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Article 5

# The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification

Tracey Leigh Dowdeswell

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# The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification

## **Abstract**

The Brussels Conference of 1874 was convened after the Franco-Prussian War (1870-71). At stake was not only the restoration of the fragile balance of power in Europe, but also the articulation of a new ideal of warfare and its role in the European state system. This article discusses the Conference in relation to the “new war” thesis put forth by Mary Kaldor in *New and Old Wars* (1999). It was at Brussels that the “old war” crystallized as a political ideal: war would be a tournament, fought by professional armies, organized by nation states; civilians who refrained from participation would be protected from being attacked. At Brussels, this view prevailed over the “total war” view, which would permit both deliberate targeting of civilians and violent reprisal against them. Brussels laid the foundations for the further development of international humanitarian law at The Hague Peace Conference of 1899.

## **Cover Page Footnote**

Tracey Leigh Dowdeswell completed her doctoral dissertation with the assistance of Professor Douglas Hay at Osgoode Hall Law School, where she studied the historical and legal aspects of guerrilla fighters and counterinsurgent warfare. She previously completed the degrees of LLB and BCL at McGill University. She would like to thank Professors Douglas Hay and Philip Girard for their comments and advice on previous versions of this article, as well as Clare Burton, the Knowledge Management Coordinator at the United Kingdom Foreign and Commonwealth Office for her assistance in locating historical documents.

## Special Issue

## Law, Authority &amp; History: A Tribute to Douglas Hay

# The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification\*

TRACEY LEIGH DOWDESWELL<sup>†</sup>

The Brussels Conference of 1874 was convened after the Franco-Prussian War (1870-71). At stake was not only the restoration of the fragile balance of power in Europe, but also the articulation of a new ideal of warfare and its role in the European state system. This article discusses the Conference in relation to the “new war” thesis put forth by Mary Kaldor in *New and Old Wars* (1999). It was at Brussels that the “old war” crystalized as a political ideal: war would be a tournament, fought by professional armies, organized by nation states; civilians who refrained from participation would be protected from being attacked. At Brussels, this view prevailed over the “total war” view, which would permit both deliberate targeting of civilians and violent reprisal against them. Brussels laid the foundations for the further development of international humanitarian law at The Hague Peace Conference of 1899.

La Conférence de Bruxelles de 1874, organisée après la guerre franco-prussienne (1870-1871), visait non seulement à restaurer le fragile équilibre des pouvoirs en Europe, mais aussi à formuler un nouvel idéal de guerre et à en définir le rôle au sein des États européens. Cet article aborde la Conférence dans le contexte de la théorie de la « nouvelle guerre »

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\* An earlier version of this article was presented at the Law/Authority/History: A Tribute to Douglas Hay symposium to mark the retirement of Douglas Hay. The symposium took place on 5 and 6 May 2016 at Osgoode Hall Law School and the York University History Department, Toronto.

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avancée par Mary Kaldor dans son ouvrage *New and Old Wars* (1999). C'est à Bruxelles que l'« ancienne guerre » s'est cristallisée en un idéal politique où la guerre serait un tournoi mené par des armées professionnelles et organisé par des États-nations, et où les civils qui s'abstiennent d'y participer seraient protégés contre les attaques. À Bruxelles, ce modèle l'a emporté sur une autre vision, celle de la « guerre totale », qui implique au contraire de cibler délibérément des civils et d'exercer des représailles violentes à leur rencontre. La Conférence de Bruxelles a jeté les bases nécessaires au développement ultérieur du droit international humanitaire lors de la Conférence de la paix organisée à La Haye en 1899.

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## I. NEW AND OLD WARS

THE BRUSSELS CONFERENCE OF 1874 produced the first international code of land warfare, the draft *Brussels Project of an International Declaration Concerning the Laws and Customs of War (Brussels Declaration)*.<sup>1</sup> The *Brussels Declaration* set down the basic rules governing the treatment of prisoners of war, the laws of belligerent occupation, and the treatment of civilians. It also set out the first international rules governing the circumstances under which guerrilla fighters may be authorized to wage war as lawful combatants.<sup>2</sup> These rules were adopted at the Hague Peace Conferences in 1899 and 1907 and codified in the *Hague Regulations Concerning the Laws and Customs of War on Land*,<sup>3</sup> but they were formulated a quarter of a century earlier at the Brussels Conference of 1874.

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1. “Projet d'une Declaration Internationale concernant les Lois et Coutumes de la Guerre (Texte Modifié par la Conférence),” *Supplement to the London Gazette* (24 October 1874) 24144 (5077, 3.42) [“Brussels Declaration”].
  2. *Ibid* art 9.
  3. *Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 29 July 1899, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, art 1; *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, art 1 [*Hague Regulations*].

Many of the debates that shaped these early laws of belligerent qualification dealt with issues that remain contentious today: Under what conditions may non-state actors lawfully wage war? May a state authorize ununiformed, self-funded, and self-armed fighters to wage war on its behalf? When guerrilla fighters are mixed in with a sympathetic civilian population, what steps need to be taken by a hostile power to protect those civilians? Are reprisals against civilians ever justified to end a violent insurgency and restore order?<sup>4</sup>

At Brussels in 1874, these debates arose directly out of the events of the recent Franco-Prussian War of 1870-71. The issues discussed at Brussels were similar to those raised by Mary Kaldor in her 1999 work, *New and Old Wars: Organized Violence in a Global Era*.<sup>5</sup> Kaldor defines “new wars” as being characterized by the breaking down of traditional categories of state power and violence in war: state versus non-state, public versus private, internal versus external.<sup>6</sup> Unlike old wars, new wars have a fluid violence and make significant use of non-state guerrilla fighters.<sup>7</sup> Much of the violence takes place outside the conventional battlefield, in urban areas and against the civilian population; identity politics leads to the use of ethnic cleansing and population displacement.<sup>8</sup>

The Franco-Prussian War, like many conflicts, exhibited characteristics of both “old” and “new” wars. This fact creates difficulties in using historical evidence, particularly evidence of battle strategies, to support or disprove the “new wars” thesis. In many ways, the Franco-Prussian War was a paradigmatic example of an old war. It broke out as a clash between empires, namely the Second French Empire of Napoleon III and the emerging German Empire led by the Kingdom of Prussia. The war was largely a product of *raison d'état*: It was fought to alter the European balance of power abroad and to foster nationalist sentiments at home. Each side mobilized standing armies of unprecedented size, the products of massive efforts at conscription, training, and preparation

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4. See e.g. Emily Crawford, “Regulating the Irregular: International Humanitarian Law and the Question of Civilian Participation in Armed Conflict” (2011) 18:1 UC Davis J Intl L & Pol’y 163 at 167-70; Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford: Oxford University Press, 2015) at 99-101; Geoffrey S Corn & Eric Talbot Jensen, “Untying the Gordian Knot: A for Determining Applicability of the Laws of War on Terror” (2008) 81:3 Temp L Rev 787.
  5. Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 3rd ed (Cambridge, UK: Polity Press, 2012) [Kaldor, *New and Old Wars*].
  6. Mary Kaldor, “In Defence of ‘New Wars’” (2013) 2:1 Stability: Int’l J Sec Dev 1 at 2 [Kaldor, “In Defence of ‘New Wars’”].
  7. *Ibid* at 2.
  8. *Ibid* at 9.

in peace-time.<sup>9</sup> The belligerents made use of technological advances, including railroads to mobilize troops quickly across great distances, as well as innovations in weaponry that greatly increased the destructive power of artillery.<sup>10</sup> As Michael Howard states, “[i]n 1870 there dawned in Europe an age of ‘absolute war’ in a sense which even Clausewitz had never conceived.”<sup>11</sup>

At the same time, the Franco-Prussian War exemplified many characteristics of new wars, including weak and failed governance, official corruption, the prevalence of non-state belligerents, the spilling of the battles and their combatants into the cities and over the countryside, and the deliberate targeting of civilians as a strategy of warfare. The French government all but collapsed after Napoleon III capitulated to the German forces at Sedan.<sup>12</sup> The French army was easily defeated, due largely to the corruption of the Emperor, who had converted much of the army stores for his own use.<sup>13</sup> As L.P. Brockett and John Abbott state, “almost every officer, from the highest to the lowest, had followed [Napoleon III’s] example. Where he supposed he had a hundred soldiers fully armed and equipped, there were found about fifty, and these imperfectly supplied with arms and ammunition.”<sup>14</sup> The provisional government had great difficulties raising troops; these troops were poorly trained and equipped, and often had no uniforms.<sup>15</sup>

After the conventional French forces were routed by Germany, the provisional French government called up groups of irregular militia, including the uniformed *Garde Mobile*, as well as individuals belonging to shooting clubs, known as the *francs-tireurs*.<sup>16</sup> Unlike regular troops, the *francs-tireurs* came out in large numbers to fight.<sup>17</sup> Some *francs-tireurs* wore uniforms, while others wore only blue blouses with a red armband or shoulder strap.<sup>18</sup> The *francs-tireurs* were

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9. Michael Howard, *The Franco-Prussian War: The German Invasion of France, 1870-1871* (London: Routledge, 2001) at 3.

10. *Ibid.*

11. *Ibid.*

12. LP Brockett & John SC Abbott, *The History of the Franco-German War of 1870-71* (Toronto: AH Hovey, 1871) at 239.

13. *Ibid.* at 116.

14. *Ibid.*

15. *Ibid.* at 284-85.

16. US Army, *A Treatise on the Juridical Basis of the Distinction between Lawful Combatant and Unprivileged Belligerent* (Charlottesville, Va: Judge Advocate General’s School, 1959) at 32 [*JAG Treatise*].

17. Brockett and Abbott, *supra* note 12 at 284—85.

18. *Ibid.* See also James M Spaight, *War Rights on Land* (London: MacMillan and Co, 1911) at 41-42.

authorized, but not uniformed, trained, or equipped by the French government. The occupying German forces refused to recognize the *francs-tireurs* as lawful combatants, denying them prisoner of war status and executing them upon capture.<sup>19</sup> Germany denied not only the legitimacy of such fighters, but claimed the right to engage in severe reprisals against the occupied population as a whole in order to suppress what was essentially a guerrilla insurgency.<sup>20</sup>

After this time, the conflict became largely a guerrilla war. The *francs-tireurs* harassed the Germans through such guerrilla tactics as hiding in ambush, capturing convoys, destroying railways and bridges, and cutting supply lines.<sup>21</sup> The citizenry of the contested territory of Alsace-Lorraine resisted the occupying German forces. As a result, Germany directed reprisals against civilians in an extremely brutal—and deliberate—strategy of using violence *in terrorem* against the civilian population. German forces “hanged the culprits—or the suspected culprits—whenever they caught them.”<sup>22</sup> At other times, they burned entire villages to the ground.<sup>23</sup> As Howard states, “[b]y the end of October [1870] it was clear to the Germans that the war had entered a stage in which terror and counterterror were to play a formidable part.”<sup>24</sup> By this time, there were few discernable distinctions between public and private fighters, or between violence involving civilians and violence involving military personnel.

Several variables are used to define and categorize new and old wars. In new wars, the protagonists are more often non-state and private actors, frequently warlords, terrorists, and organized criminal groups as opposed to public, state-led institutions.<sup>25</sup> The motivations of warring parties in new wars tend to involve issues

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19. Alex J Bellamy, *Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity* (Oxford: Oxford University Press, 2012) at 74. Particularly controversial was the Prussian practice of reprisal killings against civilians in order to deter insurgent activity, or to punish the killings of Prussian soldiers. Compare this with similar German practices in use during World War II. See *Trial of Wilhelm List and Others (Hostages Trial)* No 47 (1947-48) Law Reports of Trials of War Criminals, vol 8 (London: UN War Crimes Commission, 1949) [*Hostages Trial*].
  20. Letter No 34 from Sir A Horsford to the Earl of Derby (17 August 1874) in Foreign Office (UK), *Confidential Correspondence with Major-General Sir A. Horsford Respecting the Conference at Brussels on the Rules of Military Warfare: July 25 to September 28, 1874* (London: Foreign Office, 1874) 61 at 62 [*Horsford Correspondence*].
  21. Howard, *supra* note 9 at 198. The hallmark of such guerrilla tactics is that arms are not carried openly.
  22. *Ibid* at 199.
  23. *Ibid* at 200.
  24. *Ibid*.
  25. Edward Newman, “The ‘New Wars’ Debate: A Historical Perspective is Needed” (2004) 35:2 Security Dialogue 173 at 174.

of identity, rather than ideology or territory as in old wars.<sup>26</sup> The geography of old wars revolves around state territory and its boundaries. Old wars are typically inter-state conflicts whereas new wars are spatially fluid, intra-state, regional, and transnational.<sup>27</sup> New wars make use of military tactics such as ethnic cleansing and forced displacement as opposed to the more traditional top-down techniques of belligerent occupation and martial law.<sup>28</sup> The technology of new wars is typical of the post-modern era, using communications systems and surveillance technologies, drones, as well as cheaper and more powerful small arms. The political economy of new wars is determined by the means by which militant and terrorist groups are funded and sustained economically. In new wars, money and weapons are often filtered through terrorist or organized criminal groups and sustained through government corruption; these activities are destabilizing, and weaken state authority. Old wars are led and funded by states, and are meant to centralize and consolidate the power of the state and its bureaucracies.<sup>29</sup> Finally, the humanitarian impact of new wars is often greater than that of old wars, as the violence is waged in and amongst the civilian population and the guerrilla fighters who shield themselves amongst them.<sup>30</sup>

Does the history of war bear out the “new war” thesis? Kaldor asserts that it does, and that while many features of new wars can be found in earlier wars in the modern era, it is not the individual characteristics that matter so much as the patterns they form, and what this tells us about the changing nature of state violence and power.<sup>31</sup> Old wars were nation-building; they were about gaining territory, certainly, but in waging war the state was centralizing its authority and consolidating its power over the armed forces.<sup>32</sup> Victory in war was a clear goal.<sup>33</sup> This was certainly true of the Franco-Prussian War. On the other hand, “new wars tend to spread and to persist or recur as each side gains in political or economic ways from violence itself rather than ‘winning’”; the goal is not

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26. *Ibid* at 174-75.

