
Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874

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Abstract

In this article, we challenge the canonical narrative about civil society's efforts to discipline warfare during the mid-19th century—a narrative of progressive evolution of Enlightenment-inspired laws of war, later to be termed international humanitarian law. Conversely, our historical account shows how the debate over participation in international law-making and the content of the law reflected social and political tensions within and between European states. While the multifaceted influence of civil society was an important catalyst for the inter-governmental codification of the laws of war, the content of that codification did not simply reflect humanitarian sensibilities. Rather, as civil society posed a threat to the governmental monopoly over the regulation of war, the turn to inter-state codification of IHL also assisted governments in securing their authority as the sole regulators in the international terrain. We argue that, in codifying the laws of war, the main concern of key 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 in the bottle. These concerns were brought to the fore most forcefully in the Franco-Prussian War of 1870–1871 and the subsequent short-lived, but violent, rise of the Paris Commune. These events formed the

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backdrop to the Brussels Declaration of 1874, the first comprehensive text on the laws of war. This Declaration exposed civilians to war's harms and supported the growing capitalist economy by ensuring that market interests would be protected from the scourge of war and the consequences of defeat.

1 Introduction

During the course of the second half of the 19th century, the rules regulating the conduct of armies during hostilities were internationally codified for the first time – a move that is often read in the context of the laws of war and their histories. This article offers a broader reading, and suggests that the codification process of this era epitomized a struggle over the role and influence of civil society in Europe. The age of nationalism had brought to the battlefield civilians who were eager to take up arms in defence of their respective nations, and who thus tested the limits of Jean-Jacques Rousseau's succinct proposition that civilians must be insulated from the scourge of war as much as possible, for '[w]ar . . . is a relation, not between man and man, but between State and State'.¹ Even more ominous for state leaders, the late 19th century was also an era of greater democratization that was feared as potentially breeding discontent with the government. Anti-establishment 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, *inter alia*, on international law to curtail nationalist and revolutionary sentiments.² Monarchs and emperors turned to international law as a tool to protect themselves against the potential consequences of placing 'a gun on the shoulder of every socialist'.³

European governments sought to use the regulation of war to secure their political authority and their monopoly of violence against the growing influence and power of the civil society, and to protect private property in times of war. 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

¹ Rousseau continued: '[A]nd 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.' J. J. Rousseau, *The Social Contract* translated by G.D.H. Cole (1762; reprinted 2003) at 6.

² On the disciplinary aspect of the laws of war to ensure control over soldiers, see Benvenisti and Cohen, 'War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective', 112 *Michigan Law Review* (2014) 1363.

³ This phrase was coined by Adolphe Thiers, chief executive of the French Republican government, who crushed the Paris Commune (see Part 3.A.2) and later opposed the resurrection of national conscription. Quoted in D. Moran and A. Waldron (eds), *The People in Arms: Military Myth and National Mobilization since the French Revolution* (2003), 100, at 103.

civilizing mission was similarly applied to those who were not part of the European elite. The architects of the laws of war were not so much concerned with colonized communities but, rather, with turning the 'savages' of Europe into disciplined soldiers and submissive citizens, while protecting the private property of the bourgeoisie.⁴

We hold that the multifaceted influence of civil society was an important catalyst for the intergovernmental codification of the laws of war, but that the content of that codification did not reflect such humanitarian sensibilities and should not be read simply as a reflection of its heroic cause. Rather, as civil society posed a threat to the governmental monopoly over the regulation of war, the turn to interstate codification of international humanitarian law was meant, *inter alia*, to assist governments in securing their authority as the sole regulators in the international terrain. We are not the first to discuss how the codification of the laws of war served the powerful states against the weak.⁵ Realist scholars, such as James Morrow, Eric Posner and Alan Sykes, have emphasized that the rationale for codifying the laws of war was bound up with the armies' wish to ensure reciprocity during combat.⁶ Similarly, critical scholars, such as Chris Jochnick and Roger Normand, have argued that the laws of war reflected the desire of the powerful European nations to privilege military necessity.⁷ Commenting on the late 20th-century use of the laws of war, David Kennedy suggests that while, initially, the codification reflected a 'humanitarian strategy' shared by 'humanitarian and military professionals', it has more recently become a means by which these actors can avoid exercising ethical and moral judgment.⁸ Other scholars have gone beyond the interstate perspective to explore the intra-state dimension as an arena of contestation. Eyal Benvenisti and Amichai Cohen have emphasized the function of the laws of war in promoting discipline within the expanding echelons of power in the large European armies.⁹

However, the existing realist and critical accounts do not address the puzzle of what prompted the European governments of the late 19th century to constrain themselves in that specific manner and at that particular moment.¹⁰ In this article, we canvas a broader perspective, suggesting that the late 19th-century codification of the laws of war was designed by powerful governmental actors to monopolize their authority *vis-à-vis* competing domestic actors not only in times of war but also, crucially, in

⁴ On the condescending perceptions towards the rural French as 'savages', see E. Weber, *Peasants into Frenchmen: The Modernization of Rural France 1870–1914* (1976), at 3.

⁵ A. Cassese, *International Law* (2nd ed., 2005). With respect to the law of occupation, see E. Benvenisti, *The International Law of Occupation* (2nd ed., 2012), at 45–46.

⁶ E. Posner and A. Sykes, *Economic Foundations of International Law* (2013), at ch 11; J. Morrow, *Order within Anarchy: The Laws of War as an International Institution* (2014). For a critique, see Benvenisti and Cohen, *supra* note 2.

⁷ See, e.g., Jochnick and Normand, 'The Legitimation of Violence: A Critical History of the Laws of War', 35 *Harvard International Law Journal* (1994) 49.

⁸ D. Kennedy, *Of War and Law* (2006), at 83–86, 167.

⁹ Benvenisti and Cohen, *supra* note 2.

¹⁰ Historical attempts to unravel the origins of the laws of war are not very prevalent. See Witt, 'The Dismal History of the Laws of War', 1 *University of California Irvine Law Review* (2012) 895. This is despite the fact that critical historical analysis of international law in other contexts is a flourishing area of research.

peacetime. We develop a historically-grounded critical account of this reading, and, in this sense, we support the proposed explanatory framework of previous realists. However, we also complicate their approach by piercing the sovereign veil over state interests and probing some of the social, economic and political processes within different societies (such as the rise of nationalism, democratization or technological advancements). Our analysis demonstrates how these processes posed a threat to governmental control over violence and unruly civic resistance and illuminates the relationship between this threat and the introduction of the laws of war. We share the contextual approach of John Fabian Witt's study on the crucial role of domestic political economy and the politics of the era in shaping the laws of war during the American Civil War.¹¹ Drawing on primary sources, we show that, while civil society sought to protect civilians from combatants' fire, governments regarded the law as primarily protecting combatants from civilians.¹² The international code enabled them to ward off unruly civilians from threatening to undermine the social and political European order.

