

**Who's Killing Whom? The Modern Evolution of the  
Classification and Targeting of Civilians and  
Noncombatants**

**A Monograph  
by  
Major William R. Abb  
United States Army**

**School of Advanced Military Studies  
United States Army Command and General Staff College  
Fort Leavenworth, Kansas**

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**MONOGRAPH APPROVAL**

**Major William R. Abb**

**Title of Monograph: Who's Killing Whom? The Modern Evolution of the  
Classification and Targeting of Civilians and Noncombatants**

**Approved by:**

\_\_\_\_\_  
**Robert M. Epstein, Ph.D.** **Monograph Director**

\_\_\_\_\_  
**COL Robin P. Swan, MMAS** **Director, School of Advanced  
Military Studies**

\_\_\_\_\_  
**Philip J. Brookes, Ph.D.** **Director, Graduate Degree  
Program**

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## Abstract

Who's Killing Whom? The Modern Evolution of the Classification and Targeting of Civilians and Noncombatants By William R. Abb, U.S. Army 55 pages

The prosecution of war has always been tempered by constraints, both real and artificial. These constraints are described by Clausewitz as the factors which prevent the conduct of absolute war. These factors include moral and professional codes of conduct many of which have been codified through the Geneva and Hague Conventions, International Humanitarian Law, military doctrine and others to establish expectations for behavior. It is the adherence to these norms or expectations that allow belligerents to argue the legitimacy of their actions and to maintain international and domestic popular support. Among these expectations is the treatment of civilians and noncombatants.

Attacks against the civilian population have been a part of warfare since its inception, from siegecraft in antiquity through strategic bombing to the modern concept of information warfare, the civilian populace has paid a heavy price for its defense. Today the classification and legitimate targeting of civilians and noncombatants through the use of lethal and non-lethal fires is critical for any military operation, which has as its operational or strategic objectives/aims the separation of civilian leadership or the military from the popular (civilian) support of the people. It is also critical in a time when the destruction of key military infrastructure (fuel, power generation, communications) has first, second and third order effects that ripple through the civilian populace. Finally, this classification, targeting and the impact of collateral damage is critical in a period when technology creates expectations which when failed to be met, threaten international legitimacy and often popular support within fragile coalitions.

This monograph concludes that just as a distinction is made between the justness of war (*jus ad bellum*) with justness in war (*jus in bello*) to differentiate between the responsibilities of belligerents in resorting to war with their responsibilities in the prosecution of that war (just or not), there is a distinction drawn between what actions in war are legal and what are legitimate for the maintenance of domestic and international support. When behavior is tied to legitimacy instead of the law, the expectations for behavior are much more subjective and sensitive to shifting as a result of normally stable factors like the spectrum of conflict and the technological capabilities of the belligerents. Differing interpretations of the law, technological mismatch and behavior tied to legitimacy further encourages belligerents to respond in asymmetric ways. They further allow belligerents to maintain legitimacy and international and domestic support (public opinion) while responding in a manner which causes greater civilian casualties. For example, a precision guided missile (PGM) attack and a car bomb in a crowded market place may be viewed with the same degree of legitimacy based upon the technological capabilities of the belligerents. Instead of technology solving our problems and ending wars/conflict more quickly it may create situations where its coercive effects can be contemplated at earlier stages of a conflict without threatening domestic support but actually serving as a more destabilizing factor that results in asymmetric responses and puts civilians at greater risk than before.

## Table of Contents

TITLE PAGE.....	i
APPROVAL SHEET.....	ii
ABSTRACT.....	iii
TABLE OF CONTENTS.....	iv
INTRODUCTION.....	1
CRITERIA AND METHODOLOGY.....	3
LITERATURE REVIEW.....	5
JUST WAR THEORY AND THE USE OF FORCE.....	6
MILITARY ETHICS AND MORALITY.....	9
TECHNOLOGY.....	12
RECENT CIVILIAN CASUALTIES.....	13
RESTRAINT IN WAR.....	13
THE EVOLUTION OF THE LAW OF LAND WARFARE.....	17
PREPARATORY CONFERENCES.....	18
THE AMERICAN CONTRIBUTION--THE LIEBER CODE.....	19
THE HAGUE CONVENTIONS OF 1899 TO THE PRESENT.....	21
CONCLUSIONS.....	33
RECOMMENDATIONS.....	40
ENDNOTES.....	43
BIBLIOGRAPHY.....	52

## Introduction

War is an act of force to compel our enemy to do our will...Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it...To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.

*Carl von Clausewitz*<sup>1</sup>

Hugo Grotius, writing in the seventeenth century, observed that, concerning war, we must not believe either that nothing is allowable, or that everything is.

*Paul Christopher in his introduction to The Ethics of War and Peace*<sup>2</sup>

The bombing of non-combatant populations violated international and humanitarian laws.

*American protest to Japanese bombing of China in 1938*<sup>3</sup>

The American Government and the American people have for some time pursued a policy of wholeheartedly condemning the unprovoked bombing and machine-gunning of civilian populations from the air.

*American President Roosevelt on the Soviet bombing of Helsinki in 1939*<sup>4</sup>

On 29 May, 1945 The cover of *The New York Times* included two related but distinctly different articles on the prosecution of World War II in the Pacific. The articles were related in that they both dealt with the issue of noncombatants or protected civilians, but distinctly different in the application of International Law for the classification and legitimate targeting of these civilians.<sup>5</sup>

The first article ran with the headline "51 Square Miles Burned Out In Six B-29 Attacks on Tokyo" and described in great detail the assessment of civilian casualties and infrastructure damage attributed to the successful prosecution of fire bombing Tokyo. Major General Curtis E. LeMay backed figures of 1,000,000 Japanese deaths and laying waste to 51 square miles of the capital. The reader requires no further explanation as to

the legitimate targeting of population centers as a means to breaking the will of the Japanese people and forcing Japan to capitulate.

The second story ran with the headline "U.S. Rejects Tokyo Charge In Sinking of Relief Ship" and described the accidental sinking of a protected ship by an American submarine and the ordered court martial of the commander. The reader again requires no further explanation as to why the officer in charge should be prosecuted to the full extent of military law.

The prosecution of war has always been tempered by constraints, both real and artificial. These constraints are described by Clausewitz as the factors which prevent the conduct of absolute war.<sup>6</sup> These factors include moral and professional codes of conduct many of which have been codified through the Hague and Geneva Conventions, International Humanitarian Law, and others to establish expectations for behavior. It is the adherence to these norms or expectations that allow belligerents to argue the legitimacy of their actions and to maintain international and domestic popular support. Among these expectations is the treatment of civilians and noncombatants.

Attacks against the civilian population have been a part of warfare since its inception, from siege craft in antiquity through strategic bombing to the modern concept of information warfare, the civilian populace has paid a heavy price for its defense. It appears that today that price is higher than ever as recent statistics show a four-fold increase in civilian casualties in conflicts.<sup>7</sup>

The classification and legitimate targeting of civilians and noncombatants through the use of lethal and non-lethal fires is critical for any military operation which has as its operational or strategic objectives/aims, the separation of the civilian leadership or the

military from the popular (civilian) support of the people. It is also critical in a time when the destruction of key military infrastructure (fuel, power generation, communications) has first, second and third order effects that ripple through the civilian populace. Finally, this classification, targeting and the impact of collateral damage is critical in a period when technology creates expectations which when failed to be met, threaten international legitimacy and often popular support within fragile coalitions.

### **Criteria and Methodology**

This monograph examines the modern historical evolution of classifying and targeting of civilians and noncombatants while examining the impact of historical theories from Douhet and the advent of strategic bombing to modern issues including the use of non-lethal and informational attacks in support of operational and strategic objectives. This monograph seeks to answer the question; Does the evolution of modern warfare represent a significant shift in the classification and targeting of civilians and noncombatants? The answer to this question will assist commanders and staffs in the future classification and targeting of civilians and noncombatants throughout the full spectrum of conflict. It determines if this evolution follows changes in international law or changes in interpretation and expectations for behavior. Finally it supports a recommendation for updating U.S. Army and Joint Doctrine to incorporate these findings.

The criteria used to evaluate this research question is less empirical and more argumentative. They are the affirmation or refutation of supporting or nested research questions: what is the historical foundation and evolution of the U.S. Army doctrine on the Law of Land Warfare; what does current U.S. doctrine say about the classification

and targeting of civilians and nonmilitary targets by lethal and non-lethal fires; what are the implications of targeting dual use (military and civilian) targets; how does the classification and targeting of civilians and noncombatants change across the full spectrum of conflict; how does technology impact on the legitimacy of operations that target civilians and noncombatants or cause significant collateral damage; and finally, what does this analysis say about the future classification and targeting of civilians and noncombatants? Satisfaction of these questions allows for the assertion of solid and supportable conclusions about the main research question.

This study begins by examining the current body of literature related to the research question and how the findings compliment or add to that existing body of knowledge. Understanding International Law, the legitimate use of force, intervening in the internal affairs of sovereign states, dual use targeting and morality in modern warfare are the focus of a tremendous amount of current political-military writing. The sheer volume of work speaks to the relevancy and contentious nature of these subjects.

The examination begins with a foundation in the historical development of U.S. Doctrine and the law of land warfare and the linkage to international humanitarian law as codified in the Hague Conventions, Geneva Conventions, Additional Protocols to the Geneva Convention of 1949 and other sources. This foundation is critical for establishing an understanding of the rights of protected groups and noncombatants. This study understands the theoretical debate over just war theories and the legitimate use of force. It is not within the scope of this study to fully justify why the belligerents are in conflict but simply examine what governs their behavior.



This study examines whether shifts in classification represent more of an evolution in expectations by determining if behavior is less a matter of the law and more a matter of meeting expectations in order to maintain legitimacy and international and domestic support. This line of thought may support conclusions about whether differing expectations or interpretations of the law resulted in NATO members pulling aircraft out of certain missions in the recent air campaign in Kosovo.

The focus shifts to examining how the classification and targeting of civilians and noncombatants changes with the nature of the conflict from insurgency, civil war and low through high intensity conflict. This focus also includes an examination of the impact of technology on operations where the legitimate use of force, servicing of military and dual use targets in population centers, Information Operations, economic embargos and acceptable levels of collateral damage are often in dispute.

Finally this study makes recommendations, not in terms of the specific future classification and targeting of civilians and noncombatants, but on areas that require further legal and doctrinal review until further international consensus can be reached.

### **Literature Review**

A wealth of writing exists detailing the legitimate use of force, questioning the moral conduct of war and attempting to determine if international law and moral or professional codes of conduct still exist. The work summarized in this literature review is not all-inclusive. It simply represents a sampling of the collective body of knowledge available to draw upon for debate. This paper serves to compliment that body of knowledge and to distill from a "wide cast" those thoughtful and supported conclusions which eventually help shape the findings and recommendations. To that end this

literature review focuses on four areas: just war theory and the use of force, war and morality, technology issues and theories attempting to explain recent civilian casualties. This monograph briefly touches on the idea that modern warfare has evolved to the point where its prosecution must include the notion that the destruction of the enemy's military capability is simply a means to an end and that victory is not achieved without the capitulation or elimination of the populace.