27. *Ibid*.

28. *Ibid*.

29. *Ibid*.

30. *Ibid*.

31. Kaldor, “In Defence of ‘New Wars,’” *supra* note 6 at 3-4.

32. *Ibid* at 3; see also Randall Lesaffer, “Siege Warfare in the Early Modern Age: A Study on the Customary Laws of War,” in Amanda Perreau-Saussine & James B Murphy, eds, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, UK: Cambridge University Press, 2009) 176 (discussing how the state consolidated its power over the, largely private, armed forces in the early modern era).

33. Kaldor, “In Defence of ‘New Wars,’” *supra* note 6 at 3.



necessarily victory, but sowing social and political breakdown.<sup>34</sup> We can see these forces at work in the conflicts of the 1990s in the former Yugoslavia, the South Caucasus, Rwanda, and sub-Saharan Africa, as well as the more recent wars in Syria, Afghanistan, and Iraq.<sup>35</sup>

Edward Newman disagrees. While the “literature of the ‘new wars’ provides a great service in explaining patterns of contemporary conflict...,” he claims that “much of this is not new: all of the factors that characterize new wars have been present, to varying degrees, throughout the last 100 years.”<sup>36</sup> Newman argues that a historical perspective is warranted, and that it may often challenge the assumptions of the new wars thesis.<sup>37</sup>

At the same time, the historical research on the changing nature of war has yielded mixed results. Given Kaldor’s claim that new wars have resulted from economic and political changes arising out of the end of the Cold War and the advance of neo-liberal globalization, most studies have focused on the end of the Cold War as the fulcrum on which the strategies of the new wars were raised. One such study performed at the Department of Peace and Conflict Research at Uppsala University found no support for three key assertions of the new wars thesis. It found that the intensity of wars was decreasing, not increasing; the number of civilians displaced in wars was not noticeably rising; and the absolute number of civilians killed in war was not increasing.<sup>38</sup> In contrast, an empirical study by Anouk Rigterink examined relative rather than absolute numbers and found a number of trends in favour of the new wars thesis: A higher proportion of civilians relative to military personnel was killed in battle from 1946-2010 and that there was a relative increase in violence directed against civilians since the end of the Cold War.<sup>39</sup> On the question of whether there were more non-state combatants in war, the evidence appears mixed.<sup>40</sup> Rigterink concluded that there

34. *Ibid.*

35. *Ibid* at 7.

36. Newman, *supra* note 25 at 179.

37. *Ibid* at 186.

38. Erik Melander, Magnus Öberg & Jonathan Hall, “The ‘New Wars’ Debate Revisited: An Empirical Evaluation of the Atrociousness of ‘New Wars’” (2006) Department of Peace and Conflict Research, Uppsala Peace Research Papers No 9 at 4-5.

39. Anouk Rigterink, “New Wars in Numbers: An Empirical Test of the ‘New Wars’ Thesis” (2013) Security in Transition Discussion Paper at 4-5. See also Sven Chojnacki, “Anything New or More of the Same? Wars and Military Interventions in the International System, 1946-2003” (2006) 20:1 *Global Society* 25 (looking at armed conflict since World War II and concludes that while inter-state conflict is increasing, inter-state warfare still forms a key part of the international system).

40. Rigterink, *supra* note 39 at 5.

is more support for the new wars thesis when we look at relative trends rather than absolute numbers.<sup>41</sup> Monika Heupel and Bernhard Zangl compared three wars that began during the Cold War and continued after 1990 (Cambodia, Angola, and Afghanistan) with the post-1990 wars in Somalia and Sierra Leone.<sup>42</sup> They found not only that the new wars thesis was plausible based on the evidence, but also that “the end of the Cold War was the triggering factor in the transformation of warfare.”<sup>43</sup>

The above studies may have produced ambiguous results because they focused on war-fighting strategies and tactics rather than the politics of state power. Like the Franco-Prussian War, many conflicts have made use of state and non-state actors, as well as conventional and guerrilla tactics of warfare. Practices and strategies can shift dramatically, even within a single conflict, and over the course of a few months. On the other hand, if we accept Kaldor’s thesis that new wars are largely about the organizing logic of state power and how organized violence is marshalled in its service, then a shift in these ideas can be seen clearly at the Brussels Peace Conference in 1874. This is evidenced not by how the Franco-Prussian War was waged in France, but by how the leading statesmen of Europe came together at Brussels to articulate a new ideal of warfare and its role in the late nineteenth century European state system. The key debates at Brussels revolved around the questions of whether a state could authorize guerrilla fighters to wage war on its behalf, and whether it could be lawful to wage an insurgency against a foreign or occupying power. The answers to these questions had long been affirmative—there were few restrictions on what kind of fighters a sovereign power could authorize to wage war, or on the participation of the general civilian population.<sup>44</sup> By the late nineteenth century, however, these customs were being destabilized by changes in the nature of state power, and the increasing consolidation of state power over the armed forces. As a result, states adopted discordant and contradictory views on the old customs, and these disagreements came to a head over the way they had been applied in the Franco-Prussian War.

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41. *Ibid* at 29.

42. Monika Heupel & Bernhard Zangl, “On the Transformation of Warfare: A Plausibility Probe of the New War Thesis” (2010) 13:1 *J Int’l Relat & Dev* 26 at 29-30.

43. *Ibid* at 30.

44. Hugo Grotius, *De Jure Belli Ac Pacis*, translated by J Barbeyrac (Clark, NJ: The Lawbook Exchange, Ltd, 2004) at para III.V.i; Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed by Béla Kapossy & Richard Whatmore (Indianapolis: Liberty Fund, 2008) at para III.II.9. For further discussion, see Part II, below.

Some states wished to ban the use of guerrilla fighters and restrict warfighting to state-authorized, organized armed forces; other states asserted that they needed these guerrilla fighters to defend themselves against aggression by the great military powers.

The new draft rules adopted at Brussels might seem at first to limit sovereign power, in that they restricted a state's ability to authorize certain kinds of fighters and permitted civilians to engage in insurgent activities against a foreign invader. However, the debates at Brussels show that these rules were introduced to strengthen state power over the military, not to limit it. Restricting the kinds of fighters a state could authorize had the effect of privileging the standing armies of the great military powers and consolidating the state's power over the use of military force. Permitting civilians to engage in an insurgency against an invading power assisted a weak nation to defend itself against a stronger. Both rules were the result of compromise and were intended to work together to support the European balance of power. This observation supports the central point of Kaldor's thesis about old wars—that they were about nation-building and consolidating state power.<sup>45</sup>

The political ideal of the “old war” crystalized at Brussels in 1874 as an ideal of this restored balance of power. Baron Jhomini of Russia opened the conference by stating the debate in the following terms:

[V]ery contradictory ideas prevail concerning war. There are those that would like it made more terrible so as to make it less frequent, while others would turn it into a tournament between regular armies with civilians simply as onlookers. People must know where they stand... It is easier to do one's duty than to define it. We must, therefore, tell everyone what his duty is.<sup>46</sup>

The view of war as a tournament meant that it would be fought by professional armies organized by nation states; civilians would not be permitted to participate in the conflict, but they would be protected from attack. In the alternative view of war, civilian participation would continue to be permitted, but just as they could fight, they could be targeted. Reprisal violence against civilians would be permitted, both to discourage civilians' disloyalty to occupying powers and to put down insurrection. This “more terrible” view of war—the “total war”—was

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45. Kaldor, *New and Old Wars*, *supra* note 5 at 6.

46. Letter No 5 from Sir A Horsford to the Earl of Derby (31 July 1874), in *Horsford Correspondence*, *supra* note 20 at 5; translated & reprinted in Pierre Boissier, *From Solferino to Tushima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute, 1985) at 292.

recognized in the American *Lieber Code* of 1863,<sup>47</sup> and was most forcefully advocated at the time by American and German jurists. Yet the Germans failed to make their case at Brussels in 1874, and The Hague Peace Conference of 1899 would adopt the *Brussels Declaration* as its template. Although the *Brussels Declaration* was not ratified at the time, what clearly emerged from the conference was the affirmation of the second vision of war over the first: war was to be a tournament, civilians were to be excluded but protected, and there was an affirmation of humanitarian goals and a clear rejection of the thesis that a sharp war was a short war.

This article begins, in Part II, with a discussion of the laws and customs of belligerent qualification in force before the Brussels Conference, focusing on the significant changes brought about by the *Lieber Code* of 1863.<sup>48</sup> Although Francis Lieber recognized the need for new rules concerning guerrilla fighters and civilian insurgents, he and the American jurists who followed him advocated the second, rejected, view of war. According to them, an overwhelming show of force—even including reprisals against civilians—was necessary to limit the violence of war and restore order. At the same time, adopting the “tournament” view of war was impractical, as a belligerent power could not change the rules according to which its enemies fought, except through force.

Part III then examines the Brussels Conference itself through original source material obtained from the archives of the Foreign and Commonwealth Office of the United Kingdom. This material includes the original notes and minutes of the Conference proceedings as published at the time in the *London Gazette*,<sup>49</sup> as well as correspondence relating to the Conference published by the British Parliament.<sup>50</sup> It also includes several volumes of previously unpublished confidential documents of the Foreign Office of the United Kingdom, containing much diplomatic

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47. US, General Order No 100, *Instructions for the Government of Armies of the United States in the Field*, Lincoln Administration, prepared by Francis Lieber (24 April 1863) [*Lieber Code*].

48. *Ibid.*

49. “Correspondence respecting the Conference at Brussels on the Rules of Military Warfare,” *Supplement to the London Gazette* (23 October 1874) 24144 (4927-5111) [*London Gazette*].

50. Parliament of the United Kingdom and Great Britain, *Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare*, Miscellaneous No 1 (London: Harrison & Sons, 1874) [*Published Correspondence No I*]; *Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare*, Miscellaneous No 2 (London: Harrison & Sons, 1874) [*Published Correspondence No II*].

correspondence with delegates from other nations in attendance.<sup>51</sup> Finally, other sources include the confidential correspondence between Major-General Sir Alfred Horsford, the British delegate to the Conference, and Edward Stanley, the Earl of Derby, who was then Secretary of State for Foreign Affairs.<sup>52</sup> Part IV will discuss the legacy that the Brussels Conference had on international humanitarian law. Although its code of land warfare was not formally adopted, it had a significant impact upon state practice almost immediately. It also gave rise to the modern laws concerning belligerent qualification, many of which remain in force today.

## II. THE LIEBER CODE OF 1863: SHIFTING NORMS CONCERNING GUERRILLA FIGHTERS

At the dawn of the modern era, the laws and customs of war did not demarcate who was a lawful combatant, or a civilian. Laws and customs governing belligerent qualification and civilian participation in warfare were the product of the long consolidation of state power as it developed in the centuries following the *Treaty of Westphalia*.<sup>53</sup> As Leslie Green states, “[i]n ancient times, as evidenced by the Laws of Manu, the Old Testament, or the writings of Kautilya or Sun Tzu, there was no attempt to identify those who were entitled to be treated as combatants. ... During feudal times, when the law of arms was developing there was equally no attempt at definition.”<sup>54</sup> The distinction between civilians and combatants was

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51. UK Foreign Office, *Confidential Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare, Part I, April 11 to July 4, 1874* (London: Foreign Office, 1874) [*Confidential Correspondence Part I*]; UK Foreign Office, *Confidential Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare, Part II, June 30 to July 28, 1874* (London: Foreign Office, 1874) [*Confidential Correspondence Part II*]; UK Foreign Office, *Confidential Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare, Part III, July 24 to August 5, 1874* (London: Foreign Office, 1874) [*Confidential Correspondence Part III*]; UK Foreign Office, *Confidential Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare, Part IV, November 28, 1874 to February 15, 1875* (London: Foreign Office, 1875) [*Confidential Correspondence Part IV*]. Many of these materials are in French, the language of diplomacy in nineteenth-century Europe, and the translations from French to English are the author's own.
52. *Horsford Correspondence*, *supra* note 20.
53. *Peace Treaty Between the Holy Roman Emperor and the King of France and their respective Allies (Treaty of Westphalia)*, 24 October 1648 [*Treaty of Westphalia*].
54. Leslie C Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester: Manchester University Press, 2008) at 125.

not yet recognized in the Middle Ages; violence was fluid, and non-combatants often played a significant role in the war effort.

