

Taming Democracy: Codifying the Laws of War to Restore the European Order

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Abstract

In this article, we challenge the canonical narrative about civil society's efforts to discipline warfare during the mid-nineteenth century—a narrative of progressive evolution of Enlightenment-inspired international humanitarian law (IHL). On the basis of archival work and close reading of protocols, we argue that in codifying the laws of war, the main concern of powerful European governments was not to protect civilians from combatants' fire, but rather to protect combatants from civilians eager to take up arms to defend their nation—even against their own governments' wishes. We further argue that the concern with placing “a gun on the shoulder of every socialist” extended far beyond the battlefield. Monarchs and emperors turned to international law to put the dreaded nationalist and revolutionary genies back into the bottle. Specifically, we propose that it was the Franco-Prussian War of 1870–1871 and the subsequent short-lived, but violent, rise of the Paris Commune that prompted governments to adopt the Brussels Declaration of 1874, the first comprehensive text on the laws of war. The new law not only exposed civilians to the war's harms, but also supported the growing capitalist economy by ensuring that market interests would be protected from the scourge of war and the consequences of defeat. The codification of the laws of war, in this formative stage, reflected an elite-driven project to restore the political and economic order of Europe. In light of this aristocratic motivation, judicial interpretations that deviate today from the original intent of the legal texts may well promote the interests of the many.

I. INTRODUCTION

We have been taught, and we teach our students, that the laws of war (or what we now call international humanitarian law—IHL) exist to protect civilians from harm and reduce unnecessary suffering of combatants. The classic story emphasizes the influence of the Enlightenment on mid-nineteenth-century efforts to instill humanitarian ideals

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into the interrelations of states, a narrative of progressive evolution of law and society that invariably celebrates civil society initiatives, most notably that of Henry Dunant, one of the founders of the Red Cross, who witnessed the battle of Solferino in 1859. According to this narrative, the law is said to inculcate Rousseau's succinct proposition that civilians must be insulated from the scourge of war as much as possible, for:

War . . . is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders . . .¹

Rousseau's ideas are said to have gained widespread acceptance and were put into "practical effect" during the nineteenth century.² The canonical story suggests that nineteenth-century European governments espoused such humanitarian ideals.³ In the St. Petersburg Declaration of 1868, for example, plenipotentiaries went as far as to explicitly state that "The progress of civilization should have the effect of alleviating as much as possible the calamities of war."⁴

This progressive narrative has been challenged from at least three angles. Realists such as James Morrow, Eric Posner, and Alan Sykes emphasize the role of IHL in ensuring compliance with reducing the harms of war, secured by the threat of retaliation.⁵ Critical legal scholars, such as David Kennedy, suggested that while, initially, the codification reflected a "humanitarian strategy" shared by "humanitarian and military professionals," it has lately become a way by which these actors can avoid exercising ethical and moral judgment.⁶ Historical challenges to the dominant narrative of IHL are much less prevalent.⁷ Chris Jochnick and Roger Normand have famously argued that the laws of war reflected the interests of the powerful European nations and

¹ "[t]he object of the war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms; but as soon as they lay them down and surrender they become once more merely men, whose life no one has any right to take" JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 6 (G.D.H. Cole trans., 2003) (1762).

² See, e.g., CHRISTOPHER GREENWOOD, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* paras. §§113-14 (2d ed., 2008). For the Enlightenment thought as shaping early notions of IHL, see also DANIEL THURER, *INTERNATIONAL HUMANITARIAN LAW: THEORY, PRACTICE, CONTEXT* 44 (2011).

³ For a sophisticated account of the influence of such humanitarian ideals on the codification of the laws of war and their relation to democratization processes see GEOFFREY BEST, *HUMANITY IN WARFARE* 128-214 (1980).

⁴ Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles, para 2, 29 November/11 December 1868 [hereinafter St. Petersburg Declaration].

⁵ ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW*, Chapter 11 (2013); JAMES D. MORROW, *ORDER WITHIN ANARCHY: THE LAWS OF WAR AS AN INTERNATIONAL INSTITUTION* (2014). For a critique, see Eyal Benvenisti & Amichai Cohen, *War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective*, 112 MICH. L. REV. 1363 (2014).

⁶ DAVID KENNEDY, *OF WAR AND LAW* (2006) (see especially pages 83-86, 167).

⁷ John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV., 895 (2012). This is despite the fact that critical historical analyses of international law in other contexts is a flourishing area of research.

were aimed at privileging military necessity.⁸ In a path breaking study on the history of the Lieber Code, John Fabian Witt went beyond the inter-state realist perspective and explored the crucial role of domestic political economy and the politics of the era in shaping the laws of war.⁹ This move to explain the history of international law through the prism of domestic political processes and concerns is shared by historians of human rights law, following the pioneering work of Samuel Moyn.¹⁰

Sharing Witt's historical perspective, we investigate the political, economic, and social circumstances that prevailed in the different European states that took an active part in the codification process. We analyze the power relations between the more powerful and weaker governments, as well as internal political dynamics during this transformative period of democratization. Against this backdrop and on the basis of archival work and close reading of protocols,¹¹ we show that, while several civil society initiatives *did* play a role in advocating for the evolution of the international laws of war, their efforts were ultimately co-opted by key European governments to suppress civil society challenges to their authority and to reinforce their political and economic power, both at home and abroad. The European governments that embarked on the process of codifying the laws of war during the nineteenth century pursued an agenda contrary to their stated intentions. Rather than seeking to protect civilians from combatants' fire, the laws that were drafted sought to protect combatants from civilians. Our first thesis relates to the most direct threat during battle. As we will demonstrate through the case of the Franco-Prussian war, when francs-tireurs continued to fight despite the surrender of their government, the age of nationalism had brought to the battlefield civilians who were eager to take up arms in defense of their nation. The new codified laws of war were, in fact, designed partly to protect armies—and their governments—from “patriotic insurrections.”¹² The Brussels Declaration lived up to the instructions given by the German Ministry of War to the Foreign Office, namely

⁸ See e.g., Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994).

⁹ JOHN FABIAN WITT, *LINCOLN'S CODE* (2014). For a brilliant analysis of transformation of the goals of warfare as a reflection of deep political processes see JAMES Q. WHITMAN, *THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR* (2012).

¹⁰ SAMUEL MOYN, *THE LAST UTOPIA* (2010).

¹¹ This study is based on archival research in France (Centre des archives diplomatiques, La Courneuve, Paris), Germany (Bundesarchiv, www.deutsche-digitale-bibliothek.de/item/OL25EEGPE6SSVCLEKSFWWTQ6EVG6KCHB), England (The National Archives of the UK and the British Library, London) and Russia (the Historical-Military Museum of Artillery, Engineer and Signal Corp in St. Petersburg (<http://www.artillery-museum.ru/en/home.html>)).

¹² In the discussions that preceded the Brussels Declaration of 1874, there were many references to the dangers of patriotism. Of note, during the session on August 14, Russian delegate Baron Jomini quoted directly from the work of Rolin-Jaequemyns, *La guerre dans ses rapports avec le droit international* (1871), in which the Belgian international lawyer condemned irregular warfare and patriotic insurrections. See *Actes de la Conférence de Bruxelles de 1874, sur le projet d'une convention internationale concernant la guerre* [hereinafter Brussels Conference Protocols] Paris: Librairies des Publications Législatives, A. Wittersheim & Cie. 1874, Protocol No. 12, p. 27.

that “as permitted by Prussian military law that follows the usages of war . . . [the rebel] is immediately shot without any proceedings.”¹³

But this was not the only source of concern. While our first thesis attributes the turn to the laws of war as a means to preclude the foreign civilian fighter, our second thesis in this article makes a link between the codification of the laws of war and the challenge of the ‘enemy within,’ asserting that the concern with patriotic insurrection extended far beyond the battlefield. The late-nineteenth century was not merely the age of nationalism that roused civilians to take up arms for their state, but an era of greater democratization that was seen as potentially breeding discontent with the government. Antiestablishment sentiments were inspired by ideologies that opposed the status quo—socialist, anarchist, pacifist, or feminist, to mention but a few—and whose proponents were not averse to taking up arms *against* the regime. We argue here that the emerging phenomenon of ‘nations in arms,’ and more generally the mobilization of civil society from the Crimean War onward, challenged the public order in Europe and prompted governments to rely on international law to put the nationalist and revolutionary genies back into the bottle.¹⁴ Monarchs and emperors turned to international law as a tool to protect themselves against the consequences of placing “a gun on the shoulder of every socialist.”¹⁵

Specifically, we propose that it was the Franco-Prussian War of 1870–1871 and the short-lived, but violent, rise of the Paris Commune that followed it—more than the Battle of Solferino or any other war during this formative era of international law—that prompted governments to take up the challenge of codifying the laws of war.¹⁶ This war was the first to be shaped by a civil society more eager to fight than its own government, exposing the dangers of the democratization of warfare. The Brussels Declaration of 1874, the first comprehensive statement of the modern laws of war, was a concerted imperial effort to inhibit all those dangerous forces and assert exclusive control during wartime *and* peacetime.

Our third thesis is that, counterintuitively, during this period of patriotic sentiment and democratization Rousseau’s distinction between combatants and civilians was rejected by the governments of the powerful states as incompatible with their interests. The 1863 Lieber Code acknowledged the transformation of the civilian to an object of

¹³ “Es ist vielmehr notwendig, dass in denjenigen Fällen, in welchen der Rebell auf frischer That betroffen wird, auch ferner, wie es nach Preußischem Militärrecht zulässig, nach Kriegsgebrauch mit ihm verfahren, d.h. dass er ohne Procedur sofort erschossen werde.” Report of the German Ministry of War sent by German Minister of War Georg von Kameke to Bismarck (July 18, 1874) (Folder R 901/ 28961 No. 46; the German Foreign Office, National Archives in Berlin) (the report comments on each paragraph of the draft Russian text for the Brussels conference).

¹⁴ On the disciplinary aspect of IHL, see Benvenisti & Cohen, *supra* note 5.

¹⁵ This phrase was coined by Adolphe Thiers, Chief Executive of the French Republican Government, who crushed the Paris Commune (see *infra* Part IV.A.2) and later opposed the resurrection of national conscription. Quoted in *THE PEOPLE IN ARMS: MILITARY MYTH AND NATIONAL MOBILIZATION SINCE THE FRENCH REVOLUTION* 103 (Daniel Moran & Arthur Waldron eds., 2003).

¹⁶ Bordwell is distinctive in acknowledging that this war and the subsequent Brussels Declaration were responsible for “[m]uch of the modern law of war” because “[d]riven by desperation by the catastrophes that had befallen them, the French people, or at least individual Frenchmen, resorted to an irregular warfare [. . .].” PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 89 (1908).

warfare when it noted that, in the era of nationalism, war had become “a state of armed hostility between sovereign *nations*” and that “the citizen or native of a hostile country is thus an enemy.”¹⁷ The Brussels Declaration epitomizes this refutation of the Enlightenment idea. The Russian proposal in Brussels to include Rousseau’s statement as a general principle of the laws of war was silently withdrawn,¹⁸ as the text of the Declaration justifies the harming of civilians including those who stand by.¹⁹

Our fourth thesis is that the newly-codified laws of war were also designed to support the growing capitalist economy by ensuring that market interests would be independent and protected from the calamities of war and the consequences of defeat. Private property was to be protected directly through norms that explicitly respected ownership, and indirectly by the prohibition of interference with the legislation in occupied territories. These moves enabled traders, investors, industrialists, and land-owners to continue their business as usual or at least to a greater extent than before. We believe this was not incidental, but a result of the growing interdependency between global politics and economic ties during this formative period.

Our fifth and final thesis moves beyond the laws of war and exposes the role of modern international law more generally during this period. The codification of the laws of war as an international text, drafted by government representatives in secrecy, reflected the international order in which state governments were the exclusive authors of international law. In this newly-established regime of the laws of war, the drafting and enforcement of the law was the prerogative of each state alone, through exclusive participation in international gatherings and the development of internal military codes. This regime asserted, yet again, the meaning of the state (each state) as the sole enforcer within its territory and over the community it governs. Moreover, the architects of the laws of war were not so much concerned with colonized communities,²⁰ but with turning the “savages” of Europe into disciplined soldiers.

The confidential nature of the codification efforts, conducted by statesmen and international lawyers behind closed doors, enabled European governments to maintain control over the public discourse regarding the laws of war, and thereby stymied any possibility that international law could be influenced by public conventions and civil society organizations, while at the same time legitimizing their authority by appearing

¹⁷ Instructions for the Government of Armies of the United States in the Field (Lieber Code), Arts. 20, 21, 24, April 1863.

¹⁸ At the Brussels conference of 1874, the original draft of the ‘International Convention Concerning the Laws and Customs of War,’ authored by Martens and presented by Russian delegate Baron Jomini, included an opening statement of ‘General Principles’, the first two of which read: “An international war is a state of opening fighting between two independent states (acting alone or with allies) and between their armed and organized forces. The operations of war must be directed exclusively against the forces and the means of warfare of the enemy state, and not against its subjects, so long as the latter do not take part themselves in the war activities.” But there was no explicit discussion of these principles, and the reference to the first principle is mentioned only in a side document, the response to the petition of the inhabitants of Antwerp (*infra* text to note 231).

¹⁹ See *infra* Part IV.B.3.

²⁰ While the historiography of international law has thus far concentrated on the application of international law in the colonized world as a “civilizing mission”, our analysis demonstrates how the civilizing mission was similarly applied towards the non-elite masses within Europe. See *infra* notes 261-274 and accompanying text.

to be responsive to humanitarian concerns over suffering in war. Moreover, through the Declaration of London of 1871, which recognized the principle of *pacta sunt servanda* as a norm of positive international law that insulated their agreements from the destabilizing potential of newly-established governments,²¹ together with the laws on neutrality and the rule of nonintervention in the domestic affairs of other states, the infrastructure of international law provided support for the long-term stability of the imperial legal order in Europe. That the law was based on state consent meant that the consent of the more powerful among European nations was critical. Indeed, the Brussels text was opposed by the weaker European governments (and their support across the English Channel), but it was clear to all that the German interpretation of the Declaration would reflect international law from that point onward.

International lawyers contributed to the legitimation of this imperial effort. While their ideas and involvement in various codification initiatives reflected genuine humanitarian concerns, their reference to the “bestial urges” of drafted soldiers²² reflected their aristocratic perspective; and the involvement of leading scholars (such as Lieber, Martens, and Bluntschli) in intergovernmental codification efforts betrayed their progovernmental leanings. Their claim to reflect the apolitical character of the law reinforced the antidemocratic implications we attribute to the project of codifying the laws of war. Ironically, as this article shows, the newly-codified laws of war were more about peacetime than wartime. These laws cemented the political and economic order more than they protected the fate of combatants, much less civilians.

Generations of lawyers and civil society activists would play down, perhaps unintentionally, memories of the Crimean War, the Franco-Prussian War, and the Brussels Declaration. They would instead emphasize what seemed like the triumph of civil society in setting the legal agenda during the 1860s.²³ By promoting this narrative, they successfully kept up the apparently humanitarian spirit attributed to the laws of war sufficiently to allow judges in our times to expound the law as if its goals were informed by such noble sensibilities.²⁴ In light of our findings, a humanitarian

²¹ Recognizing “that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement.” The London Declaration, Jan. 17, 1871, 18 Martens Nouveau Recueil 278 (1873), *reprinted in* 3 T. HERTSLET, THE MAP OF EUROPE BY TREATY 1901 (1890).

²² J. C. Bluntschli, *Das moderne Völkerrecht in dem französisch-deutschen Kriege 1870*, 13 (Nov. 22, 1870) (“der Krieg deckt . . . die ursprüngliche Wildheit wiederauf, welche die Menschennatur mit der thierischen Natur verbindet.”).

²³ For a influential treatment, see Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 243 (2000) (“The American Civil War generated the Lieber Code, which ultimately spawned the branch of international humanitarian law that governs the conduct of hostilities, commonly known as The Hague Law. The Battle of Solferino, along with Henry Dunant’s moving portrayal of the suffering and bloodshed there (A Memory of Solferino, 1862) inspired the creation of the Red Cross movement and the Geneva Law, the other branch of humanitarian law, which emphasizes protection of the victims of war, the sick, the wounded, prisoners and civilians”). Brussels is not mentioned.

²⁴ See, e.g., the treatment of the Martens Clause (Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78 (2000)).

interpretation of these laws would be ahistorical. However, our findings also suggest that such an interpretative approach cannot simply be criticized as an illegitimate judicial exercise of countermajoritarianism, because our contemporary judges were reacting to laws that had been set in a decidedly countermajoritarian manner and intent. Put differently, given the aristocratic motivations of the drafters, the deviation from the original intent may well promote the interests of the many.²⁵

The present article begins with a discussion of the challenges of modern warfare that were exposed during the period between the Crimean War and Franco-Prussian War (Part II). Part III reflects on the Geneva Convention of 1864 and the St. Petersburg Declaration of 1868, and considers whether they were aimed at providing suitable answers to these challenges and whether they ultimately provided such answers. We conclude that they did not, and therefore dedicate the following Part (IV) to the historical events that signaled the tipping point toward the codification of the laws of war: the Franco-Prussian War and the Paris Commune, as well as the Brussels Declaration that followed. Part V further explores the broader meaning of this effort to codify the laws of war against the backdrop of wider developments in the international law project of the late-nineteenth century. Part VI concludes.

II. FROM CRIMEA TO THE FRANCO-PRUSSIAN WAR: THE CHALLENGES OF MODERN WARFARE EXPOSED

This Part outlines the economic, political, social and technological transformations that prompted European governments to codify the laws of war. These transformations, which brought war closer to home and to public debate, surfaced during the Crimean War, even before manifesting themselves fully during the Franco-Prussian War. This public debate compelled governments to address concerns about the loss of life and to reassert their legitimate claim to monopoly over violence. The response – codification – put the lid on humanitarian challenges to the law.

A. Post-1848: The State's New Functions

For most of the nineteenth century, Europe experienced relative peace under the auspices of the Concert of Europe.²⁶ But the political order of the Concert was severely

²⁵ Eyal Benvenisti & George W. Downs, *Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance*, 46 N.Y.U J. INT'L L. & POL. 741 (2014).

²⁶ The Congress of Vienna (1815), held under the direction of the “Great Powers,” Austria, Great Britain, Prussia, and Russia, laid the foundations for the Concert of Europe and was later institutionalized in a series of subsequent congresses. For a concise overview, see Stephan G. Hinghofer-Szalkay, *The Concert of Europe*, Max Planck Encyclopedia of Public International Law (2013), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e908?prd=EPIL>. For a comprehensive account of the Vienna Congress and its liberal and conservative influences, see Brian E. VICK, *THE CONGRESS OF VIENNA: POWER AND POLITICS AFTER NAPOLEON* (2014).

destabilized by the revolutions of 1848.²⁷ Despite their immediate suppression, these revolutions paved the way toward a set of profound transformations across the continent, which form the background to our story. The 1850s, and even more so the 1860s, were characterized by conflicting trends of restoration and reform. European governments, particularly in France, Prussia, Britain, and Russia, sought to maintain their old regime, while simultaneously conceding to some of the demands of their citizens.²⁸ During the course of the 1850s, many European governments underwent little short of a revolution in their manner of operating. The post-revolutionary centrist governments, such as those in Prussia and France, spurred economic growth by expanded investment in infrastructure projects and economic policies for the purpose of modernization.²⁹ While there was great variation in state models and activities (among them, the restored French monarchy, the growing Prussian military prowess, and the special model of British self-government),³⁰ state governments across Europe assumed new functions that ushered in the bureaucratic state of the nineteenth century.