### **Just War Theory and the Use of Force:**

The notion of "just war" theories extends throughout nearly all of the works reviewed in some manner from the main focus of the book to simply a cursory examination to provide a foundation for other lines of inquiry. What is significant for the purpose of this study is that there are a number of competing schools of thought used in the conduct of historical examination on the evolution of "just war" and the related issues of morality and the legitimate use of force. Current theories incorporate international law as well as the moral arguments often used to circumvent that law.

It is interesting to note that much of the wealth of American writing on modern "just war" theory is loosely tied to recent historical events. These events include the Vietnam War (1959-1975), Operation URGENT FURY in Grenada (1982), Operation DESERT STORM/DESERT SHIELD in Iraq/Kuwait (1990/1991), and events in Europe since the reunification of Germany (1990) the breakup of the Soviet Union (1991) and UN/NATO intervention in the Balkans (1995 to present). The American experience in Vietnam resulted in a great rebirth in "just war" theory in how the war was prosecuted. The American invasion of Grenada in 1982 revitalized the slumbering U.S. military and resulted in several debates over such issues as the legitimate use of force, United Nations

(U.N.) Charter, Chapter 2 (4) issues of sovereignty and the relevance and enforcement of international law. The impact of the Gulf War and events in Europe spurred debate over the future of land warfare, possible revolutions in military affairs and a “new world order” no longer dominated by bi-polar superpowers but fraught with opportunities for small scale contingencies, humanitarian relief and other military operations other than war (MOOTW).

One of the best works is *Just and Unjust Wars* by Michael Walzer. It is required reading at the military academies as well as many other schools in the officer professional development programs of the U.S. Army.<sup>8</sup> The book seeks to dispel the notion that just war theories have lost their relevancy to the idea that no war in the modern world can possibly be just.<sup>9</sup> As stated by the author, he presents a moral theory of war focused on the tension within the theory “summed up in the dilemma of winning and fighting well.”<sup>10</sup> This is the military form of the means/ends problem, the central issue in political ethics.”<sup>11</sup>

The author discusses the moral reality of war as divided into two parts. These parts represent logically independent “judgments about aggression and self defense” and “about the observance or violation of the customary and positive rules of engagement.”<sup>12</sup> In describing the reasons for going to war and the means that belligerents adopt in fighting wars, he draws upon Medieval writers who distinguish between *jus ad bellum*, the justice of war, from *jus in bello*, justice in war explaining that it is possible for a just war to be fought through unjust means and for an unjust war to be fought within the restraints of customary rules of engagement.<sup>13</sup>

Michael Howard in several of his books including *War in European History*, *Restraints on War* and *The Laws of War* provides an excellent analysis of the development of warfare from antiquity to the present. In *War in European History*, he sought to study wars of the past not "in order to deduce either immutable principles or lines of development as guides to the efficient conduct of war in the future." But instead to study war in the framework of political, economic, social and cultural history; as part of "a totality of human experience...understood only in relation to one another."<sup>14</sup> He sought to describe war in terms of what they were fought about.<sup>15</sup> In *Restraints on War* and *The Laws of War*, Howard starts with the premise that wars between civilized societies have always been subject to certain constraints/restraints with the notions of "the laws of war" and "just war" developed in the Middle Ages. He compiles studies from several prominent historians, lawyers and political scientists as they trace the evolution of attempts to apply "reasonable bounds" to the conduct of war while integrating contemporary issues of weapons of mass destruction and wars on national liberation.

Another excellent overview of the development of just war traditions is provided by Paul Christopher in his book *The Ethics of War & Peace an Introduction to the Legal and Moral Issues*. Although a good deal of the information is redundant to other sources, he provides a good explanation of the transition from secularization based justifications/traditions to the application of international law. He also deals well with contemporary issues and addresses where he feels current international law no longer meets the requirements.<sup>16</sup>

A common thread running through much of this work is contemporary issue of International Law as it governs the use of force. The American invasion of Grenada in 1982 served as the genesis for a collaborative book entitled *Right V. Might; International Law and the Use of Force* by Louis Henkin, Stanley Hoffman et al.<sup>17</sup> The book is a collaborative selection of essays on the use of force. A second edition of the book was published in 1991 to reflect actions in Panama and Iraq and predicting shifts in practice if not in international law to support collective intervention.

### **Military Ethics and Morality:**

Military ethics and morality serves as a grouping of works that move beyond a foundation in just war theories to espousing positions on the military profession and morality in modern warfare. These works include *War, Morality, and the Military Profession* by Malham M. Wakin. His book is a compilation of articles and essays which stress the “ethical dimensions of the military profession” and “the agonizing moral issues associated with warfare.”<sup>18</sup> These topics include the conflict between military values and societal norms, the laws of war and war crimes and morality in the nuclear age.

Some authors like Ralph Peters in his *Parameters* article “A Revolution in Military Ethics,” wrestles with the notion of what truly represents a “shift in the nature of war.” He advocates a military doctrine that states, “that the primary goal of any U.S. war or intervention would be to eliminate the offending leadership, its supporting cliques, and the enabling infrastructure.”<sup>19</sup> This doctrine is in stark contrast to grinding “within the antique paradigm that insists that the leader is identical with his (or her) people, and therefore, punishing the people or its military representation is a just response to the leader’s offenses?”<sup>20</sup>

A. J. Bacevich in his *Parameters* article entitled "New Rules: Modern War and Military Professionalism," describes World War II as a watershed event in the history of warfare. "The actual conduct of the war—the vast pretensions of campaigns such as Operation Barbarossa, the terror bombing of European and Asian cities, the emergence of "unconditional surrender" as an acceptable war aim, and the American employment of atomic weapons—shattered the final restraints on war...The fever of Cold War legitimized the use of unlimited violence to achieve unlimited ends (the preservation of 'our way of life')." <sup>21</sup> "With the end of the Cold War this paradigm has been collapsed and that any western army that fails to appreciate this—that persists in planning for apocalyptic war, for example, by retaining nuclear weapons as integral to its Warfighting doctrine—will forfeit its claim to popular and political support. An army deprived of such support can scarcely hope to serve a useful function." <sup>22</sup> He argues that a new paradigm will supersede the old which has as its foundation, preconditions of political and moral acceptability. A future where war involves the civilian population as "central to the definition of war aims, strategy, and the methods that soldiers will employ in accomplishing their mission and which postulates a new theory of warfare derived not simply from the limits of technological possibility but from the political and moral dictates of our age—dictates that can redefine themselves with disconcerting suddenness." <sup>23</sup>

Conrad C. Crane, a professor at the U.S. Army Military Academy, in a recent article entitled "Ethics and the RMA: Matching Moral Expectations and Military Capabilities in Modern Warfare," compares strategic bombing in the Korean War with recent operations in Kosovo to argue that technology has not had the intended effect of

restraining war or making it less likely. He argues that it is "now much easier to get domestic public support to use force when all it requires is to launch a cruise missile or drop a precision bomb."<sup>24</sup> Further, that technological mismatches between belligerents results in asymmetrical responses which blunt the effects of the RMA and instead of ushering in a period where technology allows for the quick and decisive end to wars with minimal impact on the civilian population, the result is more in line with what Douhet predicted where new weapons will "decide wars by inflicting the maximum amount of distress on the civilian population" and "civilians will appear to be more vulnerable to the destructive power of modern technology than military capability."<sup>25</sup>

Harvey M. Sapolsky and Jeremy Shapiro in their *Parameters* article entitled "Casualties, Technology, and America's Future Wars," provide some interesting insights as an example of works which tout the concerns in western armies over casualty aversion. The authors take an interesting twist in describing concerns over acceptable enemy casualties creating a category called "worse than lethal" where the political ramifications are disproportionately large as to challenge continued domestic and international support.<sup>26</sup>

Nicholas Fotion and Gerald Elfstrom in their book *Military Ethics* attempt to reconcile the mistaken views of pacifists who argue that the use of military force should never be contemplated let alone applied in a morally justifiable manner and realists who argue that the brutal and violent character of war prevents any hope of moral standards guiding it.<sup>27</sup> The result is a practical utilitarian approach to describing what is possible rather than what is ideal in war. Nicholas Fotion follows up this work with another book entitled *Military Ethics; Looking Toward the Future* and seeks to determine if the

technology of modern warfare has made military ethics impossible concluding that technology has not destroyed our ability to exercise control over our behavior in the conduct of war.<sup>28</sup>

### **Technology:**

The notion of just wars, military ethics and morality has been further examined in light of expectations based on technology including Sheldon M. Cohen who in his book *Arms and Judgment* argues that “the key to understanding both the law and the morality of war lies in grasping the changing nature of warfare in response to technological progress.”<sup>29</sup>

Charles Dunlap Jr. in his Strategic Studies Institute (SSI) monograph entitled “Technology and the 21<sup>st</sup> Century Battlefield: Recomplicating Moral Life for the Statesman and the Soldier” argues that from a moral standpoint, emerging RMA technologies have significant “unintended consequences and revenge effects” including unpredictable and asymmetric responses to high-tech attacks; the increased co-mingling of military and civilian high tech systems causing increased debate over dual and multi use targets; the blurring of the distinction between noncombatant civilians and combatant military personnel, information operations aimed at destroying democratic values, the militarization of space, the acceptable casualties and an organizational culture which shifts decision making responsibilities to lower levels.<sup>30</sup>

David Shukman in *Tomorrows War* argues that advances in technology have led to greater instability and unpredictability rather than to create a safer more secure world order. His argument is more over political acceptability and proportionality than from moral constraints.<sup>31</sup>



### **Recent Civilian Casualties:**

The last area reviewed abounds with the work done predominantly by humanitarian organizations to address recent trends in civilian casualties and to highlight perceived atrocities. Much of this work circulates on the internet and espouses utopian theories for ending human conflict and for calling attention to the concerns of their causes. Organizations like The International Committee of the Red Cross, Worldwatch, The Heritage Foundation, Christian Science Monitor and others use the power of their publications and the internet to provide volumes of information and leverage public support.<sup>32</sup> Individual internet sites offer a wealth of information, often of questionable reliability, on war, morality, democide and other contemporary atrocities. R.J. Rummel for example, in a web site entitled "Freedom, Democracy, Peace; Power, Democide and War" provides access to some 900 documents and 4000 pages dedicated to supporting his theories about the corrupting nature of power and to advancing the knowledge and confidence in freedom—in liberal democracy.<sup>33</sup> His site along with Matthew Whites' "Death by Mass Unpleasantness" portion of the "Historical Atlas of the Twentieth Century" provide some of the most comprehensive statistics on the casualties attributed to conflict and governments with enlightening comparisons to modern categories of smoking, abortion, AIDS, homicides, natural disasters, etc.<sup>34</sup>

### **Restraint in War**

The literature review helped to establish several key points that serve as the foundation for this examination of the notion of restraint in war. Michael Howard in his book, *Restraints On War; Studies in the Limitation of Armed Conflict*, establishes this point quite convincingly. He argues that control and restraint are not alien to the very

nature of war.<sup>35</sup> He argues that, "war, at least as the term has been understood in Western societies since the Middle Ages, is not the condition of generalized and random violence pictured by Thomas Hobbes as the 'state of nature'. It is on the contrary a highly social activity—an activity indeed which demands from the groups which engage in it a unique intensity of societal organization and control."<sup>36</sup> He goes on to say that war "involves the reciprocal use of organized force between two or more social groups, directed according to an overall plan or series of plans for the achievement of a political object."<sup>37</sup>

The role of the military in this social activity is tightly controlled through authoritative control.