Hugo Grotius, in his 1625 *De Jure Belli Ac Pacis*, placed few limitations on who may wage war or who may be attacked in war. Grotius recognized an almost unrestricted right for a *just* party to use force against an enemy population. He stated that the “rights of war” flowed solely from the sovereign authority by which such crimes were authorized.<sup>55</sup> Grotius stated that the “Slaughter of Infants and Women is allowed, and included by the Right of War,” as was the wasting of villages with fire and sword<sup>56</sup>—much as the Germans did to the French village of Ablis in the fall of 1870.<sup>57</sup>

The first attempt to abolish private wars and institute national armies was made by European states when they concluded the *Treaty of Westphalia* in 1648 at the close of the Thirty Year’s War (1618-1648). Article 118 states: “[T]he Troops and Armys of all those who are making War in the Empire, shall be disbanded and discharg’d; only each Party shall send to and keep up as many Men in his own Dominion, as he shall judge necessary for his Security.”<sup>58</sup> The Peace of Westphalia was only the beginning of states’ consolidation of the use of military force, however. In the century that followed,

the customs of war were still determined by the same professional elite that had dominated them for ages and whose incorporation into the state was as yet far from complete. ...While today’s international lawyers take it for granted that state authorities dictate the behaviour of their military agents and lay down the law, during the century after 1648 it was often the other way around.”<sup>59</sup>

Throughout the late eighteenth and early nineteenth centuries, the great military and industrial powers of Europe began to professionalize their armies and to demarcate the lawful scope of conflict by excluding those fighters who were not organized into professional armed forces. Emerich de Vattel was one of the earliest treatise writers to describe the situation of a soldier<sup>60</sup> who was now a professional,<sup>61</sup> an agent of a public authority,<sup>62</sup> subsumed under the command of

55. Grotius, *supra* note 44.

56. *Ibid* at para III.IV.ix.

57. Howard, *supra* note 9 at 200.

58. *Treaty of Westphalia*, *supra* note 53 at para CXVIII.

59. Lesaffer, *supra* note 32 at 196.

60. Kaldor, “In Defence of ‘New Wars,’” *supra* note 6 at 126.

61. Vattel, *supra* note 44.

62. *Ibid* at para III.II.7. de Vattel describes the public authority requirement, stating that the “power of levying troops, or raising an army, is of too great a consequence in a state, to be entrusted to any other than the sovereign.”

a higher officer.<sup>63</sup> Vattel made no distinction, however, between those who could and could not be authorized by the sovereign to wage war. To determine whether a belligerent was qualified, it was only necessary to demonstrate that he had been authorized by the sovereign to wage war; there were, in turn, no restrictions on the kinds of fighters a sovereign might have authorized. A state, then, could legally have authorized guerrilla fighters to wage war.

Vattel justified the introduction of standing armies primarily on humanitarian grounds, arguing that it limited the violence of war. He stated:

If we confine our view to the law of nations, considered in itself,—when once two nations are engaged in war, all the subjects of the one may commit hostilities against those of the other, and do them all the mischief authorised by the state of war. But should two nations thus encounter each other with the collective weight of their whole force, the war would become much more bloody and destructive, and could hardly be terminated otherwise than by the utter extinction of one of the parties.<sup>64</sup>

“It is therefore with good reason,” Vattel concluded, “that the contrary practice has grown into a custom with the nations of Europe,—at least those that keep up regular standing armies or bodies of militia. The troops carry on the war, while the rest of the nation remain in peace.”<sup>65</sup> Since Vattel, debates surrounding the professionalization of armies have always considered the question of whether consolidating force in a standing army will limit the violence of total war.

At the time of Vattel, the custom of standing armies was not universal among European nations—it prevailed only among those who could maintain standing armies or militia—and Vattel enumerated several exceptions to the general custom. He stated that, “although the operations of war are by custom generally confined to the troops” the inhabitants of a place taken by storm may take up arms to recover the liberty of the territory on behalf of the sovereign, “[a]nd where is the man that shall dare to censure it?”<sup>66</sup> Here, Vattel articulated the concept known today as a *levée en masse*, which remains protected by the

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63. *Ibid* at para III.II.19-21 (on subordinate powers in war); *ibid* at para III.II.19 (the commander-in-chief should have a nearly unlimited discretion to conduct war); *ibid* at para III.II.18 (military discipline is of the utmost importance).

64. *Ibid* at para III.XV.226.

65. *Ibid*.

66. *Ibid* at para III.XV.228.

*Third Geneva Convention*.<sup>67</sup> The *levée en masse* refers to civilian insurgents who are not authorized, uniformed, or equipped by a national government, but who spontaneously take up arms to repel a foreign invader. As will be discussed below, whether this ancient practice should be abolished was one of the most contentious issues at Brussels in 1874 and at The Hague Peace Conference in 1899.<sup>68</sup> The smaller powers argued strenuously against its abolition, as it was considered essential for their national defence.

The sovereign authorization rule articulated by Vattel was still the main custom in use at the outbreak of the American Civil War (1861-65), but it was coming under severe pressure as nation states continued to build their standing armies and consolidate their monopoly over the use of military force. To clarify the laws and customs of war applicable to US forces fighting in the Civil War, the Lincoln administration commissioned Francis Lieber, a German American who had been trained in the Prussian Army, to draft the *Lieber Code*.<sup>69</sup> Lieber affirmed the prevailing customary rule concerning guerrilla fighters, which stated that a sovereign may authorize irregular fighters to wage war on its behalf. Article 57 of the *Lieber Code* states, “So soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offences.” It was precisely this rule that would buckle under the pressure of changing international consensus in 1874 at Brussels.

Volunteer or militia corps—often referred to as partisans in the US Civil War—were used by both sides of the conflict to supplement their regular armies. Article 81 of the *Lieber Code* defined partisan soldiers by stating,

Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all of the privileges of the prisoner of war.<sup>70</sup>

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67. *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, International Committee of the Red Cross (ICRC), 12 August 1949, 75 UNTS 135 art 4(6) [*Third Geneva Convention*]. In Vattel’s formulation of the rule, *levées en masse* could retake territory that had been lost; art 4(6) of the *Third Geneva Convention* restricts this only to the time of invasion. This rule was derived from the discussions at the Brussels Conference. See the text accompanying note 160 and following.
68. Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict” (1997) 317 Int’l Rev Red Cross 125 at 125. For further discussion, see the text accompanying note 242.
69. *Lieber Code*, *supra* note 47.
70. *Ibid.*



Article 82 distinguished partisans from unqualified belligerents—often referred to as brigands or guerrillas—as follows:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army [and who occasionally return to their civilian avocations] are public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.<sup>71</sup>

Often, individual irregulars would be arrested and court-martialed solely on charges of being a brigand. Charges would be laid for such crimes as Free Booting, Jayhawking, and Bushwacking—“all terms which were said to be so well understood as to of themselves state a punishable offence without elaboration.”<sup>72</sup> A distinction was drawn between more and less irregular troops. Sovereign authorization remained a necessary condition of belligerent qualification, but the *Lieber Code* further required that troops wear uniforms, be paid by and be “part and portion of the organized army.”<sup>73</sup> Thus, the *Lieber Code* reflects a transition between the earlier period in which sovereign authorization was sufficient for belligerent qualification, and the international agreements of the late nineteenth century that imposed numerous organizational criteria that troops would have to follow if they were to be considered lawful combatants.<sup>74</sup>

While drafting his code, Lieber was asked to address the issue of partisans in greater depth. He produced a treatise entitled *Guerrilla Parties Considered with Reference to the Laws and Usages of War*.<sup>75</sup> Lieber called this a “new topic” in the laws of war, and his purpose in writing the treatise was to sum up the applicable practices and usages of states, rather than to propose new rules.<sup>76</sup> Lieber summed up the problem posed by guerrilla warfare during the Civil War by stating that the “rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines.”<sup>77</sup> Several Confederate leaders openly claimed the right to use such non-uniformed partisan rangers to engage

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71. *Ibid.*

72. *JAG Treatise*, *supra* note 17 at 37.

73. *Lieber Code*, *supra* note 47 art 82.

74. *JAG Treatise*, *supra* note 17 at 45.

75. Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (New York: D van Nostrand, 1862) at 5.

76. *Ibid* at 1.

77. *Ibid.*

in guerrilla attacks against Union soldiers.<sup>78</sup> Governor John Letcher of Virginia, claiming the right to authorize irregular guerrilla fighters, declared that all men who had a commission from the state were entitled to the protections of soldiers and prisoners of war.<sup>79</sup> Confederate General Thomas Hindman asserted that the Confederacy would be bound only by military necessity, not laws imposed by foreign powers. Another Confederate commander declared, “We cannot be expected to allow our enemies to decide for us...whether we shall fight them in masses or individually, in uniform, without uniform, openly or from ambush.”<sup>80</sup>

In his treatise, Lieber defined guerrilla troops as being “self-constituted or constituted by the call of a single individual, not according to the general law of levy, conscription, or volunteering.”<sup>81</sup> Lieber distinguished these fighters from partisans, for whom he proposed the definition of partisan troops that he would later adopt as Article 82 of the *Lieber Code*.<sup>82</sup> In his treatise, Lieber attempted to define the difference between guerrilla and partisan troops on the basis of the sovereign authorization rule: partisan troops were called up according to the general law of levy and were part and portion of the regular army, whereas guerrilla troops were self-constituted or called up at the behest of an individual.<sup>83</sup> However, Lieber also recognized that guerrilla fighters *were* in fact called up by the Confederate authorities, who *were* indeed claiming the right to authorize and to use such troops.<sup>84</sup> The sovereign authorization rule would have permitted this; if the use of such irregulars were to be prohibited, then some other rule would be required. Lieber declined to propose a new rule, but in the interests of humanity he did attempt to restrain the worst abuses against such troops, recognizing that “it will be difficult for the captor of guerrilla-men to decide at once whether they are regular partisans, distinctly authorized by their own government,” and so there should be a presumption that they are to be treated as regular partisans, and according to the law.<sup>85</sup>

Even as he urged leniency and humanity against irregular troops, Lieber preferred to leave the actual formulation of policies concerning guerrilla fighters up to the legislative and executive powers, without seeking to circumscribe their

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78. John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012) at 192.

79. *Ibid.*

80. *Ibid.*

81. *Supra* note 75 at 8.

82. *Ibid* at 11.

83. *Ibid* at 8. Lieber may have had a corps such as Mosby's Rangers in mind when he wrote this.

84. *Ibid* at 5.

85. *Ibid* at 20.

discretion through general rules of law.<sup>86</sup> John Fabian Witt argues that Lieber did more than just declare the law, however. He states that Lieber's chief innovation was to focus on the characteristics that made men soldiers.<sup>87</sup> These characteristics included open and visible manifestations of the legitimacy and permanency of the fighting group, such as uniforms, insignia, and the permanence of the regiment.<sup>88</sup> This moved the law, for the first time, away from the sovereign authorization rule and toward the view that something more was required for lawful belligerency, although that something had not yet been articulated with precision.

The legal rules respecting belligerent qualification have always had at their core issues concerning the right of insurrection, resistance to invasion, and the treatment to be afforded to an occupied enemy population. The rules for distinguishing belligerents from civilians and protecting the latter are in many ways two sides of the same coin, and the customary rules for belligerent qualification and civilian protection grew up together. Civilians have generally been defined in the law as all those persons who are not qualified belligerents; qualified belligerents are those who fight according to the criteria laid out in Annex B of the *Hague Regulations*, so that they might be distinguished from civilians, who are defined negatively as all those persons who possess no belligerent privileges and who are immune from attack.<sup>89</sup>

The *Lieber Code* of 1863, while an important transitional document in the modern laws of war, did not espouse what we now call the principle of civilian immunity, currently expressed in Article 51(3) of the *First Protocol Additional to the Geneva Conventions*.<sup>90</sup> Lieber did recognize a growing usage of distinguishing combatants from non-combatants, when stating in Article 22:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private

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86. *Ibid* at 21-22.

87. Witt, *supra* note 78 at 193.

88. *Ibid* at 193-4; Lieber, *Guerrilla Parties*, *supra* note 75 at 18.

89. The present rules are set out in the *Protocols Additional to the Geneva Conventions of 1977*. See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, International Committee of the Red Cross (ICRC), 8 June 1977, 1125 UNTS 3 art 50(1) (defining "civilians" as "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian") [*Protocol I*]; See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, International Committee of the Red Cross (ICRC), 8 June 1977, 1125 UNTS 609 art 4 [*Protocol II*].