These new state functions developed as a response to, and further catalyst for, the intensifying industrial revolution. Industrialization gave rise to significant population growth, urbanization, and mass migration in several European states.³¹ New transportation modes were cheap enough for most people to use as they moved from the countryside to work in cities within or beyond state borders.³² The growth in industry and trade was accommodated by a communications revolution, the building of railways and telegraph lines and the intensified use of steam power reducing distances in time and space.³³ These societal transformations naturally affected the experience of war, both at home and on the battlefield. The intense public debate over the Crimean War, to which we shall now turn, compelled governments to signal their concern more actively over the loss of life and suffering of soldiers in times of war.

²⁷ JONATHAN SPERBER, *THE EUROPEAN REVOLUTIONS 1848-1851*, Chapters 1-2 (1994); PAUL SCHROEDER, *THE TRANSFORMATION OF EUROPEAN POLITICS, 1763-1848*, Chapters 12-17 (1994); MICHAEL BROERS, *EUROPE AFTER NAPOLEON: REVOLUTION AFTER NAPOLEON* (1996).

²⁸ ARNO J. MAYER, *THE PERSISTENCE OF THE OLD REGIME: EUROPE TO THE GREAT WAR*, Chapter 2 (2d ed., 2010); F. R. BRIDGE & ROGER BULLEN, *THE GREAT POWERS AND THE EUROPEAN STATES SYSTEM* 127 (2d ed., 2005).

²⁹ This new emphasis on infrastructural improvement was particularly evident in programs for urban improvement in Paris, Madrid, and Vienna. See Christopher Clark, *After 1848: The European Revolution in Government*, 22 *TRANSACTIONS ROYAL HIST. SOC'Y* 171, 178-91 (2012). See also Richard Tilly, *The Political Economy of Public Finance and the Industrialization of Prussia 1815-1866*, 26 *J. ECON. HIST.* 484 (1966).

³⁰ Jörn Leonhard, *The Rise of the Modern Leviathan*, in *A COMPANION TO NINETEENTH-CENTURY EUROPE 1789-1914* 137, 141-44 (Stefan Berger ed., 2006).

³¹ *THE EUROPEAN ECONOMY, 1750 - 1914: A THEMATIC APPROACH* 37-72 (D. Aldcroft & S. Ville eds., 1994); IVAN BEREND, *AN ECONOMIC HISTORY OF NINETEENTH-CENTURY: DIVERSITY AND INDUSTRIALISATION* 260-72 (2012); S. Pollard, *Industrialization and the European Economy*, 26 *ECON. HIST. REV.* 636 (1973); S. POLLARD, *TYPOLGY OF INDUSTRIALIZATION PROCESSES IN THE NINETEENTH CENTURY* (2002); C. TREBILCOCK, *THE INDUSTRIALIZATION OF THE CONTINENTAL POWERS, 1780-1914* (1981).

³² BARRY BUZAN & GEORGE LAWSON, *THE GLOBAL TRANSFORMATION: HISTORY, MODERNITY AND THE MAKING OF INTERNATIONAL RELATIONS* 77 (2015).

³³ See, e.g., Y. Kaukiainen, *Shrinking the World: Improvements in the Speed of Information Transmission, c. 1820-1870*, 5 *EUR. REV. ECON. HIST.* 1 (2001).

B. Crimea: The People's War

In September 1854, a distressing media report described the cruel fate of thousands of Turkish soldiers killed when Russian cannons struck their ships. This episode, soon named 'The Stain of Sinope', was covered extensively in the British press, in a tone of moral outrage.³⁴ France and Britain forged an alliance, joined by Turkey, and a fully-fledged inter-European war began.³⁵ After four decades of relative peace, the Concert of Europe, institutionalized in Vienna in 1815, was subject to a protracted, costly global conflict—one that entirely transformed the military establishment and the relations between the military and civil society. The Crimean war exposed some of the modern challenges of warfare and the role of law in addressing those challenges and turned the war into public war. It exposed how the media and the involvement of citizens in war as conscripts, journalists and volunteers could translate into political pressure governments were ill afford to ignore. At the same time, the experience of the public interest in the fate of *their* soldiers and the public pressure to engage and win the war demonstrated how governments could use nationalist sentiments to pursue their goals. The war changed the perspective of European governments to nationalist sentiments – rather than a threat to their rule the war revealed the potential of nationalism as a disciplinary tool in the battlefield and as a means to recruit public support for the cause of war back home.

In September 1854, the British and French sent a combined force of fifty thousand men to the peninsula. Months passed, and they failed to take the fortress of Sevastopol. The Russians, on their part, failed to drive their enemies out of Crimea. As the winter set in, military deadlock persisted. Leo Tolstoy spent much of the siege of Sevastopol writing dispatches for *The Contemporary* that would later be collected and known as the *Sevastopol Sketches*, vividly conveying the general sense of dead-end: "...six month have already passed ...and since that day thousands of bombs, cannon-balls, and rifle-balls have been flying incessantly from the bastions into the trenches and from the trenches into the bastions and the angel of death has never ceased to hover over them."³⁶

The Crimean War introduced two new heroes and one heroine: the professional journalist, the common soldier, and the compassionate nurse. Tolstoy's reporting in *The Contemporary* was part of a broader phenomenon in which war became the people's war because of new communication technologies. The telegraph was used for the first time,³⁷ facilitating an unprecedented coverage of action on the battlefield. From its early days, Crimea was a "media war," in which the press, through extensive reporting, photography, and considerable growth in circulation, played a particularly central role; it was "a war that was experienced through cultural documentation not only after the fact but as events were transpiring."³⁸ Not far behind the journalist stood the common soldier, whose letters to the press were published daily, bringing the horrors of war, his suffering, and the incompetence of the military administration closer to home than

³⁴ JOHN SWEETMAN, *THE CRIMEAN WAR* 20 (2001).

³⁵ A. J. P. TAYLOR, *THE STRUGGLE FOR MASTERY IN EUROPE 1848-1918* 62 (1954).

³⁶ LEO TOLSTOY, *THE SEVASTOPOL SKETCHES* 37 (Isabel F. Hapgood trans., 1888).

³⁷ STEFANIE MARKOVITS, *THE CRIMEAN WAR IN BRITISH IMAGINATION* 3 (2009).

³⁸ *Id.* at 2-3. See also Sweetman *supra* note 34, at 14-15.

ever.³⁹ As noted by Stephanie Markovitz, "[b]efore the war the stereotypical soldier was an aristocratic fop. After it, he was a brave private – the abstract common soldier was newly lauded."⁴⁰ Furthermore, if in previous wars soldiers' death and suffering were far-removed from the public gaze, their plight was now made impossible to ignore. In a letter published in *The Times* on October 14, 1854, a "sufferer by the present war" asked why the British had no "sisters of charity" similar to those employed by the French.⁴¹ The public outcry that followed prompted the British government to expand its military medical services. As the head of the army's nursing services, Florence Nightingale (soon to become popularly known as 'The Lady with the Lamp'), pioneered a number of health and sanitation practices that radically reduced British fatalities.⁴² Following the war, she lobbied her government, which subsequently introduced military reforms in which the British army assumed responsibility for the treatment of its wounded soldiers.⁴³

The outpouring of mass media reports on the British soldiers who stood in defiance of Russian aggression, their heroic tales of great sacrifice, and the humanitarian devotion of Nightingale and her profession served to criticize the military and army in real time, and exposed, for the first time, the potential impact of public opinion on the course of war and peace.⁴⁴ The three new heroic wartime figures presented the horrendous consequences of incompetent military leadership or simple blunders that cost the lives of too many.

Yet the pressure they exerted on their governments had unexpected consequences: they transformed the attitude of European rulers to nationalism and its role in times of war. Initially, conservative monarchies opposed the nationalist undercurrents of the 1840s revolutions. Ever since the defeat of Napoleon's million-man-strong army, European military leaders had sought to revert "so far as they could to an eighteenth-century pattern of aristocratic officers and long-serving professional troops kept isolated from the rest of the community."⁴⁵ Writing in 1832, Carl von Clausewitz described how "[i]t was precisely this outburst of national enthusiasm, as dangerous to themselves as to their enemies, that the statesmen of the Restoration hoped that they

³⁹ Thousands of private letters arrived from the front, as described in a *Times* leader: "Are we, or are we not, to publish the letters that pour in from the Crimea? . . . The Question now concerns letters long and many, some original, from sergeants and privates, some copied by fair and anxious hands, from officers of all ranks in the army, from old colonels to youthful lieutenants – from everybody, in fact, excepting only the members of that faithful cordon that surrounds each General." Leader, *THE TIMES*, Dec. 30, 1854, at 6, quoted in MARKOVITS, *supra* note, 33 at 43.

⁴⁰ MARKOVITS, *supra* note 32, at 4.

⁴¹ *THE TIMES*, Oct. 14, 1854, at 7.

⁴² DAVID WETZEL, *THE CRIMEAN WAR: A DIPLOMATIC HISTORY* 164 (1985); WINFRIED BAUMGART, *THE CRIMEAN WAR: 1853-1856* 143-44 (1999). It should be noted that the majority of the patients who were hospitalized during the Crimean war suffered from sickness, mostly cholera. Those wounded in battle were the minority.

⁴³ PIERRE BOISSIER, *FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS* 89 (3rd ed., 1985).

⁴⁴ Some historians consider the influence of public opinion on British policy quite minimal and emphasize its even more limited influence in France. See Bruce Weller, *Relations Between States and Nations*, in *THEMES IN MODERN EUROPEAN HISTORY 1830-1890* 263 (1990).

⁴⁵ MICHAEL HOWARD, *WAR IN EUROPEAN HISTORY* (1970)

would not live to see again."⁴⁶ By the mid-nineteenth century, European armies were once again professionalized, reinforced with long-term conscripts from the poorest sections of the population and an officer corps composed of aristocrats.⁴⁷ The Crimean War marked a turning point in military history because armies grew bigger, employing inexperienced soldiers drafted against their will, under the scrutiny of civil society. The neat separation of the military from civil society could no longer be maintained. Armies needed to grow because the innovations in the means of production during the industrial revolution soon transformed the means of destruction, with the arrival of new weapons and new forms of transportation and communication.⁴⁸ The small professional armies of past generations were replaced by hordes of inexperienced soldiers. These technological innovations and the need to control masses of combatants involved fierce battles and heavy losses.

The outcry over the heavy losses among inexperienced and ill-equipped soldiers that prompted the critique of journalists and civil society activists such as Nightingale was not merely a source of pressure against governments. It also revealed its potential as a means to generate political support for their involvement in wars. Governments began to laud nationalism and patriotism for celebrating the loyalty and courage of fighters and for galvanizing public support from their soldiers and the wars they were commanded to fight. As noted by Bridge and Bullen, "They did so quite deliberately. Aggressive wars of national reconstruction and the identification of victory on the battlefield with national pride and regeneration were the means by which monarchical conservatism gave itself a new lease of life."⁴⁹ Some journalists actively contributed to these efforts to glorify wars. Writing for *The Times*, William Russell, considered the leading reporter on the Crimean War, drew the reader into the scene with emotive, nationalist undertones:

. . . let us climb up one of the hills, near the scene of the French review, and watch the march of our regiments. They came on solid and compact, as blocks of marble, the sun dancing on their polished bayonets and scarlet coats with congenial fierceness . . . [A]nd if one follows them, he will see how men drop out, exhausted and half-smothered, and at what a vast amount of physical inconvenience all this solidity and rigidity of aspect are acquired.⁵⁰

As F. H. Hinsley lucidly observed, after 1856 and the end of the Crimean war "other governments in addition to the French began to ally with the dynamic force of

⁴⁶ *Id.* at 97.

⁴⁷ Jan Lucassen & Erik-Jan Zürcher, *Conscription and Resistance: The Historical Context*, 43 INT'L REV. SOC. HIST. 405, 413 (1998). Prussia was the only country to have kept universal conscription after 1815, yet without compromising on hierarchy or order. Gudrun Persson, *The Russian Army and Foreign Wars, 1859-187*, 24 (Ph.D. London School of Economics, 1999).

⁴⁸ BUZAN & LAWSON *supra* note 32, at 243.

⁴⁹ F. R. BRIDGE & ROGER BULLEN, *THE GREAT POWERS AND THE EUROPEAN STATES SYSTEM* 126 (2d ed., 2005).

⁵⁰ William Howard Russell, *The British Expedition*, THE TIMES, May 23, 1854, at 10, quoted in MARKOVITS, *supra* note 32, at 30.

the national principle in their own societies as a means of advancing their interests."⁵¹ Almost in tandem with becoming national citizens—with the introduction of male suffrage and greater participation in public affairs—Europeans were called to serve in the army, where human sacrifice was extolled as the culmination of good citizenship. The nation was rebuilt around human sacrifice. The military aristocracy had found a way to transform voters with newly-gained franchise into soldiers who would not “reason why” but instead would simply “do and die,” as Tennyson, the Poet Laureate, captured in his poem devoted to the cavalry brigade whose obedient fighters rode to their death following a misguided order.⁵²

In *The Verdict of Battle*, James Whitman described how the wars of the eighteenth century were fought as pitched battles.⁵³ Their objective was to affirm the legitimacy of monarchs to base their monopoly over military violence on dynastic succession. But the events of 1789–1815 weakened dynastic succession, which “no longer stood at the foundation of the law of nineteenth-century war as it had a century before.”⁵⁴ The Crimean War exemplified this new type of war. Given the growing involvement of civil society in warfare (as both combatants and spectators, and most importantly as patriotic members of the unified nation), after 1848, European governments needed to reassert their legitimate claim to monopoly over violence on grounds other than dynastic succession. They turned nationalism, previously conceived as a menace, into a governance asset that would enhance their legitimacy to exercise violence. But, as they would soon discover, the unruly horse of nationalism would first need to be tamed.

C. The Paris Declaration: The Laws of War as a Means to Constitute Power Relations and a New Economic Order

The Crimean War ended with the Treaty of Paris (1856), which established the neutralization of the Black Sea and, as noted by A. J. P. Taylor, “seemed to provide what the western powers had long sought—a barrier against Russia without effort from themselves”⁵⁵ The condescending tone of the treaty toward the Russians explains in part their later motivation to revise it. As we will later discuss, Russia’s attempt to shirk its commitments under the Treaty of Paris would pave the way for the London Declaration of 1871, which we consider an important element in the emerging international law regime.⁵⁶

Alongside the Treaty, seven powers (Britain, France, Russia, Prussia, Austria, Sardinia-Piedmont, and the Ottoman Empire) endorsed the 1856 Declaration of Paris. It was this declaration—the first important initiative in the codification of the laws of war—that constituted an important milestone in the evolution of the laws of war. The Declaration of Paris stipulated four articles: the first banned privateering, the second

⁵¹ F. H. HINSLEY, *POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES* 245 (1967).

⁵² Alfred, Lord Tennyson, *The Charge of the Light Brigade* (1854).

⁵³ Whitman, *supra* note 9.

⁵⁴ *Id.* at 224.

⁵⁵ A. J. P. TAYLOR, *THE STRUGGLE FOR MASTERY IN EUROPE 1848-1918* 85 (1954).

⁵⁶ See *infra* notes 268-275 and accompanying text.

and third regulated the rights of neutrals during war, and the fourth banned paper blockades.⁵⁷ The end of privateering embodied two central rationales that would prove relevant to the regulation of warfare on land as well. First, it consolidated the meaning of war (in this case, naval war) as an interstate conflict to which private actors have no access, and during which free trade and thereby private property are protected. As noted by Jan Lemnitzer, The Paris Declaration's "rationale was simple but revolutionary—the new globalization and network of trade had to be protected from the impact of war."⁵⁸ The emphasis on war as an interstate conflict and the turn to international codification to assert such meaning was to be central to the drafters of the Brussels Declaration of 1874 in the aftermath of the Franco-Prussian War. Second, the Paris Declaration sought to strip weaker naval powers of a primary means of naval defense: privateers.⁵⁹ We will later explore how subsequent stipulations in the regulation of land war in Brussels similarly limited the defense capabilities of states with weaker armed forces, and thereby enhanced the supremacy of the more powerful. Both the Paris Declaration and the later Brussels Declaration thus expose how powerful European governments used the codification of the laws of war to sustain their supremacy in comparison to weaker armies of smaller states. The introduction of these two rationales in the Declaration of Paris thus serves as a prelude to the potential of the laws of war in constituting an order favorable to the emerging commercial powers of the late-nineteenth-century global economy. We will later address how key components of the Brussels Declaration served economic interests in the same vein.

C. Toward a Nation in Arms

The governmental challenges exposed during the Crimean War would intensify in subsequent years. The 'media war' revealed how the conscription of nonaristocratic soldiers could enlist the public against the war and not merely *for* it. Furthermore, the oversized, nonprofessional armed forces that were being sent far afield to fight posed new administrative challenges to the military. Enlisting even greater portions of the population to the armies seems an almost counterintuitive answer to these challenges. And yet, in the decades following the Crimean War, mass national conscription became both feasible and strategically preferable to the previous model of professional armed forces. Until the Franco-Prussian War, only the Prussians enforced a true national conscription regime, but in most European countries it tended to be poor, nonaristocratic soldiers who could not buy their way out of military service who became part of their nations' armed forces. The Prussian victories against Austria in 1866 and France in 1870–1871 demonstrated to European leaders the benefits of national

⁵⁷ The Paris Declaration Respecting Maritime Law of 16 April, 1856.