The prime characteristic of a military is not that they use violence, nor even that they use violence legitimized by virtue of their function as instruments of the state. It is that they use that violence with great deliberation. Such violence, purposeful, deliberate, and legitimized is normally known as force, and the use of force between states is what we mean by war. War consists of such deliberate, controlled, and purposeful acts of force combined and harmonized to attain what are ultimately political objectives.<sup>38</sup>

The object of this force is destruction with strategy consisting of determining "how, where and on whom that destruction is to be inflicted."<sup>39</sup> History shows that the destruction can be random (by virtue of technological limitations or policy choices) or it can be applied with tremendous precision. These decisions flow from deliberate choices and require for their implementation, highly articulated structures of control. When random violence results from the "breakdown of such control...when troops lapse from discipline and discriminating use of force into purposeless and indiscriminate violence, the result is as repugnant to military professionalism as it is to transcendent ethical values."<sup>40</sup>

Howard thus concludes that control and limit in the conduct of war is not inherently impossible and that without controls and limitations "war cannot be conducted at all."<sup>41</sup> He further argues that:

The difficulty lies in introducing and maintaining controls and limits derived from criteria other than those inherent in sound strategy and the requirements for 'good order and military discipline'. Such criteria can normally be grouped under two heads. There are the categorical imperatives derived from the general value-systems of the culture concerned; and there are the prudential considerations which demand that, to put it at its lowest, the cost of war do not in the long run outweigh its benefits.<sup>42</sup>

In summary, war for the purpose of this study is inherently constrained, conducted by agents of the state making clear and deliberate decisions and obedient to the authoritative controls of a hierarchical command structure. That:

Whatever the objective aimed at or the weapons used, the plea of military necessity has to be brought into focus with other requirements, arising from the nature of man as a moral and as a social being. The first imposes an ethical rule: one does not cease to be moral being when one takes up arms, even if required by military necessity to commit immoral acts. There are other tribunals to which one may be called to account. And the second imposes a prudential rule: one should not behave to one's adversary in such a way as to make subsequent reconciliation impossible. War is instrumental, not elemental: its only legitimate object is a better peace.<sup>43</sup>

This argument does however assume a degree of rational decision-making. It is this assumption of rationality that leads critics to charge that if both belligerents are rational enough to allow external constraints to govern their behavior they would be rational enough to find other remedies than resorting to war. This counter argument seems to fail to recognize that military force as an instrument of national power can be exercised as a rational policy choice.

The second foundational point established in the literature review is the division of war into two distinct judgments. The first is with regard to the reasons why nations resort to war, the second is with regard to the means they adopt in the prosecution of that war. As Michael Walzer explains in his book, *Just and Unjust Wars; A Moral Argument with Historical Illustrations*, that "Medieval writers made the difference a matter of prepositions, distinguishing, *jus ad bellum*, the justice of war, from *jus in bello*, justice in war." He continues that "*jus ad bellum* requires us to make judgments about aggression and self-defense; *jus in bello* about the observance or violation of the customary and positive rules of engagement."<sup>44</sup> These judgments are logically independent thus it is possible for a just war to be fought unjustly and an unjust war to be fought in strict accordance with established rules.

The notion of *jus ad bellum* remains a matter of some dispute. In previous periods of history, the justness of the cause was presupposed and it followed that all actions which advanced the cause of a just war were equally just.<sup>45</sup> Today, many argue that no nation will act in a manner which it does not feel can be defended as "just". The distinction is important for the purposes of this study, not from the standpoint that *jus in bello* flows from *jus ad bellum* and that actions today in the advancement of a just cause are themselves just, but to draw a distinction between the two and establish the foundational premise that the justness of a war (*jus ad bellum*) is independent of the requirement for belligerents to subordinate their behavior to external constraints in the conduct of that war (*jus in bello*).

### **The Evolution of the law of Land Warfare:**

For as long as man has organized himself for collective security there has been war. For nearly as long, there have been attempts to temper or moderate the prosecution of war. There are a number of works that provide rather exhaustive examinations and detail on the evolution of the law of land warfare. These works include: *The United States and the Development of the Laws of Land Warfare* by Grant R. Doty; *Restraints On War: Studies in the Limitation of Armed Conflict* by Michael Howard; *Law Among Nations: An Introduction to Public International Law* by Gerhard von Glahn; *Lieber's Code and the Law of War* by Richard S. Hartigan; *Documents on the Laws of War* by Adam Roberts and Richard Guelff; *International Law and the Use of Force* by Anthony C. Arend and Robert Beck; *Handbook on the Law of War for Armed Forces* by Frederic De Mulinen and the International Committee of the Red Cross; *Department of the Army Pamphlets 27-1, Treaties Governing Land Warfare* dated December 1956 and *27-1-1, Protocols to the Geneva Conventions of 12 August 1948* dated September 1979; and *Department of the Army Field Manual 27-10, The Law of Land Warfare* dated July 1956. It is important to note that at least one author has attempted to identify the linkage between codes as "not merely circumstantial or tangential but rather explicit and sequential."<sup>46</sup> In other words, that each code served as the basis for the subsequent code.

For the purposes of this study and by general consensus from this myriad of sources, the evolution of modern laws of land warfare are traced back to the Middle Ages, the rules issued by kings for the conduct of war and the chivalry code of medieval knights. There were further attempts later, for example, King Gustavus Adolphus of Sweden, in 1621, personally drafted a code incorporating limitations on warfare. "He

prohibited the pillage or damage of any hospital, church, school, or mill, except upon command. His code also protected the clergy, the elderly, and all those who did not take up arms against him.”<sup>47</sup> One of Gustavus Adolphus’ contemporaries was a prominent scholar, Hugo Grotius, today recognized universally by international law scholars as the father of modern international law, particularly the concepts of the laws of war and peace. His book *De Jure Belli ac Paci*, first published in 1625 “was profoundly significant in the development of the laws of war, especially in the context of the era in which it was written.”<sup>48</sup> This evolution with a European tradition is based upon Western legal thought and political history and it is argued by many that it is “therefore tainted with Christian, imperialistic, capitalistic, and exploitive aspects. They maintain that such rules can at best, form part of a general customary western law but not universal international law...”<sup>49</sup>

### **Preparatory Conferences**

It is commonly held that until the mid-nineteenth century the law of war, “although increasingly well developed, remained, with few exceptions, in the realm of customary international law.”<sup>50</sup> The first “statutory measures” of this period was the Declaration of Paris of 16 April 1856 and “consisted of four articles which abolished privateering, addressed maritime neutrality, and identified elements of a binding blockade.”<sup>51</sup>

The next milestone in our chronology of the evolution of the law of war was the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of August 1864. Among other things agreed to, this convention formalized the red cross as a symbol of neutrality and proclaimed the neutrality of the sick, wounded,

and those that cared for them. This convention was initially signed by only nine states but eventually was acceded to by nearly every civilized state. Just as in the Declaration of Paris, the United States did not participate nor did it accede to the convention until 1882 because of its tradition of avoiding entangling alliances.<sup>52</sup>

The St. Petersburg Conference of 1868 introduced into the declaration the customary principle of prohibiting the use of means of warfare which cause unnecessary suffering by applying restrictions on the use of exploding and flammable projectiles under 400 grams.<sup>53</sup>

The Russian Proposal for and the resultant Brussels Declaration of 1874 played a role in this evolution of the laws of war that is a matter of some dispute. The declaration was never ratified and the reader is left to make his own judgment as to the placement of these events in the continuum and the impact they had if any on connecting the American efforts through the Lieber Code with the Hague Convention of 1899. It is sufficient for the purpose of this study to simply acknowledge the events for the purpose of completeness rather than as a critical element of my argument.

### **The American Contribution—The Lieber Code (1863)**

The Lieber Code stands as a major advance in the law of war but the American tradition or contribution to the evolution of the laws of land warfare can be traced back to the nation's forefathers. The 1785 Treaty of Amity and Commerce between Prussia and the United States serves as an early example of how men like Thomas Jefferson, John Adams, Benjamin Franklin and George Washington embraced the laws and customs of warfare.<sup>54</sup>

General Winfield Scott during the Mexican Wars of the 1840s crafted his famous general orders on martial law to govern the behavior of his men and put a halt to the atrocities that were being committed in the prosecution of that war thus codifying the commander's right to convene tribunals in occupied areas, a right previously based solely on custom.

[Under this order], all offenders, Americans and Mexicans, were alike punished—with death for murder or rape, and for other crimes proportionally. [The] order did not in the least interfere with the administration of justice between Mexican and Mexican, by the ordinary courts of the country. It only proved a special American tribunal for any case to which an American might be a party. And further...military commissions in applying penalties to convicted felons, were limited to "known punishments, in like cases in some of the United States."<sup>55</sup>

General Scott retired in 1861 and was succeeded by another soldier-lawyer General Henry W. Halleck. Halleck too was a product of West Point and his experiences during the Mexican Wars. After the war he resigned his commission in favor of private practice. In 1861 he published his first book, *International Law, or Rules Regulating the Intercourse of States in Peace and War*. General Halleck returned to active service at the beginning of the Civil War accepting an appointment as a Major General and command of the Union Army in Missouri.<sup>56</sup>

It was during his tenure as the General-in Chief of the Army that he realized that the laws and customs, both written and unwritten, governing the conduct war were whole insufficient to deal with the war raging between the North and South. The problem was underscored "by the fact that both the Union and Confederate armies were manned by untrained volunteers, and conscripts and largely commanded by politically appointed officers whose military and legal training rarely, if at all rose above the level of their corps."<sup>57</sup> "The general lack of military experience created a need for a practical guide to



the customs and laws of warfare, to be distributed to the soldiers of both belligerents. Thus the Civil War laid the foundation for the first comprehensive codification of the laws of war.” It was General Halleck that recommended the creation of such a codification.<sup>58</sup>

Dr. Francis Lieber, working with a panel of distinguished officers compiled the customary laws of war into one succinct document known as Lieber’s Code. He later wrote General Halleck stating that “nothing of the kind exists in any language” and that he “had no guide, no ground-work, no text-book.” His guides were simply “[u]sage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization.”<sup>59</sup> President Lincoln adopted the panel’s codification of the laws of war on 24 April 1863 and issued *Instruction for the Government of Armies of the United States in the Field, War Department General Order 100*.<sup>60</sup> “This order was so complete that the Confederacy adopted it as its own, substituting the word ‘Confederate States’ where the words ‘United States’ appeared in the document.”<sup>61</sup> So complete was Lieber’s Code that it was the official guidance on the laws of war in all American conflicts until 1914.<sup>62</sup> This code would have a tremendous impact either directly or indirectly in the publication of similar manuals or codes by Prussia, 1870; the Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893.<sup>63</sup>

### **The Hague Conventions of 1899 to the Present**

The *Documents of the Laws of War* by Adam Roberts and Richard Guelff provides one of the most comprehensive collections of the documents that detail the

evolution of the law of war. The major documents from the Hague Conventions of 1899 to the present are summarized below.