90. *Protocol I*, *supra* note 89.

individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.<sup>91</sup>

Lieber found this to be a growing custom among those peoples he described as “civilized.”<sup>92</sup> Yet he also posited a number of exceptions to this rule, permitting sieges and bombardments of noncombatants,<sup>93</sup> and the starvation of civilians to promote their capitulation.<sup>94</sup> Lieber demonstrated a flexible and pragmatic approach that gave deference to the discretion of military commanders, allowing that civilians should be protected only “as much as the exigencies of war will admit.”<sup>95</sup> Unarmed civilians he divided into those who were loyal and those who were perceived as disloyal to the occupying army. Disloyal civilians were to include those who “sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy.”<sup>96</sup> The “commander will throw the burden of war, as much as lies within his power, on the disloyal citizens.”<sup>97</sup>

The draft code of international law put forth by David Dudley Field largely followed the *Lieber Code* on the issues of belligerent qualification and civilian protection. Using political, rather than military, concepts Field defined “active enemies” to include “disloyal civilians” who, although they had not actually taken up arms, nevertheless “unlawfully give aid and comfort to the opposing belligerent.”<sup>98</sup> Field stated that such civilians could lawfully be killed by any

91. *Lieber Code*, *supra* note 47.

92. *Ibid*, art 25.

93. *Ibid*, art 18 (“When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, to as to hasten on the surrender”). See also art 19 (“Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity”). Compare *Protocol I*, *supra* note 89 art 57 (the stringent requirements that armies must now undertake).

94. *Lieber code*, *supra* note 47 art 17 (“War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy”).

95. *Ibid*, art 22.

96. *Ibid*.

97. *Ibid*, art 156.

98. David Dudley Field, *Draft Outlines of an International Code* (New York: Baker, Voorhis & Company, 1872) at para 746.3 [*Field’s Code*]. Cf *Lieber Code*, *supra* note 47 art 155 (defining disloyal civilians as those who, without taking up arms, sympathize with the rebellion, or give positive aid and comfort to the rebels).

army or occupying force.<sup>99</sup> Concerning the treatment of civilians who were not actively providing aid and comfort to the enemy, Field stated that “[f]or the purpose of self-preservation, a belligerent may ravage or lay waste the territory of the hostile nation.”<sup>100</sup> Again, this closely reproduced similar provisions from the *Lieber Code*.<sup>101</sup> Field’s code did not propose any great innovations in the laws of war—particularly on the points that were most contentious at the Brussels Conference: Field’s proposed norms concerning qualified belligerency and the rights of occupied populations closely followed the *Lieber Code*, and did not take into account the debates then taking place on the European continent.<sup>102</sup> For Lieber and Field, these kinds of reprisals were justified if they brought disloyal citizens and rebellious peasants to heel, and ended the war more quickly. However, it was precisely this idea of the war of reprisals—that “sharp wars are brief”<sup>103</sup>—that would be rejected at Brussels in favour of the view of war as a tournament between great armies.

Lieber’s approach to the problem would be influential in Europe in other ways, however. In preparation for the Brussels Conference, a draft code of the laws of land warfare, provisionally entitled the *Draft Declaration Concerning the Laws and Customs of War (Draft Declaration)*, was drawn up by the Russian jurist Fyodor de Martens and circulated to the various states that were invited to the Conference.<sup>104</sup> Martens had been strongly influenced by Lieber’s example of setting down the laws of war with precision and then issuing them as instructions to armies in the field.<sup>105</sup> Martens thought that this method of articulating and enforcing the laws of war would be appropriate for the international community as a whole: each nation would adopt and enforce an international code of land warfare that had been formulated through the negotiation and consent

99. *Field’s Code*, *supra* note 98.

100. *Ibid* at para 839. Field cites Henry Wheaton & William Beach Lawrence, *Wheaton’s Elements of International Law*, 2nd ed (Boston: Little Brown & Company, 1863) at para 6.

101. *Lieber Code*, *supra* note 47 arts 17-18.

102. F de Martens, *La Paix et la Guerre: La Conférence de Bruxelles 1874, Droits et Devoirs des Belligérants (Leur Application pendant la Guerre d’Orient 1874-1878), La Conférence de La Haye 1899*, translated by N De Sancé (Paris: Arthur Rousseau, 1901) at vi, 77-78.

103. *Lieber Code*, *supra* note 47 art 29.

104. Letter No 7 from Prince Gortchakow to Count Brunnow (Communicated by Count Brunnow to the Earl of Derby) (11 May 1874) in *Published Correspondence Part I*, *supra* note 50 at 5-6. This draft code was referred to by the delegates at the Brussels Conference as the “Original Project,” and the final declaration as the “Final Project” or “Final Protocol.” The entire project of convening the conference and drafting an international code of land warfare is often referred to as the “Russian Project.”

105. *Ibid* at 77-78.

of individual nation states.<sup>106</sup> This was the genesis of the idea of the draft *Brussels Declaration*. At the same time, Johann Bluntschli, a noted scholar of international law at the University of Heidelberg, would translate the *Lieber Code* into German, and it would become the Prussian Code of Land Warfare that was in use during the Franco-Prussian War.<sup>107</sup> The failure of Lieber's code to prohibit the use of irregular troops, to prevent the slaughter of insurgents and suspected insurgents, and to quell international disagreements concerning the behavior of armies towards such actors is unsurprising. Disputes over these rules would come to a head over the *francs-tireurs* called up by the French government during the Franco-Prussian War. The *Lieber Code* could not prevent these atrocities or resolve these disputes. For this, a new international code of land warfare would be required.

### III. THE BRUSSELS CONFERENCE, 27 JULY TO 27 AUGUST 1874

After the main body of France's conventional forces was routed by the armies of Prussia, the provisional government was forced to call up groups of irregular fighters, including the *francs-tireurs*.<sup>108</sup> *Francs-tireurs* were not recognized by Germany, who "treated all these forces, without distinction, as unlawful belligerents, although all were authorized by the French government."<sup>109</sup> The Germans required not only uniforms but also clear evidence of sovereign authorization, for which

each individual irregular combatant was required to have on his person a certificate of his character as a soldier, issued by a legal authority, and addressed to him personally, to the effect that he was called to colors, and was borne on the rolls of a corps organized on a military footing by the French government.<sup>110</sup>

These requirements were impossible to meet<sup>111</sup>—the French government was experiencing significant difficulties outfitting even its remaining regular

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106. *Ibid.*

107. Witt, *supra* note 78 at 327-28, 343. See also George B Davis, "Doctor Francis Lieber's Instructions for the Government of Armies in the Field" (1907) 1:1 Am J Int'l L 13 at 22.

108. *JAG Treatise*, *supra* note 17 at 32.

109. *Ibid.*

110. *Ibid.* at 33.

111. Spaight, *supra* note 18 at 45. Spaight reports that a German jurist had doubted whether "such a demand can be insisted upon."

armies<sup>112</sup>—and large numbers of *francs-tireurs* were executed upon capture.<sup>113</sup> At the Brussels Conference, France sought legal recognition for such irregular combatants, and was supported by many smaller European nations that were also unable to raise and equip professional standing armies of their own.<sup>114</sup> The old sovereign authorization rule was failing to perform the function of distinguishing which combatants were authorized, or protecting captives, and this had resulted in large numbers of casualties. Uncertainty over the applicable rules was a source of contention between the European powers, who disagreed over the terms of the emerging customary law regarding belligerent qualification. The dispute over the *francs-tireurs* concerned “whether an insurgent population in an occupied territory should be considered lawful combatants,”<sup>115</sup> entitled to all the privileges and immunities of prisoners of war.

It was with the goal of clarifying the emerging customs of war that Tsar Alexander II of Russia called the Brussels Conference in 1874. The resolution of this dispute would give rise to the modern laws of belligerent qualification.<sup>116</sup> The original Russian Circular of 17 April 1874 announcing the Conference spoke of international solidarity and fostering consensus among nations; in this way, states might establish with greater clarity the rules of war that would bind all governments and would be issued as instructions to their armies in the field.<sup>117</sup> The Conference was convened in Brussels from 27 July to 27 August 1874. Represented at the Conference were the great powers of Germany, France, Austria-Hungary, the Ottoman Empire, Russia, and Great Britain, as well as the secondary powers of Belgium, Denmark, Spain, Greece, Italy, the Netherlands, Sweden and Norway, and Switzerland.<sup>118</sup> Portugal joined the Conference on the 3rd of August.<sup>119</sup> Several Delegates from the South American states were offered a place on the eve of the Conference, but they declined as they had not been formally

112. Boissier, *supra* note 46 at 243.

113. *JAG Treatise*, *supra* note 17 at 34.

114. *Ibid* at 41-42.

115. Peter Holquist, *The Russian Empire as a Civilized State: International Law as Principle and Practice in Imperial Russia, 1874-1878* (Washington, DC: National Council for Eurasian and East European Research, 2004) at 13.

116. *Hague Regulations* of 1899 and 1907, *supra* note 3.

117. Letter No 7 from Prince Gortchakow to Count Brunnow (Communicated by Count Brunnow to the Earl of Derby) (11 May 1874) in *Published Correspondence Part I*, *supra* note 50 at 6.

118. Letter No 5 from Sir A Horsford to the Earl of Derby (31 July 1874) in *Horsford Correspondence*, *supra* note 20 at 4.

119. Letter No 24 from Sir A Horsford to the Earl of Derby (7 August 1874), *Horsford Correspondence*, *supra* note 20 at 29.

invited.<sup>120</sup> Persia was invited but did not attend for reasons that have not been recorded.<sup>121</sup> The United States was also invited to the Conference, but declined.<sup>122</sup>

Attendees brought diverse interests to the Conference. The secondary powers Spain, Holland, Belgium, and Switzerland maintained the legitimacy of calling up irregular forces to fight an occupying power.<sup>123</sup> Great Britain considered *francs-tireurs* as lawful combatants, their status similar to that of privateers. The Earl of Denbigh stated as much in a House of Commons debate on the war in 1871,<sup>124</sup> and this view would be echoed by Cavendish Bentick, who stated that “belligerent Powers had to the full as much right to employ privateers as Francs-Tireurs, torpedoes, or Gardes Mobiles.”<sup>125</sup> Germany, on the other hand, strenuously argued against this practice, and instead demanded that irregular forces be outlawed, as their use would only result in military escalation and cruel reprisals.<sup>126</sup> Martens “argued that the German claim that military necessity took precedence over all else in fact amounted to a denial of international law as a principle.”<sup>127</sup> The German position was thus similar to that of earlier Confederate leaders: They would be guided by military necessity rather than foreign laws imposed by their enemies.<sup>128</sup> An international code of land warfare would instead be based upon principles of humanitarianism, and would “mitigate the horrors of war, in accordance with the legal awareness and humanism that were growing among the general public.”<sup>129</sup>

In fact, at this time several groups in Europe were advocating for a more complete international code for the conduct of warfare. These included the International League for Peace and Freedom and the Association for Reform and Codification of the Law of Nations, which shared the goal of wanting to impose

120. Letter No 3 from Sir A Horsford to the Earl of Derby (28 July 1874) in *Horsford Correspondence*, *supra* note 20 at 3.

121. Letter No 3 from Lord A Loftus to the Earl of Derby (13 July 1874) in *Published Correspondence Part II*, *supra* note 50 at 2.

122. Letter No 1 from the Earl of Derby to Sir A. Horsford (Foreign Office, 25 July 1874) in *Horsford Correspondence*, *supra* note 20 at 1.

123. Spaight, *supra* note 18 at 50.

124. UK, HL, *Parliamentary Debates*, 3rd ser, vol 207, col 197 at 202 (19 June 1871) (Earl of Denbigh).

125. UK, HC, *Parliamentary Debates*, 3rd ser, vol 205, col 1469 at 1478 (21 April 1871).

126. Letter No 34 from Sir A Horsford to the Earl of Derby (17 August 1874) in *Horsford Correspondence*, *supra* note 20 at 62.

127. Holquist, *supra* note 115 at 5.

128. Witt, *supra* note 78 at 192-3.

129. Vladimir V Pustogarov, “Fyodor Fyodorovich Martens (1845-1909) – A Humanist of Modern Times” (1996) 312 *Int’l Rev Red Cross* 300 [Pustogarov, “Humanist of Modern Times”].



the rule of law on states' conduct of war.<sup>130</sup> The Society for the Improvement of the Condition of Prisoners of War, led by the Comte de Houdetot and Henri Dunant, had originally proposed a conference in Paris to discuss the adoption of an international convention relating to prisoners of war, but this plan was preempted by the Russian project.<sup>131</sup> The Society called off the Paris Conference in deference to Russia, but when they arrived in Brussels with their delegation, they were denied entry by the state delegates, who determined that only "European Powers such as those invited, could be allowed to attend or take part in the in the proceedings of the Conference."<sup>132</sup> None of these non-governmental groups sought to adopt the Prussian Code of Land Warfare translated from Lieber.