Our analysis centres on the institutional and substantive dimensions of the codification of the laws of war. The institutional dimension refers to the identity of the agents involved in the codification process, while the substantive dimension is concerned with the content of the law. From an institutional perspective, the 1864 Geneva Convention model, which positioned civil society agents as recognized participants in international law, was thereafter cast aside in favour of the exclusive participation of government representatives.¹³ The drafting of the subsequent St Petersburg and Brussels Declarations purposefully excluded civil society.¹⁴ These codification processes asserted that state governments are the sole actors recognized by international law as having the power to oblige the state.

From a substantive point of view, our analysis upsets the common narrative that presents these early codification endeavours as promoting peace and epitomizing 'progress for civilization'.¹⁵ We found evidence in the 1856 Paris Declaration and in the 1874 Brussels Declaration of the influence of a very particular vision of peace,

¹¹ J.F. Witt, *Lincoln's Code* (2014). For a brilliant analysis of transformation of the goals of warfare as a reflection of deep political processes, see J.Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* (2012). For a similar methodological move to explain the history of international law through the prism of domestic political processes, see S. Moyn, *The Last Utopia* (2010).

¹² This study is based on archival research in England (the National Archives of the United Kingdom and the British Library, London), France (Centre des Archives Diplomatiques, La Courneuve, Paris), Germany (Bundesarchiv Berlin-Lichterfelde and Bayerisches Hauptstaatsarchiv) and Russia (the Historical-Military Museum of Artillery, Engineer and Signal Corp in St Petersburg).

¹³ Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva Convention) 1864, 129 CTS 361.

¹⁴ Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles (St Petersburg Declaration) 1868, 138 CTS 297; Project of an International Declaration Concerning the Laws and Customs of War (Brussels Declaration) 1874.

¹⁵ St Petersburg Declaration, *supra* note 14, preamble, para 2. See also the Institut de Droit International, Manuel des lois de la guerre sur terre (*Oxford Manual*), 9 September 1880, preamble (offering a manual 'in accord with both the progress of juridical science and the needs of civilized armies').

which linked it to the promotion of free trade and was tailored to protect the propertied class.¹⁶ In contrast, the humanitarian efforts of the fathers (and also, importantly, mothers)¹⁷ of the Red Cross merely managed to obtain during this formative era (by the Geneva Convention of 1864) that the armies would allow private associations to treat the sick and wounded. The governments tolerated this initiative as long as those associations stayed away while the battle was still raging.¹⁸ Similarly, the 1868 St Petersburg Declaration, which was drafted only by states while excluding civil society, posed few constraints on the exercise of violence.

The Brussels Declaration was designed partly to protect armies – and their governments – from ‘patriotic insurrections’ by foreign and domestic civilians.¹⁹ We read this declaration against the backdrop of the devastating events of the Franco-Prussian War, which exposed the menace of democratization of warfare: a civil society more eager to fight than its own government. It was these destabilizing events that convinced leading figures in powerful European governments to take up the challenge of codifying the laws of war.²⁰ Those scholars who distinguish between two strands in the laws of war – the laws of warfare *stricto sensu* and the protection of the victims of warfare – may find our narrative that combines the Brussels Declaration (often identified with ‘the Hague law’) with the history of Geneva of 1864 quite perplexing. However, we believe that the narrative according to which these two bodies of law are separate developed *after* the period we are studying here and, probably, as a result of the Brussels Declaration’s intended suppression of the humanitarian dimension. A concrete manifestation of how the distinction between these two dimensions was not part of the mind-set of the 1870s can be derived from the publications of the members of the Institut de Droit International, who were also involved in this codification effort and referred to Brussels as being all about humanizing warfare.²¹

Part 2 of this article begins with a discussion of the particular challenges of modern warfare – the economic, political, social and technological developments that transformed wars into national events. These challenges were exposed during the period

¹⁶ Paris Declaration Respecting Maritime Law (Paris Declaration) 1856, Martens Nouveau Recueil Generale des Traites, xv. 791.

¹⁷ Queen Augusta of Prussia and her Aunt Maria Pavlovna of Russia were prominent supporters of Henry Dunant’s initiative.

¹⁸ Not all governments adhered to it. France and Austria most notably did not. See note 77 below and accompanying text.

¹⁹ During the session of 14 August 1874, the Russian chairman of the conference, Baron Jomini, quoted directly from the work of G. Rolin-Jaequemyns, *La guerre dans ses rapports avec le droit international* (1871), in which the Belgian international lawyer had 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* (Paris: Librairies des Publications Législatives, A. Wittersheim and Cie. 1874), Protocol no. 12, at 27 (*Brussels Conference Protocols*).

²⁰ 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’. P. Bordwell, *The Law of War Between Belligerents* (1908), at 89.

²¹ *Oxford Manual*, *supra* note 15, preamble.

between the Crimean War and the Franco-Prussian War, and are fundamental in explaining the most important codification project of this period as it was embodied in the 1856 Paris Declaration and the 1874 Brussels Declaration. In this part, we critically assess the history of the 1864 Geneva Convention and the 1868 St Petersburg Declaration against the backdrop of these developments and highlight their limited significance. In light of our findings in Part 2, Part 3 is devoted to the historical events that signalled the tipping point towards the codification of the laws of war: the Franco-Prussian War and the Paris Commune, as well as the Brussels Declaration that followed. In this part, we further explore the broader meaning of this moment for the history of codification in international law by examining the adoption of the 1871 Declaration of London, which insulated intergovernmental agreements from potential challenges by political contestants.²² We also elucidate how the newly-codified laws of war were more about peacetime than wartime; seemingly apolitical, the laws of war codification project was actually more elitist and counter-majoritarian than humanitarian and democratic. These new laws therefore served more to cement the political order than to protect the fate of combatants – much less civilians. Part 4 concludes.