The codification of the laws of war accelerated at the turn of the twentieth century with the First Hague Peace Conference held in 1899 and leading to three conventions (two of which deal with the laws of land and maritime war) and three declarations (relating to particular means of conducting warfare). This conference was followed in 1904 by the Hague Convention of hospital ships and the 1906 Geneva Convention on wounded and sick. The Second Hague Conference in 1907 led to thirteen conventions (ten of which dealt with the laws of land warfare and maritime war) and one declaration (relating to a particular method of conducting warfare.) This process of codification continued with the Declaration on naval war of 1909.<sup>64</sup>

The conclusion of the First World War and the Treaty of Versailles in 1919 as well as other peace treaties expressly recognized that certain methods of conducting warfare were prohibited. The restrictions imposed by the Covenant of the League of Nations were such that no state may resort to war until a limited period of time had elapsed after the failure of pacific means for settling the dispute.<sup>65</sup> The Pact of Paris in 1928 had a "renunciation of war as an instrument of national policy and an obligation to settle disputes pacifically, with a reservation of the right of self-defense."<sup>66</sup> In 1945, Article 2(4) of the Charter of the United Nations (U.N.) contained a prohibition whereby "Members were forbidden to use, or threaten, force against any State except under the auspices of the U.N. or in self-defense."<sup>67</sup> As described in the literature review, the U.S. invasion of Grenada was sharply criticized as a violation of international law and an affront to this provision of the U.N. Charter. The conclusion of the Second World War

brought additional agreements including the Geneva Conventions of 1949, which along with the IV Hague Peace Conference of 1907, remain as the basis for our modern law of war. The Geneva Conventions of 1949 are viewed by many as primarily backwards looking to the experiences of World War II. The focus was on the humanitarian treatment of service personnel and civilians in the hands of the enemy and not on the conduct of military operations.<sup>68</sup> The rules governing military operations and the use of weapons on land rested with few exceptions, as they were codified by the Hague Convention No IV of 1907.<sup>69</sup> By the middle of the twentieth century it was becoming increasingly clear that these laws of war were inadequate. The subsequent developments to expand the scope of the law of war centered around the efforts of the United Nations and the International Committee of the Red Cross (ICRC). The U.N., in two important documents as Secretary-General reports entitled *Report on Respect for Human Rights in Armed Conflict* (GA Doc A/7720, November 20, 1969) and its sequel (GA Doc A/8052, September 18, 1970).<sup>70</sup> These reports provided an excellent "analysis of major gaps in existing law governing armed conflicts including guerrilla and internal warfare, wars on national liberation, certain methods of warfare, treatment of prisoners of war in unusual circumstances, and so on."<sup>71</sup> The ICRC, normally the custodians of the Humanitarian Law of Armed Conflicts, including the initiation of the series of Geneva Conventions from 1864 to 1949 took steps to seek a revision of the laws of armed conflict and especially to deal with the similar conclusion as to the wholly inadequate body of law governing internal conflict which was becoming more and more prevalent in the post-1945 era.<sup>72</sup> "This major undertaking sought both to reaffirm and extend and exploit the implicit and fundamental rule of the law of war that civilians should not be the subject of

deliberate attack and that the means of civilian existence should not be destroyed in hostilities.”<sup>73</sup>

The ICRC organized two sessions of a Conference of Government Experts (1971 and 1972) in Geneva to draft additional protocols to the 1949 Geneva Conventions. These conferences were followed by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977).<sup>74</sup> On June 8, 1977, the Diplomatic Conference adopted two instruments: “Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and [a second] Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).”<sup>75</sup> With these protocols as an addition not only to the Conventions of 1949 but to the parts of the Hague Conventions IV of 1907 which dealt with the conduct of hostilities, the international community finds for the first time since 1907 the part of the law dealing with hostilities in the same instrument with that dealing with the treatment of war-victims in the hands of the enemy. This represents a “modified merger of the ‘Hague’ and ‘Geneva’ streams of law.”<sup>76</sup>

This study now shifts to an examination of several principles of the laws of war that are directly applicable to the classification and treatment of civilians and noncombatants. These include the principles of distinction, military necessity, prevention or minimization of harm to civilians, prevention of unnecessary suffering, and protecting the force. Also in this discussion is the recent U.S. extension of the application of the laws of war to all conflicts (including MOOTW).

The first of these principles is the principle of distinction. According to the official commentary to the Geneva Protocol I<sup>77</sup> the concept of distinguishing between lawful and unlawful targets is at the very foundation of virtually every provision of the contemporary laws of war.<sup>78</sup> Despite the apparent centrality of this principle to the development of the laws of war, it remained implied instead of formally articulated until 1977.

As stated in *The Army Lawyer* series of practice notes on the concepts of the laws of war as part of the Department of Defense Law of War Program,<sup>79</sup> "The first explicit articulation of the principle of distinction in a multi-lateral law of war treaty appeared as Article 48 of Additional Protocol I of 1977 to the Geneva Convention of 1949:

In order to ensure respect for the protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>80</sup>

The language of article 48 is established as the basic rule.<sup>81</sup> Article 52 is a further expression of the limitation imposed on combatants specifically within the context of protection of civilian persons and objects during international armed conflict. Article 52 establishes that:

Attacks shall be limited to strictly military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>82</sup>

Although the United States never ratified the Additional Protocols, the principles espoused in these Protocols are captured in other manuals and doctrine. In particular,

*Department of the Army Pamphlet 27-1-1 Protocols to the Geneva Conventions of 12 August 1949*, concedes that the United States is bound to these principles.<sup>83</sup>

There are a number of additional points to be made regarding this principle and the obligations of the defender. The first is that the obligation to make such distinctions is not considered as having been eliminated when making such distinctions becomes more difficult as a result of facing "non-traditional" forces, by proximity to the target in the case of aerial attacks or anytime that the defending force does not adequately distinguish itself from civilians. The second point is the obligations of the defender as codified in agreements including Article 58 of the 1977 Protocol I entitled, *Precautions against the effects of attack*<sup>84</sup> and are extended to both parties not just the attacker. It states: The parties must

- (1) Endeavor to remove civilians and civilian objects under their control from the vicinity of military objectives;
- (2) Avoid locating military objectives within or near densely populated areas;
- (3) Take other precautions to protect civilians under their control from the dangers of military operations.

This obligation of the defender takes other complicated forms as well, including issues related to prisoner of war status. For the purposes of this study however, this issue of "distinction" in terms of the obligation of the defender is one of the most troubling and complicating aspects of the law of war. With ever increasing lethality, expansion of "battle space" and technological mismatches between belligerents, many are faced with the option of intentionally co-mingling military assets within the civilian population in order to attempt to overcome technical or tactical superiority. This is especially true against belligerents who are perceived to be determined to adhere to the laws of war and to minimize collateral damage and injury to civilians if it threatens the legitimacy of their

operations and their maintenance of domestic and international support.

The next principle is that of military necessity. First codified in the Lieber Codes and in a multi-lateral treaty in the St Petersburg Declaration of 1868.<sup>85</sup> In the *Department of the Army Field Manual 27-10, Treaties Governing Land Warfare*, the United States addresses military necessity as follows:

The law of war...requires that belligerents refrain from employing any kind of degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.

The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.<sup>86</sup>

As *The Army Lawyer* series continues the discussion: "The essence of the concept of military necessity is that the only legitimate focus of a combatant's destructive power is the enemy war-making capability, or in the negative, that war does not justify the intentional infliction of destruction on any person or object within the range of the combatant's weapons systems."<sup>87</sup> This principle rejects the notion that whatever directly contributes to bringing about victory is permissible instead it posits that some actions are strictly forbidden and criminal even if without them the war will be lost.<sup>88</sup>

The principle that belligerents must endeavor to prevent or minimize the harm to civilians compliments the previous principles of "distinction" and "military necessity." Once again relying on the examination provided in *The Army Lawyer*, the author expresses the basic principle by citing *Department of the Army Field Manual 27-10*: "Those who plan or decide upon an attack, therefore must take all reasonable steps to ensure that the objectives are identified as military objectives or defended places...but

also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.”<sup>89</sup> The discussion continues to explain that the law of war includes a comprehensive body of rules to implement this basic principle, most notably the 1977 Protocol I Additional to the Geneva Convention of 1949.<sup>90</sup> The author continues with a very convincing argument for the integration of this principle into all aspects of planning and execution advocating an active role in the process for judge advocates.

Many of these detailed provisions may appear “aspirational” in nature because they are often qualified with caveats such as “when possible,” or “as feasible.” These caveats, however, must be understood within the context of the basic rule—endeavor to minimize civilian suffering. Against a backdrop, the practitioner should recognize that these detailed provisions are neither irrelevant because of the application of caveats nor absolutely mandatory because of what they seek to achieve. Instead, the provisions should be understood as mechanisms for achieving compliance with the basic principle; therefore, they must be considered in the planning and execution of military operations.<sup>91</sup>

This principle of limiting destruction to people and property leads directly into the next principle of preventing unnecessary suffering. Codified in the St. Petersburg Declaration of 1868 it explicitly recognized that military necessity only justifies the infliction of as much suffering as is necessary to bring about the submission of an enemy.<sup>92</sup>

The only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable...That the employment of such arms would, therefore, be contrary to the laws of humanity.<sup>93</sup>

As stated in *Department of the Army Field Manual 27-10*, “the conduct of armed hostilities on land is regulated by the law of land warfare which is both written and



unwritten. It is inspired by the desire to diminish the evils of war by [p]rotecting both combatants and noncombatants from unnecessary suffering.”<sup>94</sup> The main focus of this principle is distinctly different from the principles which seek to protect civilians in that it focuses on reducing the suffering of combatants and seeks to reconcile suffering with military necessity. It seeks to prevent arguments that actions which are not explicitly forbidden are therefore permissible as well as reconciling the notion that military necessity justifies the infliction of suffering upon an enemy combatant.

This principle requires a balance between destruction and humanity as follows:

Not all means or methods of attaining even a ‘legitimate’ object of weakening the enemy’s military forces are permissible under the laws of armed conflict. In practice, a line must be drawn between action accepted as ‘necessary’ in the harsh exigencies of warfare and that which violates basic principles of moderation.<sup>95</sup>

The requirements of distinction, military necessity, minimizing harm to civilians and prevention of unnecessary suffering do not preclude belligerents from taking steps under the principle of protecting the force from unlawful belligerents. This principle recognizes the fact that a belligerent may target civilians when they take part in hostilities against the force while balancing the needs to protect civilians under enemy occupation with the legitimate need of the occupying force to ensure the security from hostile acts of that population.<sup>96</sup>

The basis of this principle is founded in several areas including Article 5 of the Fourth Geneva Convention that focuses on the relationship between armed forces and civilians acknowledging the rights of a force to protect itself against hostile elements of the civilian community.<sup>97</sup> Article 51 of Geneva Protocol I, “acknowledges the right of an armed force to treat ‘civilians’ as legitimate targets if, and for so long as, ‘they take a

direct part in hostilities.”<sup>98</sup> Civilians, normally immune from attack, forfeit that protection when they become active participants in the conflict by taking action intended to cause harm to the personnel or equipment of an armed force.<sup>99</sup> The need for distinction and the degree of support required to trigger this loss of immunity remains problematic and the basis for significant differences in interpretation of the law, especially with regard to later discussions on “dual use” targets and the previous discussion on the requirements of the defender.