Baron Jhomini, the principal Russian delegate and Chairman of the Conference, made it clear in his opening statement that what was at stake was the very idea of war itself in the modern age.<sup>133</sup> Germany's views were essentially militaristic—echoing the "sharp wars are brief" thesis earlier put forward by Lieber and Field.<sup>134</sup> Their argument assumed that military violence was an effective—perhaps even the preeminent—tool for maintaining security and social order and for carrying out political goals and administrative tasks. Baron Jhomini, on the other hand, stated that wars should be made more and more rare, and until this could take place their harms should be mitigated as much as possible.<sup>135</sup> He reiterated the words of the *St. Petersburg Declaration*—that the only legitimate goal of war is to weaken the military forces of the enemy, and to achieve as quickly as possible restoration of a durable and lasting peace.<sup>136</sup> He stated that, at the present time:

[V]ery contradictory ideas prevail concerning war. There are those that would like it made more terrible so as to make it less frequent, while others would turn it into a tournament between regular armies with civilians simply as onlookers. People must know where they stand... It is easier to do one's duty than to define it. We must, therefore, tell everyone what his duty is.<sup>137</sup>

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130. Boissier, *supra* note 46 at 285.

131. Letter No 2 from The Universal Alliance, London Branch to the Earl of Derby (16 April 1874) in *Published Correspondence Part I*, *supra* note 50 at 2.

132. Letter No 19 from Sir A Horsford to the Earl of Derby (6 August 1874) in *Horsford Correspondence*, *supra* note 20 at 23.

133. Boissier, *supra* note 46 at 292.

134. *Field's Code*, *supra* note 98 and accompanying text.

135. Letter No 5 from Sir A Horsford to the Earl of Derby (31 July 1874) in *Horsford Correspondence*, *supra* note 20 at 5.

136. *Ibid* at 6.

137. Letter No 5 from Sir A Horsford to the Earl of Derby (31 July 1874) in *Horsford*, *supra* note 20 at 5; translated & reprinted in Boissier, *supra* note 46 at 292.

While the delegates at the Brussels Conference generally agreed with the above view of war, the fault lines developed along pragmatic rather than ideological lines. The secondary powers were simply unable to organize and equip the kind of regular military that this tournament of war demanded, and that Germany already possessed; instead, they maintained that they needed to rely on the conscription of irregular forces to secure their defense against foreign invasion.

One of the great advances of the Brussels Conference was the formulation of the four organizational criteria for belligerent qualification, later adopted into the *Hague Regulations*<sup>138</sup> and Article 4 of the *Third Geneva Convention*, which forms the basis for our present laws governing belligerent qualification.<sup>139</sup> An early formulation of these rules was delivered in a paper read by Henry Richmond Droop, a barrister of Lincoln's Inn Fields, to the Juridical Society of London on 30 November 1870.<sup>140</sup> Droop's paper addressed the most pressing topic in international law of the day—the status of the *francs-tireurs*—and he articulated many of the key concepts of modern international humanitarian law. In particular, Droop espoused the four organizational criteria and linked the law of belligerent qualification with the emerging principle of civilian immunity. He stated that troops must be required to distinguish themselves from civilians in order that civilians might be protected from the ravages of war<sup>141</sup>—the idea that now forms the basis of humanitarian law and the modern principles of distinction and civilian immunity.

Droop recognized that sovereign authorization remained, at that time, the generally accepted rule for belligerent qualification.<sup>142</sup> However, he argued that this rule was no longer desirable for regulating present-day conflicts, and he proposed instead a rule for belligerent qualification based upon objective and

138. *Hague Regulations*, *supra* note 3.

139. *Third Geneva Convention*, *supra* note 67.

140. *JAG Treatise*, *supra* note 17 at 47. Henry Richmond Droop was a lawyer and mathematician. He also studied proportional representation in elections, and was an early originator of game theory, as well as the single transferable vote system. See HR Droop, "On Methods of Electing Representatives" (1881) 44:2 *J Statistical Soc'y London* 141.

141. HR Droop, "The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Soldiers" (30 November 1870) in *Papers Read Before the Juridical Society: 1863-1870*, vol III (London: Wildy & Sons Law Booksellers and Publishers, 1871) 705 at 716 [Droop, "Irregular Combatants"]; see also HR Droop, "The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops" (17 December 1870) 15 *Solicitors' J & Rep* 121 (reprinting an abridged version of the full paper).

142. Droop, "Irregular Combatants," *supra* note 141 at 717.

readily observable criteria.<sup>143</sup> Droop rejected the sovereign authorization rule<sup>144</sup> on the grounds that sovereign authorization alone would make it impossible to distinguish between troops and civilians, or to enforce respect for the laws of war on the part of belligerents.<sup>145</sup> Civilians should not be attacked in war, and protecting them is the responsibility of the armed forces who would wage that war.<sup>146</sup> At the same time, Droop argued that his rules for belligerent qualification would benefit armies as well. Regular troops must have some security for reciprocity from enemy troops, and

[t]his security they can hardly have unless the combatants they are fighting against are so connected with the national army that any part of this army can be held responsible for their conduct. ... Therefore to entitle them to the privileges of regular troops they ought to be under the actual control of officers who are in communication with, and responsible to, the commanders of the national army...<sup>147</sup>

This result could only be accomplished by clear standards for belligerent qualification, which Droop outlined as follows:

1. They must have an authorization from an established Government or from some de facto substitute for such a government.
2. They must be under the actual control of officers who are recognized by, and responsible to, the chief military authorities of the state.
3. They must themselves observe the rules of war.
4. All combatants intended to act singly or in small parties must have a permanent distinctive uniform, but this is not indispensable for troops acting together in large bodies.
5. Levies *en masse* of the whole population are legitimate combatants provided they comply with the above conditions, but not otherwise.<sup>148</sup>

Droop's formulation of belligerent qualification set out the basic outlines and rationale for the *Brussels Declaration*, including the importance of discipline maintained through a clear chain of command, yet it differs from the final *Brussels Declaration* in three key respects. First, Droop would have eliminated

143. *Ibid.*

144. *Ibid* at 713; see also Vattel, *supra* note 44 at para III.XV.228.

145. Droop, "Irregular Combatants," *supra* note 141 at 713.

146. *Ibid.*

147. *Ibid* at 715.

148. *Ibid* at 720. Droop notes that these conditions go far beyond what Lieber and Bluntschli, "the most recent authorities who have treated that subject at any length," would have required (*ibid*), and he calls for an international convention to settle the rules in a more definitive manner (*ibid* at 724).

entirely the ancient concept of *levée en masse*. Instead, he required that insurgents follow the same organizational criteria as regular troops to distinguish themselves from civilians; otherwise, it would be too difficult to identify and protect the non-combatant population. Second, Droop significantly relaxed the requirements for uniforms. Providing uniforms to a large army takes considerable time and expense, and therefore uniforms are not always available, provided troops have other means of distinguishing themselves.<sup>149</sup> Third, Droop recognized that a *de facto* authority could authorize the use of force, provided that it is able to discipline its troops. These last two ideas would be rejected at the Brussels Conference, but similar ideas would appear a hundred years later in *Protocol I*.<sup>150</sup>

The modern definition of a “lawful combatant” first appeared in its essential form in Article 9 of the *Draft Declaration* presented at Brussels, and was based upon Droop’s organizational criteria, including wearing a distinctive insignia, carrying arms openly, and being subsumed under a nation state’s military chain of command so that the laws and customs of war can be enforced by a qualified public authority. Article 9 of the *Draft Declaration* that was placed before the Brussels Conference for discussion read as follows:

The rights of belligerents shall not only be enjoyed by the army, but also by the militia and volunteers in the following cases:

1. If, having at their head a person responsible for his subordinates, they are at the same time subject to orders from headquarters;
2. If they wear some distinctive badge, recognizable at a distance;
3. If they carry arms openly; and
4. If, in their operations they conform to the laws, customs, and procedure of war.

Armed bands not complying with the above-mentioned conditions shall not possess the rights of belligerents; they shall not be considered as regular enemies, and in the case of capture shall be proceeded against judicially.<sup>151</sup>

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149. *Ibid.*

150. *Protocol I*, *supra* note 89 art 44(3) (allowing combatants to distinguish themselves solely by carrying arms openly); and art 43(1) (requiring that a Party to a conflict, even if that Party is not recognized by an adverse Party, may qualify its armed forces provided that it institutes a disciplinary system which ensures compliance with the laws of war).

151. Inclosure in letter No 52 from Sir A Horsford to the Earl of Derby, “Report on the Proceedings of the Brussels Conference on the proposed Rules for Military Warfare” (7 September 1874) in *Horsford Correspondence*, *supra* note 20 at 164 [“Report of the Conference”].

This final sentence was intended to prevent the reprisal killings that were undertaken against the *francs-tireurs* by the Germans. However, many of the delegates thought that it remained too harsh, and proposed that it be struck altogether.<sup>152</sup> The final *Brussels Declaration* states in Article 9:

The laws, rights and duties of war, apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognisable at a distance [so that they may be distinguished from the civilian population];
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.<sup>153</sup>

The *Brussels Declaration* thus formalized the position that sovereign authorization was insufficient; a government could authorize only those troops that met the four core organizational criteria.

There is a similarity between Article 9 of the *Draft Declaration* and the criteria outlined by Droop at Lincoln's Inn.<sup>154</sup> Martens had read Droop's speech to the Juridical Society of London when preparing for the Brussels Conference,<sup>155</sup> as he also did the *Lieber Code* and Lieber's treatise on *Guerrilla Parties*.<sup>156</sup> Indeed, Martens had studied the topic closely before drafting the *Brussels Declaration*. He states, "During the war of 1870-1871, being close to the theatre of war, I collected from the newspapers of all countries and through personal contacts all the facts which established a violation of the laws and customs of war. Already I had come to the conclusion that the establishment by the governments themselves of these laws and customs was entirely necessary in order to prevent endless occupations and merciless reprisals."<sup>157</sup> In this, Martens was in agreement with Droop,<sup>158</sup> particularly Droop's proposal to convene an international

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152. *Ibid* at 165.

153. "Brussels Declaration," *supra* note 1 art 9.

154. *JAG Treatise*, *supra* note 17 at 47. The *Treatise* also notes that the *Hague Regulations* are essentially the criteria outlined by Droop ("Irregular Combatants," *supra* note 141), and that "we are now using rules based upon the experience in the Franco-Prussian war" (*ibid* at 47-48).

155. Martens, *supra* note 102 at 96.

156. Witt, *supra* note 78 at 343.

157. Vladimir V Pustogarov, *Our Martens: F.F. Martens, International Lawyer and Architect of Peace* (London: Kluwer Law International, 2000) at 109 [Pustogarov, *Our Martens*].

158. Martens, *supra* note 102 at 96.

convention, such as those held earlier at Paris and Geneva, for the purpose of settling these matters.<sup>159</sup>

Even more contentious than the criteria for belligerent qualification was the narrower question of whether inhabitants of an invaded or occupied territory had the right to take up arms in the national defence. Article 10 of the *Brussels Declaration* recognized *levées en masse*—members of the population who take up arms spontaneously to repel an invading force—as qualified belligerents without their having to adhere to all four organizational criteria:

The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.<sup>160</sup>

The population of a territory that was already occupied thereby lost the right to resist through force of arms, and lawful belligerents were not to include “groups of the inhabitants of an occupied territory who take up arms subsequent to the occupation to harass or engage the occupant.”<sup>161</sup> Even the German delegate at the Brussels Conference admitted that, “amongst those unfortunate peasants who were shot in virtue of the laws of war, many were guilty of nothing more than having obeyed an instinctive and almost irresistible sentiment of local patriotism.”<sup>162</sup> However, Germany also took the position that countries must develop a strong military organization, so as to enforce the laws and usages of war, and ensure that military force would be effective.<sup>163</sup> Article 10 was therefore a compromise solution: the *Brussels Declaration* declined to require that *levées en masse* follow the organizational requirements for belligerent qualification laid down in Article 9, but also declined to abolish the concept, instead restricting it temporally to the time of invasion.

This contentious issue was debated during a tense meeting on 14 August 1874. Prior to the Conference, the Germans had declared their position on irregular troops as follows:

With regard to the question of volunteer forces - “Francs-tireurs” and “levées en masse” - Major-General Walker learns that, as the Germans have no such auxiliary forces, and as the Landsturm is to be put under legal and Parliamentary control, the

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159. *Ibid* at 96-97.

160. Green, *supra* note 54 at 129-30.

161. *Ibid* at 130.

162. Spaight, *supra* note 18 at 49.

163. Letter No 34 from Sir A Horsford to the Earl of Derby (17 August 1874) in *Horsford Correspondence*, *supra* note 20 at 62.

policy will be to endeavour to force the French into a like course, by discouraging all immunities to volunteers and free corps.<sup>164</sup>

The Germans reiterated this position at the Conference, stating that it was expedient “in the interests of humanity that no encouragement be given to the inhabitants of an occupied district to rise against the invader”—as the French had done in the late conflict—“as such a course would lead to repressive measures, which, instead of diminishing the horrors of war, would tend to increase them.”<sup>165</sup> This is essentially the same view of war espoused by Lieber and Field.