⁵⁸ JAN MARTIN LEMNITZER, *POWER, LAW AND THE END OF PRIVATEERING* 8-9 (2014). Lemnitzer further attributes Britain's decision to its leaders' concern over the threat of American use of privateers against British trade in wartime and the challenge it may have posed to British naval supremacy, especially if it were to involve further alliances with the Russians or the French. *Id.*

⁵⁹ Witt, *Lincoln's Code*, *supra* note 9, in Chapter 4.

conscription and enhanced the profile of the prestigious Prussian army as the model to be followed across Europe.⁶⁰

But the turn to national conscription was not merely a strategic choice. It occurred almost in tandem with the emergence of new polities in Europe, most prominently the United Kingdom of Italy in 1858–1870 and a united Germany between 1862 and 1871, and was meant to enhance the national identity and cohesive unity of these and other political units in need of constituting themselves as nation-states.⁶¹ School attendance in Europe increased dramatically between 1840 and 1880, making 'national languages' the written and spoken languages of 'the people.' Education systems were further deployed to provide the desired imagery of a shared past and collective commitment among the members of the newly-constituted national community.⁶² Military service and mass deployment had a similar function.⁶³ The myth of *levée en masse*—in the sense of the forced conscription introduced during the French revolutionary wars—“legitimized universal conscription as a corollary of citizenship and patriotism.”⁶⁴ Arming the people was meant to enhance their national identity and reinforce their fidelity to the state.⁶⁵ European governments used armies and schools, inter alia, for inculcating civic behavior and transforming newly-recruited soldiers, through parades, flag-waving, and anthems, into citizens of the nation.⁶⁶

D. The Civilian Front

The Europeans of 1860 were better informed and educated, and more politically engaged, than their fellow citizens in previous generations.⁶⁷ The revolutions of 1848 laid the foundations for reform that bore fruit in the 1860s, with some concession by the old elites to the forces of democracy. By the 1870s, electoral systems based on a broad franchise existed in France, Germany, Switzerland, and Denmark, and were soon introduced to other European countries.⁶⁸ With more information available and the extension of voting rights, the demands made by the public of governing elites increased. The ideological strands of the day—liberalism, nationalism, socialism, progress, and scientific racism—fostered alternatives to existing power structures.

⁶⁰ The Prussian system of compulsory military service had languished since its introduction in 1814 and was revitalized in 1858. After 1871, the Prussian institution of conscription was copied by every state in Continental Europe. See MICHAEL HOWARD, *WAR IN EUROPEAN HISTORY* 100-01 (1970).

⁶¹ These new political units, alongside the United States and Japan, challenged British industrial and economic supremacy and significantly undermined Russia's position as a decisive military power in Europe. For background, see ERIC HOBBSBAWM, *THE AGE OF CAPITAL: 1848–1875* 77-79 (1975).

⁶² *Id.* at 94.

⁶³ Interestingly, the policy of *levée en masse* served different functions within the French and Prussian militaries. In France, the universal obligation of male citizens to bear arms became the basis for the “the nation in arms.” Conversely, the Prussian army's turn to universal service was based more on an antirevolutionary sentiment. See John Horne, *Defining the Enemy: War, Law and Levée en masse from 1870-1945*, in *THE PEOPLE IN ARMS: MILITARY MYTH AND NATIONAL MOBILIZATION SINCE THE FRENCH REVOLUTION* 100, 103 (Daniel Moran & Arthur Waldron eds., 2003).

⁶⁴ *Id.*

⁶⁵ C. Dandeker, *The Bureaucratization of Force*, in *WAR* 118, 119 (Lawrence Friedman ed., 1994).

⁶⁶ ERIC HOBBSBAWM, *AGE OF EMPIRE* 304-05 (1987), EUGEN WEBER, *PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE 1870-1914* 292-338 (1976).

⁶⁷ MARGARET MACMILLAN, *THE WAR THAT ENDED PEACE* 11-13 (2013).

⁶⁸ HOBBSBAWM, *supra* note 63, at 85.

Bowing to some of these pressures seemed inevitable.⁶⁹ As Margaret Macmillan observes: "No government wanted large numbers of disgruntled citizens. The memories of Europe's many revolutions were all too fresh."⁷⁰ National conscription had the dialectical potential of bringing the war and its costs closer to home while, at the same time, disciplining the masses and educating them to become loyal citizens. Turning citizens into soldiers who would just "do and die" would also serve another purpose. In addition to soldiers who had to be indoctrinated so they did not desert the battlefield or hesitate to fight the enemy, the rise of nationalism also brought to the fore the opposite type of fighters—those eager to pursue the war more than their leadership. They would need to be restrained from fighting at will, with the law's approval.

New technology brought the war closer to home. Development in artillery enabled the targeting of civilians, and, as counterintuitive as this may sound, it was democratization and the rising political influence of civil society that provided the expanded the scope of the legitimate use of these new weapons against civilians.⁷¹ What the French General Le Blois anticipated in 1865 in his work *Fortifications in the Presence of the New Artillery* (1865),⁷² materialized during the bombardment of Strasbourg in 1870, being the first example of the use of artillery against civilian targets:

"The reason why formerly the civil population of fortified towns was often spared the terror and torture of a bombardment, was not because the warriors of the seventeenth and eighteenth centuries were more humane than those of the present day, but because their guns were less powerful. [. . .] "simple bombardment" directed against a rich and populous city like Strasburgh, . . . might force the inhabitants to bring such pressure to bear on the commandant that he would surrender forthwith."⁷³

The text of the Brussels Declaration would make sure that this type of attack was perfectly lawful.⁷⁴

III. THE PRELUDE TO BRUSSELS: THE 1864 GENEVA CONVENTION AND THE 1868 ST. PETERSBURG DECLARATION

⁶⁹ HOBBSAWM, *supra* note 63, at 95; HOBBSAWM, *supra* note 58, at 69-70.

⁷⁰ MACMILLAN, *supra* note 64 at 11-13 (2013).

⁷¹ See Best, *Supra* note 3 at 96 (noting the view, supported by Vattel, that inflicting harm on civilians whose opinions could influence public officials was justified).

⁷² I ÉTIENNE DE BLOIS, *DE LA FORTIFICATION EN PRESENCE DE L'ARTILLERIE NOUVELLE* 36-37, 74 (1865).

⁷³ H. SUTHERLAND EDWARDS, *THE GERMANS IN FRANCE: NOTES ON THE METHOD AND CONDUCT OF THE INVASION, THE RELATIONS BETWEEN INVADERS AND INVADED, AND THE MODERN USAGES OF WAR* 164-168, 305 (1874). See discussion in *De la fortification en presence de l'artillerie nouvelle*, in 9 *LE SPECTATEUR MILITAIRE, RECEUIL DE SCIENCE, D'ART ET D'HISTOIRE MILITAIRES* 51, 56 (Third Ser., 1867) (citing a publication of General de Blois from 1865, at 36).

⁷⁴ See *infra* Part IV.B.3.

As discussed, the press, the telegraph, the steamship, and the railways brought the wars of the 1850s and 1860s much closer to European homes and raised public concern over the suffering of soldiers in the battlefield. They "offered a setting which gave full scope for the prophetic voice"⁷⁵ of the peace movement—of various sorts and emphases—which had flourished in Europe and the United States since 1815. In the age of improved technology and communication, governments were exposed to a new, unfamiliar political cost: the scrutiny of the media and the public. The public outcry in response to severe casualties prompted civil society to advocate for legal constraints in times of war. These grass-roots initiatives paved the way for the two early documents that preceded the codification of the laws of war in Brussels: the 1864 Geneva Convention and the 1868 St. Petersburg Declaration. The first document addressed the treatment of wounded and sick soldiers, while the second asserted the general prohibition of needlessly aggravating the soldiers' suffering. Yet neither of these documents became central to governments' operations in times of war, nor required them to devote attention or resources to their implementation. Both are often celebrated for launching the project of the international laws of war, but, as our following analysis suggests, their real impact is quite overstated.

The mid-late 1800s is also known as a period during which a "cult of codification" emerged, playing a constitutive role in the institutionalization of the legal profession, while at the same time, serving to separate 'civil society' from the state.⁷⁶ In the context of the laws of war, codification took two central forms: a domestic form through military manuals and an international form. The first and most famous of the domestic military codes was the Lieber Code, issued at the height of the Civil War by President Lincoln on April 24, 1863.⁷⁷ Several prominent explanations have been offered for the drafting of the Code, none of them suggesting that the motivation was purely humanitarian.⁷⁸ While the code reflected familiar laws of war as they had developed since the eighteenth century, part of its novelty was the codified form itself and its universal application: a common, straightforward set of guidelines that each and every soldier was obliged to follow.⁷⁹ In the context of international codification, broadly speaking we find two, competing, strands. One strand, drawing its inspiration from the

⁷⁵ Alexander Tyrrell, *Making the Millennium: The Mid-Nineteenth Century Peace Movement*, 21 HIST. J. 75, 89 (1978).

⁷⁶ See JEAN-LOUIS HALPERIN, FIVE LEGAL REVOLUTIONS SINCE THE SEVENTEENTH CENTURY: AN ANALYSIS OF A GLOBAL LEGAL HISTORY 35-71 (2014).

⁷⁷ The Lieber Code, *supra* note 9.

⁷⁸ See Witt, *supra* note 9; Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L. L. 213, 214 (1998); DORIS GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914: A HISTORICAL SURVEY 19-20; (1949); Benvenisti & Cohen, *supra* note 5, at 1388-89.

⁷⁹ As noted by Richard S. Hartigan, "Never before had a government set down in clear, explicit, formal terms not only the rights and obligations of its own army, but of its enemy's army and civil population as well." See RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 2 (1983). As noted by one commentator, prohibitions on the taking of public or private property for the personal use of soldiers, prohibitions on torture, or damage beyond what could be conceived as necessary, ". . . comported with the needs of modern armies to . . . prevent the soldiers of the army from becoming a mob of looters and pillagers." Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 CHI. L. REV. 2071, 2101 (2013) (reviewing JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012)).

works of Jeremy Bentham and James Mill,⁸⁰ was that of the codification efforts of the Anglo–American peace movement. Its advocates—pacifists such as Elihu Burritt, James B. Miles, and David Dudley Field—viewed codification as a civil society project and emphasized arbitration as an important element in their codification scheme.⁸¹

The second strand conceived the code as a product of exclusive, scientific enterprise among jurists.⁸² In Gustave Moynier’s words, the aim of the international codification project was “to bring together those most experienced with international law so that they would proclaim, with a single voice if possible, the rules of moderation which the legal conscience of the time found indispensable.”⁸³ Johann Caspar Bluntschli (like Moynier, a Swiss jurist), marked the Lieber Code of 1863 as his source of inspiration for this second strand in the project to codify international law.⁸⁴ Moynier was also the main figure leading the way to the Geneva Convention of 1864. As the following section describes, the Geneva Convention did not embody the pacifism of the first Anglo–American strand; its main concern was not to abolish war but to confront the grave magnitude of suffering inflicted by contemporary warfare. Its limited ambitions and stark failure to restrain violence therefore destabilize the narrative about its legacy as the harbinger of the laws of war.

A. The 1864 Geneva Convention on the Sick and Wounded: Ensuring Charity in Wartime

The Battle of Solferino in 1859 reflected something of a revolution in the means of destruction. The almost infinite supply of soldiers brought to the battlefield about one hundred thirty thousand Austrian troops, who met a similarly-sized army of French and Piedmontese fighters.⁸⁵ Famously, Henry Dunant’s *A Memory of Solferino* (1862) described in great detail the brutal fate of wounded French and Habsburg soldiers fighting for the future of Italy. Thomas Longmore, soon-to-be British Surgeon General, observed in 1866 how the revolution in the means of destruction linked up with the media revolution to form a new political reality that required greater care for wounded soldiers.⁸⁶ But soldiers had not been treated so callously in the past; before the

⁸⁰ HINSLEY, *supra* note 50, at 81-91; Eliana Augusti, *Peace by Code: Milestones and Crossroads in the Codification of International Law*, in PARADOXES OF PEACE IN NINETEENTH CENTURY EUROPE 37, 41-42 (Thomas Hippler & Miloš Vec eds., 2015).

⁸¹ The Geneva Convention of 1864 stood in stark contrast to earlier strands of the peace movement (although it was compatible with the movement’s post-1850 pragmatist shift). While many of the members of the Red Cross were also involved in peace societies, Moynier maintained that the two organizations differed in significant ways. See André Durand, *Gustave Moynier and the Peace Societies*, 314 INT’L REV. RED CROSS 532 (1996).

⁸² *Id.*; MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER 544 (2009).

⁸³ André Durand, *The Role of Gustave Moynier in the Founding of the Institute of International Law*, 544 ICRC REV. 544 (1994). See also KOSKENNIEMI, *supra* note 79, at 43.

⁸⁴ As Bluntschli wrote in 1881: “From 1860 to 1870, Francis Lieber, in New York, Edward Laboulaye, in Paris, and I in Heidelberg, formed what Lieber used to call a ‘scientific clover-leaf.’” (in FRANCIS LIEBER, 2 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, 7, 12-13 (1881)).

⁸⁵ FREDRICK C. SCHNEID, THE SECOND WAR OF ITALIAN UNIFICATION 1859-61 (2014); HUMBERT FINK. AUF DEN SPUREN DES DOPPELADLERS (1994).

⁸⁶ GUSTAVE MOYNIER & LOUIS APPIA, HELP FOR SICK AND WOUNDED, 32 (John Furley trans., 1870) quoted by JOHN HUTCHINSON, CHAMPIONS OF CHARITY: WAR AND THE RISE OF THE RED CROSS 27 (1996).

Napoleonic Wars, soldiers were professionals, expensive to train, and therefore adequately protected and cared-for.⁸⁷ An elaborate practice of establishing ad hoc agreements between monarchs—so-called cartels—made sure governments would offer treatment to the wounded and sick, and was complemented by various civil society initiatives.⁸⁸ However, the introduction of universal conscription during the Napoleonic wars made vast numbers of inexperienced soldiers available and thus expendable: “[T]he French Revolution relegated the medical services to the bottom of the quartermaster-generals’ list of concerns.”⁸⁹ In a famous example from the Battle of Solferino, the Austrians even detained the Italian medical teams and prevented them from reaching the battlefield.⁹⁰

The Geneva project was not concerned with the promotion of peace or the conduct of armies *during* the war. Nor was it about requiring the military to invest resources in caring for the wounded and the sick. Unlike the approach of the British during the Crimean War, which led to a complete overhaul of their medical corps and the establishment of official medical services that were capable of responding to the requirement of contemporary wars,⁹¹ Dunant relied on civil society. He believed that Europe was imbued with “a human and truly civilized spirit” and trusted in “the good wishes at least of every decent person” to volunteer for the mission.⁹² Unsurprisingly, the Geneva initiative soon became the target of the most diligent campaigner for British post-Crimean War reform, Florence Nightingale:

I need hardly say that I think its view most absurd—just such as would originate in a little state like Geneva, which never can see war. They tend to remove responsibility from Governments. . . . it would be an error to revert to a

⁸⁷ Such was the prevailing school of thought during the eighteenth century that Louis XIV ordered the construction of *Les Invalides*, perhaps the world’s first, and certainly the most beautiful, veterans’ hospital. And to ensure that his soldiers could be safely transported to the hospital, the Sun King established the professional military medical corps, signing the royal edict in 1708. See BOISSIER, *supra* note 42, at 128.

⁸⁸ For a brief summary of military medical history before the Geneva Convention, see BOISSIER, *supra* note 42, at 125-38. For a study of the history of the treatment of the sick and wounded in international wars three hundred years before the Geneva Convention, see E. GURLT, ZUR GESCHICHTE DER INTERNATIONALEN UND FREIWILLIGEN KRANKENPFLEGE IM KRIEGE III 800-21 (1873). Gurlt describes donations by British citizens and officials to distressed Germans during the war of 1813 and a 1814 resolution in the House of Lords on the need “to afford to the suffering People of Germany such additional Relief as may be suitable to this most interesting occasion.” *Id.* He also describes the efforts in France to treat French soldiers and prisoners of war, including by bringing them to France for treatment. *Id.* at 833-845. On the practice of ‘cartels’ see also TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES, ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF WAR 353 (2d ed., 1875).

⁸⁹ François Bugnion, *Birth of an Idea: The Founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement: From Solferino to the Original Geneva Convention (1859–1864)*, 94 INT’L REV RED CROSS 1299, 1312 (2012).

⁹⁰ BOISSIER, *supra* note 42, 29-30.

⁹¹ BOISSIER, *supra* note 42, at 89.

⁹² HENRY DUNANT, A MEMORY OF SOLFERINO, 126-127 (1862). The Red Cross was composed of national societies that were volunteer-based charities, funded by private donations (often by European monarchs).

voluntary system, or to weaken the military character of the present system by introducing voluntary effort, unless such an effort were to become military in its organization.⁹³

The main thrust of the initiators of the Geneva Convention, then, was to bestow on those “decent persons” the status of neutrals who could access the battlefield after hostilities subsided and tend to the wounded and dying. Accordingly, the formal title of the conference referred to the neutralization of the care of the military in the field.⁹⁴ This was a main concern for government representatives convening in Geneva—that is, not the voluntary basis of the aid societies, but their claim to neutrality.

Loeffler, the senior Prussian delegate to the International Congress in Geneva, pointed out that the definition of the status of those volunteers as neutrals was a lacuna that needed attention.⁹⁵ Ultimately, the French proposed a text that would overcome this problem by identifying, in Article 5, “[i]nhabitants of the country who bring help to the wounded” not as neutrals but as individuals that “shall be respected and shall remain free.”⁹⁶ It was agreed that voluntary assistance would function only with the approval of commanders in the field, all volunteers being clearly identified by their distinctive armbands. States were not obliged to take any steps to develop the national societies to aid the wounded, nor was there any mechanism to enforce the Convention in times of war. Dunant, Moynier, and their colleagues were realistic. What the fathers (and also, importantly, mothers)⁹⁷ of the Red Cross were seeking was merely that the armies allow private associations to treat the sick and wounded. This was the logic of the 1864 Geneva Convention, and the governments tolerated the initiative as long as those associations stayed away while the battle was still raging.⁹⁸ The Convention absolved states from the obligation to invest in caring for their wounded soldiers, leaving the volunteer aid societies to “provide the aid which states do not⁹⁹ by delivering “practical aid”¹⁰⁰ in an age of ever-growing armies and increasingly destructive weaponry.

⁹³ From *Observations sur l'Insuffisance du Service de Santé en Campagne*, quoted in HUTCHINSON, *supra* note 86, at 40-41 (1996).

⁹⁴ See the protocols in *Conférence de Genève 1864 8-10 (Conférence Internationale pour la Neutralisation du Service de Santé Militaire en campagne, Première Séance, du 8 Août 1864)*.

⁹⁵ *Id.* at p. 10.

⁹⁶ *Id.* at p. 11.

⁹⁷ Queen Augusta of Prussia and her Aunt Maria Pavlovna of Russia were prominent supporters of Dunant's initiative.

⁹⁸ Not all governments adhered to it. France and Austria most notably did not.

⁹⁹ In a treatise published in 1867, Moynier argued that the military's purpose is to conquer the enemy, and thus care for the wounded will never be its primary concern. In order to fulfill its duty in looking after its wounded soldiers, the state should not hold a monopoly on aid (“Son monopole ne se justifie donc pas”) and therefore allow volunteer societies to provide the aid which the state does not. See GUSTAVE MOYNIER & LOUIS APPIA, *LA GUERRE ET LA CHARITE: TRAITE THEORIQUE ET PRATIQUE DE PHILANTHROPIE APPLIQUE AUX ARMEES EN CAMPAGNE*, 41 (1867).