The next subject of examination is the extension of the principles of the laws of war to military operations other than war (MOOTW). The law of war is an aspect of international law, which is a body of law that regulates the conduct of states. As a general proposition, international law requires some “justification” for intruding on the sovereign affairs of regulated states. In most cases, this “justification” results from the consensual obligations assumed by a state in exchange for receiving the benefit of being a member of the regulated community.<sup>100</sup>

As described in *The Army Lawyer* series a cognitive and legal tension exists in that the law of war becomes binding on states only if they are in a state of conflict. If the state of conflict exists between two states then the entire body of applicable law of war is “triggered” and the conduct of the belligerents is governed by that body of law. If, however, the conflict is internal and not international in nature, then the extent to which the law of war is binding upon the belligerents is limited. From a purely technical standpoint, international law only becomes binding during periods of armed conflict or belligerent occupation.<sup>101</sup>

In 1996 the Chairman of the Joint Chiefs extended application of these principles to operations that under international law would not necessarily trigger such application because they do not involve "conflict."<sup>102</sup> With the following simple paragraph, this instruction established, as a matter of U.S. policy, the scope of applicability of law of war principles to U.S. operations:

The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by higher competent authorities, will apply law of war principles during all operations that are categorized as Military Operations Other Than War.<sup>103</sup>

The last area for examination in this main body is the relationship between international law and customary law and practice. Adam Roberts and Richard Guelff in their book *Documents on the Laws of War* provide an excellent description of the importance of understanding the role of customary law and practice as a basis for how it informs the codification of international law. They argue that the present laws of war emerges as customary rules from the practice of states and "despite the importance of international agreements in the contemporary development of the law, any work concerning the laws of war which is limited to international agreements runs the risk of distorting not only the form but also the substance of the law."<sup>104</sup> Martens Clause which first appeared in the Preamble to the 1899 Hague Convention II serves to reaffirm the notion that as the codification of rules into particular agreements did not displace customary law. That "during the very process of codification it was recognized that much of the law continued to exist in the form of unwritten customary principles."<sup>105</sup> As Martens Clause states:

Until a more complete code of the 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 the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.<sup>106</sup>

The following article common to each of the four 1949 Geneva Conventions borrows heavily on the Martens Clause to suggest that despite the codification of rules in agreements, a significant part of the law continues to be in the form of customary principles and reaffirms that even if a party denounces the Convention this:

Shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.<sup>107</sup>

This notion of customary law preceding the codification of rules in international agreements is important to the later analysis in attempting to determine if current classification and targeting on civilians and noncombatants represents simply changing interpretations of existing laws of war or changes in customary law and practice that point to the need to further codify these changes in new international law.

The main body portion of this paper provided a logical path in establishing the evolution of current laws of land warfare, how those laws and common practices are codified by international organizations, conventions and treaties and U.S. Army and joint doctrine for the purpose of deriving a common and current definition of civilians and noncombatants. It continued with an examination of the relationship between expectations for behavior and how those expectations influence behavior and the legitimacy of operations.

In analyzing the evolution of international law this study sought to determine whether the current classification and targeting of civilians and noncombatants reflects a change in the law or a change in the interpretation of the law. The analysis continued with an examination of the expectations for behavior to determine if current practices for classifying and targeting civilians and noncombatants reflects a change in the interpretation of the law or a change in the expectations of behavior required to maintain legitimacy and domestic or international support. The study then shifted to an examination of whether interpretations of the law or expectations for legitimacy change across the spectrum of conflict, with regard to the technological capabilities of the belligerents and the impact of contemporary issues like Information Operations, economic embargos and dual use targets. Finally, the analysis sought to find a relationship between changing interpretations of the law and expectations for legitimacy with statistics that show a significant increase in civilian casualties.

### **Conclusions**

This monograph has attempted to answer the research question; does the evolution of modern warfare represent a significant shift in the classification and targeting of noncombatants?

The answer to this question is yes. The analysis demonstrates that the crux of the issue is really not whether international law has changed in classifying protected citizens and noncombatants. Clearly, the law has not changed in any significant or dramatic fashion. Current International Humanitarian Law and U.S. doctrine date back to the 1940s and 1950s with a foundation that dates back to the turn of the century. What has changed is the interpretation of that law in terms of what is permissible and what is not

and in the gap between what is legal and what is legitimate. The laws as written remain flexible enough to sufficiently address the legal issues of classifying and targeting civilians and noncombatants as well as flexible enough to remain relevant despite the significant technological changes that have occurred in recent years.

The laws and doctrine however, need to be updated for a number of reasons. The first is a matter of interpretation and perceptions. The perception is that current laws and doctrine are less relevant simply because they date back over 50 years. This is by far the weakest argument to support cosmetic changes to the law and doctrine simply to have a more current date applied to the conventions or manual. It is a much stronger argument that the laws need to be updated based upon differing interpretations. These differing interpretations of the law are with regard to self-determination, technology and the maintenance of international and domestic support.

The issue of self-determination versus the rights of sovereign states to exercise control over their territory and populace is one that has received a great deal of attention in recent years including debate over U.N. Chapter 2 (4). As discussed previously, a tremendous effort was made by the U.N. and ICRC since World War II to extend the law of war to internal conflicts.<sup>108</sup> This extension of international law has not been without significant debate and serves as a major source of differing interpretations.

The international community needs to reach a consensus in establishing a threshold beyond which the rights of a sovereign nation become subordinated to the rights of the international community and that action can be taken to compel or remedy a situation despite the fact that it is contained internally within that sovereign nation and without the international community challenging the right of that sovereign nation to govern its

people. An example is the recent air campaign in Kosovo where the international community acted to compel or coerce the Yugoslavian government to halt ethnic fighting/cleansing without lending support to the ethnic Albanian population in gaining independence or challenging the rights of the Yugoslavian government to rule this province.

The notion of a revolution in military affairs represents another area where international law is subject to differing interpretations. This RMA has resulted in issues of "dual use" targets, proportionality, information operations, the use of economic embargos and others which stretch the applicability of current law and the principles of distinction, necessity, prevention or minimization of harm to civilians, prevention of unnecessary suffering and protecting the force.

Finally, interpretations of the law, especially with regard to the classification and targeting of civilians and noncombatants differ based upon the requirement to maintain international and domestic support. Again, the recent air campaign in Kosovo offers fertile ground for a discussion and analysis on whether NATO members pulled their aircraft out of specific missions as a result of differing interpretations of international law or differing levels of tolerance within their own countries for maintaining domestic support. Either way, different countries apply different interpretations to the same problem and arrive at different courses of action across all instruments of power based upon maintaining international and domestic support.<sup>109</sup>

It is this point that resides at the heart of the conclusions reached by this study. Just as a distinction is made between *jus ad bellum* or the justness of war with *jus in bello* or the justness in war to differentiate between the responsibilities of belligerents in

resorting to war with their responsibilities in the prosecution of that war (just or not), there is a distinction drawn between what actions in war are legal and what are legitimate. From a purely legal standpoint, there are actions that a belligerent can take in the prosecution of a just war that are legal but not legitimate in terms of maintaining international and domestic support. For example, an Air Force bomber on a mission against a purely military target releases his ordinance prior to the target and into a hospital because of the actions of the defender and his anti-aircraft systems. By law, the defender bares full responsibility for any collateral damage done as a result of altering the attackers flight path or the trajectory of his ordinance.<sup>110</sup> Who, however, will win in the court of public opinion? The pilot may not be prosecuted as a war criminal for a breach of international law, but his actions will impact the accomplishment of the operational and strategic objectives if it causes his country to loose international and domestic support for their operations.

It is this threat to the legitimacy of operations and the requisite international and domestic support that may represent a potential center of gravity or decisive point that an enemy can exploit. As discussed in the literature review, Harvey M. Sapolsky and Jeremy Shapiro in their *Parameters* article entitled "Casualties, Technology, and America's Future Wars" discusses the notion of "worse than lethal" casualties. Casualties that have an almost insignificant impact of the ability to perform the military tasks associated with the mission but have tremendous implications and threaten fragile consensus, democratic politics, coalitions and other needed support.<sup>111</sup> What may be more important to a commander is that his targets are reviewed by a Public Affairs

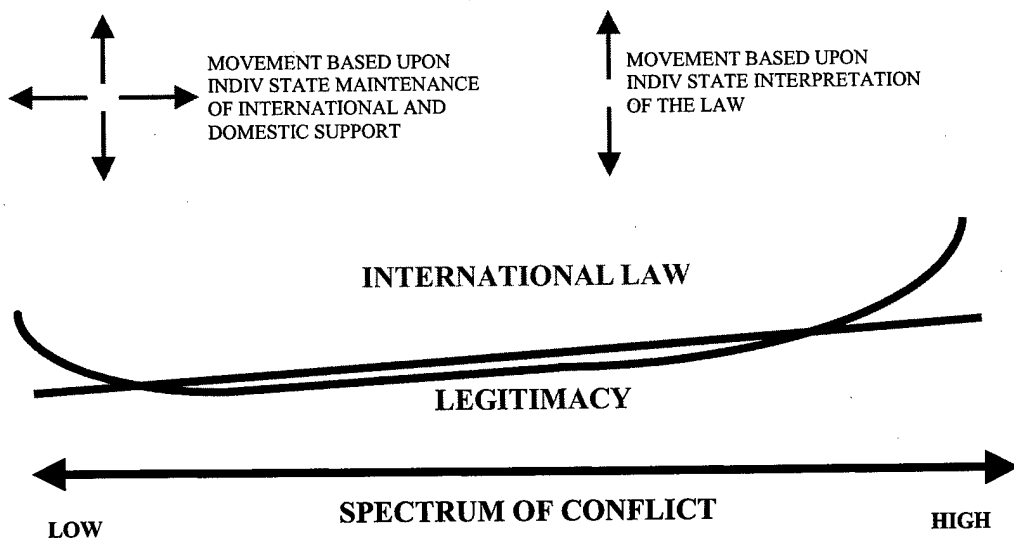


Officer not a lawyer to determine the impact on public opinion and legitimacy in accomplishing his operational and strategic objectives.

In continuing this line of reasoning, if the evolution seen in the classification and targeting of civilians and noncombatants represents less a fundamental change in the law and more a change in interpretation and expectations for maintaining legitimacy, it follows that the interpretation and expectations are much more subjective and volatile than the law and thus sensitive to shifting as a result of normally stable factors (i.e. the spectrum of conflict, the technological capabilities of the belligerents, etc.). As a result, belligerents with technological parity may choose courses of action which seek to erode the international and domestic support of their opponent based upon differing interpretations of the law or expectations for behavior. Belligerents with a technological mismatch may be further driven to asymmetric responses that directly attack the legitimacy of their opponent while garnering the same level of international and domestic support because it is the only way that they can respond in a meaningful way given the technology mismatch.

