence to Authority: Spanish Crown and the American Audiencias, 1687-1808’, University of Missouri Press, 1st ed., 1977.
- Burlamaqui, J.J., ‘The Principles of Natural Law and Politic Law’, Trans. Thomas Nugent (ed.), Indianapolis, Liberty

- Fund, 2006, Chapter III: of Different Kinds of Wars, Available at: <<http://oll.libertyfund.org>>.
- Carnahan, B. M., ‘Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity’, 92 *Am. J. Int’l L.* 213 1998.
- Cassese, A., ‘International Law’, Oxford University Press, 2nd ed., 2004.
- Cassese, A., ‘the Martens Clause: Half a Loaf of Simply Pie in the Sky?’ *EJIL* (2000), Vol. 11 No. 1, pp. 187-217.
- Castren, E., ‘Civil War’, SUOMALAINEN TIEDEAKATEMIA, 1966.
- Chroust, A-H., ‘Hugo Grotius and the Scholastic Natural Law Tradition’ *New Scholasticism*, Vol. 17: 101-133, printed in Dunn and Harris (ed.) Grotius, Edward Elgar Publishing, 1st ed., 1997.
- Coker, C., ‘War and the 20th Century: A Study of War and Modern Consciousness’, University of Michigan Press, 1994.
- Columbia-Spain, Convention of Truxillo, 26 Nov. 1820, 71 CTS 281
- Davis, G. B., ‘Doctor Francis Lieber’s Instructions for the Government of Armies in the Field’, 1 *Am. J. Int’l L.* 13 January and April 1907.
- Detter, I., ‘the Law of War’, Cambridge University Press, 2nd edition, 2000.
- Draper, G.I.A.D., ‘Humanitarian Law and Internal Armed Conflicts’, *GA. J. Int’L & Comp. L.* 253 (1983).
- Dhokalia, R.P., ‘the Codification of Public International Law’, Manchester University Press, 1970.
- Draper, G.I.A.D. (1990) ‘Grotius’ Place in the Development of Legal Ideas about War’, In ‘Hugo Grotius and International Relations’, Bull, H., et al., Clarendon Press, 1992.
- Draper, G.I.A.D., ‘Implementation and Enforcement of Geneva conventions’, 1 *Receuil des cours* 1979 III.

- Draper, G.I.A.D., "The Status of Combatants and the Question of Guerrilla Warfare", 45 Brit. Y.B. Int'l L. 173 1971.
- Edmunds, S.E., "The Laws of War: Their Rise in the Twentieth Century and Their Collapse in the Twentieth", 15 *Va. L. Rev.* 321-349.
- Eicher, D.J., 'the Longest Night: A Military History of the Civil War', Simon & Schuster, 2002.
- Emmerich De Vattel, "Law of Nations: Principle of Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns", J. Chitty & E.D. Ingraham, Published by T. & J.W. Johnson, 1867 original from Harvard University Digitized, Aug 24, 2007, Book III.
- Engdal, O. & Wrangé, P., (eds.), 'Law of War: the Law as It Was and the Law as it should be', Brill, 2008.
- Epperson, J.F., "Causes of the Civil War", OTTN Publishing, 2005.
- Eyffinger, A., 'the 1899 Hague Peace Conference: The Parliament of Man, the Federation of the World,' Kluwer Law International, The Hague, 1999.
- Falk, R.A., 'the international Law of Civil War', The Johns Hopkins Press, 1st ed., 1971.
- Finkel, C., 'Osman's Dream: the Story of Ottoman Empire 1300-1923', John Murray Publishers, 1st ed., 2006.
- Fitzgerald, A., 'Peace and War in Antiquity' Scholartis Press (London), 1st ed., 1931.
- Francis Lieber, 'the Miscellaneous Writings of Francis Lieber: Reminiscences, Addresses and Essays (1881), Babu Press, 2010.
- Frank Friedel, Francis Lieber: Nineteenth Century Liberal, Baton Rouge: Louisiana University Press, 1st ed., 1947.
- French, D., "the British Way in Warfare: 1688-2000", Routledge, 1st ed., 1990.
- Friedman, L. (ed.), 'the Law of War: A Documentary History', Greenwood Publishing, 1972.