2 From Crimea to St Petersburg: The War Becomes a Public Concern

This part outlines the economic, political, social and technological developments that transformed wars from aristocratic duels into national events, thus generating public awareness of human suffering, and prompted European governments to codify the laws of war. These developments, 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. The ensuing public debate and civil society activism compelled governments to address these concerns and to reassert their claim to monopoly over violence.

A Crimea: Civilians Experiencing the War at Home

In *The Verdict of Battle*, James Whitman describes how the wars of the 18th century were fought as pitched battles.²³ These limited, curated encounters would be superseded during the 19th century by what Carl von Clausewitz referred to as ‘absolute wars’,²⁴ while the political order of the Concert of Europe would be severely destabilized by the revolutions of 1848.²⁵ Despite their immediate suppression, these revolutions

²² The London Declaration 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’. Declaration on the Nonalteration of Treaties without Consent (London Declaration) 1871, 18 *Martens Nouveau Recueil* (1873) 278, reprinted in T. Hertslet, *The Map of Europe by Treaty* (1890), vol. 3, at 1901.

²³ Whitman, *supra* note 11.

²⁴ M. Kaldor, *New and Old Wars. Organized Violence in a Global Era* (3rd edn, 2012), at 23.

paved the way towards a set of profound transformations across the continent, which form the background to our story. The 1850s and, to an even greater degree, the 1860s were characterized by conflicting trends of restoration and reform. European governments, particularly those of France, Prussia, Britain and Russia, sought to maintain their old regime, while simultaneously conceding to some of the demands of their citizens.²⁶ 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 expanding their investment in infrastructure projects and economic policies for the purpose of modernization.²⁷ While there was great variation between state models and activities (among them, the restored French monarchy, the growing Prussian military prowess and the special model of British self-government),²⁸ in general terms, state governments across Europe assumed new functions that ushered in the bureaucratic state of the 19th century.²⁹ Reasserting their claim to monopoly over violence on grounds other than dynastic succession, these governments turned nationalism – previously conceived as a menace – into a governance asset that would enhance their legitimacy to exercise force. But, as they would soon discover, the unruly horse of nationalism would first need to be tamed.

These new state functions developed as a response to, and further catalyst for, the intensifying industrial revolution. Industrialization was responsible for significant population growth, urbanization and mass migration in several European states.³⁰ The growth in industry and trade was accompanied by a communications revolution, the building of railways and telegraph lines and the intensified use of steam power, all of which reduced distances in time and space.³¹ New transportation modes were cheap enough for most people to use as they moved from the countryside to work

²⁵ J. Sperber, *The European Revolutions 1848–1851* (1994), chs 1–2; P. Schroeder, *The Transformation of European Politics, 1763–1848* (1994), chs 12–17; M. Broers, *Europe after Napoleon: Revolution after Napoleon* (1996).

²⁶ A.J. Mayer, *The Persistence of the Old Regime: Europe to the Great War* (2nd edn, 2010), ch. 2; F.R. Bridge and R. Bullen, *The Great Powers and the European States System* (2nd edn, 2005), at 127.

²⁷ This new emphasis on infrastructural improvement was particularly evident in programmes for urban improvement in Paris, Madrid and Vienna. See Clark, 'After 1848: The European Revolution in Government', 22 *Transactions of the Royal Historical Society* (2012) 171, at 178–191; see also Tilly, 'The Political Economy of Public Finance and the Industrialization of Prussia 1815–1866', 26 *Journal of Economic History* (1966) 484.

²⁸ Leonhard, 'The Rise of the Modern Leviathan', in Stefan Berger (ed.), *A Companion to Nineteenth-Century Europe 1789–1914* (2006) 137, at 141–144.

²⁹ Kaldor, *supra* note 24, at 23–25.

³⁰ Tranter, 'Population, migration and labour supply', in D. Aldcroft and S. Ville (eds), *The European Economy 1750–1914* (1994) 37; I. Berend, *An Economic History of Nineteenth-Century Europe: Diversity and Industrialization* (2012), at 260–272; Pollard, 'Industrialization and the European Economy', 26 *The Economic History Review* (1973) 636; S. Pollard, *Typology of Industrialization Processes in the Nineteenth Century* (2002); C. Trebilcock, *The Industrialization of the Continental Powers 1780–1914* (1981).

³¹ See, e.g., Kaukiainen, 'Shrinking the World: Improvements in the Speed of Information Transmission, c. 1820–1870', 5 *European Review of Economic History* (2001) 1.

in cities within, or beyond, state borders.³² These societal transformations naturally affected the experience of war, both at home and on the battlefield.

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 dubbed ‘The Stain of Sinope’, was covered extensively in the British press in a tone of moral outrage.³³ France and Britain forged an alliance, joined by Turkey, and a fully-fledged inter-European war began.³⁴ After four decades of relative peace, the Concert of Europe, institutionalized in Vienna in 1815, was subjected to a protracted and costly global conflict – one that entirely transformed the military establishment and the relationship between the military and civil society. The Crimean War turned the aristocratic duel into public war. The media coverage of the Crimean War and the involvement of citizens as conscripts, journalists and volunteers translated into political pressure that governments could ill afford to ignore. At the same time, the public’s interest in the fate of its soldiers and the societal pressure to engage in, and win, the war demonstrated how governments could use nationalist sentiments to pursue their goals.

This war exposed the dialectic role of nationalist sentiments to governing elites – nationalism was a threat to their rule by garnering public involvement in the war, a disciplinary tool on the battlefield *and* a means to recruit public support for the cause of war back home. It also introduced two new heroes and a heroine to the ‘story’ of war: the professional journalist, the common soldier and the compassionate nurse. 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’.³⁵ One particularly famous journalist was Leo Tolstoy, who spent much of the war writing dispatches for *The Contemporary*, vividly conveying the general sense among soldiers of war being futile. 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,³⁶ facilitating unprecedented coverage of action on the battlefield. 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 ever.³⁷ As noted by Stefanie Markovits, ‘[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’.³⁸ While in previous wars soldiers’ deaths and suffering had been far removed from the public gaze, their

³² B. Buzan and G. Lawson, *The Global Transformation: History, Modernity and the Making of International Relations* (2015), at 77.

³³ J. Sweetman, *The Crimean War* (2001), at 20.

³⁴ A.J.P. Taylor, *The Struggle for Mastery in Europe 1848–1918* (1954), at 62.

³⁵ *Ibid.*, at 2–3; see also Sweetman, *supra* note 33, at 14–15.

³⁶ S. Markovits, *The Crimean War in British Imagination* (2009), at 3.