The diagram below graphically displays this point. The base line of the diagram depicts the full spectrum of conflict from participation in small-scale contingencies and security and support operations to high intensity conflict. A line depicting International Humanitarian Law applied to this diagram shows very little vertical movement given that the classification and targeting of civilians and noncombatants is not particularly sensitive to the spectrum of conflict with the exception of the individual interpretation of each state and rules of engagement and other provisions that provide greater flexibility at the highest levels of intensity. Creating a line to depict legitimacy is a bit more

problematic as each belligerent would be different based upon cultural values and the requirement to maintain international and domestic support. Democracies would obviously be more sensitive to influence than dictatorships, totalitarian regimes, etc. For the purposes of this example it is suggested that the line depicting legitimacy for actions directed against civilians and noncombatants follows an inverted bell curve where at the lowest levels of conflict, significant resources may be directed through non-lethal means at the civilian populace. As the spectrum of conflict grows in intensity, the line depicting legitimacy drops below the legal threshold representing the notion that actions are more closely scrutinized than the law allows in order to maintain international and domestic support. Finally, as the spectrum of conflict grows to the highest levels of intensity, the line depicting legitimacy crosses above the legal threshold representing the notion that there may be international and domestic support for actions against civilians that are not within the bounds of International Humanitarian Law. It is at these points that the National Command Authority needs to exercise restraint in responding to the passions of the populace.



In summary, the line depicting International Law is sensitive to the legal interpretation of each belligerent. The line depicting legitimate action is shaped and positioned by each belligerents need to garner international and domestic support thus the lines would be different for each belligerent and for each conflict along the full spectrum of conflict. Finally, if the diagrams of both belligerents for the same conflict are overlaid the result will be that each belligerent will have a different interpretation of some aspects of international law and have different expectations for behavior based upon cultural values and technological capabilities. Legal actions, which are permissible for one belligerent, may not be acceptable for another if they both seek to maintain legitimacy and international and domestic support.

The main point to take from this discussion is that because of differing interpretations, technological mismatch and legitimacy tied to expectations for behavior rather than the letter of the law, belligerents will be further encouraged to respond in asymmetric and asynchronous ways that allow them to maintain legitimacy and international and domestic support (public opinion) while responding in a manner which causes greater civilian casualties. For example, a precision guided missile (PGM) attack and a car bomb in a crowded market place may be viewed with the same degree of legitimacy based upon the technological capabilities of the belligerents.

As expressed in detail later in the recommendations, it is this gap between what is legal and legitimate that must be closed so that all behavior is governed by the letter of the law. It certainly is in the best interests of the west to end the spiral effect of technological advances and the ability for lesser developed states to resort to terror tactics against the populace. As we saw in Cranes article, instead of technology solving our

problems and ending wars/conflict more quickly it may create situations where its coercive effects can be contemplated at earlier stages of a conflict without threatening domestic support but actually serving as a more destabilizing factor that results in asymmetric responses and puts civilians at greater risk than before.<sup>112</sup>

### **Recommendations**

The recommendations portion of this paper performs two functions. First it provides this authors opinion, supported by the accompanied analysis, on how to address some of the concerns that provide relevance to the research question. Secondly, it serves to provide suggestions for future study to address questions not fully explored within the relatively narrow scope of this work.

It is the recommendation of this study that International Humanitarian Law and current U.S. Army and Joint doctrine be updated to reflect a new international consensus and codify more strictly, areas of the law that currently enjoy widespread interpretation. The purpose of this update is not merely cosmetic but required to codify many contentious issues including "dual use" targets, issues of self-determination and state sovereignty, information operations, economic embargos, etc.

As discussed in the conclusion, it is these differing interpretations that feed a growing gap between what is legal in war and what is legitimate in the eyes of the international community and for maintaining requisite international and domestic support.

It is further recommendation that efforts be made to codify in law a clear distinction between just war and justness in war. That there are ramifications for both determinations and that one does not presuppose the other. Once a conflict starts the

discussion of who was the aggressor is separate from how they are prosecuting the conflict. Return the word "war" to the vocabulary of international law where it has been replaced by "acts of aggression", "self-defense", and other more benign descriptors. Repair the damage done to the UN Charter forbidding the action against sovereign states. Greater consensus will create more uniform and timely responses by the international community

Finally, policy makers need to understand the distinction between justness (legitimate v legal) and all of the dynamics depicted in the legal v. legitimate diagram while crafting policy. Educate policy makers in strategic art. Expect that the U.S. drives our enemies to an asymmetric response because of technology mismatches, perceived U.S. vulnerabilities and differing scales of legal interpretation and legitimacy from our enemies. The more sophisticated we get, the greater our expectations and the more legitimate use of lesser powers to resort to clumsier tactics which cause greater civilian casualties (by number and proportion)

Perhaps it is the issues of differing interpretations, of undefined expectations with regard to war of liberation and self-determination and the gap between what is legal and what is legitimate that helps explain the increase in civilian casualties since the end of the Second World War. Perhaps this phenomenon of increasing casualties reflects an evolution in warfare and the continued search for the decisive battle that will force ones enemy to capitulate. Perhaps it reflects a modern belief that wars cannot be won simply on the battlefield but must involve breaking the will of the people. Or the view that no act of aggression will result in the international community advocating a position that redraws international boundaries differently than those established prior to hostilities. If

a country does not feel that its territorial integrity or its right to govern is in jeopardy, they have little to fear from failed acts of aggression against their neighbors. The international community fears power vacuums as greatly as they fear aggressive saber rattling or military capability. Perhaps the increase is a reflection on the type of conflicts in the latter part of the twentieth century where wars of liberation dominate. Conflicts which are more force oriented than terrain oriented and based upon ideological, ethnic and tribal differences with significant historical and emotional baggage attached. Recent history provides abundant examples of the success of imposing your will upon the people without resorting to conventional warfare and with inconsistent responses from the international community.

This paper ends with a quote used in another source but which applies well to this very difficult issue of the treatment of civilians and noncombatants in conflict (internal and international):

Wars happen. It is not necessary that war will continue to be viewed as an instrument of national policy, but it is likely to be the case for a very long time. Those who believe in progress and the perfectibility of human nature may continue to hope that at some future point reason will prevail and all international disputes will be resolved by nonviolent means, perhaps ultimately through the agency of an international structure beyond the level of the nation-state. Unless and until that occurs, our best thinkers must continue to pursue the moral issues related to war. Those who romanticize war do not do mankind a service; those who ignore it abdicate responsibility for the future of mankind, a responsibility we all share even if we do not choose to do so.

*Malham M. Wakin, Introduction to War and Morality*<sup>113</sup>

## Endnotes

<sup>1</sup> Clausewitz, Carl von. *On War*. New York: Everyman's Library, 1976. page 83.

<sup>2</sup> Christopher, Paul. *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*. Englewood Cliffs, N.J.: Prentice Hall, 1994. page 1. Uncited quotation, "Hugo Grotius writing in the seventeenth century, observed that, concerning war, we must not believe either that nothing is allowable, or that everything is."

<sup>3</sup> Quote taken from "Chapter 13 Statistics of Democide: Death By American Bombing and other Democide Estimates, Calculations, and Sources" from the "Freedom, Democracy, Peace; Power, Democide and War" internet site of R.J. Rummel (<http://www2.hawaii.edu>) The site provides access to some 900 documents and 4000 pages dedicated to supporting his theories about the corrupting nature of power.

<sup>4</sup> Ibid.

<sup>5</sup> Moscow, Warren. "51 Square Miles Burned Out In Six B-29 Attacks on Tokyo," *The New York Times*, 29 May 1945, page 1 and Warren, Lansing. "U.S. Rejects Tokyo Charge In Sinking of Relief Ship," *The New York Times*, 29 May 1945, page 1. The cover of The New York Times contained two stories regarding the prosecution of the Pacific Theater of World War II. The first article with the headline "51 Square Miles Burned out In Six B-29 Attacks on Tokyo" discusses the results of the Allied fire bombing of the capitol city of Japan and the resultant 1,000,000 deaths and 51 square miles of devastation to the city. The second article contains the headline "U.S. Rejects Tokyo Charge In Sinking of Relief Ship" and discusses the accidental sinking of a protected vessel by a U.S. submarine and the ordered court martial of the submarine commander.

<sup>6</sup> Clausewitz, Carl von. *On War*. New York: Everyman's Library, 1976. See also Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 2nd ed. New York: Basic Books, 1992. Howard, Michael. *War in European History*. Oxford: Oxford University Press, 1976. Howard, Michael. *Restraints On War*. Oxford: Oxford University Press, 1979 and Howard, Michael and George J. Andreopoulos and Mark R. Shulman. *The Laws of War: Constraints on Warfare in the Western World*. New Haven: Yale University Press, 1994.

<sup>7</sup> Rummel, R.J. "Freedom, Democracy, Peace; Power, Democide and War" internet site of R.J. Rummel (<http://www2.hawaii.edu>).

<sup>8</sup> As per phone conversation with LTC Conrad Crane of the United States Military Academy in January 2000 to discuss his article cited later and the ethics instruction provided to the students. He said that Michael Walzer's, *Just and Unjust Wars* is required reading at all of the military academies. It is also read by students at the United States Army Command and General Staff College (CGSC) and the School of Advanced Military Studies (SAMS) at Fort Leavenworth, Kansas.

<sup>9</sup> Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 2nd ed. New York: Basic Books, 1992. page xii.

<sup>10</sup> Ibid. page xxi.

<sup>11</sup> Ibid. page xxi.

<sup>12</sup> Ibid. page 21.

<sup>13</sup> Ibid. page 21.

<sup>14</sup> Howard, Michael. *War in European History*. Oxford: Oxford University Press, 1976. pages ix-x. See also Howard, Michael. *Restraints On War*. Oxford: Oxford University Press, 1979 and Howard, Michael and George J. Andreopoulos and Mark R. Shulman. *The Laws of War: Constraints on Warfare in the Western World*. New Haven: Yale University Press, 1994.

<sup>15</sup> Ibid. page x.

<sup>16</sup> Christopher, Paul. *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*. Englewood Cliffs, N.J.: Prentice Hall, 1994.

<sup>17</sup> Henkin, Louis et al. *Right v. Might: International Law and the Use of Force*. 2<sup>nd</sup> ed. New York: Council on Foreign Relations Press, 1991.

<sup>18</sup> Wakin, Malham M. *War, Morality, and the Military Profession*. 2<sup>nd</sup> ed. Boulder, CO: Westview Press, 1986.

<sup>19</sup> Peters, Ralph. "A Revolution in Military Ethics". *Parameters*. Summer 1996. page 106.

<sup>20</sup> Ibid. page 106.

<sup>21</sup> Bacevich, A. J. "New Rules: Modern War and Military Professionalism". *Parameters*. December 1990. page 21.