- Friedman, L., (Compiled by), "The Law of War: A Documentary History", Greenwood Publishing Group, 1972, p. 192.
- Gallatin-Love, A., 'the Geneva Red Cross Movement: European and American Influence on its Development', Medical Field Service School, 1942.
- Green, L., 'The Contemporary Law of Armed Conflict', Manchester U.P., 3rd ed., 2008, pp. 26-65.
- Greenspan, M., 'the Modern Law of Land Warfare', University of California Press, 1959.
- Greenwood, C., 'International Humanitarian Law (Laws of War) – Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899', in F. Kalshoven, ed., The Centennial of the First International Peace Conference – Reports & Conclusions (The Hague, Kluwer Law International 2000).
- Gross, L., 'The Peace of Westphalia 1648-1948' 42 *AJIL*, 1948, p. 20..
- Lesaffer, R.C.H. (ed.), 'Peace Treaties and International Law in European History: from the Late Middle Ages to World War One', Cambridge University Press, 2008.
- Greenwood, C., "Historical Development and Legal Basis" in Fleck D. & Bothe, M., "The Handbook of International Humanitarian Law", Oxford University Press, 2007.
- Heirbaut, D., "The Belgian Legal tradition: Does it Exist?" in "Introduction to Belgian Law", Bocken, H. & De Bondt, W. (ed.), The Hague: Kluwer Law international, 2001.
- Henry Dunant, 'A Memory of Solferino', International Committee of Red Cross, English Translation, 1986.
- Herring, H., 'History of Latin America from the Beginning to the Present', Knopf Publications, 3rd ed., 1968;

- Hoffman, M.H., “The Customary Law of Non-International Armed Conflict”, 30 *Int’l. Rev. Red Cross* 322 (No. 277, July-August 1990).
- Hoffman, S., and Fidler, P., ‘Rousseau on International Relations’, Oxford University Press, 1st ed., 1991
- Holland, T., ‘Persian Fire: The First World Empire, Battle for the West’, Little and Brown Publications, 1st ed., 2006.
- Howard, M., ‘the France-Prussian War: the German Invasion of France, 1870-1871’, London, new edition, 1979.
- Howard, M., ‘War in European History’, Oxford University Press, 2001.
- Hugo Grotius, ‘The Laws of War and Peace (*De Jure belli ac Pacis*), New Translation, Published for classic club by W. J. Black (1949).
- Hull, W.I., ‘The Two Hague Conferences and their Contribution to international Law, Ginn & Company, Boston, 1908; Reprinted Co., New York, 1970.
- Instructions for the Government of the Armies of the United States in the Field, General Order 100, War Department, Adjutant General’s Office (Washington, April 24, 1863).
- Johnson, J.T., ‘Lieber and the Theory of War’ in “Francis Lieber and the Culture of the Mind”, Mack, C.R., & Lesesne, H.H., (ed.), University of South Carolina Press, 2005.
- Judicial Decisions: International Military Tribunal (Nuremberg), reprinted in *Am. J. Int’l L.* vol. 41, 1947.
- Kalshoven, F. and Zegveld, L., ‘Constraints On the Waging of War: An Introduction to International Humanitarian Law’, International Committee of Red Cross, 2001.
- Kalyvas, S.N., ‘The Changing Character of Civil Wars, 1800-2009, in H. Strachan & S. Scheipers, ‘The Changing Character of War’, Oxford University Press, 2011.
- Khadduri, M., ‘War and Peace in the Law of Islam’, Luzac & Company, 1940.