¹⁰⁰ In distinguishing themselves from peace movements, the founders of the Red Cross espoused practical Christian aid, which was not meant to bring about the end of war, but would at least contend with the

Unfortunately, even this minimal effort to care for the expendable soldiers proved to be problematic in the new type of wars between nations. During the Franco-Prussian war, the Convention was abused by civilians who invoked immunity to rob fallen soldiers or evade the duty to billet troops, and violated by the French forces, who had not been instructed to comply with the Convention.¹⁰¹ In fact, by the end of the war, it was regarded as such a dismal failure that the very idea of amending its provisions with a new convention was readily dismissed as unrealistic. Boissier notes that “[d]ivided within itself, its faith badly shaken, misunderstood by the public and an irritant to national governments, the Red Cross entered into the most serious crisis of its entire history.”¹⁰²

B. The St. Petersburg Declaration: A Commitment to a More Humane War?

Alexander II’s ascension to the throne in Russia before the end of the Crimean War ushered in an era of liberal reform.¹⁰³ Backed by a like-minded cabinet, he introduced a series of judicial, educational, and military reforms. While successfully suppressing the Polish Rebellion (1863–1864) and maintaining a protectionist policy over the Balkan states, Alexander succeeded in his efforts to uphold the public image of a benevolent dictator.¹⁰⁴ Thus, when his Minister of War, Dmitry Milyutin, presented a proposal to ban a certain type of bullet on humanitarian grounds, the prospect of publicly displaying his civility while reaffirming Russia’s importance on the world political stage probably appealed.

As the story goes, exploding bullets were introduced to the Russian army in 1863 for the purpose of destroying the enemy’s cartridge boxes (caissons) and artillery.¹⁰⁵

reality of it, alleviating the pain and suffering of wounded soldiers. Such statements appear through the *travaux préparatoires*, protocols, and early publications of the Red Cross. See, e.g., SECOURS AUX BLESSES, COMMUNICATIONS DU COMITE INTERNATIONAL FAISANT SUITE AU COMPTE RENDU DE LA CONFERENCE INTERNATIONALE DE GENEVE, 12 (1864); HENRI DUNANT, LA CHARITE SUR LES CHAMPS DE BATAILLE SUITES DU SOUVENIR DE SOLFERINO ET RESULTATS DE LA CONFERENCE INTERNATIONALE DE GENEVE, 6 (1864).

¹⁰¹ On January 9, 1871, Bismarck writes a letter detailing the French mistreatment of wounded Prussian soldiers, while suggesting that the French soldiers be cared-for by the Prussians (see Count Bismarck to Count Bernstorff (communicated to Earl Granville) January 9, 1871, doc. No. 326 rep. in Great Britain Foreign Office, Further Correspondence respecting the War between France and Germany 1870-71 (1871) at pp. 252-56). For detailed description of the behavior of French forces and civilians see Boissier, *supra* note 42, at 252; HUTCHINSON, *supra* note 86, at 55.

¹⁰² Boissier, *supra* note 42, 272. Following the Franco-Prussian War, the Red Cross did not meet again for over ten years.

¹⁰³ ORLANDO FIGES, CRIMEA: THE LAST CRUSADE (2010); W. BRUCE LINCOLN, NICHOLAS I, EMPEROR AND AUTOCRAT OF ALL THE RUSSIAS (1978); *The Reign of Nicholas I, 1825-1855, and the New Intellectual Climate*, in NICHOLAS V. RIASANOVSKY, RUSSIAN IDENTITIES: A HISTORICAL SURVEY (2005).

¹⁰⁴ THE CAMBRIDGE HISTORY OF RUSSIA, VOLUME 2, IMPERIAL RUSSIA, 1689-1917 561, 593 (Dominic Lieven ed., 2006); GEOFFREY HOSKING, RUSSIA: PEOPLE AND EMPIRE 1552-1917 315 (1997); BEN EKLOF, JOHN BUSHNELL & LARISA GEORGIEVNA ZAKHAROVA. RUSSIA'S GREAT REFORMS, 1855-1881 (1994).

¹⁰⁵ Annexe au protocole no. 1 – ‘Mémoire sur la suppression de l’emploi des balles explosives en temps de guerre’ in *Conférences de St. Pétersbourg*, in NOUVEAU RECUEIL GENERAL DE TRAITES,

Experiments conducted by the Russian army exposed the great devastation and suffering these bullets could cause. For humanitarian and operational reasons, army regulations restricted their supply; only six of these cartridges could be issued, and only to noncommissioned officers, to be used solely for the destruction of caissons and not men: “The soldier having at his disposal a great many of these cartridges would not be able to resist the temptation to use them against men, which must never be tolerated – or else against caissons, but at distances from which the effectiveness of the shot would be more than dubious.”¹⁰⁶ By 1867, continued developments had led to the invention of inflammable bullets that, according to the Minister of War, would “unnecessarily increase the sufferings” if they were to strike human or animal flesh. It was then that the Minister proposed to Tsar Alexander II a complete, *international*, ban on explosive and inflammable bullets. The invitations to the St. Petersburg Convention followed.

The Russians had several reasons for introducing such an initiative, particularly: genuine concern over unnecessary human suffering;¹⁰⁷ a greater need to ensure military discipline, especially in their own army (the largest in Europe at the time, and composed of uneducated conscripts¹⁰⁸ and Polish insurgents);¹⁰⁹ and the desire to prevent an arms race.¹¹⁰ The idiosyncrasies of the Russians’ geo-political and economic situation may

CONVENTIONS ET AUTRES TRANSACTIONS REMARQUABLES 458 (*Continuation du Grand Recueil* de G. Fr. De Martens, Charles Samwer & Jules Hopf eds., 1873).

¹⁰⁶ *Id.* (authors’ translation). See also Крылов В. М., Маковская Л. К. Санкт-Петербургская декларация 1868г. Новые архивные материалы // Повелители огня. Сборник статей и материалов, посвященный 135-летию Главного ракетно-артиллерийского управления, Под. ред. Н. И. Караулова. Москва -СПБ, 1997. С. 166-189. (V. M. Krylov & L. K. Makovskaya, Saint-Petersburg Declaration of 1868. The New Archive Materials, at Masters of Fire. A Collection of Articles and Materials, Dedicated to the 135th Anniversary of the Main Missile and Artillery Directorate 166-189 (N. I. Karaulova ed., 1997)).

¹⁰⁷ *Conférences de St. Pétersbourg*, *supra* note 105, at 458.

¹⁰⁸ REFORMING THE TSAR’S ARMY: MILITARY INNOVATION IN IMPERIAL RUSSIA FROM PETER THE GREAT TO THE REVOLUTION 11-14, 292–95 (David Schimmelpenninck van der Oye & Bruce W. Menning eds., 2004); Jan Lucassen & Erik-Jan Zürcher, *Conscription and Resistance: The Historical Context*, 43 INT’L REV. SOC. HIST. 405 (1998); Walter M. Pintner, *The Burden of Defense in Imperial Russia, 1725–1914*, 43 RUSS. REV. 231 (1984).

¹⁰⁹ In 1863, Russia forcibly recruited Polish insurgents to its army as a means to suppress their opposition. For specific concerns about unreliable foot soldiers having access to dangerous weapons, see Benvenisti & Cohen, *supra* note 5. For background on military reforms in Russia, see NICHOLAS RIASANOVSKY & MARK D. STEINBERG, *A HISTORY OF RUSSIA* 342-43 (2005); Persson, *supra* note 46, at 41; CAMBRIDGE HISTORY OF RUSSIA, *supra* note 104, at 561.

¹¹⁰ We did not find any trace of the desire to prevent an arms race in the St. Petersburg archives (in the Historical-Military Museum of Artillery, Engineer and Signal Corp (<http://www.artillery-museum.ru/en/home.html>)) Cf. Scott Keefer who attributes the discrepancies between the Russians (in favor of regulation) and the British (opposing regulation) to the British strategic interest in new munitions technologies as a way to overcome manpower deficiencies in Europe (vis-à-vis other European powers) and to enhance its supremacy in colonial contexts. Keefer further suggests that the Russian motivation was to curtail the use of weaponry that would provide profound military advantages to the most technologically advanced nations. Scott Keefer, ‘*Explosive Missals*’: *International Law, Technology, and Security in Nineteenth Century Disarmament Conferences*, 21 WAR IN HISTORY 445, 449-455 (2014); SCOTT KEEFER, *THE LAW OF NATIONS AND BRITAIN’S QUEST FOR NAVAL SECURITY: INTERNATIONAL LAW AND ARMS CONTROL 1898-1914* 39-41 (2016).

have added to their motivations. Following the Crimean War, Russia was eager to rehabilitate its devastated stature¹¹¹ as a worthy member of the club of civilized nations,¹¹² especially at a time when the country was beginning to open its economy to foreign investors.¹¹³ We need not dwell on these various explanations here. For our purposes, we would like to highlight that the declaration reflects a shared concern among European governments over disciplinary challenges in their armies and the reliance on an international code to limit soldiers' personal discretion during combat.

At the same time, it is important to recognize the limited significance of the Declaration, as reflected in its text and the parties' deliberations over its content. At first glance, St. Petersburg indeed does appear to represent a watershed moment in the regulation of war; but more cautious observation might reveal another layer that offers a more disturbing reading.

The Preamble of the 1868 St. Petersburg Declaration famously set forth the rationale of legitimate warfare. It invokes "the progress of civilization" as requiring the

¹¹¹ Since the Crimean War, Russia's standing in the Concert of Europe had been damaged, as reflected in Minister of Foreign Affairs Gorchakov's famous statement following the war: "La Russie ne boude pas; elle se recueille." Russia's dubious position was further exacerbated by international sympathy, and explicit French support, for the Polish Rebellion (1863-4). For background on Gorchakov's statement, see JULIUS WILHELM ALBERT VON ECKARDT, *LA SOCIÉTÉ RUSSE* 74 (1877); *NARRATIVE OF THE MISSION TO RUSSIA IN 1866 OF THE HON. GUSTAVUS VASA FOX, FROM THE JOURNAL AND NOTES* (John-Denison Champlin ed., 1873); 10 *THE NEW INTERNATIONAL ENCYCLOPAEDIA* 158 (Herbert Treadwell Wade ed., 1922); EDVARD RADZINSKY, *ALEXANDER II; THE LAST GREAT TSAR* 109 (2006).

¹¹² There is a growing body of literature on Russian approaches to international law during this period. See, e.g., Alfred Rieber, *Persistent Factors in Russian Foreign Policy: an Interpretive Essay*, in *IMPERIAL RUSSIAN FOREIGN POL'Y* 315 (Hugh Ragsdale & V.N. Ponomarev, eds., 1993); Peter Holquist, *The Russian Empire as a "Civilized State": International Law as Principle and Practice in Imperial Russia, 1874-1878* (Title VIII Program, National Council for Eurasian and East European Research, 2004) 1-37; Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 *HARV. INT'L L.J.* 539 (2010); Eric Myles, "Humanity", "Civilization" and the "International Community" in the Late Imperial Russian Mirror: Three Ideas "Topical for Our Days," 4 *J. HIST. INT'L* 310 (2002); Lauri Mälksoo, *The History of International Legal Theory in Russia: a Civilizational Dialogue with Europe*, 19 *EUROPEAN J. INT'L L.* 211 (2008).

¹¹³ Russian railway construction surged following the Crimean War, and drew a significant number of foreign investors. In 1857, the imperial government granted a concession to the joint stock company, the Society of Russian Railroads, to build three thousand miles of railways, including a line from Saint Petersburg to Warsaw and a branch to the Prussian frontier. The first issue of stock was readily purchased investors thanks to five percent return on investment guaranteed by the Russian government. Following the success of this inaugural public-private project (hitherto, public works, such as banks, had been entirely state-owned and -operated), foreign capital poured into Russia due to substantial government subsidies and an 1868 law, which enabled the government to purchase bonds of railroad consortia, and in turn issue consolidated bonds which carried the guarantee of a minimum interest payment. The influx of French and Belgian capital, notes Fisk, was so substantial it triggered temporary inflation. HARVEY E. FISK, *THE INTER-ALLY DEBTS* 294-95 (1924). For background on foreign capital invested in late imperial Russia, see ANTON CRIHAN, *LE CAPITAL ÉTRANGER EN RUSSIE* (1934); PAVEL VASIL'EVICH OL', *FOREIGN CAPITAL IN RUSSIA* (1983); FISK at 293-304. For background on France's pivotal role in financing Russian state projects after Prussian support waned, see Marianne Seydoux, *Les thèses concernant la Russie et l'URSS soutenues en France de 1888 à 1964*, 6 *CAHIERS DU MONDE RUSSE ET SOVIÉTIQUE* 437 (1965). For Belgian investments, see Edward F. Yurkick, *The Russian Adventure: Belgian Investments in Imperial Russia* 2-33 (unpublished Ph.D. dissertation, Ohio State University, 1959). For a more critical assessment of the impact of foreign investment on the Russian economy, see D. C. M. PLATT, *FOREIGN FINANCE IN CONTINENTAL EUROPE AND THE UNITED STATES 1815-1870: QUANTITIES, ORIGINS, FUNCTIONS AND DISTRIBUTION* 39-81 (2013).

“alleviation as much as possible the calamities of war.” Therefore, it asserts, “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”¹¹⁴

This rationale had been self-evident only a century earlier. But its reiteration was diminished by the Declaration in two important ways. First, the Conference participants rejected a proposal made by the Prussian government to adopt a general prohibition on weapons that uselessly aggravate the suffering of soldiers, and instead focused on prohibiting only two specific types of bullets: those that exploded or ignited when striking human or animal flesh.¹¹⁵ The Prussians’ concern that it was necessary to formulate a general principle to address the great diversity in the means of destruction (in particular the recent development of chemical weapons) was met by the British delegate’s argument that smaller armies had to rely on stronger fire power, and other governments’ insistence on the need for specificity.¹¹⁶ Second, the final paragraph explicitly declares that, until further agreement, the use of all other types of weapons or ammunitions is not prohibited.¹¹⁷ By prohibiting so little and allowing so much, the St. Petersburg Declaration demonstrates the meager willingness—or even reluctance—of governments to constrain themselves on the battlefield, and then only in interstate conflicts.¹¹⁸

Indeed, unlike the Geneva project of 1864, the Declaration, which was drafted only by states parties, applied to states’ armed forces and expresses a commitment to limit states’ military might, but the actual commitment was minimal. It merely conformed to the parties’ wish to rid themselves of unhelpful types of munitions. Despite the growing disciplinary challenges within military units, economic interests seeking protection from wartime hostilities, and the vocal humanitarian lobby, governments were not prepared to agree on constraints over the exercise of violence, either in 1864 or 1868.

¹¹⁴ St. Petersburg Declaration, para. 2.

¹¹⁵ The Prussian proposal was rejected mainly by Britain, which argued (not unlike the US) that, because of its relatively small armed forces, it relied on technology. France also rejected it. But Austria and Switzerland supported Prussia’s proposal and, in correspondence before the conference, Bavaria, Portugal, Belgium, and the Netherlands expressed support for it. The proposal was ultimately rejected because it lacked consensus: delegates had agreed, and were instructed by their governments, to only sign a declaration that was agreed-upon by all the governments at St Petersburg. *Conférences de St. Petersbourg* in NOUVEAU RECUEIL GENERAL DE TRAITES, CONVENTIONS ET AUTRES TRANSACTIONS REMARQUEABLES 465-66 (Continuation du *Grand Recueil* de G. Fr. De Martens, Charles Samwer & Jules Hopf eds., 1873).

¹¹⁶ *Id.* at 452-56, 462-66, 471.

¹¹⁷ “The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.” St. Petersburg Declaration, para. 2.

¹¹⁸ The St. Petersburg Declaration aimed at regulating interstate wars. The preamble describes the project as designed “to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations,” The St. Petersburg Declaration, preamble.

The first comprehensive attempt to regulate war would have to wait until the Brussels Declaration of 1874, resulting from the devastating events of the Franco-Prussian War.

IV. FROM THE FRANCO-PRUSSIAN WAR TO THE BRUSSELS DECLARATION

The 1870–1871 Franco-Prussian War shook the foundations of the European balance of power. The war fully exposed the implications of the rise of citizens’ involvement in the conduct of hostilities, which the European political and economic aristocracy had long perceived as a threat to order. “The crisis of 1870 was thus a crisis of European politics, and was perceived as such by foreign observers, states and organisations.”¹¹⁹

In this part we explore how the War and its aftermath impacted on the formation of the modern laws of war, and prompted international codification in the Brussels Declaration of 1874, and more generally on the shaping of the basic tenets of international lawmaking. We argue that, in response to the War, key European governments turned to codification of the laws of war—a particular format of codification that silenced civilian groups that were perceived as potentially undermining the status quo. We propose that it was the Franco-Prussian War, rather than the Battle of Solferino or any other battle during the formative era of international law, that urged governments to turn to the codification of international law and agree on the specific norms required. More generally, we argue that these events contributed to the shaping of international law as an elite tool to ensure exclusive control of European affairs and secure the Concert of Europe against emerging transnational challengers. The codification in Brussels which focused exclusively on inter-state wars made clear that governments had a free hand to quell internal challenges to their authority, such as the Paris Commune.

A. The Franco-Prussian War and the Unruly Civilian: Challenges to Empire

1. The Franco-Prussian War: The Republican Fight Against Empire

The first phase of the War began with the French Declaration of War on July 19, 1870, and ended with the surrender of the French army at Sedan on September 2, 1870.¹²⁰ Before the rise of nationalism, a war would have commenced and ceased within this short period.¹²¹ But the stunning capitulation and captivity of Emperor Napoleon III and more than one hundred thousand French troops proved to be merely

¹¹⁹ BERTRAND TAITHE, *CITIZENSHIP & WARS, FRANCE IN TURMOIL 1870-1871* 38 (2001). *See also* HINSLEY, *supra* note 50, at 244, 255.

¹²⁰ This section is based on: DOCUMENTS PUBLIÉS POUR SERVIR A L’HISTOIRE DE LA GUERRE DE 1870-1871 – RECUEIL DES DEPECES (P. Chasteau ed., 2016); JOHN MERRIMAN, *MASSACRE: THE LIFE AND DEATH OF THE PARIS COMMUNE OF 1871* 18-38 (2014); PETER M.R. STIRK, *A HISTORY OF MILITARY OCCUPATION FROM 1792 TO 1914* 188-223 (2016); MICHAEL ELIOT HOWARD, *THE FRANCO-PRUSSIAN WAR: THE GERMAN INVASION OF FRANCE*, (1961); ALISTAIR HORNE, *THE FALL OF PARIS* (2d ed., 1990); PROSPER-OLIVIER LISSAGARAY, *HISTORY OF THE PARIS COMMUNE OF 1871* (1876, Eleanor Marx trans., 1886); ROBERT TOMBS, *THE WAR AGAINST PARIS 1871* (1981); and the more literary rendition by Emile Zola in *The Debacle*. EMILE ZOLA, *THE DEBACLE* (1892).