³⁷ Thousands of private letters arrived from the front. ‘Leader’, *The Times* (30 December 1854), at 6, quoted in Markovits, *supra* note 36, at 43.

³⁸ Markovits, *supra* note 36, at 4.

plight was now impossible to ignore. Writing for *The Times*, William Russell, considered the leading reporter on the Crimean War, drew the reader into the war zone:

[L]et us climb up one of the hills, near the scene of the French review, and watch the march of our regiments. ... [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.³⁹

In a letter published in *The Times* on 14 October 1854, a 'sufferer by the present war' asked why the British had no 'sisters of charity' similar to those employed by the French.⁴⁰ The ensuing public outcry 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.⁴¹ Following the war, she lobbied the British government, which subsequently introduced military reforms under which the British Army assumed responsibility for the treatment of its wounded soldiers.⁴²

These three new heroic wartime figures powerfully presented the horrendous consequences of incompetent military leadership or simple blunders that cost the lives of too many. The deluge 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.⁴³

The Crimean War thus marked a turning point in military history as armies grew bigger, employing inexperienced soldiers drafted against their will, and were 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.⁴⁴ The small professional armies of past generations were thus replaced by hordes of inexperienced soldiers. The many technological innovations and the unprecedented need to control masses of combatants involved fierce battles and heavy losses.

³⁹ W.H. Russell, 'The British Expedition', *The Times* (23 May 1854), at 10, quoted in Markovits, *supra* note 36, at 30.

⁴⁰ *The Times* (14 October 1854), at 7.

⁴¹ D. Wetzel, *The Crimean War: A Diplomatic History* (1985), at 164; W. Baumgart, *The Crimean War: 1853–1856* (1999), at 143–144.

⁴² P. Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (3rd edn, 1985), at 89.

⁴³ Some historians consider the influence of public opinion on British policy quite minimal and emphasize its even more limited influence in France. See Waller, 'Relations between States and Nations', in B. Waller (ed.), *Themes in Modern European History 1830–1890* (1990) 252, at 263.

⁴⁴ Buzan and Lawson, *supra* note 32, at 243.

The outcry over the heavy losses among inexperienced and ill-equipped soldiers that prompted the condemnation of journalists and civil society activists such as Nightingale was a source of pressure against governments. Yet, at the same time, growing public attention to war invited governments 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 Roy Bridge and Roger Bullen, '[t]hey 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'.⁴⁵

As Francis Hinsley lucidly observes, after 1856 and the end of the Crimean War, 'other governments in addition to the French began to ally with the dynamic force of the national principle in their own societies as a means of advancing their interests'.⁴⁶ 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 pinnacle of good citizenship. Indeed, 'the nation' was rebuilt around human sacrifice. In a celebrated poem featuring a scene from the Battle of Balaclava, Tennyson, the Poet Laureate, glorifies the bravery of the cavalry brigade whose fighters charged '[i]nto the jaws of Death' despite knowing that 'Some one had blunder'd': fearless soldiers were not supposed to 'reason why; Theirs but to do and die'.⁴⁷ For many years after that terrible battle in 1854, soldiers would be told that obedience and sacrifice meant heroism.

The economic, social, political and technological challenges exposed during the Crimean War would intensify in subsequent years. The 'media war' revealed how the conscription of non-aristocratic soldiers could enlist the public against the war and not merely *for* it. Furthermore, the oversized, non-professional armed forces that were being sent far afield to fight posed new administrative challenges to the military. Enlisting even greater portions of the population into the armies seems an almost counter-intuitive 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 had enforced a true national conscription regime, but, in most European countries, it tended to be poor soldiers from the lower classes 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 conscription and enhanced the profile of the prestigious Prussian Army as the model to be followed across Europe.⁴⁸

⁴⁵ Bridge and Bullen, *supra* note 26, at 126.

⁴⁶ F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (1967), at 245.

⁴⁷ A. Lord Tennyson, *The Charge of the Light Brigade* (1854).

⁴⁸ See M. Howard, *War in European History* (1970), at 100–101.

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.⁴⁹ 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.⁵⁰ Military service and mass deployment performed a similar function.⁵¹ 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’.⁵² Arming the people was meant to enhance their national identity and reinforce their fidelity to the state.⁵³ European governments used armies and schools, *inter alia*, to inculcate civic behaviour and transform newly-recruited soldiers, through patriotic parades, flag-waving and anthems, into citizens of the nation.⁵⁴

The Europeans of 1860 were better informed and educated, and more politically engaged, than their fellow citizens in previous generations.⁵⁵ The revolutions of 1848 laid the foundations for reform that bore fruit in the 1860s, albeit 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.⁵⁶ 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. Bowing to some of these pressures seemed inevitable.⁵⁷ As Margaret Macmillan observes, ‘[n]o government wanted large numbers of disgruntled citizens. The memories of Europe’s many revolutions were all too fresh’.⁵⁸ National conscription had the dialectical potential to bring war and its costs closer to home while, at the same time, instilling discipline among the masses and educating them to become loyal citizens.

The early codification efforts of the laws of war included elements related to these new social and political forces. While Crimea was not a ‘free-trade war’, it did usher the British foreign policy closer than before towards Richard Cobden’s (1804–1865)

⁴⁹ See E. Hobsbawm, *The Age of Capital: 1848–1875* (1975), at 77–79.

⁵⁰ *Ibid.*, at 94.

⁵¹ See Horne, ‘Defining the Enemy: War, Law and *Levée en Masse* from 1870–1945’, in Moran and Waldron, *supra* note 3, 100, at 103.

⁵² *Ibid.*

⁵³ Dandeker, ‘The Bureaucratization of Force’, in L. Friedman (ed.), *War* (1994) 118, at 119.

⁵⁴ E. Hobsbawm, *Age of Empire* (1987), at 304–305; Weber, *supra* note 4, at 292–338.

⁵⁵ M. Macmillan, *The War That Ended Peace* (2013), at 11–13.

⁵⁶ Hobsbawm, *supra* note 54, at 85.

⁵⁷ *Ibid.*, at 95; Hobsbawm, *supra* note 49, at 69–70.