None of the other delegates present at the Conference supported this view. The Belgian delegate, Baron Lambertmont, pointed out the practical difficulties of organizing and funding a regular army of the kind deployed by Germany. He pointed out that, despite the time and sacrifices they had put into the defense of their countries, the armed forces of the secondary nations would always be inferior to those of the great powers; he spoke, therefore, in glowing terms of the necessity for such countries to preserve those “patriotic” and “heroic” sentiments that led their subjects to rise and defend their nations.<sup>166</sup> Concerning the proposed punishment of irregular forces who resisted an occupying power, he stated that

if citizens were to be sacrificed for having attempted to defend their country at the peril of their lives, they need not find inscribed on the post at the foot of which they are about to be shot, the Article of a Treaty signed by their own Government, which had in advance condemned them to death.<sup>167</sup>

Privately, the Belgian Under-Secretary communicated to Major-General Horsford in plainer terms that:

[A]ny inhabitants who might rise in rear of the invaders, would be liable to be treated by the enemy with the utmost rigour, whereas (to make use of the words employed by the Under-Secretary himself) the inhabitants would most probably be shot by the Belgians themselves if they did not rise in defence of their own standard; and, he continued, neither the Government nor even the King would dare to propose to them any other course.<sup>168</sup>

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164. Letter No 40 from Mr Adams to the Earl of Derby (22 June 1874) in *Confidential Correspondence Part I*, *supra* note 51 at 23.

165. Letter No 34 from Sir A Horsford to the Earl of Derby (17 August 1874) in *Horsford Correspondence*, *supra* note 20 at 62.

166. “Séance du 14 Août, 1874” in *Horsford Correspondence*, *supra* note 20 at 84 [“Séance du 14 Août, 1874”].

167. “Report of the Conference,” *supra* note 151 at 175.

168. Letter No 11 from Sir A Horsford to the Earl of Derby (3 August 1874) in *Horsford Correspondence*, *supra* note 20 at 12-13.

The delegates at Brussels thus recognized the impossible position in which their current laws placed those inhabitants—peasant fighters who were expected to sacrifice their lives in the interests of their sovereign—even as they were eager to establish their powers and prerogatives on the backs of those very men. During the Conference, no delegate phrased this as plainly as the Belgian Under-Secretary. Instead, other delegates couched the point in terms of such nationalist sentiments as heroism and patriotism.

The Dutch delegate clearly phrased the problem felt by the secondary powers by pointing out that in outlawing irregulars they were essentially being required to raise and equip a standing army along the lines of what Germany had done—an impossible task for many. He remarked that, in practical terms, the effect of outlawing irregular troops would mean that the secondary powers would either have to compromise their national defense or institute compulsory conscription as Germany had done—a course many were not prepared to accept.<sup>169</sup> The new rules of belligerent qualification proposed at Brussels favored the disciplined and well-equipped regular forces of the great powers. The secondary powers were forced either to develop inferior armies along the same lines or see their citizenry subjected to a harsh war of reprisals.

The chief German Delegate, General de Voights-Rhetz, recognized that the inhabitants of an invaded territory had the right of self-defence, but argued that this defence must be organized, and this organization must be established in peacetime. He proposed, for example, that the territory be divided into quarters in which the levee would be called up, and local notables could be appointed to exercise command. It was a small matter, he believed, to ask members of the levee to affix a distinctive symbol to their apparel, to distinguish themselves from marauders and bandits and thus protect the local population.<sup>170</sup> What he was proposing was essentially an organized reserve militia similar to the *Landsturm* as it was then organized in Germany. Germany was all but mandating that every nation be required to organize a similar standing reserve force. Colonel Hammar of Switzerland agreed with Germany on this point; rising up in the national defence was an act of patriotism, and while this was highly desirable, the defence must be organized.<sup>171</sup> Baron Jhomini of Russia interjected, stating that if the inhabitants of an invaded country were to be considered as qualified belligerents, then what would prevent such a war from becoming simply a war of

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169. "Séance du 14 Août, 1874," *supra* note 166 at 85.

170. *Ibid.*

171. *Ibid* at 83.



extermination?<sup>172</sup> The Spanish delegate opined that a lawful belligerent was simply any inhabitant who, as a result of patriotism, took up arms against the enemy. The German delegate replied that this assertion did not meet the chief difficulty, which was to distinguish a patriotic belligerent from a common brigand, and that the four organizational criteria had to be applied in order to do this.<sup>173</sup> The Russian delegate, General de Leer, replied that this was so, and that the four conditions were there to better organize the defence; this would prevent a lengthy insurrection and therefore a lengthy war of reprisals.<sup>174</sup> Delegates queried what resolution would best meet humanitarian goals, support the state's consolidation over the use of military force, and prevent the escalation of conflicts into total war.

Baron Lambermont, the Belgian delegate, noted that there were difficulties with the ideal of a universal and obligatory military service, such as that being proposed by Germany, Russia, and Switzerland.<sup>175</sup> He noted that this goal would take considerable time and expense; even so, the secondary powers would always have numerically inferior armed forces compared to the Great Powers.<sup>176</sup> This inferiority needed to be balanced out by the patriotism and heroism of the nation.<sup>177</sup> What else could such nations fall back on in times of invasion? Several delegates were in agreement with Lambermont on this point, including those of the Netherlands, Portugal, Spain, Switzerland, and Turkey.<sup>178</sup> After reading the minutes, the Earl of Derby, then British Secretary of State for Foreign Affairs, rejected these articles very succinctly, stating they "would have been greatly to the advantage of the Powers having large armies constantly prepared for war, and systems of universal compulsory military service."<sup>179</sup> The effect of Article 10 was that unorganized warfare would be permitted, but only if the inhabitants rose spontaneously to repel an enemy force at the time of invasion and otherwise respected the laws and customs of war. An insurgency against an established occupation would not be permitted. This rule had the effect of establishing both the rights of the *levées en masse* to be treated according to the law, as well as the right of conquest of an occupying power.

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172. *Ibid.*

173. *Ibid.*

174. *Ibid* at 73-4.

175. *Ibid* at 84.

176. *Ibid.*

177. *Ibid.*

178. "Report of the Conference," *supra* note 151 at 160.

179. Letter No 3 from The Earl of Derby to Lord A Loftus (20 January 1875) in *Accounts and Papers of the House of Commons* vol 82 (London: Harrison and Sons, 1875) 1 at 3 [*Accounts of HC*].

Discussed also at the Conference were a number of innovations in the laws of war to protect civilians and promote more humanitarian conduct. In his *Draft Declaration*, Martens had set out five general principles of international law that he felt were uncontroversial, and that were among the most important of the general principles that belonged in an international code of land warfare.<sup>180</sup> These articles were excised from the final *Brussels Declaration*. They were not rejected so much as set aside as being too theoretical, although they laid the groundwork for several Articles of the final *Brussels Declaration*<sup>181</sup> and were indeed to be found in treaties and later in codes of land warfare. They state:

- I. An international war is a state of open conflict between two independent States (acting alone or with allies), and between their armed and organized forces.
- II. Operations of war must be directed exclusively against the forces and the means of making war of the hostile State, and not against its subjects, so long as the latter do not themselves take any active part in the war.
- III. In order to attain the object of the war, all means and all measures in conformity with the laws and customs of war, and justified by the necessities of war, shall be permitted. The laws and customs of war forbid not only useless cruelty and acts of barbarity committed against the enemy; they furthermore require from the competent authorities the immediate punishment of those guilty of such acts, provided they have not been provoked by absolute necessity.
- IV. The necessities of war cannot justify either treachery towards the enemy, or declaring him an outlaw, or the employment of violence or cruelty towards him.
- V. In the event of the enemy not observing the laws and customs of war, as laid down in the present Convention, the opposing force may resort to reprisals, but only as an inevitable evil, and without ever losing sight of the duties of humanity.<sup>182</sup>

One of the most important of these principles was a recognition of the general legal principle mandating civilian immunity from attack. This provision is a forerunner to the general protection of civilian immunity in Article 51(3) of *Protocol I* that was adopted nearly a century later,<sup>183</sup> and is the earliest formulation of this principle in an international legal instrument.

Delegates discussed other protections for civilians as well. The Conference received a petition from the inhabitants of the town of Antwerp, asking that

180. Martens, *supra* note 102 at 112.

181. "Report of the Conference," *supra* note 151 at 161.

182. *Ibid.*

183. *Protocol I*, *supra* note 89.

bombardments be confined to military forces only, not the quarters of a town where peaceful inhabitants are residing.<sup>184</sup> This proposition received general favour, and it is notable how far it departs from the principle earlier declared in the *Lieber Code* that “[t]he citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war,”<sup>185</sup> and more specifically that military commanders need not inform the enemy of their intention to bombard a place so that non-combatants might be evacuated.<sup>186</sup> The *Lieber Code* also provided that “[i]t is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.”<sup>187</sup> The legitimacy of civilian reprisals was giving way to the “tournament” ideal of warfare.

The *Draft Declaration* also contained three short articles limiting, although not abolishing, reprisals. They stated that reprisals are admissible in extreme cases only, when violations of the laws and customs of war have unquestionably been violated by the enemy, that reprisals must not be disproportionate, and that they are allowed only on the authority of the commander in chief.<sup>188</sup> However, the parties agreed not to discuss this section, as ill feelings were still running high over the late war and its violent reprisals. Horsford stated, “It seemed to be the general feeling that occasions on which reprisals of a severe character had been executed were of far too recent a date to allow the practice to be discussed calmly.”<sup>189</sup> It was not thought propitious to undo all of the good work that had been accomplished up to that late date by opening up such a difficult subject.<sup>190</sup> Some parties wanted reprisals abolished entirely, and faulted the *Draft Declaration* for failing to do so. Baron Jhomini clarified that the intention of the Russian Project was to limit reprisals, not to legitimate them.<sup>191</sup> The rules concerning reprisals were uncertain and often left up to the exigencies of military necessity.<sup>192</sup> He had hoped that the ability of members of the Conference to address so serious and repugnant a

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184. Inclosure No 3 in letter No 12 from Sir A Horsford to the Earl of Derby (2 August 1874) in *Horsford Correspondence*, *supra* note 20 at 16.

185. *Lieber Code*, *supra* note 47 art 21.

186. *Ibid* art 19.

187. *Ibid* art 17.

188. “Report of the Conference,” *supra* note 151 at 179-80.

189. *Ibid* at 180.

190. *Ibid*.

191. Inclosure in letter No 41 from Sir A Horsford to the Earl of Derby (24 August 1874), “Protocols of the Meeting of the Commission of Delegates of the Conference, No. 16 - Meeting of 20 August, 1874” in *Horsford Correspondence*, *supra* note 20 at 112.

192. *Ibid*.

fact of war would have a positive moral bearing on limiting the use of reprisals in the future.<sup>193</sup>

Despite the above achievements in setting out a draft code of the laws of land warfare, the *Brussels Declaration* was signed but not ratified by the parties present.<sup>194</sup> There were a number of reasons—mainly political—why this was so. Great Britain was determined not to undertake any new legal obligations as a result of the Brussels Conference, and although the Government sent a representative, Major-General Horsford was instructed not to participate in any of the discussions at the Conference.<sup>195</sup> This antipathy stemmed mainly from Britain's reluctance to see any changes to maritime law or the laws governing naval warfare. The importance of the national security issues at stake is demonstrated by the Earl of Derby's instructions to the foreign missions requiring they use cypher in all communications concerning the Brussels Conference.<sup>196</sup> Thomas Wright Fenton, a prominent British shipping magnate, wrote an impassioned letter to the Earl of Derby, stating that in his opinion the chief aim of the Russian project was to get the 1856 *Declaration of Paris* accepted as law.<sup>197</sup> That declaration, signed at the end of the Crimean War (1853-6), set out new rules of naval warfare, including an agreement that belligerents would not seize enemy goods on neutral vessels or neutral goods on enemy vessels, as well as an explicit abolition of privateering.<sup>198</sup> The Earl of Derby informed Lord Loftus at the Foreign Office that "Her Majesty's Government are fully determined not to enter into any discussion of the rules of international law by which the relations of belligerents are guided, or to undertake any new obligations or engagements of any kind in regard to general principles."<sup>199</sup> In fact, the Earl of Derby maintained

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193. *Ibid.* See also *Hostage Trial*, *supra* note 19. This case permitted civilian reprisals of a similar nature committed by German forces during World War II, but this view was rejected by the UN War Crimes Commission.

194. Letter No 57 from M Solvyns to the Earl of Derby (19 September 1874) in *Horsford Correspondence*, *supra* note 20 at 187. This lists the signatories to the *Brussels Declaration*, and it includes delegates from each country in attendance, including Major-General Horsford of Great Britain, the delegates of France, being Baron Baude and General Arnaudeau, as well as the jurists Martens and Bluntschli.