- Kraemer, J.L., ‘Apostates, Rebels and Brigands’, *Israel Oriental Studies* 10 (1980): p. 34-73.
- Kurtz, L.R., Turpin, J.E., “Encyclopaedia of Violence, Peace and Conflict”, Academic Press Publishing, 1999.
- Lauterpacht, H., ‘recognition in international law’, Cambridge University Press, 1947, p. 176.
- Khaled Abou El Fadl, ‘Rebellions and Violence in Islamic Law’, Cambridge University Press, 2001.
- Levie, H.S., ‘History of the Law on Land’, *International Review of Red Cross* No. 838, pp. 339-350.
- Lytle, S., ‘Robespierre, Danton, and the *Levee En Masse*’, *the Journal of Modern History*, vol. 29-30, 1957.
- Menon, P.K., ‘the Law of Recognition in International Law, Lewiston, N.Y., 1994.
- Meron, T., ‘Francis Lieber’s Code and Principles of Humanity’, 36 *Colum. J. Transnat’l L.* 269 1998.
- Meron, T., “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, 94 *Am. J. Int’l L.* 78, 2000.
- Moir, L., “The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949”, 47 *Int’l & Comp. L. Q.* 337 1998.
- Moir, L., ‘The Law of Internal Armed Conflict’, 1st ed., Cambridge U.P., 2002.
- Moir, L., ‘Towards the Unification of International Humanitarian Law?’ in ‘international and Security Law: Essays in Memory of Hilaire McCoubrey’ edited by Burchill, White and Morris, Cambridge University Press, 2005.
- Nabulsi, K., ‘Tradition of War: Occupation, Resistance and the Law’, Oxford University Press, 2nd ed., 2005.
- Nabulsi, K., “Evolving Conceptions of Civilian and Belligerents: One Hundred Years after the Hague Peace Conferences” in “Civilians in War”, Chesterman, S., (ed.), Lynne Rienner Publishers, 2001.

- Neff, S., ‘ War and the Laws of nations: A General Story’, Cambridge University Press, 1st ed., 2005, p. 251.
- Neumann, I.B., ‘Russia and the Idea of Europe: A study in Identity in International Relations’, Routledge, 1996.
- Nurick, L. & Barrett, R.W., ‘Legality of Guerrilla Forces Under the Laws of War’, 40 *Am. J. Int’l L.* 563 1946.
- Nussbaum, A., ‘A Concise History of the Law of Nations’, Revised Edition, Macmillan London, 1962.
- Nussbaum, A., ‘A Concise History of the Laws of Nations’, Macmillan, 1st ed., 1947.
- Oeter, S., “Civil War”, in “Encyclopaedia of Public International Law: Use of Force; War and Neutrality; Peace Treaties”, vol. 4, Bernhardt, R. (ed.), North Holland, 1982.
- Onuma Yasuaki (ed.), ‘A Normative Approach to War: Peace, War and Justice in Hugo Grotius’, Oxford university Press, 1993.
- Oppenheim, L. & McNair, A.D., ‘International Law: Disputes, War and Neutrality’, Longmans, Green & Company, 1926.
- Paludan, P.S. ‘The Presidency of Abraham Lincoln (American Presidency Series), University of Kansas Press, 1st ed., 1994.
- Paust, J. J., ‘Dr Francis Lieber and the Lieber Code’, 95 *Am. Soc’y Int’l L. Proc.* 112 2001.
- Pearce-Higgins, A., ‘the Hague Peace Conferences and other International Conferences Concerning the Laws and Usage of War: Text of the Conventions with Commentaries’, Stevens & Sons, Limited, 1904.
- Perry, R.L., (ed.), ‘Sources of Our Liberties’, New York: McGraw-Hill, 1959.
- Phillipson, C., ‘The International Law and Custom of Ancient Greece and Rome 166-384, Macmillan, London, vol. II, 1911.
- Pustogarov, V.V., “The Martens Clause in International Law”, 1 *J. Hist. Int’l L.* 125 1999.

- Pustogarov, V.V., 'Fyodor Fyodorovich Martens: a Humanist of Modern Times', *IRRC*, no. 312, 1996.
- Raymond, G.A., 'Lieber and International Laws of War', in 'Francis Lieber and the Culture of the Mind', Mack, C.R., & Lesesne, H.H., (ed.), University of South Carolina Press, 2005.
- Reid, J.J., 'the Crisis of the Ottoman Empire: Prelude to Collapse 1839-1878', Steiner, 2000.
- Reydams, L., 'A la guerre comme a la guerre: patterns of armed conflict', 88 *International Review of Red Cross* 729 (2006).
- Richard S. Hartigan, "Lieber's Code and the Laws of War", Transaction Publishers, 1985.
- Roberts, A. and Guelff, G., 'Documents on Laws of War', Oxford University Press, 1st ed., 1989.
- Roberts, A., 'Land Law from Hague to Nuremburg' in 'The Laws of War: Constraints on Warfare in the Western World' edited by Howard, M., et.al., Yale University Press, 1st ed., 1994.
- Roberts, G. B., 'Judaic Sources of and Views on the Laws of War' 37 *Naval L. Rev.* 221 1988.
- Roger, A.V.P., 'Law on the Battlefield', Manchester University Press, 3rd edition, 2012.
- Rosas, A., 'Rousseau and the Law of Armed Force', in 'Law at War: the Law as It Was and the Law as it should be', Martinus Nijhoff Publishers, 2008.
- Roth, B.R., 'Governmental Illegitimacy in International Law', Oxford university Press, 1999.
- Rousseau, C., '*Le Droit des Conflicts Armes*', Paris, 1983; Lytle, S., "Robespierre, Danton, and the *Levee En Masse*", *The Journal of Modern History*, vol. 29-30, 1957.
- Rousseau, J.J., '*Le Contrat Social*', English Translation by Maurice Cranston, Penguin Classics, 1968, Book 1, Chapter 4.