⁵⁸ Macmillan, *supra* note 55 at 11–13.

free-trade vision, which linked peace with the evolution of free trade and global markets.⁵⁹ The railway boom, the revolution in communication and technological transformations in everyday life ‘offered a setting which gave full scope for the prophetic voice’ of the free-trade movement.⁶⁰ The economic interests of members of the middle classes would win further protection in times of war thanks to the first international codification attempt we analyse here: the Declaration of Paris of 1856. The protection of their interests may attest to the growing influence of the bourgeoisie on European governments. Furthermore, as we shall see in the following section, the Paris Declaration formed an important prelude to the later Brussels Declaration, in its distinction between legitimate warfare by national armed forces and illegitimate use of force by privateers at sea. The later Brussels Declaration of 1874 would similarly secure national governments’ monopoly over violence on land. The Geneva Convention of 1864, which we will analyse in turn, was another product of the rising influence of the middle classes in the mid-19th century. It represents their philanthropic and humanitarian sensibilities in favour of the codification of the laws of war during this period. However, as our analysis of this Geneva Convention and the later St. Petersburg Declaration reveals, humanitarian sensibilities had limited influence on the content of these codification efforts.

1 The 1856 Paris Declaration: Abolishing Privateering and Insulating Neutral Goods

Endorsed by seven powers (Britain, France, Russia, Prussia, Austria, Sardinia-Piedmont and the Ottoman Empire), the 1856 Paris Declaration was the first milestone in the codification of the laws of war, pronouncing rules of general applicability open to all states wishing to accede.⁶¹ It generalized the ad hoc agreement reached by England and France when the Crimean War started, desirous ‘to make war softer afloat, and to lessen its burdens upon commerce’.⁶² Although addressing war at sea, it asserted a principle that would become (in the 1874 Brussels Declaration) the central tenet in the modern laws of war: individuals, even when commissioned by a state party, are not legitimate combatants. The abolition of ‘privateering’, under the first of the four articles of the Paris Declaration, embodied two central rationales that would prove relevant to the regulation of warfare on land as well: it stripped weaker naval powers of a primary means of naval defence,⁶³ and it consolidated the meaning of war as an interstate conflict to which private actors have no access. From the Paris Declaration onward, governments would use the codified laws of war to consolidate their authority.

⁵⁹ A. Howe, *Free Trade and Liberal England 1846–1946* (1998), at 90; Cain, ‘Capitalism, War and Internationalism in the Thought of Richard Cobden’, 5 *British Journal of International Studies* (1979) 229, at 238–240.

⁶⁰ Tyrrell, ‘Making the Millennium: The Mid-Nineteenth Century Peace Movement’, 21 *The Historical Journal* (1978) 75, at 89.

⁶¹ Declaration Respecting Maritime Law, Paris, 16 April 1856.

⁶² Stockton, ‘The Declaration of Paris’, 14 *American Journal of International Law (AJIL)* (1920) 356, at 358.

⁶³ Witt, *supra* note 11, at ch 4.

The second and third articles of the Paris Declaration insulated commercial ‘neutral goods’ from the scourge of warfare. As noted by Jan Lemnitzer, their ‘rationale was simple but revolutionary – the new globalization and network of trade had to be protected from the impact of war’.⁶⁴ These principles were to sea warfare what the more elaborate rules of the Brussels Declaration later constituted to land warfare: rules that restricted civilian access to the battlefield and protected the interests of the propertied classes.

Yet the monopoly of state governments over the project of international codification was challenged at this point by growing awareness and pressure from civil society. The relationship between home and front became a matter of empathy, concern and commitment among civil society activists, journalists, doctors, lawyers and other leading figures. These sentiments inspired such actors to set a humanitarian agenda for protecting combatants from the worst consequences of war, while governments felt the need to pre-empt such initiatives. The following section demonstrates how these processes played out in the context of the Geneva Convention and the St Petersburg Declaration.

2 *The 1864 Geneva Convention on the Sick and Wounded: Could Civil Society Participate in International Regulation?*

In the course of the Crimean War, governments became exposed to a new, unfamiliar political cost to national conflict: the scrutiny of the media and the public. Between them, they ‘offered a setting which gave full scope for the prophetic voice’ of the peace movements – of various sorts and emphases – which had flourished in Europe and the USA since 1815.⁶⁵ The public outcry in response to severe casualties prompted civil society to advocate for legal constraints in times of war. These grassroots initiatives paved the way for the two early documents that preceded the codification of the laws of war in Brussels: the 1864 Geneva Convention⁶⁶ and the 1868 St Petersburg Declaration.⁶⁷ The former addressed the treatment of wounded and sick soldiers, while the second asserted the general prohibition on needlessly aggravating soldiers’ suffering. Yet neither of these documents ultimately became central to the governments’ operations in times of war, nor required them to devote attention or resources to their implementation.

The modern formation of the laws of war is generally attributed to civil society initiatives, prompted by the visionary Henry Dunant, who had witnessed the great suffering of wounded soldiers left to die on the battlefields of Solferino in 1859. Solferino reflected the ‘revolution’ of the means of destruction: the almost infinite supply of soldiers brought to the battlefield – about 130,000 Austrian troops met a similarly-sized army of French and Piedmontese troops.⁶⁸ Famously, Henry Dunant’s *A Memory*

⁶⁴ J. Lemnitzer, *Power, Law and the End of Privateering* (2014), at 8–9.

⁶⁵ Tyrrell, *supra* note 60, at 89.

⁶⁶ Geneva Convention, *supra* note 13.

⁶⁷ St Petersburg Declaration, *supra* note 14.

⁶⁸ F.C. Schneid, *The Second War of Italian Unification* (2014), at 1859–1861.

of *Solferino* (1862) described in great detail the brutal fate of wounded French and Habsburg soldiers fighting for the future of controlling Italy.⁶⁹ Thomas Longmore, soon to be the British surgeon general, observed in 1866 how the revolution in the means of destruction linked up with ‘all of the machinery for the rapid diffusion of intelligence and personal observations, which exists in our epoch’ to form a new political reality that supported the humanist vision, as ‘public sympathy has sought to lessen these evils [results of war] thought worthy of being made an object of international concern’.⁷⁰ This inspiring story has resonated ever since: the image of civil society activists promoting increasingly benevolent laws of war, assuming the title ‘international humanitarian law’ and thereby serving as humanity’s response to the horrible consequences of modern warfare.⁷¹