195. Letter No 1 from the Earl of Derby to Sir A Horsford (25 July 25 1874) in *Horsford Correspondence*, *supra* note 20 at 2.

196. Letter No 74 from Sir E Harris to the Earl of Derby (20 July 1874) in *Confidential Correspondence Part II*, *supra* note 51 at 34.

197. Letter No 34 from Mr Fenton to the Earl of Derby (17 June 1874) in *Confidential Correspondence Part I*, *supra* note 51 at 21.

198. *Declaration Respecting Maritime Law*, Paris, 16 April 1856, arts 1-3.

199. Letter No 60 from the Earl of Derby to Lord Loftus (4 July 1874) in *Confidential Correspondence Part I*, *supra* note 51 at 33.

that before agreeing to send any delegate to the Brussels Conference, Great Britain must obtain assurances from the Russian Government that the project “shall not entertain, in any shape, directly or indirectly, anything relating to maritime operations or naval warfare.”<sup>200</sup> He later declared as much in the House of Lords, and many in Europe thought that this speech delivered a decisive “death blow” to the Russian project before it had even begun.<sup>201</sup>

The British position had considerable influence on other countries. The Spanish Minister of Foreign Affairs echoed the British position closely, stating that at the Brussels Conference, the “Spanish Government cannot accept any decision which would tend to make obligatory the suppression of privateering, or to prevent the capture of goods on enemy vessels.”<sup>202</sup> The Ottoman delegate, who attended for the first time only on the 18th of August near the end of the Conference—and thus missed the crucial discussions of Article 10 on 14 August—stated that his role was limited to assisting the Conference and taking part in the deliberations, but that he would not express any but a personal opinion, and formally reserved any expression of agreement that would bind his government.<sup>203</sup>

Great Britain was given the opportunity to lead the smaller powers in achieving consensus and ratifying the *Brussels Declaration*, but refused to do so. In a confidential communication with the Earl of Derby, Horsford stated that Count Chotek, the delegate from Austria-Hungary, had approached him privately, and that “[h]is object apparently was to impress upon me that the smaller States having Constitutional Governments, were prepared to regulate their conduct with regard to the Conference according to the line which England might take.”<sup>204</sup> Chotek put it to Horsford that English alignment with the secondary powers would induce France and Austria to join in; if the Russian Emperor received the assent of these countries to its *Brussels Declaration*, then England’s “alliance with

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200. *Ibid.*

201. Letter No 19 from Mr Lumley to the Earl of Derby (8 July 1874) in *Confidential Correspondence Part II*, *supra* note 51 at 11.

202. Letter No 58 from Mr Macdonell to the Earl of Derby (18 July 1874) in *Confidential Correspondence Part II*, *supra* note 51 at 26.

203. Inclosure in letter No 42 from Sir A Horsford to the Earl of Derby, “Protocoles des Séances de la Commission déléguée par la Conférence (Séance du 21 Août, 1874)” (25 August 1874) in *Horsford Correspondence*, *supra* note 20 at 114.

204. Letter No 39 from Sir A Horsford to the Earl of Derby (22 August 1874), in *Horsford Correspondence*, *supra* note 20 at 102.

Russia would be strengthened, and Germany would not be drawn into a closer intimacy with Russia, which might otherwise be the case.”<sup>205</sup>

Not only was Great Britain not interested in this diplomatic manoeuvre, the Earl of Derby excoriated in its entirety the Russian project of a draft code of land warfare. He stated that

there is no possibility of an agreement upon the really important Articles of the Russian Project; that the interests of the invader and the invaded are irreconcilable; and that, even if certain rules of warfare could be framed in terms which would meet with acquiescence, they would prove to exercise little more than that fictitious restraint deprecated by the Russian Government at the opening of the Conference.<sup>206</sup>

The Earl of Derby took the position that there was no use in taking part in any further discussions or conferences codifying the laws of war, and he informed the Russian Emperor that it was the duty of Great Britain “to firmly repudiate... any project for altering the principles of international law upon which this country has hitherto acted, and above all to refuse to be a party to any agreement, the effect of which would be to facilitate aggressive wars, and to paralyze the patriotic resistance of an invaded people.”<sup>207</sup>

The German government also attended the Conference with no plans to enter into a draft code. The British representative in Berlin, Mr. Adams, learned through confidential quarters that Prince Bismarck felt that he could not refuse the proposals of the Emperor of Russia, but that this was immaterial since he would simply let the project for a draft code of land warfare falter under its own weight.<sup>208</sup> Relations with Russia would be improved if Germany was seen to acquiesce in the project. As a confidential German source stated to Mr. Adams,

It, however, is calculated that the members will soon find out that so vast a programme cannot be executed by them at once; that there will be need of special Commissioners to examine into various subjects, that, consequently, an early adjournment will be found necessary, and thus, for the present at least, nothing will come of the Conference.<sup>209</sup>

The Conference turned out to be more successful than the Germans had anticipated. A second conference was to be scheduled for 1875, after each

205. *Ibid.*

206. Letter No 3 from the Earl of Derby to Lord Loftus (20 January 1875) in *Accounts of HC 2* at 6.

207. *Ibid.* at 7.

208. Letter No 43 from Mr Adams to the Earl of Derby (22 June 1874) in *Confidential Correspondence Part I, supra* note 51 at 24.

209. *Ibid.*

government had had time to submit the *Brussels Declaration* to their experts for further study. Great Britain once again refused to participate.<sup>210</sup> For their part, the French government stated that they were “not disposed to be parties to any international agreement which would restrict the patriotic efforts of a nation to defend their country against invasion.”<sup>211</sup> With the deepening of the Balkan Crisis in 1875, followed by the outbreak of the Russo-Turkish War in 1877, Russia was forced to lay aside any further diplomatic conferences; the Brussels project of codifying the international laws of war faltered under the resurgence of full-scale war in Europe.<sup>212</sup>

#### IV. THE BRUSSELS CONFERENCE’S LEGACY FOR INTERNATIONAL HUMANITARIAN LAW

The Conference at Brussels was, according to Martens himself, a “complete failure.”<sup>213</sup> Not only was the *Brussels Declaration* not ratified, but the very idea of codifying the international laws of war by the mutual agreement of states was called into doubt. This result was due in large part not to the nature of codification or to the content of the proposed laws themselves, but to diplomatic discord and a general lack of political will on the part of major powers to bind themselves to new laws. The Brussels Conference nevertheless had an enormous impact on the idea of law in the international arena, particularly the law most closely associated with state sovereignty and power. The debates that crystallized at Brussels brought the great powers to the threshold of a new understanding of the nature of law and its role in international relations. This would enable the ideas first presented at Brussels to triumph 25 years later, when the *Brussels Declaration* would form the basis of the *Hague Conventions* of 1899 and 1907.<sup>214</sup> As Vladimir Pustogarov states, “an important role of the Brussels Conference consisted of overcoming the atmosphere which existed [against codifying the

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210. Martens, *supra* note 102 at 116. See also letter No 31 from the Earl of Derby to Mr Lumley (15 February 1875) in *Confidential Correspondence Part IV*, *supra* note 51 at 27.

211. Letter No 10 from Sir A Buchanan to the Earl of Derby (21 December 1874) in *Confidential Correspondence Part IV*, *supra* note 51 at 10.

212. Martens, *supra* note 102 at 118.

213. Pustogarov, *Our Martens*, *supra* note 157 at 113.

214. *Hague Regulations*, *supra* note 3.

laws of war] and laying the basis for further creative work.”<sup>215</sup> It was also in keeping with public opinion in Europe at the time, helping to both reflect and reinforce more humanitarian norms in the conduct of warfare.<sup>216</sup>

The *Draft Declaration* and the final *Brussels Declaration* that followed are the first formal articulations of the modern rules of belligerent qualification and the principle of distinction between civilian and military targets: Belligerent qualification belongs equally to all those who fight on behalf of a public authority, who follow the laws of war, who are subject to the discipline of a military chain of command, and who clearly distinguish themselves from the civilian population by wearing distinctive emblems and by carrying arms openly. The only exceptions to this rule are the specific circumstances that give rise to a *levée en masse*, a spontaneous uprising against an invading force. All other combatants—partisans, guerrillas, free-corps, insurgents, rebels, and militants—are unqualified, and their taking up arms can be treated as a criminal offence. Although the *Brussels Declaration* was not ratified, the definition of a combatant laid down at Brussels was adopted essentially unchanged at the 1899 Hague Peace Conference, and again at the second Hague Conference of 1907.<sup>217</sup>

The rules concerning belligerent qualification set out in the *Hague Regulations* were adopted almost word for word from the *Brussels Declaration*.<sup>218</sup> Article 1 of *Annex B: Regulations Respecting the Laws and Customs of War on Land* of the *Hague Regulations* of 1899 and 1907 sets out the four organizational criteria for belligerent qualification now in use, stating:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- i. To be commanded by a person responsible for his subordinates;
- ii. To have a fixed distinctive emblem recognizable at a distance;
- iii. To carry arms openly; and
- iv. To conduct their operations in accordance with the laws and customs of war.

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215. Pustogarov, *Our Martens*, *supra* note 157 at 113; see also Green, *supra* note 54 at 131.

As Green states, “what appears in The Hague Regulations is the wording of Brussels, with but minor verbal changes,” and these criteria were subsequently adopted into Article 4 of the *Third Geneva Convention* of 1949, which adopts the *Hague* law of belligerent qualification to determine which combatants are entitled to the privileges of prisoner of war treatment.

216. Pustogarov, *Our Martens*, *supra* note 157 at 114.

217. *Hague Regulations*, *supra* note 3.

218. “Annex B: Regulations Respecting the Laws and Customs of War on Land” in *Hague Regulations*, *supra* note 3 art 1.



In countries where militia and volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”<sup>219</sup>

The final *Brussels Declaration* stated in Article 9:

The laws, rights and duties of war, apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognisable at a distance [so that they may be distinguished from the civilian population];
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.<sup>220</sup>

The laws adopted at The Hague were therefore determined at Brussels, and so the deliberations at the Brussels Conference form a very important part of our understanding of the forces that shaped these laws.<sup>221</sup> These criteria were subsequently adopted into Article 4 of the *Third Geneva Convention* of 1949, which adopts the *Hague* law of belligerent qualification to determine which combatants are entitled to treatment as prisoners of war.<sup>222</sup>

The *Brussels Declaration* had a significant impact upon customarily accepted usages of war in the decades leading up to the peace conferences at The Hague. Great Britain, which had initially supported the *francs-tireurs*—and despite its refusal to ratify the *Brussels Declaration*—would largely adopt the *Declaration’s* principles. Sir Henry Drummond Wolf would approve of the findings of the Brussels Conference, telling the House of Commons that “the articles submitted restricted the laws, rights, and duties of war to troops of any kind commanded by officers responsible for their subordinates conforming to the laws and customs of war, and forbade the Constitution of an Army unless it was governed by men having knowledge of those laws and customs.”<sup>223</sup> Sir William Harcourt would state in the House of Commons in 1875 that *francs-tireurs* were not volunteers, and that “volunteers did not go out for gain as they did.”<sup>224</sup> Even the Earl of

219. *Ibid.*

220. *Brussels Declaration*, *supra* note 1 art 9. For an English language discussion of the original Article 9, a summary of the discussions at the Conference, and the final text of Article 9 in the *Brussels Declaration*, see also “Report of the Conference,” *supra* note 151 at 166ff.

221. Pustogarov, *Our Martens*, *supra* note 157 at 113-14.

222. *Third Geneva Convention*, *supra* note 67 art 4.

223. UK, HC, *Parliamentary Debates*, 3rd ser, vol 222, col 667 (22 February 1875).

224. UK, HC, *Parliamentary Debates*, 3rd ser, vol 223, col 859 (13 April 1875).

Denbigh, who stated that the United Kingdom would not undertake any new obligations as a result of the Brussels Conference,<sup>225</sup> expressed his approval for legitimating the rights of the *levée en masse*. The Earl of Denbigh pointed out that this concept was clearly intended to protect state sovereignty and territorial integrity from outside. He stated that without the law authorizing a *levée en masse*, “if a foreign force landed in Kent, that county would cease to belong to the Queen. Hitherto the safeguard of a country had been thought to be the breast and arm of every citizen.”<sup>226</sup> Any proposals to deny belligerent qualification to a *levée en masse* would “deprive the country attacked of that advantage.”<sup>227</sup> Even though Parliament rejected the *Brussels Declaration* and the idea of a code of land warfare, it enthusiastically endorsed its provisions. This demonstrates the importance the concept of the *levée en masse* held in expounding ideas surrounding patriotism, nationalism, and the right of national defence.