- Russell, F. H., 'The Just War in the Middle Ages', Cambridge University Press, 2nd ed., 1977.
- Rwelamira, M.R., 'the Significance and Contribution of the Protocols to the Geneva Conventions of August 1949', pp. 227-236, in Swinarski, C. (ed.), 'Studies and Essays on International Humanitarian Law and Red Cross Principles', In Honor of Jean Picet, ICRC, Geneva, 1984.
- Solis, G.D., 'the Law of Armed Conflict: International Humanitarian Law in War', Cambridge U.P., 1st ed., 2010.
- Schindler, D., Toman, J., 'The Laws of Armed Conflicts', 3rd ed., Martinus Nijhoff Publishers/Henry Dunant Institute, Dordrecht/Geneva, 1988.
- Shaw, M.N., 'International Law', 5th ed., Cambridge University Press, 2003.
- Scott, J.B., 'The Hague Peace conferences of 1899 and 1907: A Series of Lectures Delivered before the Johns Hopkins University in the Year 1908', Published by The Johns Hopkins University, 1909.
- Shepard, W. S., 'One Hundredth Anniversary of the Lieber Code', 21 *Mil. L. Rev.* 157 1963;
- Solomon, N., 'Judaism and the ethics of war' *IRRC* Vol. 87 No. 858 June 2005
- Sun Tsu, 'The Art of War', Translated by S. B. Griffith, Oxford University Press, 1971.
- Tanja, G., (ed.), 'Humanitarian Law of Armed Conflict: Challenges Ahead', Dordrecht: Nijhoff, 1st ed., 1991
- Thomas E. Greiss, 'American Civil war', (West point Military History Series), Avery, 2000.
- Thomas Hobbes, Richard Tuck (ed.), 'Leviathan', Cambridge University Press, 2nd ed., 1996.
- Ticehurst, R., 'The Martens Clause and the Laws of Armed Conflict', *IRRC*, no. 317, 1996.

- Trainin, I. P., 'Question of Guerrilla Warfare in the Law of War' 40 *Am. J. Int'l L.* 534 1946.
- Van Creveld, M., 'The Transformation of War', New York, the Free Press, 1991.
- Viswanatha, S., 'International Law in Ancient India', Longmans Green, Bombay, 1925. Wells, H., Ancient South East Asian Warfare, London: Bernard Quaritch, 1952.
- Von Clausewitz, C., 'On War', Penguin Classics, 3rd ed., 1982.
- Von Elbe, J., 'The Evolution of the Concept of the Just War in International Law' 33 *Am. J. Int'l L.* 665 1939.
- Walker, W.L. and Grey, F.T., 'Pitt Cobbett's Leading Cases on International Law, 5th ed., Sweet and Maxwell, 1937, vol. II.
- Wheaton, H.B., International Law, (7th English ed., by A.B. Keith), London, 1944.
- Whisker, J. B., 'The Militia', Edwin Mellen Press, 1st ed., July 1992.
- Wilkes, G., 'Judaism and Justice in War', in P.F. Robinson, 'Just War in Comparative Perspective', Ashgate, 2003.
- Wilson, H., 'International Law and the Use of force by National Liberation Movements, Oxford, 1st ed., 1988.
- Wolff, C., '*Jus Gentium Methodo Scientifica Pertractatum*', vol. II (translation), J.B. Scott (ed.), Classics of International Law, Carnegie Endowment for International Peace, 1934.
- Wright, Q., 'The Outlawry of War and the Law of War', 47 *Am.J. Int'l L.* 365 1953.
- Yapp, M.E., 'The Making of the Modern Near-East', London and New York: Longman, 1987.