Yet, while several civil society initiatives played an important role in shaping the Geneva Convention, its contents and limitations reflected governmental interests. Despite the public outcry, the Geneva Convention did not require the military to invest resources in caring for the wounded and sick, and nor was it concerned with the promotion of peace or the conduct of armies during the war. Unlike the approach of the British during the Crimean War, which led to the establishment of official medical services,⁷² the main thrust of the initiators of the Geneva Convention was to bestow on voluntary aid societies the status of neutrals who could access the battlefield after hostilities subsided and tend to the wounded and dying.⁷³ Indeed, caring for wounded soldiers was a governmental interest. Gustave Moynier, the Swiss jurist and architect of the Red Cross and the Institut de Droit International, together with Louis Appia, the Swiss Surgeon who volunteered in field hospitals and became the chairman of the Medical Society in Geneva, explained that the interest of generals was to ensure against ‘a consumption of men, as must, short as the war might be, soon exhaust the population’.⁷⁴ However, governments were not necessarily willing to bear the costs of such care. It was therefore agreed that voluntary assistance would function only with the approval of commanders in the field, all volunteers being clearly identified by their distinctive armbands.⁷⁵ The 1864 Geneva Convention relied on civil society to tend to the soldiers’ suffering. States were not obliged to take any steps to develop national aid

⁶⁹ H. Dunant, *A Memory of Solferino* (1862).

⁷⁰ Quoted by J. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross* (1996), at 27.

⁷¹ See Alexander, ‘A Short History of International Humanitarian Law’, 26 *European Journal of International Law (EJIL)* (2015) 109 (discussing the origins of the term that first appeared in the 1970s); Luban, ‘Military Lawyers and the Two Cultures Problem’, 26 *Leiden Journal of International Law* (2013) 315 (explaining the fundamental difference between the traditional law that emphasized military necessity and the more recent law that subjects necessity to humanitarian concerns).

⁷² Boissier, *supra* note 42, at 89.

⁷³ Accordingly, the formal title of the conference referred to the neutralization of the care of the military in the field. See the protocols from the Conférence Internationale pour la Neutralisation du Service de Santé Militaire en campagne, Première Séance, 8 August 1864, at 8–10.

⁷⁴ G. Moynier and L. Appia, *Help for Sick and Wounded: La Guerre et la Charité*, translated by John Furely (1870), at 32. For a concise overview on Louis Appia see http://www.redcross.int/en/history/not_appia.asp. See also the Louis Appia Society at <http://louis-appia.ch/en/home/>.

⁷⁵ *Ibid.*, at 11.

societies to aid the wounded,⁷⁶ nor was there any mechanism to enforce the convention in times of war.

Even though it demanded so little, the Geneva Convention was severely abused during the Franco-Prussian war by civilians who invoked immunity to rob fallen soldiers or evade the duty to billet troops. It was entirely ignored by the French forces, which had not even been instructed to comply with it.⁷⁷ In fact, by the end of this war, it was regarded as a dismal failure. The very idea of amending its provisions by introducing a new convention was readily dismissed as unrealistic. Pierre 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'.⁷⁸

Indeed, pressure from civil society may have urged governments to participate in the codification of the laws of war, but the signing of the 1864 Geneva Convention would be the last occasion during the 19th century on which civil society activists would be permitted to set the agenda and initiate codification. From the St Petersburg Declaration onward, governments would pre-empt civil society initiatives and exclude their members from participation in the drafting processes.

3 *St Petersburg: A Commitment to a More Humane War?*

Alexander II's ascent to the throne in Russia before the end of the Crimean War ushered in an era of liberal reform.⁷⁹ With the backing of a like-minded Cabinet, he introduced a series of judicial, educational and military reforms. Despite violently suppressing the Polish Rebellion (1863–1864)⁸⁰ and maintaining a protectionist policy over the Balkan states, Alexander managed to maintain the public image of a benevolent dictator.⁸¹ Thus, when his minister of war, Dmitry Milyutin, presented a proposal

⁷⁶ Moynier and Appia argued that the military's purpose was to conquer the enemy, and, thus, care for the wounded would never be its primary concern. To fulfil its duty in looking after its wounded soldiers, the state should not hold a monopoly on aid and should therefore allow volunteer societies to provide the aid that the state does not. See G. Moynier and L. Appia, *La Guerre et la Charite: Traite Theorique et Pratique de Philanthropie Appliquee aux Armees en Campagne* (1867), at 46–48.

⁷⁷ On 9 January 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), 9 January 1871, Doc. 326, reprinted in Great Britain Foreign Office, *Further Correspondence Respecting the War between France and Germany 1870–71* (1871), at 252–256. For a detailed description of the behaviour of French forces and civilians, see Boissier, *supra* note 42, at 252; J. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross* (1996), at 55.

⁷⁸ Boissier, *supra* note 42, at 272. Following the Franco-Prussian War, the Red Cross did not meet again for over 10 years.

⁷⁹ O. Figes, *Crimea: The Last Crusade* (2010); W. Bruce Lincoln, *Nicholas I, Emperor and Autocrat of All the Russias* (1978); Riasanovsky, 'The Reign of Nicholas I, 1825–1855, and the New Intellectual Climate', in *Russian Identities: A Historical Survey* (2005), 130.

⁸⁰ *Affaires Étrangères, Documents Diplomatiques, Affaires de Pologne* (1863) (in French); 'Earl Russell on Poland', *The Spectator* (2 May 1863), at 1941; A. O'Brien, *Petersburg and Warsaw: Scenes Witnessed during a Residence in Poland and Russia in 1863–4* (1864).

⁸¹ D. Lieven (ed.), *The Cambridge History of Russia: Volume 2, Imperial Russia, 1689–1917* (2006), at 561, 593; G. Hosking, *Russia: People and Empire 1552–1917* (1997), at 315; B. Eklof, J. Bushnell and L.G. Zakharova, *Russia's Great Reforms, 1855–1881* (1994).

to ban a certain type of bullet on humanitarian grounds, the prospect of publicly displaying his civility while reaffirming Russia's importance on the political world stage was no doubt appealing.

By now, the background of the St Petersburg Declaration is well known.⁸² Explosive bullets were introduced to the Russian Army in 1863 for the purpose of destroying the enemy's cartridge boxes (*caissons*) and artillery.⁸³ Experiments conducted by the Russian Army exposed the great devastation and suffering these bullets could cause. For humanitarian and operational reasons, the army regulations restricted the supply of such cartridges; only six could be issued at a time and only to non-commissioned 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'.⁸⁴ By 1867, continued developments 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 Milyutin proposed to the tsar a complete international ban on explosive and inflammable bullets, except those used for the purpose of exploding munitions.