¹²¹ Whitman, *supra* note 9, at 209-11; STIRK, *supra* note 120, at 188.

the trigger for the second phase of the war. Calls for revolution against the French monarchy immediately spread across Paris and, on September 4, Léon Gambetta proclaimed the founding of the Government of National Defense. This government was determined to continue the war throughout France. Instead of relying on the defeated army, the republican authorities rallied the National Guard (a proletarian force, about two hundred thousand-strong, who were paid F 1.50 per day) and francs-tireurs (free-shooters). The latter were irregular fighters who emerged throughout France in response to Gambetta's call upon "everyone . . . let us rise *en masse* and die rather than submit to the shame of [national] dismemberment."¹²² But with the Prussian army's effective siege of Paris, their artillery pounding Paris day and night, and military losses in other parts of France, the republican opposition to the Prussians seemed increasingly hopeless. After Paris had been under siege for four excruciating months, French Foreign Minister Favre signed, on behalf of the French government, an armistice with Bismarck on January 30, 1871. The agreement included painful concessions to be made by the French, conceived by them primarily as the dismemberment of the French nation, with the transfer of Alsace and Lorraine, as well as the payment of F 5 million. National elections were called for a new National Assembly that would vote on whether to accept these harsh conditions.¹²³ The newly elected Assembly heard the plea of the representatives of both Alsace and Lorraine,¹²⁴ but the Chief Executive of the Government, Adolphe Thiers, convinced the Assembly, elected for ending the war, that it was necessary to amputate a limb to save the body of the nation.¹²⁵

But even if the National Assembly did opt for humiliating peace, others vowed to keep fighting. The representatives of Alsace and Lorraine reasserted the struggle for their rights "by all and everyone, in the form and to the extent that our conscience will dictate to us."¹²⁶ And in Paris and in some other cities around France, popular resistance to the terms of the peace agreement led to uprisings. The Commune would soon be proclaimed and would last for ten more weeks until crushed by the Republican government.

2. *The Paris Commune*

The Parisians, out-voted in the National Assembly, refused to give up their arms.¹²⁷ Short-lived revolutionary communes also sprang up in a few other French cities.¹²⁸ On March 1, 1871, reacting to the National Assembly's ratification of the Treaty of Versailles, the Central Committee of the National Guard issued a proclamation

¹²² See HORNE, *supra* note 56, at 103, 108 (Daniel Moran & Arthur Waldron eds., 2003).

¹²³ See the debates in the National Assembly, 17 February, 1871 – 1 March, 1871, DOCUMENTS PUBLIES POUR SERVIR A L'HISTOIRE DE LA GUERRE DE 1870-1871 VO. VIII – RECUEIL DES DÉPÊCHES FRANCAISES OFFICIELLES, 5-54 (P. Chasteau ed., 1871).

¹²⁴ "We are like the sailor who sees his ship sinking and reaches out to those who can save him. We extend our hand to you, do not refuse us yours." *Id.* at 9 (authors' translation).

¹²⁵ *Id.* at 11-16.

¹²⁶ Declaration of representatives read in the National Assembly on March 1. *Id.* at 37-38 (authors' translation).

¹²⁷ MERRIMAN, *supra* note 113, at 18-38 (2014); HORNE, *supra* note 56; LISSAGARAY, *supra* note 113; TOMBS, *supra* note 113.

¹²⁸ ROGER V. GOULD, *INSURGENT IDENTITIES 187-192* (1995); TOMBS, *supra* note 114, at 57-58.

asserting its intention to “defend the threatened Republic by all possible means.”¹²⁹ Ten days later, it issued another proclamation, calling on “Soldiers, the children of the people, [to] unite for saving the Republic!” and asserting that a three hundred thousand-strong Guard was ready to save the Republic.¹³⁰ For Maurice, Emile Zola’s hero in *La Débâcle*, the situation was clear: “Even with no hope of victory Paris had to defend itself so that the homeland might live.”¹³¹

When, on March 18, Thiers’ government (then located in Versailles) sent regular army units to disarm the National Guard in Paris, the army encountered resistance, and fighting broke out: the uprising had begun. The Paris Commune was formally proclaimed on March 28, 1871, after municipal elections. It lasted for nearly two months, until May 21, when the regular army entered the city, precipitating the “biggest massacre in Europe of the nineteenth century”¹³² of Parisians who were believed to have taken part in the Commune’s activities. By virtue of this “Bloody Week,” the subjugation of the city was a *fait accompli*. Robert Tombs writes that the brutal massacre was designed to quell anarchy and restore order.¹³³ On May 25, Thiers issued a circular to all French authorities updating them on the army’s victory, adding: “The soil of Paris is strewn with corpses. This frightful spectacle will serve as a lesson to the fools who dare to declare themselves supporters of the Commune.”¹³⁴

Even if the Communards were a motley crowd of confused individuals trapped in a hopeless situation, the French government had to cast them as enemies of the nation to justify its ruthless reaction. In order for France to be rebuilt, the Communards had to be viewed as dangerous *internationalists* who threatened the entire economic social and political order of Europe.¹³⁵ This was soon to become useful for key political revolutionaries such as Karl Marx, then one of the leaders of the International Workingmen’s Association (the International), established in 1864. Thus, while the Commune was short-lived, its memory made a lasting impression on those invested in changing political and social order: “history was to prove that the death of the Commune, with all the mythology it left behind, fanned by Marx, was far more important than its life.”¹³⁶

The Communards were motivated by several antinational and antiestablishment strains.¹³⁷ While some of the antiestablishment sentiments remained local in their

¹²⁹ Documents relatifs à la guerre franco-allemande 1871-1872, Archives Diplomatiques 1873, recueil de diplomatie et d’histoire (vol. 1), Doc. No. 1136, p. 33.

¹³⁰ *Id.* Document No. 1156, 53.

¹³¹ ZOLA, *supra* note 113, at 457.

¹³² MERRIMAN, *supra* note 113, at 2.

¹³³ TOMBS, *supra* note 113, at 107-11.

¹³⁴ Circulaire May 25, 1871, rep. in Recueil des dépêches françaises officielles *supra* note 116, at 90. The massacre perpetrated in the name of the nation against its citizens was seen by Emile Zola’s protagonist as a second act of betrayal of the French nation by the same government that cut off parts of its territory. When referring to the massacre, Henriette sees “the final paroxysm of a nation.” ZOLA, *supra* note 113, at 500.

¹³⁵ Thiers’ Circulaire, 20 March, in recueil des dépêches françaises officielles, *supra* note 116, at 56-57.

¹³⁶ HORNE, *supra* note 56, at 430.

¹³⁷ For an overview, see TAITHE, *supra* note 112, at 15; MERRIMAN, *supra* note 113, at 167; GOULD, *supra* note 121, at 153, 165-171. *See also*, HORNE, *supra* note 56, at 430; HOBBSAWM, *supra* note 54, at 167.

reach,¹³⁸ other ideologies resonated across Europe: Proudhonism, which demanded local autonomy;¹³⁹ socialism, which promoted a transnational class struggle¹⁴⁰ that would ultimately replace the very existence of states;¹⁴¹ and anarchy, led by people such as Mikhail Bakunin, who had anticipated the French defeat early on and rushed to France to seize the opportunity to start the Europe-wide revolution.¹⁴² Driven by social democratic ideology, the Commune promulgated laws that subjected private ownership to social needs.¹⁴³ This ideology did not merely challenge the existing economic order, but clashed with the Church, which would teach the poor that “this world is a valley of tears and that they should resign themselves to poverty—their reward for suffering would come in Heaven.”¹⁴⁴ Feminist ideology also inspired women to take to the streets. “Women’s involvement in the Commune presented a fundamental subversion of bourgeois society, a shocking rejection of conventional morality.”¹⁴⁵ There were even voices denouncing marriage as a type of slavery.¹⁴⁶ Several ideologies found a common enemy worth fighting to the death, because what was at stake was the possibility of “fall[ing] under the yoke [to be] enfranchised for eternity,” as a Communard proclamation exclaimed, calling all Parisians “Aux armes! Aux armes!” after the army sent from Versailles had entered one of the city gates.¹⁴⁷ For some—Zola’s protagonist, for example—“the Commune was impotent, being torn asunder by too many contradictory elements.”¹⁴⁸ Yet, to onlookers, the Commune became a model of “liberal democracy, with broad freedom of speech, assembly and the press, and [the government’s] reluctance to use extreme measures of repression against political

¹³⁸ Gould emphasizes the role and motivation of the urban community. GOULD, *supra* note 121, at 153.

¹³⁹ The Commune’s Declaration to the French People (19 April 1871) calls, *inter alia*, for “The absolute autonomy of the Commune extended to all localities in France.” ‘Declaration to the French People’, April 19, 1871, in THE COMMUNARDS OF PARIS 1871 82 (Stewart Edwards ed., 1973). Tombs mentions the influence of Proudhon and Bakunin, who advocated “destroying oppressive state structure by devolving power to local democratic communities.” TOMBS, *supra* note 113, at 117-18.

¹⁴⁰ As John Merriman notes, in many respects, the Commune was a trans-European event (“Paris was a surging city of great social contrasts and contradictions during Napoleon III’s Second Republic (1852–1870) [. . .] In 1870, almost half a million Parisians – one quarter of the population – could be found classified as indigent.” MERRIMAN, *supra* note 113, at 2, 5.

¹⁴¹ “Popular understanding of the Commune’s struggle is perfectly summarized in by far the most famous of Communard texts, the *Internationale*, written by a member of the Commune, Eugène Pottier.” TOMBS, *supra* note 113, at 125, 220-22.

The *Internationale* presents a vision of class struggle: “This is the final struggle; Let us group together, and tomorrow; The Internationale; Will be the human race.” See also MERRIMAN, *supra* note 113, at 12.

¹⁴² As Arthur Lehning suggests in his introduction to Michael Bakunin’s *Selected Writings*, “This [the revolution], he hoped, might very well spread to Italy and Spain, and could, via the Slav peoples of Austria, extend to Poland and the Ukraine, finally to reach the Russian peasant masses.” MICHAEL BAKUNIN, *SELECTED WRITINGS* 23-24 (Arthur Lehning ed., 1873).

¹⁴³ Marx describes the laws that abolished night work among bakers and prohibited the reduction of wages and the expropriation of workshops and factories. KARL MARX, *THE CIVIL WAR IN FRANCE* 85 (1871).

¹⁴⁴ MERRIMAN, *supra* note 113, at 11, 97-115.

¹⁴⁵ TOMBS, *supra* note 113, at 132.

¹⁴⁶ *Id.* at 105-06.

¹⁴⁷ HORNE, *supra* note 56 (opposite page 315).

¹⁴⁸ ZOLA, *supra* note 113, at 474.

insurrection or military insubordination.”¹⁴⁹ Hobsbawm writes that the Commune had “frightened the wits out [of the bourgeoisie order] by its mere existence.”¹⁵⁰

Karl Marx was not alone in realizing the significance of the Commune and its rallying cry for the international worker. Figures of authority within the French government lay the blame for the violence on the proletariat. Horne quotes an influential cleric referring to the rise of the Commune as “the conquest of France by the worker.”¹⁵¹ Merriman quotes the British Positivist Frederic Harrison, who, after the fall of the Commune, wrote that, for the first time in European history, “the workmen of the chief city of the Continent have organized a regular government in the name of a new social order.”¹⁵² The official government inquiry also blamed socialists, specifically the International, and anarchists and the weakening influence of the Church, for the “moral disorder” of the Commune,¹⁵³ thereby confirming the other governments’ worst fears.¹⁵⁴

The fact that foreigners also joined the struggle by taking an active part in instigating uprisings and fighting the Prussian and French governments raised the concerns of neighboring governments. Some of the Communards included political émigrés who had been welcomed in France by Napoleon III. Bakunin, the Russian anarchist who had been a fugitive of Prussia, Austria, and Russia for inciting revolutions, inspired insurrections in Lyon and in the south of France during the autumn of 1870.¹⁵⁵ One of the former leaders of the Polish uprising against the Russians in 1863 became Commander-in-Chief of the Communard troops, leading about eight hundred Polish emigrants, before he was killed in action.¹⁵⁶

Alistair Horne writes that “overnight Marx . . . achieved universal notoriety as the ‘Red Terrorist Doctor’.”¹⁵⁷ Marx’s observation that “Class rule [was] no longer able to disguise itself in a national uniform” and that all the national governments acted as one against the proletariat led him to the conclusion that “the battle must break out again and again in ever-growing dimensions.” His assertion that the French working class was “the vanguard of the modern proletariat”¹⁵⁸ and that the Commune was “the glorious harbinger of a new society”¹⁵⁹ reverberated across Europe. According to Gareth Stedman Jones, for “republicans and socialists from Spain and Italy through to Switzerland and Belgium, the *Commune*’s defiance of one of the most centralized and heavily policed regimes of post-1848 Europe was a source of inspiration.”¹⁶⁰ The

¹⁴⁹ TOMBS, *supra* note 113, at 41.

¹⁵⁰ HOBBSAWM, *supra* note 54, at 167.

¹⁵¹ HORNE, *supra* note 56, at 292.

¹⁵² MERRIMAN, *supra* note 113, at 11, 251.

¹⁵³ *Id.* at 248.

¹⁵⁴ Enquête parlementaire sur l'insurrection du 18 mars, Rapports (3 volumes), (1872) available at <https://archive.org/details/enquete-parlement00marsgoog>.

¹⁵⁵ TAITHE, *supra* note 112, at 32; HORNE, *supra* note 56, at 316.

¹⁵⁶ R. Żurawski Vel Grajewski, *Poland in The Period Of Partitions 1795–1914*, in POLAND: HISTORY, CULTURE AND SOCIETY, SELECTED READINGS 115 (E. Bielawska-Batorowicz ed., 2015).

¹⁵⁷ HORNE, *supra* note 56, at 429-30; GARETH STEDMAN JONES, KARL MARX, GREATNESS AND ILLUSION, 507-08 (2016).

¹⁵⁸ MARX *supra* note 136, at 104.

¹⁵⁹ KARL MARX, THE PARIS COMMUNE (Fredrick Engels, ed., 1891) 105.

¹⁶⁰ STEDMAN JONES, *supra* note 150, at 511.

required response, in the thinking of the political leadership in Europe, was clear: the masses had to be constrained.

The Prussians encircling the Commune understood the sensitivity of the situation. Von Moltke thought that, while the Germans “could easily have put a speedy end” to the uprising, they realized it would be better for the future European order if the French government were to do so: “What Government could allow its rights to be vindicated by foreign bayonets?”¹⁶¹ Because the armistice conditions rendered the French forces “almost defenseless,” the Germans allowed reinforcements of French troops, and even released prisoners of war.¹⁶² And when the French army entered Paris to quell the Commune, German forces “advanced almost to the gates of the city, and barred all communications through them until . . . Paris was again in the control of the French Government.”¹⁶³

At home, Bismarck was no less worried. Fearing the potential impact of the Commune in Germany, he more than doubled his military forces in France and expedited the return of the French prisoners of war.¹⁶⁴ Meanwhile, German Socialists were invoking the duty of solidarity between the German and French workers and calling for an “honorable peace with the French Republic.”¹⁶⁵ While “lurid pictures of the excesses of the *Commune* shocked the propertied classes” in Germany,¹⁶⁶ the German socialist August Bebel declared in the Reichstag that “before many decades have gone by, the battle-cry of the Parisian proletariat – ‘War on palaces, peace to cottages, death to poverty and idleness!’ – will be the battle-cry of the entire European proletariat.”¹⁶⁷

To preempt the rise of the German Social Democrats, Bismarck imprisoned those who called for German–French solidarity on the charge of “inciting to high treason.”¹⁶⁸ Later, he acknowledged that his hostility toward Social Democracy stemmed from hearing “one of its leading members in an open sitting of the Reichstag express his sympathy for the Paris Commune.”¹⁶⁹ Despite Bismarck’s efforts, the German

¹⁶¹ *Id.* at 407.

¹⁶² *Id.* at 408.

¹⁶³ *Id.*

¹⁶⁴ HORNE, *supra* note 56, at 314.

¹⁶⁵ As Carlton Hayes notes, “After Sedan, all the German Socialists, both Eisenachers and Lassalleans, declared and voted against the continuation of a war which they considered no longer defensive.” Carlton J. H. Hayes, *The History of German Socialism Reconsidered*, 23 AM. HIST. REV. 62, 72-73 (1917). Furthermore, a “Manifesto to the German Workingmen” from September 5, 1870, stated that “it is a duty of the German people, and indeed it is in their own interests, to accord an honorable peace to the French Republic. . . . Above all it is the duty of the German workingmen, among whom the solidarity of interests between the German and French peoples has become a sacred conviction and who see in the French workingmen only brothers and comrades to whom they are united by a common lot and by common aspirations, to secure for the French Republic such a peace. . . . It is absolutely necessary that in all places the party, in accordance with our manifesto, shall organize popular demonstrations as imposing as possible against the annexation of Alsace-Lorraine and in favor of an honorable peace with the French Republic.” (citing CARL STEGMAN & C. HUGO, HANDBUCH DES SOCIALISMUS, Art. “Eisenacher”, 170 (1897)).

¹⁶⁶ STEDMAN JONES, *supra* note 150, at 555.

¹⁶⁷ STEDMAN JONES, *supra* note 150, at 555, citing Suzanne Miller & Heinrich Potthoff, *A history of German Social Democracy from 1848 to the Present* 31 (1986).

¹⁶⁸ Hayes, *supra* note 158, at 72-73.

¹⁶⁹ John William Perrin, *The German Social Democracy*, 192 NORTH AM. REV. 464 (1910).

Socialists considerably strengthened their position in the 1870s, aided by the growth of industry in Germany that brought increasing numbers of disgruntled workers to support the socialist cause. In line with his earlier suspicions, Bismarck introduced antisocialist legislation in the Reichstag in 1878.¹⁷⁰

In his diplomatic relations, Bismarck conveyed these concerns of an uncontained Commune to his counterparts across Europe. Arriving in St. Petersburg for a meeting with Alexander II in late April, 1872, Bismarck told him that the election of the radical mayor of Lyon meant there were more than one hundred eighty thousand Communards eager for revenge.¹⁷¹ Such fears, along with his own geopolitical interests,¹⁷² motivated Bismarck to corral the monarchs of Austria, Russia, and Germany to sign the League of the Three Emperors of 1873.¹⁷³ Bismarck would again call on European Powers to act collectively to suppress “the forces of anarchy and destruction” when Alexander II of Russia was assassinated by Nihilists in 1881.¹⁷⁴

Understandably, the Russian government, the least democratic of the European regimes, was also deeply worried by the challenge the Commune represented.¹⁷⁵ Gudrun Persson examined the Russian government’s strategic plan of national defense, prepared in 1873. She quotes John Keep, who noted that “Sedan was almost a second Sevastopol for the Russian military establishment.”¹⁷⁶ The Russians were worried about the threat from the West, not due to “personal quarrels among the European sovereigns” but to “significant political differences,”¹⁷⁷ and expressed concerns over the potential involvement of insurgent Polish rebels in a possible attack on the Tsar’s regime.¹⁷⁸

The British also shared Bismarck’s concerns that France was dangerously unstable. But while Bismarck was worried that Thiers (by then France’s president) would lose control and that, as a result, the “radical republicans . . . would then make France the center of European revolution,”¹⁷⁹ Lord Lyons, the British Ambassador to France, expressed relief when Thiers lost the elections in 1873 because “little doubt was felt that, with or without any error of policy on [Thier’s] own part, the country was gradually drifting towards communism.”¹⁸⁰ Such fears were not unfounded. Gambetta, having resigned from government upon the signing of the Treaty of Versailles, had returned from his sojourn in Spain in 1872 and begun campaigning across France. In

¹⁷⁰ Hayes, *supra* note 158, at 75.