<sup>22</sup> Ibid. pages 21-22.

<sup>23</sup> Ibid. page 22.

<sup>24</sup> Crane, Conrad C. "Ethics and the RMA: Matching Moral Expectations and Military Capabilities in Modern Warfare". Unpublished 1999.

<sup>25</sup> Ibid.



<sup>26</sup> Sapolsky, Harvey M. and Jeremy Shapiro. "Casualties, Technology, and America's Future Wars". *Parameters*. Summer 1996. pages 119-127.

<sup>27</sup> Fotion, Nicholas and Gerald Elfstrom. *Military Ethics*. Boston: Routledge & Kegan Paul. 1986. page 3.

<sup>28</sup> Fotion, Nicholas. *Military Ethics: Looking Toward the Future*. Stanford, CA.: Hoover Institution Press, 1990.

<sup>29</sup> Cohen, Sheldon M. *Arms and Judgment*. Boulder, CO: Westview Press. 1989.

<sup>30</sup> Dunlap, Charles J. Jr. *Technology and the 21<sup>st</sup> Century Battlefield: Recomplicating Moral Life for the Statesman and the Soldier*. Carlisle Barracks, PA: Strategic Studies Institute, 15 January 1999.

<sup>31</sup> Shukman, David. *Tomorrows War*. New York: Harcourt Brace and Company. 1996.

<sup>32</sup> Organizations like The International Committee of the Red Cross (ICRC), Worldwatch (<http://www.worldwatch.org>), The Heritage Foundation (<http://www.heritage.org>), Christian Science Monitor, Amnesty International, Stockholm International Peace Research Institute (<http://www.sipri.se>) and any number of private individuals have flooded the internet with information of questionable reliability in the advancement of their causes.

<sup>33</sup> Rummel, R.J. "Freedom, Democracy, Peace; Power, Democide and War" internet site of R.J. Rummel (<http://www2.hawaii.edu>).

<sup>34</sup> White, Mathew. "Death by Mass Unpleasantness" portion of the "Historical Atlas of the Twentieth Century" at (<http://users.erols.com/mwhite28/warstst8.htm>)

<sup>35</sup> Howard, Michael. *Restraints On War*. Oxford: Oxford University Press, 1979. page I. See also Howard, Michael. *War in European History*. Oxford: Oxford University Press, 1976. Howard, Michael and George J. Andreopoulos and Mark R. Shulman. *The Laws of War: Constraints on Warfare in the Western World*. New Haven: Yale University Press, 1994.

<sup>36</sup> Ibid. page I.

<sup>37</sup> Ibid. page I.

<sup>38</sup> Ibid. page 3.

<sup>39</sup> Ibid. page 3.

<sup>40</sup> Ibid. page 3.

<sup>41</sup> Ibid. page 4.

<sup>42</sup> Ibid. page 4.

<sup>43</sup> Ibid. page 14.

<sup>44</sup> Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 2nd ed. New York: Basic Books, 1992. page 21.

<sup>45</sup> Ibid. The discussion on this point centers around the assumptions of justness for all actions performed in the advancement of a just cause. The nobility of the cause or the religious nature of the cause blurred the distinction between these logically independent judgments.

<sup>46</sup> Doty, Grant R. "The United States and the Development of the Laws of Land Warfare". *Military Law Review*. June 1998 page 225.

<sup>47</sup> Morris, Scott R. "The Laws of War: Rules by Warriors for Warriors". *Department of the Army Pamphlet 27-50-319. The Army Lawyer*. December 1997. page 5. See also Kenneth Ogren, "Humanitarian Law in the Articles of War Decree in 1621" by King Gustavus II Adolphus of Sweden, *International Review*. Red Cross, July-August, 1996, page 438.

<sup>48</sup> Ibid. page 6.

<sup>49</sup> Glahn, Gerhard von. *Law Among Nations: An Introduction to Public International Law*. Fifth ed. New York: MacMillian Publishing Company, 1986. page 5.

<sup>50</sup> Doty, Grant R. "The United States and the Development of the Laws of Land Warfare". *Military Law Review*. June 1998 page 227.

<sup>51</sup> Ibid. page 227.

<sup>52</sup> Ibid. page 228.

<sup>53</sup> Ibid. page 228.

<sup>54</sup> Morris, Scott R. "The Laws of War: Rules by Warriors for Warriors". *Department of the Army Pamphlet 27-50-319. The Army Lawyer*. December 1997. page 6. See also Davis, *supra* note 3, page 530. Besides negotiating treaties, John Adams had direct contact with the rules and customs imposed upon soldiers. He defended the British soldiers accused of, and later convicted for, firing upon Bostonians during the Boston Massacre. Frederick Kidder, *History of the Boston Massacre, March 5, 1770* (1870). Sheldon Cohen, *Yankee Sailors in British Gaols: Prisoners of War at Forton and Mill*,

1777-1783, 108-11, 115-18, 121-24, 148-51 (1995) (discussing Benjamin Franklin's involvement in aiding escaping American prisoners of war).

<sup>55</sup> Morris, Scott R. "The Laws of War: Rules by Warriors for Warriors". *Department of the Army Pamphlet 27-50-319. The Army Lawyer*. December 1997. page 8. See also Scott, *supra* note 32, at 395.

<sup>56</sup> *Ibid.* page 10.

<sup>57</sup> *Ibid.* page 11. See also Richard Shelly Hartigan. *Lieber's Code and the Law of War* page 7.

<sup>58</sup> *Ibid.* page 11.

<sup>59</sup> *Ibid.* page 11. It is generally believed that Dr. Lieber was solely responsible for his famous code, but this is not the case. In fact, the Secretary of War appointed a board to develop the code, and Dr. Lieber happened to be part of the distinguished panel. The composition of the panel demonstrates the "warrior" influence of the code. In addition to Dr. Lieber, the board included four general officers: Major General Ethan Allen Hitchcock, Major General George Cadwalder, Major General George L. Hartsuff, and Brigadier General J. H. Martindale. Their mandate was to "propose amendments or changes in the rules and Articles of War, and a code of regulations for the government of armies in the field, as authorized by the laws and usages of war. Among General Cadwalder, Hartsuff, and Martindale, "two were lawyers, and one was a former instructor at West Point. As for General Hitchcock, he graduated from West Point in 1817, taught military tactics at West point for three years, and fought in both the Seminole Wars of the 1830s and the Mexican War. His peers called him "The Pen of the Army" because of his administrative and intellectual prowess. When General Hitchcock came out of retirement in 1862, President Lincoln offered him command of the Army of the Potomac, but he declined the offer because of poor health.

<sup>60</sup> *Ibid.* page 12. See also the Henry Durant Institute, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*. page 3 (Dietrich Schindler & Jimi Toman eds., 1988 (reprinting General Order 100)).

<sup>61</sup> *Ibid.* page 12.

<sup>62</sup> *Ibid.* page 13.

<sup>63</sup> Doty, Grant R. "The United States and the Development of the Laws of Land Warfare". *Military Law Review*. June 1998 page 230.

<sup>64</sup> Roberts, Adam and Richard Guelff. *Documents on the Laws of War*. Oxford: Clarendon Press, 1982. page 3.

<sup>65</sup> Howard, Michael. *Restraints On War*. Oxford: Oxford University Press, 1979. page 138.

<sup>66</sup> Ibid. page 138.

<sup>67</sup> Glahn, Gerhard von. *Law Among Nations: An Introduction to Public International Law*. Fifth ed. New York: MacMillian Publishing Company, 1986. page 588.

<sup>68</sup> Howard, Michael. *Restraints On War*. Oxford: Oxford University Press, 1979. page 141.

<sup>69</sup> Ibid. page 141.

<sup>70</sup> Glahn, Gerhard von. *Law Among Nations: An Introduction to Public International Law*. Fifth ed. New York: MacMillian Publishing Company, 1986. page 612.

<sup>71</sup> Ibid. page 612.

<sup>72</sup> Howard, Michael. *Restraints On War*. Oxford: Oxford University Press, 1979. page 142.

<sup>73</sup> Ibid. page 142.

<sup>74</sup> Glahn, Gerhard von. *Law Among Nations: An Introduction to Public International Law*. Fifth ed. New York: MacMillian Publishing Company, 1986. page 612.

<sup>75</sup> Ibid. page 612.

<sup>76</sup> Howard, Michael. *Restraints On War*. Oxford: Oxford University Press, 1979. page 144.

<sup>77</sup> Corn, Mike. "International and Operational Law Note: Principle 2: Distinction". *Department of the Army Pamphlet 27-50-309. The Army Lawyer*. August 1998. page 35. See also Corn, Mike. "International and Operational Law Note: Principle 7: Distinction Part II". *Department of the Army Pamphlet 27-50-319. The Army Lawyer*. June 1999.

<sup>78</sup> Ibid. page 35.

<sup>79</sup> Ibid. page 35. See also Department of the Army. *Field Manual 27-10, The Law of Land Warfare*. Washington, D.C: GPO, July 1956. Department of the Army. *DA Pam 27-1, Treaties Governing Land Warfare*. Washington, D.C.: GPO, December 1956.

Department of the Army. *DA Pam 27-1-1, Protocols to the Geneva Conventions of August 1949*. Washington, D.C.: GPO, September 1979. page 34.

<sup>80</sup> Ibid. page 36. See also Department of the Army. *DA Pam 27-1-1, Protocols to the Geneva Conventions of August 1949*. Washington, D.C.: GPO, September 1979. page 34-35.

<sup>81</sup> Ibid. page 36.

<sup>82</sup> Ibid. page 36. See also Department of the Army. *DA Pam 27-1-1, Protocols to the Geneva Conventions of August 1949*. Washington, D.C.: GPO, September 1979. page 37.

<sup>83</sup> Department of the Army. *DA Pam 27-1-1, Protocols to the Geneva Conventions of 12 August 1949* dated September 1979. As stated in the forward to DA Pam 27-1-1 "The United States signed the Protocols on 12 December 1977, subject to three understandings. The understandings made by the United States and other understandings and declarations made by other countries are included in the pamphlet. In order for the treaties to go in effect for the United states, the Senate must first give its advice and consent to ratification."

<sup>84</sup> Department of the Army. *DA Pam 27-1-1, Protocols to the Geneva Conventions of August 1949*. Washington, D.C.: GPO, September 1979. page 42.

<sup>85</sup> Corn, Mike. "International and Operational Law Note: Principle 1: Necessity". *Department of the Army Pamphlet 27-50-308. The Army Lawyer*. July 1998. page 72.

<sup>86</sup> Ibid. page 72. See also U.S. Department of the Army. *Field Manual 27-10, The Law of Land Warfare*. July 1956. pages 3-4.

<sup>87</sup> Ibid. page 72.

<sup>88</sup> Ibid. page 72.

<sup>89</sup> Corn, Mike. "International and Operational Law Note: Principle 3: Endeavor to Prevent or Minimize Harm to Civilians". *Department of the Army Pamphlet 27-50-311. The Army Lawyer*. October 1998. page 55. See also U.S. Department of the Army *Field Manual 27-10, The Law of Land Warfare*. July 1956. page 5.

<sup>90</sup> Ibid. page 55.