There have been a number of suggestions and educated guesses about the Russians' motivations for this move: genuine concern over needless human suffering; a greater need to ensure military discipline;⁸⁵ the desire to prevent an arms race;⁸⁶ the

⁸² For recent assessments, see Schäfer, 'The 150th Anniversary of the St Petersburg Declaration: Introductory Reflections on a Janus-Faced Document', 20 *Journal of Historical International Law (JHIL)* (2018) 501; Kolb and Milanov, 'The 1868 St Petersburg Declaration on Explosive Projectiles: A Reappraisal', 20 *JHIL* (2018) 515; Crawford, 'The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in International Humanitarian Law', 20 *JHIL* (2018) 544.

⁸³ 'Annex au protocole no. 1: Mémoire sur la suppression de l'emploi des balles explosives en temps de guerre', reprinted in 'Conférences de St. Petersburg', in G. Fr. de Martens, C. Samwer and J. Hopf (eds), *Nouveau Recueil General de Traites, Conventions et Autres Transactions Remarquables* (1873) 458; 'Mémoire sur las suppression de l'emploi des balles explosives en temps de guerre', enclosed in St George to Under Secretary of State for War Pakenham, 18 November 1868, 'Use of Explosive Projectiles in Time of War', 1868–1869, Doc. FO 83/316, The National Archives (TNA), Kew, United Kingdom.

⁸⁴ *Ibid.* (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. See V. Krylov and L. Makovskaya, 'Saint-Petersburg Declaration of 1868' in N.I. Karaulova (ed.), *New Archival Materials: A Collection of Articles and Materials, Dedicated to the 135th Anniversary of the Main Missile and Artillery Directorate* (1997), at 166–189.

⁸⁵ D. Schimmelpenninck van der Oye and B.W. Menning (eds), *Reforming the Tsar's Army: Military Innovation in Imperial Russia from Peter the Great to the Revolution* (2004), at 11–14, 292–295; Lucassen and Zürcher, 'Conscription and Resistance: The Historical Context', 43 *International Review of Social History* (1998) 405; Pintner, 'The Burden of Defense in Imperial Russia, 1725–1914', 43 *Russian Review* (1984) 231; N. Riasanovsky and M.D. Steinberg, *A History of Russia* (2005), at 342–343; G. Persson, 'The Russian Army and Foreign Wars, 1859–1873' (1999) (PhD dissertation on file at London School of Economics); D. Lieven (ed.), *The Cambridge History of Russia: Volume 2, Imperial Russia, 1689–1917* (2006), at 561.

⁸⁶ Keefer, "'Explosive Missals": International Law, Technology, and Security in Nineteenth Century Disarmament Conferences', 21 *War in History* (2014) 445, at 449–455; S. Keefer, *The Law of Nations and Britain's Quest for Naval Security: International Law and Arms Control 1898–1914* (2016), at 39–41.

idiosyncrasies of their geopolitical and economic situation; and Russia's eagerness to rehabilitate its devastated stature after the Crimean War⁸⁷ as a worthy member in the club of civilized nations,⁸⁸ especially at a time when it was beginning to open its economy to foreign investors.⁸⁹ We do not need to dwell on these various explanations here. Instead, we wish to highlight the institutional dimension of our argument in this context: the governmental pre-emption of civil society initiatives to codify the laws of war. The invitation to St Petersburg coincided with a Swiss invitation, prompted by the Red Cross, to update the Geneva Convention. In 1876, Thomas Erskine Holland described the efforts made by 'the enthusiastic friends of the convention' to add to its stipulations 'a long list of new ones'.⁹⁰ But these efforts faltered as too few delegates showed up in Geneva.⁹¹ Gustav Moynier described the Geneva gathering on 5–20 October 1868 as successful,⁹² but he failed to note that, by that time, all eyes were turned to St Petersburg. A week after Geneva, on 28 October 1868, a well-attended first round of negotiations in St Petersburg commenced. Not only did St Petersburg overshadow Geneva in its successful conclusion, but it also excluded civil society from its meetings and allowed only state representatives to participate. As we will show, the tension between civil society initiatives and the governmental quest to monopolize the codification of the laws of war would become explicit in the preparations for the meeting in Brussels in 1874.⁹³

⁸⁷ On Russia's standing in the Concert of Europe since the Crimean War, see J. Von Eckardt, *La Société Russe* (1877), at 74; J. Champlin (ed.), *Narrative of the Mission to Russia in 1866 of the Hon. Gustavus Vasa Fox, From the Journal and Notes of J. E. Loubat* (1873); H. Wade (ed.), *The New International Encyclopaedia: Volume 10* (1922), at 158; E. Radzinsky, *Alexander II: The Last Great Tsar* (2006), at 109.

⁸⁸ See, e.g., Rieber, 'Persistent Factors in Russian Foreign Policy: An Interpretive Essay', in H. Ragsdale and V.N. Ponomarev (eds), *Imperial Russian Foreign Policy* (1993) 315; P. Holquist, *The Russian Empire as a 'Civilized State': International Law as Principle and Practice in Imperial Russia, 1874–1878*, Title VIII Program on the National Council for Eurasian and East European Research (2004), at 1–37; Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', 51 *HILJ* (2010) 539; Myles, 'Humanity', 'Civilization' and the 'International Community' in the Late Imperial Russian Mirror: Three Ideas 'Topical for Our Days', 4 *JHIL* (2002) 310–334; Mälksoo, 'The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe', 19 *EJIL* (2008) 211.

⁸⁹ An 1868 Russian law enabled the government to purchase railroad consortium bonds and, in turn, issue consolidated bonds, which carried the guarantee of a minimum interest payment. The influx of French and Belgian capital was so substantial that it caused temporary inflation. H.E. Fisk, *The Inter-Ally Debts* (1924), at 294–295. For background on foreign capital invested in late Imperial Russia, see A. Crihan, *Le Capital Étranger en Russie* (1934); P. Vasil'evich Ol', *Foreign Capital in Russia* (1983). For background on France's pivotal role in financing Russian state projects after Prussian support waned, see Seydoux, 'Les thèses concernant la Russie et l'URSS soutenues en France de 1888 à 1964', 6 *Cahiers Du Monde Russe et Soviétique* (1965) 437. For Belgian investments, see E.F. Yurkic, 'The Russian Adventure: Belgian Investments in Imperial Russia' (1959) (PhD dissertation on file at Ohio State University), at 2–33.