¹⁷¹ LE GENERAL LE FLO, AMBASSADEUR DE FRANCE A SAINT-PETERSBOURG, A M. DE REMUSAT, MINISTRE DES AFFAIRES ÉTRANGERES. T. POUR M. THIERS, Saint-Petersbourg, 2 Mai 1873, 7 H. 20, in 1 DOCUMENTS DIPLOMATIQUE FRANCAIS 1871-1914, 234; CARL G. SCHOTT, MISSION TO SAINT PETERSBURG, Chapter 10 (2011).

¹⁷² A. J. P. TAYLOR, THE STRUGGLE FOR MASTERY IN EUROPE 1848-1918 219 (1954).

¹⁷³ HOBBSAWM, *supra* note 54, at 167; TOMBS, *supra* note 113, at 181.

¹⁷⁴ Perrin, *supra* note 162.

¹⁷⁵ SCHOTT, *supra* note 165, at Chapter 6. See also LE GENERAL LE FLO, AMBASSADEUR DE FRANCE A SAINT-PETERSBOURG, A M. DE REMUSAT, MINISTRE DES AFFAIRES ÉTRANGERES. Saint-Petersbourg, 6 août 1871, in 1 DOCUMENTS DIPLOMATIQUE FRANÇAIS 1871-1914, 55; TAYLOR, *supra* note 165 at 214.

¹⁷⁶ JOHN L. H. KEEP, SOLDIERS OF THE TSAR: ARMY AND SOCIETY IN RUSSIA 1462 – 1874 276 (1985).

¹⁷⁷ Persson, *supra* note 42, at 147.

¹⁷⁸ *Id.* at 159.

¹⁷⁹ SCHOTT, *supra* note 164, at Chapter 9.

¹⁸⁰ Lord Lyons to Lord Granville, Paris, March 4, 1873, in II LORD LYONS: A RECORD OF BRITISH DIPLOMACY, 44 (Lord Newton ed., 1913).

advance of the 1873 elections, he told a cheering crowd of some six thousand in Grenoble that it was time for a “new social stratum” to rule France.¹⁸¹ Coincidentally, Gambetta’s speech was heard by Russian Interior Minister, Timascheff, who was in France to observe and congratulate Thiers on the speedy recovery of the French economy. “Gambetta’s Grenoble tirade,” as Schott notes, “prompted Timascheff to warn Thiers that Europe would not look kindly on France becoming a hotbed of revolution once again.”¹⁸² Indeed, Gambetta’s candidacy was reported widely in the European press,¹⁸³ raising fears across Europe that, once the German occupying forces left, France’s government would again be plagued by radicals.¹⁸⁴

B. The Response: The Brussels Declaration

Disputes concerning compliance with the laws of war arose throughout the different phases of the Franco-Prussian War: the failure of the French Imperial army to comply with the 1864 Geneva Convention,¹⁸⁵ the questionable lawfulness of the destruction of residential areas and cultural heritage sites within besieged French cities,¹⁸⁶ the taking of property by the Prussian occupier,¹⁸⁷ and especially the legal status of the *francs-tireurs* and the National Guardsmen and the Communards.¹⁸⁸ The practice of the Prussian forces was to shoot *francs-tireurs* on sight,¹⁸⁹ and the Versailles government adopted that same policy vis-à-vis captured Communards. The leaders of the Commune protested, and when their protest failed to convince the government, they promulgated a law on hostages that invoked international law to authorize reprisals. Pierre Vesinier, one of the Commune’s officials, cites the law:¹⁹⁰

¹⁸¹ Quoted in SCHOTT, *supra* note 164, at Chapter 9.

¹⁸² *Id.*

¹⁸³ *M. Gambetta’s Constitution*, THE SPECTATOR, 6 (March 1, 1873); *Election in Paris; M. Gambetta in Belleville*, THE LONDON DAILY NEWS, 14 (April 24, 1873).

¹⁸⁴ In a letter to Thiers, Gontaut-Biron, the French Ambassador in Berlin, wrote: “[Bismarck] me demande encore si le départ de ses troupes ne serait pas le d’agitations révolutionnaires. M. Dufaure l’avait bien senti et ne l’a pas caché à l’Assemblée nationale. D’ailleurs, Gambetta s’agite; c’est une médiocrité, mais énergique, et, dans le gouvernement des peuples, c’est ce qu’il y a de plus dangereux.” M. DE GONTAUT-BIRON, AMBASSADEUR DE FRANCE BERLIN, À M. THIERS, PRESIDENT DE LA REPUBLIQUE. Berlin, 9 mars 1873, 6 h., matin, in 1 DOCUMENTS DIPLOMATIQUE FRANCAIS 1871-1914, 213.

¹⁸⁵ See *supra* note 94 and accompanying text.

¹⁸⁶ Criticized by Bluntschli in his lecture of October 1870, *supra* note 17. See also *supra* note 65 and *infra* note 223 and accompanying text.

¹⁸⁷ See Paul Pradier-Fodéré, Commentaire sur le code de justice militaire 596-600 (1873); Gustave Rolin-Jaequemyns, *Second essai sur la Guerre Franco-Allemande dans ses rapports avec le droit international pour faire suite à la guerre actuelle*, dans SES RAPPORTS AVEC LE DROIT INTERNATIONAL 47-54 (1871).

¹⁸⁸ *Supra* note 115.

¹⁸⁹ *Supra* note 9.

¹⁹⁰ “Art. V. All executions of prisoners of war, or of partisans of the regular Government of the Commune of Paris, shall immediately be followed up by the execution of a triple number of hostages retained by virtue of Art. IV., and who will be drawn by lot. Art. VI. All prisoners of war shall be taken before the jury of accusation, which shall immediately decide whether they are to be set at liberty or retained as hostages.” LISSAGARAY, *supra* note 113, at 240.

The Government of Versailles acts contrary to the laws of war and humanity, and if it continues to disregard the common usages of civilized nations, we shall be forced to make reprisals. If our enemies assassinate a single one of our soldiers, we shall retaliate by executing the same or double the number of prisoners. The people of Paris, even in their anger, detest the shedding of blood as they detest civil war; but they must protect themselves against the savage outrages of their enemies, cost what it may— an eye for an eye, a tooth for a tooth. (*Signed*) *The Commune of Paris*.

The formal refusal of the government to recognize the Communards' entitlement to fight (and thus entitlement to Prisoner of War status) was invoked during the Commune's final hours, its fighters persevering until the bitter end. When government forces finally entered Paris, the Commune cautioned its fighters against surrender. The government forces, it warned, "will not spare you. Woe to those who would be denied being soldiers by law (*soldats-du-droit*); woe to those with [fire] powder on their fingers or smoke on their faces."¹⁹¹

The 1874 conference in Brussels was an opportunity to address the challenges posed to the laws of war in the recent conflict. While there were other matters that the Brussels text dealt with (such as the need to ensure discipline within the conscripted armies by prohibiting the looting and ransoming of prisoners of war (POWs),¹⁹² as well as the protection of cultural property),¹⁹³ Reading the Brussels Declaration within the context of the Franco-Prussian War and the Paris Commune, and exploring its underpinnings through archival research, reveals that the most pressing motivation of European governments at Brussels was to regulate the interface between the military and the civilian population during war (and, as a result, also during peacetime). Of particular importance was the wish to cleanse the future battlefield from insurrectionists and to legitimize the policy of shooting 'irregulars' on sight—and thereby to protect the European imperial order from internal and transnational military challenges. For these motives, the denial of the right to resist, and, through that, the consolidation of power by governments, was at the top of the governments' agenda. The same motivation could also explain the decision to regulate only interstate conflicts,¹⁹⁴

¹⁹¹ Proclamation in HORNE, *supra* note 56 (opposite page 315).

¹⁹² Articles 39, 23 (respectively) of the Brussels Declaration. On this concern see Benvenisti & Cohen, *supra* note 5. The Austrians, for example, were concerned that the new regime of POWs would provide the wrong incentives for the soldiers ("to be a POW would be more enviable than being a soldier under arms. The rules would give a high premium to "the weak-hearted, who would be directly tempted to forsake their colours and surrender") (THE TIMES, July 24, 1874, 8 (The Brussels Congress, "from our Austrian correspondent").

¹⁹³ Article 17 of the Brussels Declaration.

¹⁹⁴ The original Russian text to the Brussels Declaration noted the focus on the regulation of interstate warfare, referring to "Une guerre internationale est un état de lutte ouverte entre deux États indépendants (agissant isolément ou avec des alliés), et entre leurs forces armées et organisées." (Article 1). A similar focus appears in Jomini's opening statement: ". . . l'idée du Projet de Convention a été suggéré par ce qui s'est passé aux États-Unis lors de la guerre de Sécession. Le règlement du président Lincoln pour adoucir les souffrances de la guerre est présent à tous les souvenirs. Les luttes internationales ont une

thereby implicitly accepting the French government's position during the days of the Paris Commune.¹⁹⁵

The Russian Project of an International Declaration concerning the Laws and Customs of War, which invited all European governments to Brussels, sought to reach a common understanding, but not specifically an international treaty.¹⁹⁶ The aim of the conveners was to arrive at a general agreement, primarily about the contents of the norms, and then about the format, which could be a code that armies would then include in their internal codes.¹⁹⁷ In fact, the failure of the 1864 Geneva Convention during the war has led many contemporaries to doubt the sustainability of the treaty format due to the logic of reciprocity that encouraged retaliation, and the eventual collapse of whatever protection the Convention ensured.¹⁹⁸

Although several grass-roots initiatives to revisit the laws of war sprang up in the aftermath of the Franco-Prussian War,¹⁹⁹ nongovernmental parties were intentionally excluded from participating in the Brussels conference.²⁰⁰ In fact, this was the German precondition for coming to Brussels.²⁰¹ The Conference participants agreed at the outset that only state representatives would take part in it,²⁰² and their deliberations were

incontestable analogie avec la guerre civile qui déchirait l'Union américaine. Il y a, en effet, une solidarité étroite entre tous les intérêts internationaux."

¹⁹⁵ *Supra* notes 182-184 and accompanying text.

¹⁹⁶ Instructions by the Russian Government delivered at the opening of the Brussels conference. Brussels Conference Protocols 2, 4.

¹⁹⁷ "As for the final outcome, it depends on the discussion and on the agreement which shall come to be established; for the thought of the Emperor is above all a thought of general agreement." *Id.* (authors' translation).

¹⁹⁸ Boissier, *supra* note 38, at 280. *See also* letter by the British Lords Commissioners of the Admiralty concerning the Russian invitation to the Hague Peace conference suggesting that "the various proposals to regulate the conduct of war . . . would be almost certain to lead to mutual recriminations" (Admiralty to Foreign Office May 16, 1899 (Document no. 123 in Correspondence respecting the Peace Conference held at The Hague in 1899 (1898-1900)).

¹⁹⁹ The immediate precursor to the Russian invitation to Brussels was a proposal of a French 'International Society for the Amelioration of the Condition of POWs', with which Henry Dunant was associated. *See* Milyutin's Diary [authors' translation]; Boissier, *supra* note 38, at 288-89; Georges Werner, *Introduction* (Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law), available at http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/introduction-021-ej.9789028605824.001_107.3#1.

²⁰⁰ Brussels Conference Protocols 2, 7.

²⁰¹ Letter from unknown author to Bernhard von Bülow, State Secretary of the Foreign Office (July 7, 1874) (R 901/ 28961 No. 17 of the German Foreign Office, National Archives in Berlin) (noting that "the members of the society are highly politicized, and have offended the German Emperor himself. [. . .] The members of the society are notorious enemies of the German Reich. . . . Nevertheless, Gortschakow [Alexander Gortschakow, Russian Minister for Foreign Affairs] gave the society permission to take part in the conference, which would have been unacceptable for Germany, and so Russia has had to withdraw the permission. . . . Hence they are waiting for further proposals from the Russian Government on how to resolve this unfortunate incident in keeping with the objections of the German Government.") (authors' translation). In the proposed instructions for the German delegates in Brussels it was similarly stated that "[i]n case the Conference would negotiate over projects of private societies such as the 'International Society for the Amelioration of the Condition of POWs' the German delegates are not allowed to participate in any deliberations." Letter from Bernhard von Bülow, State Secretary of the Foreign Office & Georg von Kameke, Minister of War, to William I, German Emperor (July 18, 1874) (R 901/ 28961 No. 46, the German Foreign Office, National Archives in Berlin) (authors' translation).

²⁰² Brussels Conference Protocols 3, 14-15.

supposed to be confidential (indeed, they would have remained so, had they not been leaked to Leon Gambetta).²⁰³ Germany sent five delegates (compared to only one or two delegates from other countries).²⁰⁴ From the outset, the head of the German delegation, General von Voigts-Rhetz, was under the impression that the delegates from Russia, Italy, and also France had been instructed to endorse the German position.²⁰⁵

Baron Jomini, the Russian chairman, began by pointing out the need to “control patriotic aspirations.”²⁰⁶ The stated driving force was ostensibly humanitarian, due to the concern that “[u]norganized forces, without superior command, without direction, without rules, driven by the sole patriotic impulse, will not be able to observe the laws and customs of war which they will not know.”²⁰⁷ However, as this Section will show, the deliberations in Brussels and their outcome could never have come about exclusively on humanitarian basis. It was predominantly an effort to (1) tightly regulate access to the battlefield and eliminate any other insurrectional challenge to the participating states and (2) ensure the stability of the European legal political and economic order in an occupied territory, while (3) allowing the exposure of civilians to the harms of war.²⁰⁸

1. Keeping Civilians Away from the Battlefield

Article 9 of the Brussels Declaration assigned the “laws, rights, and duties of war” to armies; whereas “militia and volunteer corps” also qualified for the same status only if they fulfilled what have since become the famous four conditions: being commanded by a person responsible for his subordinates; having a fixed distinctive emblem recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war.²⁰⁹ *Levée en masse* (in the sense of

²⁰³ The German ambassador to Belgium thought someone in the French government had leaked the protocols to Gambetta, who published them in his journal *La République Française*. Letter from Friedrich von Perponcher-Sedlnitzky, German Ambassador to Belgium to Bernhard von Bülow, State Secretary of the Foreign Office (August 24, 1874) (folder R 901/ 28963 No. 8, the German Foreign Office, National Archives in Berlin).

²⁰⁴ F. DESPAGNET, *LA DIPLOMATIE DE LA TROISIEME REPUBLIQUE ET LE DROIT DES GENS* 113 (1904).

²⁰⁵ Letter from Konstantin Bernhard von Voigts-Rhetz, First German delegate to the Conference to: Bernhard von Bülow, State Secretary of the Foreign Office (July 31, 1874) (folder R901/ 28962 No. 9, of the German Foreign Office, Berlin) (Report I of the Conference).

²⁰⁶ Brussels Conference Protocols 2, 7.

²⁰⁷ Brussels Conference Protocols 14, 34.

²⁰⁸ The text also sought to ensure discipline within the military, by, inter alia, prohibiting looting and ransoming enemy soldiers (see Benvenisti & Cohen, *supra* note 5).

²⁰⁹ *Project of an International Declaration concerning the Laws and Customs of War*, Art. 9 (Aug. 27, 1874). Initially, the Russian text required that the troops be subject to “commandement général,” but this condition was deleted to include defensive troops such as the *Landsturm*, who might not be able to demonstrate such a link to the high command (Protocole N° Xii. (Séance du 14 août 1874.) P. 128, at 138; intervention of Baron de Schoenfeld (Austro-Hungary) accepted by the German delegate de Voigts-Rhetz. Note that regular armies were assumed, hence not required, to comply with these conditions. During the wars of decolonization, these conditions were read into the text by the British court in *Mohamed Ali and Another v. Public Prosecutor* [1969] A.C. 430 (P.C.) (appeal taken from U.K.) (“[A]ppellants, if they were members of the Indonesian armed forces, were not entitled to be treated on capture as prisoners of war under the Geneva Convention when they had landed to commit sabotage and had been dressed in civilian clothes both when they had placed the explosives and lit them and when they were arrested.”).

spontaneous mass uprising) among combatants who did not fulfill these conditions was permitted only to the extent that it was a defensive measure to block an invading army; the moment the enemy's troops occupied a territory, inhabitants of the occupied lands were required conform to the rigidity of Article.²¹⁰ These requirements would not extend the protection of the law to fighters such as the francs-tireurs or Communards, who, under this framework, would have been (and to a large extent were, during the War) subject to the mercy of their enemy.

These requirements were tailored to serve the powerful governments in Europe. As expected, representatives of smaller states demurred, because of what they saw as the exclusion of their own militias and freedom fighters from the battlefield. Countries such as Belgium, the Netherlands, and Switzerland, whose national ethos was nurtured by stories of brave resistance to foreign occupiers, contested the rule that gave priority to large standing armies (an anonymized book by a certain 'General T,' published in Brussels in 1875, expounded this point).²¹¹ The French were obviously on the side of the powerful as their monarchist government sought to suppress revolutionary sentiment and went to great lengths to reassure foreign powers that it was doing just that.²¹² By contrast, the British opposed what they saw as an outcome that would operate "greatly to the advantage of the powers having large armies constantly prepared for war and systems of universal compulsory military service."²¹³

The disparity in power at the Conference was clear from the start, and the representatives of the weaker states sought at the very least to agree on a text that would remain silent on the right to resist, allowing them to argue that this right was recognized in customary law. They presented that right as, in fact, a duty. As Baron Lambertont, the Belgian representative, stated, "the defense of the country is not only a right but a duty for the peoples. There are things that happen in war, which must be accepted."²¹⁴ He insisted that the text therefore be silent on this delicate matter:

If citizens are to be led to execution for attempting to defend their country by risking their lives, it must not be allowed that they will found inscribed on the pole at the foot of the place where they will be shot, the article of a treaty signed

²¹⁰ Art. 10, *supra* note 202.

²¹¹ LE GENERAL T..., L'ANGLETERRE ET LES PETITS ÉTATS A LA CONFÉRENCE DE BRUXELLES (1875). In the protocols of the Brussels conference, see, e.g., Brussels Conference Protocols 1, 4, 10, 12, 14, 8, 11, 21-22, 24, 29, 32-34.