<sup>91</sup> Ibid. page 55.

<sup>92</sup> Corn, Mike. "International and Operational Law Note: Principle 4: Preventing Unnecessary Suffering". *Department of the Army Pamphlet 27-50-312. The Army Lawyer*. November 1998. page 50.

<sup>93</sup> Ibid. page 51. See also Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 1 A.J.I.L. 95-96 reprinted in the Laws of Armed Conflict. page 102.

<sup>94</sup> Ibid. page 50. See also Department of the Army. *Field Manual 27-10, The Law of Land Warfare*. Washington, D.C: GPO, July 1956.

<sup>95</sup> Ibid. page 51.

<sup>96</sup> Corn, Mike. "International and Operational Law Note: Principle 5: Protecting the Force from Unlawful Belligerents". *Department of the Army Pamphlet 27-50-315. The Army Lawyer*. February 1999. page 11.

<sup>97</sup> Ibid. page 11. See also International Committee of the Red Cross. *International Humanitarian Law*. 1998. Accessed CD-ROM.

<sup>98</sup> Ibid. page 12. See also Department of the Army. *DA Pam 27-1-1, Protocols to the Geneva Conventions of August 1949*. Washington, D.C.: GPO, September 1979. page 36.

<sup>99</sup> Ibid. page 11.

<sup>100</sup> Corn, Mike. "International and Operational Law Note: When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War". *Department of the Army Pamphlet 27-50-307. The Army Lawyer*. June 1998. page 17.

<sup>101</sup> Ibid. page 17.

<sup>102</sup> Ibid. page 17.

<sup>103</sup> Ibid. page 17. See also JCS Instruction 5810.01, *supra* note 70, para 4.a.

<sup>104</sup> Roberts, Adam and Richard Guelff. *Documents on the Laws of War*. Oxford: Clarendon Press, 1982. page 4.

<sup>105</sup> Ibid. page 4.

<sup>106</sup> Ibid. page 4.

<sup>107</sup> Ibid. page 5.

<sup>108</sup> Roberts, Adam and Richard Guelff. *Documents on the Laws of War*. Oxford: Clarendon Press, 1982. page 3.

<sup>109</sup> Crane, Conrad C. "Ethics and the RMA: Matching Moral Expectations and Military Capabilities in Modern Warfare". Unpublished 1999. Also as per phone conversation with LTC Crane in January 2000.

<sup>110</sup> Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 2nd ed. New York: Basic Books, 1992. Chapters 3, The Rules of War pages.34-50; Chapter 8, War's Means and the Importance of Fighting Well pages 127-137; Chapter 9, Noncombatant Immunity and Military Necessity p.138-159; Chapter 10, War Against Civilians: Sieges and Blockades pages 160-175; and Chapter 16, Supreme Emergency pages 251-268. See also Corn, Mike. "International and Operational Law Note: Principle 2: Distinction". *Department of the Army Pamphlet 27-50-309. The Army Lawyer*. August 1998 and "International and Operational Law Note: Principle 7: Distinction Part II". *Department of the Army Pamphlet 27-50-319. The Army Lawyer*. June 1999.

<sup>111</sup> Sapolsky, Harvey M. and Jeremy Shapiro. "Casualties, Technology, and America's Future Wars". *Parameters*. Summer 1996. pages 119-127.

<sup>112</sup> Crane, Conrad C. "Ethics and the RMA: Matching Moral Expectations and Military Capabilities in Modern Warfare". Unpublished 1999. Also as per phone conversation with LTC Crane in January 2000.

<sup>113</sup> Wakin, Malham M. *War, Morality, and the Military Profession*. 2<sup>nd</sup> ed. Boulder, CO: Westview Press, 1986. page 224.

## Bibliography

### Books

- Arend, Anthony C., and Robert J. Beck. *International law and the use of force : beyond the UN Charter paradigm*. London ; New York: Routledge, 1993.
- Christopher, Paul. *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*. Englewood Cliffs, N.J.: Prentice Hall, 1994.
- Clausewitz, Carl von. *On War*. New York: Everyman's Library, 1976.
- Cohen, Sheldon M. *Arms and Judgment*. Boulder, CO: Westview Press, 1989.
- Dunlap, Charles J. Jr. *Technology and the 21<sup>st</sup> Century Battlefield: Recomplicating Moral Life for the Statesman and the Soldier*. Carlisle Barracks, PA: Strategic Studies Institute, 15 January 1999.
- Fotion, Nicholas and Gerald Elfstrom. *Military Ethics*. Boston: Routledge & Kegan Paul, 1986.
- Fotion, Nicholas. *Military Ethics: Looking Toward the Future*. Stanford, CA.: Hoover Institution Press, 1990.
- Glahn, Gerhard von. *Law Among Nations: An Introduction to Public International Law*. Fifth ed. New York: MacMillian Publishing Company, 1986.
- Hartigan, Richard Shelly. *The forgotten victim : a history of the civilian*. Chicago, Ill.: Precedent Pub., 1982.
- Henkin, Louis et al. *Right v. Might: International Law and the Use of Force*. 2<sup>nd</sup> ed. New York: Council on Foreign Relations Press, 1991.
- Henkin, Louis, and Council on Foreign Relations. *Right v. might : international law and the use of force*. New York: Council on Foreign Relations Press, 1989.
- Howard, Michael. *Restraints On War*. Oxford: Oxford University Press, 1979
- Howard, Michael. *War in European History*. Oxford: Oxford University Press, 1976.
- Howard, Michael and George J. Andreopoulos and Mark R. Shulman. *The Laws of War: Constraints on Warfare in the Western World*. New Haven: Yale University Press, 1994.
- Ignatieff, Michael. *The warrior's honor : ethnic war and the modern conscience*. 1st American ed. New York: Metropolitan Books, 1998.



- Lieber, Francis, and Richard Shelly Hartigan. *Lieber's Code and the law of war*. Chicago: Precedent, 1983.
- Mulinen, Frédéric de, and Institut Henry-Dunant. *The law of war and the armed forces*. 2nd ed. Ius in bello ; no. 1. Geneva: Henry Dunant Institute, 1981.
- Pape, Robert Anthony. *Bombing to win : air power and coercion in war* Cornell studies in security affairs. Ithaca, N.Y.: Cornell University Press, 1996.
- Roberts, Adam and Richard Guelff. *Documents on the Laws of War*. Oxford: Clarendon Press, 1982.
- Shukman, David. *Tomorrows War*. New York: Harcourt Brace and Company. 1996.
- Wakin, Malham M. *War, Morality, and the Military Profession*. 2<sup>nd</sup> ed. Boulder, CO: Westview Press, 1986.
- Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 2nd ed. New York: Basic Books, 1992.

#### Articles and Monographs

- Alexander, V.L. et all. "The Role of Non-Lethal Technologies in Operations Other Than War." Institute for Defense Analysis, 1996.
- Bacevich, A. J. "New Rules: Modern War and Military Professionalism". *Parameters*. December 1990.
- Corn, Mike. "International and Operational Law Note: When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War". *Department of the Army Pamphlet 27-50-307. The Army Lawyer*. June 1998.
- Corn, Mike. "International and Operational Law Note: Principle 1: Necessity". *Department of the Army Pamphlet 27-50-308. The Army Lawyer*. July 1998.
- Corn, Mike. "International and Operational Law Note: Principle 2: Distinction". *Department of the Army Pamphlet 27-50-309. The Army Lawyer*. August 1998.
- Corn, Mike. "International and Operational Law Note: Principle 3: Endeavor to Prevent or Minimize Harm to Civilians". *Department of the Army Pamphlet 27-50-311. The Army Lawyer*. October 1998.

- Corn, Mike. "International and Operational Law Note: Principle 4: Preventing Unnecessary Suffering". *Department of the Army Pamphlet 27-50-312. The Army Lawyer*. November 1998.
- Corn, Mike. "International and Operational Law Note: Principle 5: Protecting the Force from Unlawful Belligerents". *Department of the Army Pamphlet 27-50-315. The Army Lawyer*. February 1999.
- Crane, Conrad C. "Ethics and the RMA: Matching Moral Expectations and Military Capabilities in Modern Warfare". Unpublished 1999.
- Doty, Grant R. "The United States and the Development of the Laws of Land Warfare". *Military Law Review*. June 1998.
- Holland, A. E. III. "Fighting with a Conscience." Air University, 1999.
- Miller, C. D. et al. "Terror From the Skies: Exploiting the Psychological Impact of the Heavy Bomber." U.S. Naval War College, 1991.
- Monahan, E. J. "The Right to Life During Armed Conflict." Air Force Institute of Technology, 1989.
- Morris, Scott R. "The Laws of War: Rules by Warriors for Warriors". *Department of the Army Pamphlet 27-50-319. The Army Lawyer*. December 1997.
- Moscow, Warren. "51 Square Miles Burned Out in Six B-29 Attacks on Tokyo." The New York Times. 29 May 1945, cover page A1.
- Peters, Ralph. "A Revolution in Military Ethics". *Parameters*. Summer 1996.
- Price, R. A. "The Legality of Nuclear Weapons Employment Under the International Humanitarian Law." Air Force Institute of Technology, 1987.
- Sapolsky, Harvey M. and Jeremy Shapiro. "Casualties, Technology, and America's Future Wars". *Parameters*. Summer 1996.
- Solomon, P. C. "The Perplexity of What is Just in War After We Have Accepted What is Just About War." Monograph, U.S. Army War College, 1996.
- Spilane, R. L. "Humanitarian Operations and Operational Law." U.S. Naval War College, 1997.
- Treadway, C. G. C. "More Than Just A Nuisance; When Aerial Terror Bombing Works." Monograph, 1998.

- Walker, Scott G. "Targeting for Effect; Analytical Framework of Counterland Operations." Monograph, 1998.
- Walne, G. N. "International Law- The Conduct of Armed Conflict and Air Operations." Center for Naval Analysis, 1987.
- Warren, Lansing. "U.S. Rejects Tokyo Charge In Sinking of Relief Ship." The New York Times. 29 May 1945, Cover page A1.
- Woods, Kevin S. "Limiting Casualties: Imperative or Constraint?" Monograph, Command and General Staff College, 1997

#### Doctrine

- Department of the Army. *DA Pamphlet 27-1, Treaties Governing Land Warfare*. Washington, D.C.: GPO, December 1956.
- Department of the Army. *DA Pam 27-1-1, Protocols to the Geneva Conventions of 12 August 1949* dated September 1979.
- Department of the Army. *FM 27-10, The Law of Land Warfare*. Washington, D.C.: GPO, July 1956

#### Unpublished Sources

- International Committee of the Red Cross. *International Humanitarian Law*. 1998. Accessed CD-ROM.
- Rummel, R.J. "Chapter 13 Statistics of Democide: Death By American Bombing and other Democide Estimates, Calculations, and Sources" from the "Freedom, Democracy, Peace; Power, Democide and War" internet site (<http://www2.hawaii.edu>)
- White, Mathew. "Death by Mass Unpleasantness" portion of the "Historical Atlas of the Twentieth Century" at (<http://users.erols.com/mwhite28/warstst8.htm>)