The Russian government issued the *Brussels Declaration* as instructions to its armed forces in a *Code of Land Warfare* that would soon be put to the test in the Russo-Turkish War (1877-1878).<sup>228</sup> The humanitarianism of Martens’ code had a counterpart in the growing Red Cross movement, and both would be tested in a bitter war between the Russian and Ottoman Empires that was characterized by ethnic and religious animosities.<sup>229</sup> During Russia’s final march to Constantinople in January of 1878, the ensuing panic among the local population caused a vast flow of refugees, depopulating entire regions and leading to widespread starvation and disease among the civilian population in what the head of the Red Crescent Society in Turkey would term “the spectacle of a calamity perhaps without precedent in the annals of modern warfare.”<sup>230</sup> For the first time, the Red Cross was called upon to provide humanitarian relief to civilians and, while this type of activity was then outside the scope of their mandate, they felt they could not refuse in the face of the growing human catastrophe.<sup>231</sup> Although the law as it then stood was not able to protect the civilian population as such from the violence of the war, the idea of civilian immunity was “in the air,”<sup>232</sup> as Pustogarov

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225. UK, HL, *Parliamentary Debates*, 3rd ser, vol 220, col 986-8 (3 July 1874) (Earl of Denbigh).

226. *Ibid.*

227. *Ibid.*

228. Pustogarov, *Our Martens*, *supra* note 157 at 109.

229. Boissier, *supra* note 46 at 304-5.

230. *Ibid.* at 312. The Red Crescent Society in Turkey found that they were being targeted by Ottoman troops because of the cross symbol, and they requested from the ICRC in Geneva that they might be able to adopt the red crescent symbol to try to prevent this.

231. *Ibid.*

232. Pustogarov, *Our Martens*, *supra* note 157 at 110.

states, and both the protection of civilians and the organization of humanitarian relief were growing in importance.

Lieber himself saw the benefits of drafting an international code of land warfare, recognizing the need to settle the law and generate more humane rules. Shortly before his death in September 1871, he wrote to communicate this wish to Gustave Rolin-Jaequemyn. At the time, Rolin-Jaequemyn was president of the Institut de Droit International, which he had founded along with Gustave Moynier, then President of the International Committee of the Red Cross (ICRC) in Geneva.<sup>233</sup> This project came to fruition in 1880, when the Institut published the *Oxford Manual of the Laws of Land Warfare*.<sup>234</sup> Article 1 of the *Oxford Manual* forbade the use of violence by civilians, authorizing force only as between the armed forces of belligerent states. Articles 2 and 3 set out the four organizational criteria for qualified armed forces. The *Oxford Manual* did not include Article II of the *Draft Declaration* protecting the civilian population generally, stating only in Article 7 that “It is forbidden to maltreat inoffensive populations,” and in Article 4 that armed forces must refrain from acts of “undue severity.”<sup>235</sup> These provisions better reflected the division between loyal and disloyal—or offensive and inoffensive—civilians found in the American codes of Lieber and Field, rather than the more innovative approach to protecting civilians taken by Droop and Martens.<sup>236</sup> The *Oxford Manual* did, however, protect public and private property in Article 32(b), as well as religious and cultural sites in Article 34. The *Oxford Manual* therefore appears to have significantly watered down or even ignored many of the provisions discussed at Brussels that were intended to better protect the civilian population, instead harkening back to the ideas of the 1860s.

Although the *Hague Regulations* did not address civilian immunity directly by adopting an article similar to Article II of the *Draft Declaration*, they do contain provisions that prohibit the killing of non-combatants. Article 23(c) adopts Article 13(c) of the *Brussels Declaration* almost word for word, stating that it is especially prohibited to “kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion,”<sup>237</sup> thus affirming the long-standing unwritten prohibition against killing those who are *hors de combat*. Article 50 prohibits the collective punishment of enemy

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233. Boissier, *supra* note 46 at 285.

234. Institut de Droit International, *Oxford Manual of the Laws of Land Warfare* (Oxford: Institut de Droit International, 1880) [*Oxford Manual*].

235. *Ibid.*

236. See *e.g.* Lieber Code, *supra* note 47 art 155; Field's Code, *supra* note 98 at para LXIV.6; Droop, “Irregular Combatants,” *supra* note 141; Martens, *supra* note 102.

237. *Hague Regulations*, *supra* note 3, art 23(c).

populations. Article 46 most directly protects the lives of civilians, for it states that “the lives of persons” must be respected by occupying powers, as must other basic rights, including family honor, and religious convictions and practices. Although the principle of civilian immunity was not directly expressed in the *Hague Conventions*, it received some recognition as a generally accepted principle, albeit one whose scope was uncertain and whose enforcement was weak.

The rules of belligerent qualification as they appeared in the *Brussels Declaration* and the *Hague Regulations* were largely based upon European concerns arising out of the Franco-Prussian War. American jurists took little part in these debates, preferring instead their own *Lieber Code*.<sup>238</sup> The American government had been asked by the Russian government if they would take part in the Brussels Conference, but declined to do so.<sup>239</sup> At the 1907 Hague Peace Conference, US delegates again took no position concerning the debate over the proposed definition of a *levée en masse* or the text of Article 1 of Annex B of the *Hague Regulations* setting out the organizational criteria for belligerent qualification.<sup>240</sup> Major General George Davis, an American military scholar and the Judge Advocate General at the time the United States ratified the *Hague Regulations*, preferred the *Lieber Code* over the *Brussels Declaration*, which he found to err too far on the side of protecting humanitarian interests at the expense of military necessity. He stated that the *Brussels Declaration* has the “disadvantage of being adopted in times of peace, when the minds of men in dealing with military affairs turn rather to the ideal than the practical.”<sup>241</sup> Davis saw the *Brussels Declaration* and the *Hague Regulations* that followed upon it as espousing quite different rules and principles than those found in the *Lieber Code*, and he was in no way eager to claim them for America’s own.

The *Brussels Declaration* did not end the controversy over the treatment of irregular combatants. At the 1899 Hague Peace Conference, there was again significant disagreement between the great military powers and the weaker states over the issue of arming irregular fighters and their status as belligerents. This was resolved by the introduction of the Martens Clause as the preamble to the 1899 *Hague Convention II*, also drafted by Martens. As Ticehurst explains,

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238. *Field’s Code*, *supra* note 98; Davis, *supra* note 107 at 25.

239. Letter No 16 from Sir E. Thornton to the Earl of Derby (8 July 1874) in *Confidential Conference Part II*, *supra* note 51 at 10.

240. Joseph H Choate & Chandler Hale, “Report to the Secretary of State of the Delegates of the United States to the Second Hague Conference” in James Brown Scott, ed, *Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports* (New York: Oxford University Press, 1916) 86 at 102.

241. Davis, *supra* note 107 at 25.

Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. Large military powers argued that they should be treated as *francs-tireurs* and subject to execution, while smaller states contended that they should be treated as lawful combatants.<sup>242</sup>

This divide would again be in evidence at the 1949 Diplomatic Conference in Geneva. Captain Mouton, the delegate of the Netherlands, remarked that, as in 1899 and 1907, there were differing views on this point between “that of the Powers who had already repeatedly suffered invasion and were likely to be invaded again, and that of the Powers who were more or less likely to be Occupying Powers.”<sup>243</sup>

The positions of various delegates at The Hague in 1899 were so opposed on the issue of irregular combatants that the entire conference was threatened.<sup>244</sup> The Martens Clause reads:

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>245</sup>

Again, the Martens Clause failed to resolve questions concerning state support for irregular militia, and whether they would be entitled to prisoner of war treatment—issues that would only gain momentum as a consequence of the widespread use of partisan forces during World War II.

## V. CONCLUSION

Prior to Brussels, the right of insurrection had long been recognized. As Vattel stated in his 1758 *Law of Nations*, “although the operations of war are by custom generally confined to the troops” the inhabitants of a place taken by storm may take up arms to recover the liberty of the territory on behalf of the sovereign, “And where is the man that shall dare to censure it?”<sup>246</sup> By the time of the Brussels

242. Ticehurst, *supra* note 68 at 125.

243. Special Committee II, “Prisoners of War, Sixth Meeting (18 May 1949, 10 a.m.)” in *Final Record of the Diplomatic Conference of Geneva of 1949*, vol IIA, ICRC (Bern, Switzerland: Federal Political Department, 1949) 428 at 429.

244. *JAG Treatise*, *supra* note 17 at 50.

245. “Preamble,” in *Hague Convention II of 1899*, *supra* note 3.

246. Vattel, *supra* note 44 at para III.XV.228.

Conference there were many willing to censure it, and this heralded a shift in thinking about war and state power more generally. The British jurist Droop censured it because he wished to affirm the principle of distinction between civilian and military targets and to protect civilians from the operations of warfare.<sup>247</sup> Martens censured it because he believed that civilians—even enemy civilians—held imprescriptible rights to their lives, honour, and liberty, which warring nations were bound to safeguard.<sup>248</sup> Baron Jhomini, speaking on behalf of the Russian Empire, censured it because he wanted to see war become a tournament between great armies with civilians simply as onlookers, protected from the fray.<sup>249</sup> Germany, with its experience as an occupying power, censured it because it wanted irregular troops outlawed and argued that an insurgency would tend to increase military escalation and lead to severe reprisals against the civilian population.<sup>250</sup> The rhetoric of civilian protection put forth by humanitarian reformers converged with the reality of military power exercised by the imperial powers; both were important determinants of the new rules proposed at Brussels.

Baron Lambermont, the Belgian delegate, clearly phrased the problem when he pointed out that outlawing irregulars essentially meant that the secondary powers were required to raise and equip a standing army along the lines of what Germany had done—an impossible task for many nations. He remarked that, in practical terms, the effect of outlawing irregular troops would be to force the secondary powers either to compromise their national defense or to institute compulsory conscription as Germany had done—a course many were not prepared to accept.<sup>251</sup> The rules of belligerent qualification proposed at Brussels favored the disciplined and well-equipped regular forces of the great military powers. The secondary powers felt they would be forced either to develop inferior armies along the same lines, or face severe reprisals. The compromise reached was that armies should follow the four organizational criteria of belligerent qualification; *levées en masse* would be permitted to repel an invading force, but only before a full-fledged military occupation was established and only as long as they obeyed the laws and customs of war.<sup>252</sup> As Major-General Horsford phrased

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247. Droop, “Irregular Combatants,” *supra* note 141 at 716.

248. Martens, *supra* note 102 at 34, 36.

249. Boissier, *supra* note 46 at 292.

250. Letter No 34 from Sir A Horsford to the Earl of Derby (17 August 1874) in *Horsford Correspondence*, *supra* note 20 at 62.

251. Inclosure in letter No 36 from Sir A Horsford to the Earl of Derby (20 August 1874), “Protocoles des Séances de la Commission déléguée par la Conférence” in *Horsford Correspondence*, *supra* note 20, 78 at 85.

252. *Brussels Declaration*, *supra* note 1 art 10.

it, the object was to “allow the invaded country every possible means of defence short of unorganized peasant warfare.”<sup>253</sup>

Through their debates, the delegates at the Brussels Conference crystallized the modern conception of an “old war” as a grand tournament between professional standing armies—not as a fact of warfare or a privileged form of battle strategy, but as an ideal of state power. In doing so, they privileged the large, professional standing armies of the kind that had taken the field during the Franco-Prussian War. This outcome promoted the consolidation of national governments’ control over the military—its conscription, training, and equipping, but more importantly its organization and funding. Actors outside this state-centred system, including guerrilla fighters, insurgents, and civilians, were illegitimate and therefore unqualified belligerents. Some compromises were required to make these rules work. The exclusion of civilians and private fighters went along with rules protecting them; this was to encourage non-state actors to avoid taking up arms, while strengthening the national army and promoting more humanitarian outcomes. Civilians would be permitted to take up arms against a foreign invader, but they would have to lay them down again once an occupation was established. This rule was adopted for the benefit of the smaller powers, who had few standing armies and limited means of national defence. Together, the new rules were established with the goals of enabling national governments to strengthen their control over military force while restoring a sense of the balance of power in Europe that had been disturbed by the rise of the great powers and the atrocities of the late war.

This history of the Brussels Conference supports the thesis of new and old wars. As in Kaldor’s thesis, the old war was primarily concerned with consolidating and centralizing state power over the military. The laws and customs concerning belligerent qualification formulated at Brussels were a watershed in this process. The fact that the delegates could not abolish the concept of the *levée en masse*—despite strong support from Germany and Russia, and at the urging of humanitarian reformers such as Droop and Martens—also assisted in this process. Keeping the *levée en masse*, even if it permitted citizens to rise in arms only at the time of an invasion by a foreign power, facilitated the defence of smaller countries and fostered prevailing ideals about nationalism, patriotism, and the importance of the right of national self-defence. In most other respects, the interests of states and the interests of humanitarian reformers dovetailed at Brussels, and it was this convergence of interests—between humanitarian ideals and national interests,

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253. Letter No 27 from Sir A Horsford to the Earl of Derby (10 August 1874) in *Horsford Correspondence*, *supra* note 20 at 44.

between the weaker states and the great powers—that enabled consensus and compromise to take place. This enabled the rise of the ideal of the old war, that war was a tournament among armies, in which civilians would be protected but could not take part. These ideas came to lay the foundations of the international humanitarian law as it emerged in the first half of the twentieth century.