²¹² Referring to the francs-tireurs and the national guards during the war, Despagnet commented that "France had no difficulty in accepting these perfectly just demands." DESPAGNET, *supra* note 197, at 116.

²¹³ In a letter to Mr. Fish, US Secretary of State, Mr. Schuyler, US Ambassador to Russia, conveyed the view of smaller states: "the 'non-aggressive' countries of Europe are extremely suspicious [of these rules]. They believe that its adoption must either diminish the defensive power of such States, or oblige them to organize a system of universally compulsory military service." 'Lord Derby's dispatch on the Brussels congress,' in *United States Department of State / Executive documents printed by order of the House of Representatives 1875-76*, 1042-1046 (1875-1876). See also Thomas Erskine Holland, A Lecture on the Brussels Conference of 1874 (All Souls College, May 10, 1876), at 20 (1880).

²¹⁴ Brussels Conference Protocols 14, 33.

by their own government, which, in advance, condemned them to death. These are facts that it is better not to regulate, if we do not agree on.²¹⁵

Mr. de Lansberge, the Dutch representative, explained that:

Among the Dutch, there are two qualities innate and widespread in all classes of society: the love of independence and the feeling of right. No government could and would not do something that would disregard them. Any clause, therefore, which would unbind citizens in any way from the sacred duty of defending their country by any means in their power, instead of limiting the power of the enemy, would erect in law facts resulting only from the use of force, facts to which one can submit by necessity, but to which one cannot consent in advance, -any such clause would be rejected by public opinion.²¹⁶

The final text enabled the weaker countries to claim the right to resist occupation by irregular forces. In the final discussion, Lambermont (Belgium) raised the two issues—the citizen’s right to attack against an advancing army and the resistance to occupation—as questions that were left unaddressed by the text and that would, as such, be governed by the unwritten law of nations. The German delegate responded by saying that he had offered to introduce text that would explicitly deny such rights. While all the delegates agreed that the text should remain noncommittal on these two issues,²¹⁷ the German interpretation of the law could not have been clearer: they could hold on to their view that “as permitted by Prussian military law that follows the usages of war, [the rebel] is immediately shot without any proceedings.”²¹⁸

2. *The Occupation Regime as Guarantor of the European Order*

The Brussels text was the first to define the concept of occupation of enemy territory and to outline the respective rights and duties of the occupier and the occupied. The concept had been in the process of crystallization since the French Revolution and had first been approached in 1844 by the German jurist August Wilhelm Heffter.²¹⁹ Edgar Löning observed that the Prussian Army applied Heffter’s teachings during the 1870–

²¹⁵ Brussels Conference Protocols 14, 33 (1874). Colonel Hammer, the Swiss delegate, concluded that the goals of the *grandes armées* were irreconcilable with the interests of defending populations. He therefore supported the suggestion that the Brussels text pass in silence on the right of levée en masse. Brussels Conference Protocols 14, 34.

²¹⁶ Brussels Conference Protocols 10, 21.

²¹⁷ Brussels Conference Protocols 18 (Aug. 22, 1874, Actes, p. 220). *See also* Letter from Sir A. Horsford to the Earl of Derby, (August 26, 1874) (Miscellaneous No. 1 (1875) Correspondence respecting the Brussels Conference on the Rules of Military Warfare, at p. 117, No. 39) (“No decision having, he remarked, been arrived-at on these two questions, they must continue to be governed by the unwritten law’ of Nations.”).

²¹⁸ “Es ist vielmehr notwendig, dass in denjenigen Fällen, in welchen der Rebell auf frischer That betroffen wird, auch ferner, wie es nach Preußischem Militärrecht zulässig, nach Kriegsgebrauch mit ihm verfahren, d.h. dass er ohne Procedur sofort erschossen werde.” *Supra* note 9.

²¹⁹ EYAL BENVENISTI, *THE LAW OF OCCUPATION*, 27-28 (2d ed., 2012).

1871 war.²²⁰ But there were also acts that were incompatible with the principle, such as the declaration directed at the people of Alsace informing them that the area was “withdrawn, by the very occupation, from [French] imperial sovereignty, and instead German authority is established.”²²¹

Rolin-Jaequemyns studied the question of occupiers’ rights and obligations, emphasizing in his writings what he thought was a necessary limitation on the occupier’s right to exploit local resources. The occupying force, he asserted, should be entitled to use only those local resources strictly necessary for maintaining its troops, while seeking to profit from the resources of the occupied territory should be forbidden. Local resources were therefore to be used only in moderation, in proportion to their availability,²²² and where the fruits of those resources were accrued through regular use.²²³ In Rolin-Jaequemyns’ thinking, this restriction on the occupier’s authority would also entirely prevent it from exploiting immovable resources.

The Brussels conference was an opportunity to explore these and other questions related to occupation. Beyond the issue of resistance to occupation, what all governments sought were rules that would protect the political and economic status quo until a peace treaty could bring the war to its formal end. The maintenance of the status quo was ensured through two principles: the protection of private and public property from exploitation, and the prohibition on modifying existing laws (that defined and secured property rights). More generally, the occupier was expected to “take all the measures in his power to restore and ensure, as far as possible, public order and civil life,”²²⁴ including by resisting local pressures to modify the law or abolish the local political institutions. In 1875, the Institut de Droit International (the Institut) commended these new rules on occupation as more favorable to submissive citizens and to public and private ownership in occupied territories than those which had been practiced thus far.²²⁵ The Institut subsequently adopted a very similar formulation in its *The Manual on the Laws of War on Land* (“The Oxford Manual”, 1880).²²⁶

²²⁰ Edgar Löning, *Die Verwaltung des General-Gouvernements im Elsass* 13-15 (1874).

²²¹ Declaration of August 30, 1870: “[C]es territoires se trouvent, par ce fait même, soustraits à la souveraineté impériale, en lieu et place de laquelle est établie l’autorité des puissances allemandes.” Quoted in ARTHUR LORRIOT, *DE LA NATURE DE L’OCCUPATION DE GUERRE* 76–77 (1903). A declaration to the people of Strasbourg was similarly formulated, proclaiming that the city had been newly reunited (“*de nouveau réunie*”) with Germany. Declaration of October 8, 1870, rep. in Lorriot, *id.* at 42.

²²² Gustave Rolin-Jaequemyns, *Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international*, 3 *REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARE* 335 (1871).

²²³ *Id.* at 357.

²²⁴ See Articles 2, 3, 6, 7, 8 of the Brussels Declaration. *International Declaration*, *supra* note 202, Arts. 2, 3, 6, 7, 8.

²²⁵ “VI. ...Les règles tracées à cet égard sont sans doute susceptibles d’améliorations de détail, mais, dès à présent, elles sont au fond plus favorables aux citoyens paisibles et aux propriétés publiques et privées du pays occupé, que la pratique suivie jusqu’ici et que la doctrine de la plupart des auteurs.” Examen de la Déclaration de Bruxelles de 1874, *Justitia et Pace Institute de Droit Internatoinal*, Session de La Haye – 1875 (Rapporteur : M. Gustave Rolin-Jaequemyns).

²²⁶ Article 44 of the *Oxford Manual* states: “The occupant should maintain the laws which were in force in the country in time of peace, and should not modify, suspend, or replace them, unless necessary.” *The Manual on the Laws of War on Land*, Art. 44 (September 9, 1880) [Oxford Manual].

In other words, the occupation regime was essentially “a pact between state elites, promising reciprocal guarantees of political continuity.”²²⁷ It also guaranteed the safety of propertied class from deprivation by the enemy or by the working classes, and assured foreign investors that the occupier was responsible for the protection of their assets.

3. *Exposing Civilians to the Harms of War*

The Franco-Prussian War brought with it the use of heavy artillery against besieged towns. The civilian population of Strasbourg suffered heavy casualties,²²⁸ and the Parisians experienced famine under relentless bombardment throughout the subzero winter months. During this siege, the British Earl Granville wrote to Lord Loftus, the British Ambassador to Berlin, pleading with Bismarck to exhaust “all possible alternatives” to “the reduction of Paris by famine or bombardment.” Even though such unprecedented practice was “authorized by the practice of war,” it involved “the death, with incidents of peculiar horror, of hundreds of thousands of non-combatants.”²²⁹ Would the final text of the Brussels conference criticize such practices as illegal, under the laws of war?

These practices were not incidental to the Franco-Prussian war but reflected the technological innovations in weaponry and were bolstered by the new winds of democracy that amplified the voices of the affected civilians.²³⁰ The initial Russian text invoked the famous Rousseau–Portalis doctrine, whereby war is taken as a relationship between states, while citizens are not enemies—hence military operations must be conducted exclusively against the enemy forces and not against enemy citizens who do not take an active part in hostilities.²³¹ But this fundamental principle is missing from the final text of the Declaration. Perhaps, as reflected in the Lieber Code,²³² the rise of nationalism had strained the older distinction between state and citizen. The German delegates to Brussels were convinced that warfare cannot and must not be restricted: “The goal of any war is to crush the enemy, rob him of the means of resistance, and thereby to force his submission. When nations clash and put all their resources in the balance of the battle, it is difficult to determine the limits of warfare.”²³³

²²⁷ BENVENISTI, *supra* note 213, at 71.

²²⁸ Bluntschli’s 1870 lecture criticizes the bombardment and calls for proportionality in war. *See supra* note 17.

²²⁹ Letter from Earl Granville to Lord Loftus (Oct. 20, 1870) in *Further correspondence respecting the war between France and Germany 1870-1871: in continuation of correspondence presented to Parliament, July 29, 1870: presented to both Houses of Parliament by Command of Her Majesty, 1871*, 160 (1871).

²³⁰ On the “civilian front” see discussion *infra*, Part II.D.

²³¹ The original draft included an opening statement of ‘General Principles’, the second of which read: “The operations of war must be directed exclusively against the forces and the means of warfare of the enemy state, and not against its subjects, so long as the latter do not take part themselves in the war activities.” These principles were not included in the final draft of the Brussels Declaration. *See Brussels Conference Protocols 1, 4*. On the doctrine and its ultimate omission, see *infra* notes 232-234 and accompanying text.

²³² *See supra* note 13.

²³³ *See* von Kamenke to von Bismarck, *supra* note 9.

While, initially, the Russian draft sought to limit harm to civilians by offering that sieges and bombardments would require advancing armies to inform the authorities of targeted towns about their intention to attack, and to take the necessary precautions to protect religious, artistic, and scientific sites,²³⁴ the adopted text watered-down these obligations considerably, at the insistence of the German delegation.²³⁵ Notably, a requirement was added that it would be the besieged who would have to indicate in advance where the protected sites were, by means of special signs made visible to the attacking army.²³⁶

During the deliberations on this topic, the Belgian delegate presented a petition submitted by inhabitants of Antwerp.²³⁷ The petition sought to include private property belonging to inoffensive civilians in the definition of protected sites. Given the German view that “bombardment is one of the most efficient means to achieve the goals of the war and hence the petition must be rejected,” the delegates prepared a side-document invoking the Rousseau–Portalis doctrine, and expressed their confidence that every commander informed by the Brussels’ principles would consider the respect of private property a sacred duty, as long as local circumstances and the necessities of war permitted it.²³⁸ Importantly, when, on second reading, the Belgian delegate moved to include this response as part of the protocol, the participants agreed, but only after modifying the text to exclude any reference to the principle that the operations of war must be conducted exclusively against the military forces of the enemy state.²³⁹

This refusal to acknowledge the basic moral principle articulated by Rousseau in 1762 highlights a pivotal impulse of the Brussels conference: to protect combatants from civilians, rather than to protect civilians from combatants, and more broadly, to protect the European social and economic order from nonstate challenges. It would take another hundred years before the prohibitions against attacking nonmilitary targets and against causing excessive harm to civilians would be formally recognized in an international agreement, in a conference dominated by former colonies and the Communist bloc.²⁴⁰

²³⁴ Brussels Conference Protocols 1, 5 (see the text of the Russian draft, §§ 14-16).

²³⁵ BORDWELL, *supra* note 12, at 89.

²³⁶ *International Declaration*, *supra* note 203, Art. 17 (“ . . . toutes les mesures nécessaires doivent être prises pour épargner, autant qu'il est possible, les édifices consacrés . . . Le devoir des assiégés est de désigner ces édifices par des signes visibles spéciaux à indiquer d'avance à l'assiégeant.”) second meeting (July 31, protocol begins on p. 31, and reconsidered on August 1).

²³⁷ Brussels Conference Protocols 1-3, 8-10.

²³⁸ ‘Projet de réponse a la pétition des habitants d’Anvers présente dans la séance du 1ere aout, par M. le président de la conférence’ in Brussels Conference Protocols Annexe 4, 55-56: “Les opérations de guerre doivent être dirigées exclusivement contre les forces et les moyens de guerre de l'Etat ennemi et non contre ses sujets tant que ces derniers ne prennent pas eux-mêmes une part active à la guerre. [. . .] En attendant, la Commission a la ferme confiance que tout commandant d'armées civilisées, se conformant aux principes que la Conférence de Bruxelles a pour objet de faire sanctionner par un règlement international, considérera toujours comme un devoir sacré d'employer tous les moyens qui peuvent dépendre de lui, en cas de siège d'une ville fortifiée, afin de respecter la propriété privée, appartenant à des citoyens inoffensifs, autant que les circonstances locales et les nécessités de la guerre lui en laisseront la possibilité.”

²³⁹ Brussels Conference Protocols 17, 42, Second reading, session 21/7/1874, Actes p. 202.

²⁴⁰ On the evolving narrowing down of the concept of “military necessity” since the mid-nineteenth century see David Luban, *Military Lawyers and the Two Cultures Problem*, 26 LEIDEN J. INT’L L. 315

4. *The Outcome of the Conference*

The Brussels Declaration was never ratified as a binding convention by the states that participated in its creation.²⁴¹ Yet one could argue that this was not incidental, but predetermined. Weary of conventions that only raised recriminations about violations, a text that stated the law seemed more effective in eliciting compliance.²⁴² The final protocol called for the continuation of deliberations toward common accord.²⁴³ It reiterated the hope that the Conference would contribute to maintaining the European order:

. . . war, when regulated, would bring about fewer calamities, would be less subject to the aggravations brought about by the uncertainty, the unexpected, and the passions excited by the struggle; it would lead more effectively to what must be its ultimate goal, that is, the restoration of good relations and a more solid and lasting peace between the belligerent States.²⁴⁴

The deliberations exposed disagreements between the strong and the weak, with respect to the right of resistance, but, for the stronger countries, a comprehensive agreement was no longer necessary. The Russian Prince Gorchakov stated, in an indirect response to Lord Derby, that the Russian Project would inform state practice and thereby shape the evolution of international norms.²⁴⁵ Implicitly, it was understood that the Brussels outcome reflected the rights of the powerful during war. The *Pall Mall*

(2013). The new law was firstly reflected in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]. For the political background of the Additional Protocols and the influence of these two blocs, see Amanda Alexander, *International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I*, 17 MELB. J. INT'L L. 1 (2016); Roland Burke, *From Individual Rights to National Development: The First UN International Conference on Human Rights, Tehran, 1968*, 19 J. WORLD HIST. 275 (2008); Andrew S. Thompson, *Teheran 1968 and the Reform of the UN Human Rights System*, 14 J. HUM. RTS. 84 (2015); KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING (1984); Helen M. Kinsella, *Superfluous Injury and Unnecessary Suffering: National Liberation and the Laws of War*, in INTERNATIONAL ORIGINS OF SOCIAL AND POLITICAL THEORY 205 (Tarak Barkawi & George Lawson eds., 2017); Richard R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L. J. 1, 22 (1975); Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 PAC. BASIN L. J. 55, 69–71, 102–03 (1984).

²⁴¹ See the ICRC's introduction to the *International Declaration*, *supra* note 203, available at <https://ihl-databases.icrc.org/ihl/INTRO/135>.

²⁴² On the concerns about recriminations see *supra* note 191 and accompanying text.

²⁴³ Brussels Conference Protocols 4, 49.

²⁴⁴ Brussels Conference Protocols, Protocol Final, Annexe 19, 63 (1874) the Final Protocol of the Brussels Conference *British and Foreign State Papers*, vol. LXV, p. 1110, printed also by EDWARD HERTSLET, *MAP OF EUROPE BY TREATY* (1974), and GEORG FRIEDRICH VON MARTENS, *IV NOUVEAU RECUEIL GÉNÉRAL DES TRAITÉS* 226 (2d series, 1899) (authors' translation).

²⁴⁵ *Observations by Prince Gortschakoff, on the dispatch of Lord Derby to Lord Augustus Loftus dated from the Foreign Office the 20th of January, 1875* in *United States Department of State / Executive documents printed by order of the House of Representatives*, 1875-'76, 1048-1051 (1875-1876).

newspaper suggested that this result was exactly what the Russians had been aiming at when they initiated their project.²⁴⁶ But, according to Gorchakov, the weaker parties had no grounds to complain. It was preferable for the weak that their powerful adversaries acknowledged some limits rather than be free to exert naked power. In 1899, the very same argument would convince the delegates of the weaker powers to sign up to the Hague Convention.²⁴⁷

Following the Conference, most armies adopted military manuals that reflected the Brussels rules.²⁴⁸ For the German delegates to the first Hague Peace Conference of 1899, the proposed text reflected the Brussels law and added nothing of significance.²⁴⁹ As noted earlier, it would take a hundred years for IHL to finally endorse the Rousseau–Portalis doctrine, in the Additional Protocols to the Geneva Conventions of 1977.²⁵⁰ In the years immediately following 1874, civilians of the opponent would be regarded as “enemy civilians,” assumed to have allegiance to the enemy by their very nationality. As such, for the duration of the war, trade with them was prohibited,²⁵¹ their property was seized,²⁵² and they could even be interned,²⁵³ forced to remain in a besieged town,²⁵⁴ or made the target of bombardment (on the premise that their suffering might lead to their government’s surrender).²⁵⁵ The rejection of the Antwerp petition may have been felt later on in London, Dresden, Hiroshima, and many other cities.

²⁴⁶ *The Military Powers and the Usage of War [from the “Pall Mall Gazette, Saturday, December 5, 1874] in*

United States Department of State / Executive documents printed by order of the House of Representatives. 1875-’76, 1032-1033 (1875-1876).

²⁴⁷ Benvenisti, *The Law of Occupation*, *supra* note 213 at 41.

²⁴⁸ On these codes see *infra* note 254.

²⁴⁹ Colonel Groß von Schwarzhoff, final report on the revision of the Brussels Declaration, N° 30, IAAa 37 N° 3 b N° 2, R 145, p. 72-85 (The Hague, July 12, 1899) (reference files: the revision of the Brussels declaration from 1874); see also analysis of Ministry of War, Berlin, 21/11/1899, Minister of War II, 5 – III, 7 (the German Ministry of War emphasizes that it can accept the proposed text since it reflects the practice and manuals of the German army since the 1870–71 war).

²⁵⁰ Brussels Conference Protocols 1-2.

²⁵¹ MARTIN DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* (1943); ARNO A. BLUM & I. ROSKIN LEVY, *THE LAW RELATING TO TRADING WITH THE ENEMY* (1940); CHARLES H. HUBERICH, *THE LAW RELATING TO TRADING WITH THE ENEMY* (1918).

²⁵² LORD A. MCNAIR & ARTHUR D. WATTS, *THE LEGAL EFFECTS OF WAR* 332 (4th ed., 1966); MARTIN DOMKE, *THE CONTROL OF ALIEN PROPERTY* (1943); F.A. Mann, *Enemy Property and the Paris Peace Treaties*, 64 L.Q.R. 492 (1948).

²⁵³ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. See Art. 41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

²⁵⁴ *US v. Wilhelm von Leeb, et al.* (The High Command Case, US Military Tribunal, Nuremberg, October 27-28, 1948) (“if the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender”).

²⁵⁵ See *supra* Part III.D.

V. BEYOND THE BATTLEFIELD: INTERNATIONAL LAW INSULATING THE EUROPEAN ORDER FROM DOMESTIC CHALLENGES

As we have seen, in the mid-nineteenth century, governments turned to international law to comprehensively address the regulation of warfare, in an effort to tame civilian challenges to their authority on the battlefield and beyond. The rise of national, class, or other collective identities for which individuals were willing to sacrifice their lives—as was apparent during the Crimean War and the Franco-Prussian war—required a concerted response that only an internationally-agreed text could provide. What is more, the very same text could be presented to the public as reflecting the governments’ commitment to protecting their citizens from the torments of war.

Several international lawyers of that period embraced this turn to international codification, presenting it as a sign of humanity’s progress.²⁵⁶ Indeed, they debated the proper form for developing the law: through a formal treaty,²⁵⁷ a general declaration, a model code, or military codes;²⁵⁸ whether a multilateral treaty on the laws of war was desirable; and whether or not the Brussels Declaration should become an international code, such as the one ultimately produced by the Institut (the *Oxford Manual*).²⁵⁹ But, despite these differences, the supporters of codification believed that international law was conducive to implementing the Enlightenment’s vision of humane warfare. This belief is captured in the statement of Rolin-Jaequemyns:

²⁵⁶ Domestic codes were also high on the agenda. Indeed, it was only after the Franco-Prussian War that European armies adopted the American Lieber Code model and ‘transplanted’ a similar code all over Europe and in Latin America, rendering the law inscribed in the code universally binding within and between armed forces. The Prussian army adapted the code into confidential instructions it issued to its officers for its war in France in 1870. HARTIGAN, *supra* note 72, at 22. Other countries followed suit, as evidenced by the military manuals issued by The Netherlands (1871), France (1877), Serbia (1879), Argentina (1881), Spain (1893), Italy (1896), Germany (1902), Russia (1904), Switzerland (1904), Portugal (undated), and Columbia (undated). See BORDWELL, *supra* note 12, at 115-16 (referring to the manuals and army regulations of several countries). The protocols of the Brussels Project (1874) include references to the Austrian or Prussian military codes (session of August 5) and the Italian code (session of August 22). Brussels Conference Protocols 14-15, 43. For further discussion see STIRK, *supra* note 120, at 226 -230. Similarly, Ernest Nys marked the Brussels Declaration as “the real work of codification,” since its purpose was to “bring under the domain of international law that which had hitherto existed as a national decree. Ernest Nys, *The Codification of International Law*, 5 AM. J. INT’L L. 895 (1911).

²⁵⁷ In a letter from Rolin-Jaequemyns, the Secretary General of the Institut de Droit International, to Baron Jomini, the head of the Russian delegation, the former conveys his own lack of conviction over the desirability of an interstate treaty between “civilized nations on the laws of war,” whether the content of the laws of war was clear, and the principles such a codified law should include. Rolin-Jaequemyns asks for Jomini’s (and other heads of states’) opinion on the matter. Letter from Gustave Rolin-Jaequemyns, the Secretary General of the Institut de Droit International, to Baron Antoine-Henri Jomini (Feb. 26, 1875), (Jomini Onou Papers volume XXIX, British Museum Egerton MS 3194, British Library, London).

²⁵⁸ As was suggested by the French delegate at Brussels (Brussels Conference Protocols 4, August 26, 1874, p. 52). In 1872, the Austrians suggested ‘inoculating’ the principles of the Geneva Convention into European public law by their uniform introduction into the military law of each nation, rather than to draft another treaty. Boissier, *supra* note 42, at 280.

²⁵⁹ Eventually, the Institut would launch the *Oxford Manual* as a project *not* based on sovereign consent. Despite some opposing voices, most participants would consider the Manual important and necessary. See The Oxford Manual, *supra* note 226 and the debate in the *Revue de droit international et de législation comparée*, 438. For further discussion, see Augusti, *supra* note 77, at 48-49.

. . . even a partial diplomatic codification founded upon express and unanimous agreement would constitute a double step forward, at once formed and material: first, because in law simplicity and certitude are themselves inappreciable advantages; second, because at the risk of revolting human conscience in all countries it would be impossible that the systemization adopted should be not only as humane but more humane than existing customs.²⁶⁰

Some international lawyers, perhaps with a tinge of class-consciousness, were hoping to control the aforementioned “bestial urges” of the soldiers²⁶¹ and suppress the sentiments of the “unfortunate peasants” who were “obeying an instinctive feeling and almost irresistible patriotism”²⁶² to the laws of war.²⁶³ Martens pointed out that the recent Franco-Prussian War demonstrated how difficult it is to resolve irreconcilable differences about the law during battle when patriotic sentiments take center stage.²⁶⁴

Regardless of the lawyers’ noble intentions, the law they were helping to codify, from Crimea to Brussels, often led to competing, even opposing, consequences. International lawyers’ civilizing vision in the context of the laws of war was not so much concerned with colonized communities,²⁶⁵ but with turning the “savages”²⁶⁶ of Europe into disciplined soldiers. This vision proved compatible with the interests of European governments, which were struggling to contain and suppress the social upheavals of their day. So while the birth of the modern laws of war graciously nodded toward the common soldier, it was also, if not primarily, an inter-elite endeavor aimed at enhancing the collective control of European governments over their respective

²⁶⁰ Quoted in Nys, *supra* note 256, at 895-96.

²⁶¹ Bluntschli’s 1870 lecture, *supra*, note 17, at p. 16-17 (“der Krieg deckt . . . die ursprüngliche ildheit wiederauf, welche die Menschennatur mit der thierischen Natur verbindet.”)

²⁶² “il faut admettre que, parmi ces malheureux paysans, fusillés en vertu des lois de la guerre, plus d’un n’était coupable que d’avoir obéi à un sentiment instinctif et presque irrésistible de patriotisme local.” See Rolin-Jaequemyns, *supra* note 187, at 26.

²⁶³ It was during this time that the Anglo–American international codification strand similarly reached a watershed moment—but from a completely different origin: the successful conclusion of the Alabama Affair in September 14, 1872. Nys describes how their efforts led to the establishment of the International Law Association in 1873. Nys, *supra* note 256, at 871.

²⁶⁴ Noting “[l]’impossibilité de résoudre une question de ce genre pendant la lutte même, au moment où les passions patriotiques sont en jeu, témoin encore les divergences inconciliables qui se sont produites pendant la guerre franco allemande.” Rapport de M. Rolin-Jaequemyns, 7 Rev. Droit Int’l & Legis. Comp. 1st ser. 447, 452 (1875).

²⁶⁵ ANTONY ANGHIE’S IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005) and Martti Koskenniemi’s *The Gentle Civilizer of Nations* introduced path breaking critical histories of international law as a civilizing project for the colonized world. KOSKENNIEMI, *supra* note 75 at 98-278. Anghie and Koskenniemi’s work has been followed by a variety of studies inspired by postcolonial theory, focusing on the ideas and influence of international lawyers on the periphery: the Third World Approach to the history of international law (TWAAIL). See, for example, SUNDHIA PAHUJA, *DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011); ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842--1933* (2015); Liliana Obregón, *Between Civilisation and Barbarism: Creole Interventions in International Law*, *Third World Quarterly* 27 (2006): 815, 820--24; UMUT ÖZSU, *FORMALIZING DISPLACEMENT: INTERNATIONAL LAW AND POPULATION TRANSFERS* (2015).

²⁶⁶ For a reference to rural Frenchmen as ‘savages,’ see WEBER, *supra* note 63, at 3.

societies. This is true both for the governments of democratic countries and for autocracies. Both confronted social unrest, albeit diverse in its sources and manifestations, and by invoking international law they could explain and justify to their nationalistic constituencies that they may not sacrifice themselves unless ordered to. They could not take part in hostilities if they were not formally made part of the military, and they had to obey orders lest they lose the law's protection. In other words, the codification of the laws of war as part of international law was the governments' response to their need to rein in *their own* soldiers and civilians.²⁶⁷ An international treaty, promulgated at a ceremonial event with heads of states or their representatives, provided a moment of national pride, and this helped obscure the fact that the leaders who were apparently invoking the spirit of Solferino and acting paternally to protect their citizens were actually defending themselves against those whom they feared the most.

The utility of international law as a tool to tame civilian challenges was also immediately felt beyond the battlefield. In the autumn of 1870, as Napoleon III was fleeing into exile while France continued fighting, Russia seized the opportunity and announced its intention to free itself from the shackles of the 1856 Treaty of Paris that had imposed neutrality in the Black Sea. By this act, Russia was testing the efficacy of multilateral treaties as a means to secure long-term stability in an era of growing domestic dissent. It was then that the European powers found it necessary to formally and irrevocably commit for the first time to the proclamation of *pacta sunt servanda* as a principle of positive international law and not only a moral obligation. The London Declaration of January 17, 1871, recognized "that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement."²⁶⁸

Some, especially the British opposition and newspapers seeking war with Russia,²⁶⁹ derided the London Declaration as a face-saving trick to allow Russia to withdraw from its obligations under the 1856 Treaty of Paris. But the question that was raised by Russia's announcement of withdrawal was one of principle. As noted by John Stuart Mill, Russia's assertion of sovereignty merited serious discussion.²⁷⁰ The

²⁶⁷ On the disciplining function of the laws of war see Benvenisti and Cohen, *supra* note 5.

²⁶⁸ HENRY AUGUSTUS OAKES, *THE GREAT EUROPEAN TREATIES OF THE NINETEENTH CENTURY* 11 (1918).

²⁶⁹ See, e.g., HC Deb 30 March 1871 vol 205 c 900 (referring to Russia as "far too sensible, and far too cynical a Power, ever to stick at declarations." For critical press coverage see, e.e., *The Manchester Guardian* (1828-1900), Mar 14, 1871, Editorial Article 1 – No Title, p. 5, *The Manchester Guardian* (1828-1900), Mar 15, 1871, Editorial Article 3 - No Title, p. 4.

²⁷⁰ "Treaties are not made to be eternal, and before we go to war for the maintenance of one it behoves the nation at least to consider whether it would enter into it afresh at the present day." John Stuart Mill, *The Treaty of 1856*, *THE TIMES* (Nov. 19, 1870) 5, and a few days later: ". . . nations have the wild folly to make, and to exact, engagements for all time. Mankind, happily, are now beginning to find out that anything whatever to which a nation attempts to bind either itself or others in perpetuity . . . will assuredly, at some time or other, require to be, and will actually be, shaken off by those to whom it is injurious." John Stuart Mill, *The Treaty Of 1856*, *THE TIMES* (Nov. 24, 1870) 3.

reaction of some governments to the Declaration demonstrates its importance.²⁷¹ The text of the Declaration was significantly stronger than those that the Prussians and the Russians had initially offered.²⁷² The French representative, who came to London to sign the Declaration once the political situation in France had stabilized, acknowledged that it reflected “a practice which protects and affords a true guarantee for peace and civilization, and which has been too often disregarded in these last years.”²⁷³ Hinsley saw the London Declaration as a sign that the Franco-Prussian War would be “the last of the series of disturbances which had racked Europe since 1854,” pointing out that the principle of *pacta sunt servanda* “conflicted with the principle of nationality.”²⁷⁴

Through the codification of international law and the assertion of *pacta sunt servanda*, the use of international law for the regulation of war functioned as a tool for European governments with which they could consolidate and ensure their exclusive domestic authority. The evolving laws of war, and the laws on treaties, together with the laws on neutrality and on nonintervention in the internal affairs of other states,²⁷⁵ proved useful to the effort to reestablish the imperial legal order in Europe. International lawmaking, divorced from natural law, became a distinctly interstate endeavor, one that excluded representatives of civil society.

Moreover, international law showed itself in Brussels to be the tool used by the stronger states against the weaker ones. While international lawyers hailed the fact that state consent was necessary to secure general agreement as key to strengthening the weaker countries, the Brussels Declaration achieved just the opposite: the weaker parties offered an aura of legitimation to a law that reflected the consent of the powerful. This was demonstrated by the agreement to disagree on the right to resist an occupier, and the limited protection to noncombatants from bombardment, which was generally understood as sanctioning the German interpretation of the law.²⁷⁶ It was Germany’s consent to the law that ultimately mattered.

²⁷¹ Letter from Austrian Minister–President Count Friedrich Ferdinand von Beust to Count Chotek. 7 December 1870. (Correspondence respecting the Treaty of March 30, 1856, London, 1871), p. 60-61 (“We think that [the Russian] theory, if it obtained ground, would be a severe blow to the faith placed in Treaties, and its effect would be to loosen all those ties which, up to now, have held nations together. We have never pretended that international transactions are exempt from the effects of time, and that they must be eternally maintained intact. No matter how firm may be the resolution of the contracting Parties at the time of the signature of a Treaty that its duration shall be assured, it is incontestable, as the Russian Chancellor remarks, that in the long run, events may happen which change the situation so as to render it desirable to the signatories that a modification of part or all of the Convention should be made. But in that case the Law of Nations points out the course to be followed; this is, that recourse should be had by the interested State to the other intervening Powers with a view to coming to an understanding as to the modifications to be made in the Treaty.”)

²⁷² See David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT’L L. 1, 18, 20 (1988) (on Russia’s position during the negotiations as well as on Bismarck’s views on the subject). For Prussia’s support of the Russian position see MATTHEW S. ANDERSEN, *THE EASTERN QUESTION: 1774-1923*, 172 (1966).

²⁷³ *Protocols of Conference Held in London Respecting the Treaty of March 30, 1856*, 38 (1856).

²⁷⁴ HINSLEY, *supra* note 50, at 243.

²⁷⁵ On the evolution of the law on non-intervention in civil wars, see ELIAV LIEBLICH, *INTERNATIONAL LAW AND CIVIL WARS: INTERVENTION AND CONSENT* (2013).

²⁷⁶ *Supra* note 243 and accompanying text.

VI. CONCLUSION

Democratization processes of this period (1856-1874) introduced alternative counterauthoritarian values, inaugurated civil society initiatives, and pushed critical visionaries such as Dunant or Nightingale to become humanitarian ‘entrepreneurs’. Through the power of transnational networks, mass media, and public debates, the contemporary political order of the day was constantly thought anew, leading to genuine hopes and efforts to end, or at least significantly constrain, the violence of war. Meanwhile, the shift to industrialization and a globalized economy posed significant challenges to the survival of existing European governments. The revolutionary and deeply destabilizing potential of these menaces reached its zenith with the Franco-Prussian War and the Paris Commune.

The former was a transformative war because it exposed the great potential and bleak danger of nationalism and democracy for the governments holding power in Europe. Both German commanders and French intellectuals expressed concerns about the destabilizing forces of democratization. Reflecting on the war of 1870–1871, Field Marshal Helmuth von Moltke lamented that “[g]enerally speaking, it is no longer the ambition of monarchs which endangers peace; but the impulses of a nation.”²⁷⁷ The French scholar and diplomat Albert Sorel, writing in 1875, warned that “if the excessive extension of democracy were to progress . . . the benefits [democracy] seems to offer will be met by equivalent suffering.”²⁷⁸ It was this experience that led governments to move to codify the laws of war and enlist the nationalist commitment to the military mission through the turn to nations in arms. While Kant opposed standing armies since they entail the use of men “as mere machines and tools,”²⁷⁹ he could not have foreseen how nationalism would be used just a century later as a means to convince soldiers of their own will to sacrifice themselves for the sake of their nation.

The late-nineteenth-century codification of the laws of war was triggered by democratic processes, nationalism, and humanitarian values: the mass media coverage of wars, the advocacy of civil society, and the phenomenon of civilians-turned-soldiers who transformed wars from pitched battles to national wars and public debate and concern. These processes compelled governments to address the calamities of war through law as negotiated in Geneva, St. Petersburg, and Brussels. But, while public pressure, conveyed in humanitarian terms, brought governments to the negotiating table, it did not translate into a humanitarian code tailored to reduce the suffering in war and its impact on civilians. These laws of war, in their formative stage, imposed no significant constraints on the use of necessary violence, and did not protect the lives of

²⁷⁷ *Id.* at 1, 2.

²⁷⁸ ALBERT SOREL, II HISTOIRE DIPLOMATIQUE DE LA GUERRE FRANCO-ALLEMANDE 363-73 (1875). According to Michael Howard, this war was the first example in modern history of the “Nation in Arms—a nation whose entire man-power was not only trained as soldiers, but could be mobilized, armed, and concentrated on the frontiers within a very few days.” (Howard, *War in European History*, *supra* note 99, at p. 455). TOMBS, *supra* note 113, at 44.

²⁷⁹ “to pay men to kill or to be killed seems to entail using them as mere machines and tools in the hand of another (the state), and this is hardly compatible with the rights of mankind in our own person.”

civilians in times of armed conflict, at least not for a few decades to come. Rather, the turn to the codification of the laws of war and of international law writ large encapsulated a dialectic between two objectives: to enhance nationalism through recognizing the nation state as the definitive political unit for outsiders, and the only relevant authority domestically; and to establish a broader European civilizing vision that could only be defined and recognized by political and economic elites. This history of the laws of war exposes the turn to international law as an elite-driven project rather than one motivated by humanitarianism, democracy, and peace.

The story of the Franco-Prussian War and its legal outcome, the Brussels Declaration, was anathema for the peace movements, for the Red Cross, and for the international lawyers who sought to civilize humanity. Their humanitarian sensibilities were important catalysts of the turn to codification but were coopted by powerful European governments to secure their rule. The Franco-Prussian War would be conveniently forgotten, and the Brussels Declaration, if mentioned at all, would be belittled as having failed to produce a legally binding text.

History, however, is not merely about facilitative factors, causes, and consequences. History is also about ironies. Indeed, our article has shown that the humanitarian language that was inserted to the laws of war of the late-nineteenth century should not be taken at face value. But regardless of its history, judges and jurists in later generations will interpret the law to serve humanitarian goals. The story this article reveals suggests that the humanitarian interpretation could be ultimately justified as offering a corrective endorsement of a normative vision that was preempted by the powerful European governments in Brussels. Ironically, judicial interpretation that endorses the humanitarian aspects in these sources might prove more democratic than the original elitist formation of the laws of war.