⁹⁰ T. Erskine Holland, 'A Lecture on the Brussels Conference of 1874, and Other Diplomatic Attempts to Mitigate the Rigour of Warfare: Delivered at All Souls College', 10 May 1876, at 8.

⁹¹ *Ibid.*

⁹² G. Moynier, *Étude sur la convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne* (1870), at 76–77.

⁹³ See text in notes 171–178 below.

Substantively, it is important to grasp the limited significance of the St Petersburg Declaration, as reflected in its text and the parties' deliberations over its content. At first glance, St Petersburg appears to constitute a watershed moment for the regulation of war. But a more cautious observation might reveal a more disturbing reading. The preamble of the 1868 St Petersburg Declaration famously set forth the rationale of legitimate warfare. It invoked 'the progress of civilization' as requiring 'alleviating as much as possible the calamities of war [... and therefore] it is sufficient to disable the greatest possible number of men [rather than employ] arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'.⁹⁴ This rationale had been self-evident only a century earlier, and in fact had been restated by contemporaneous scholars.⁹⁵ But its solemn reiteration was diminished by the declaration in two important ways. First, the conference participants could not reach a consensus on a proposal made by the Prussian government to adopt a general prohibition on weapons that needlessly aggravated the suffering of soldiers and, instead, focused on prohibiting only two specific types of bullets, which exploded or ignited when hitting human or animal flesh.⁹⁶ Second, the final paragraph explicitly declares that, until further agreement, the use of all other types of weapons or ammunitions is not prohibited.⁹⁷ By prohibiting so little and allowing so much, the St Petersburg Declaration demonstrates the meagre willingness or even reluctance of governments to constrain themselves on the battlefield. 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 in 1868. The first comprehensive attempt to regulate war would have to wait until the 1874 Brussels Declaration, resulting from the devastating events of the Franco-Prussian War.

3 From the Franco-Prussian War to the Brussels Declaration: The Breakdown and the Reconstitution of Elite Authority

In this part, we explore how the 1870–1871 Franco-Prussian War and its aftermath impacted on the formation of the modern laws of war, prompting international

⁹⁴ St Petersburg Declaration, *supra* note 14.

⁹⁵ See on the prohibition on the causing of unnecessary suffering, including by the use of exploding and inflaming bullets: A. Heffter, *Das Europäische Völkerrecht* (3rd ed., 1855), at 221 [125].

⁹⁶ The Prussian proposal was resisted by Britain, which explained that its relatively small armed forces had to rely on new and potentially devastating technology. France also rejected the proposal, while Austria, Bavaria, Portugal, Belgium, the Netherlands and Switzerland expressed support for it. See De Martens, Samwer and Hopf, *supra* 83, at 465–466.

⁹⁷ '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, *supra* note 14, para. 2.

codification in the 1874 Brussels Declaration and, more generally, on the shaping of the basic tenets of international law-making. This war shook the foundations of the European balance of power and 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.'⁹⁸ This crisis would give rise to the formation of the revolutionary Paris Commune, which we will feature here for its relevance to the crystallization of the law – a role that is arguably underestimated.

We contend that it was in response to the Franco-Prussian War (rather than the Battle of Solferino or any other battle) that key European governments turned to the codification of the laws of war – a particular format of codification that silenced civilian groups that were perceived as potentially undermining the *status quo*. More generally, we argue that the war contributed directly to the moulding of international law by European powers seeking to ensure their exclusive control of European affairs and thus ward off emerging transnational challengers.

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 this conflict began with the French declaration of war on 19 July 1870 and ended with the surrender of the French Army at Sedan on 2 September 1870.⁹⁹ Before the rise of nationalism, a war would have commenced and ceased within this short period.¹⁰⁰ But the stunning capitulation and captivity of Emperor Napoleon III and more than 100,000 French troops proved to be merely the trigger for the second – protracted and bloody – phase of the war. Calls for revolution against the French monarchy immediately spread across the country, and, on 4 September 1870, 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 200,000-strong, who were paid 1.50 francs per day), and *francs-tireurs* (free-shooters). These were volunteer irregular fighters from different

⁹⁸ B. Taithe, *Citizenship and Wars, France in Turmoil, 1870–1871* (2001), at 38; see also Hinsley, *supra* note 46, at 244, 255.

⁹⁹ This section is based on: P. Chasteau (ed.), *Documents Publiés pour Servir à l'Histoire de la Guerre de 1870–1871 – Recueil des Depeches* (2016); J. Merriman, *Massacre: The Life and Death of the Paris Commune of 1871* (2014), at 18–38; P.M.R. Stirk, *A History of Military Occupation from 1792 to 1914* (2016), at 188–223; M. Eliot Howard, *The Franco-Prussian War: The German Invasion of France* (1961); A. Horne, *The Fall of Paris* (2nd edn, 1990); P.-O. Lissagaray, *History of the Paris Commune of 1871*, translated by Eleanor Marx (1886); R. Tombs, *The War against Paris 1871* (1981); and the more literary rendition by Emile Zola in *The Debacle*. E. Zola, *The Debacle* (1892).

¹⁰⁰ Whitman, *supra* note 11, at 209–211; Stirk, *supra* note 99, at 188.

political and social backgrounds throughout France, who operated against advancing Prussian troops as well as against their lines of communication in occupied territory, sometimes as guerrilla forces and at other times in support of regular forces in the open. In significant numbers, they responded to Gambetta's call: '[E]veryone ... let us rise *en masse* and die rather than submit to the shame of [national] dismemberment.'¹⁰¹ However, Sibylle Scheipers writes that the *francs-tireurs* 'were a nuisance to the German forces, but never developed into an existential threat or even a serious operational challenge'.¹⁰² The Republican government saw them as lawfully-commissioned soldiers (just as the Confederate government viewed the partisan rangers it commissioned to fight during the American Civil War).¹⁰³ The Prussians, by contrast, regarded them as rebels, to be 'immediately shot without any proceedings'.¹⁰⁴

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 seemed increasingly hopeless. After Paris had been under siege for four excruciating months, French Foreign Minister Jules Favre signed, on behalf of the French government, an armistice with Bismarck on 30 January 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, coupled with the payment of heavy war reparations. National elections were called for a new National Assembly that would vote on whether to accept these harsh conditions.¹⁰⁵ The newly elected assembly heard the representatives of both Alsace and Lorraine pleading for the unity of the nation to be secured and for their own souls to be saved: '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'.¹⁰⁶ But the Chief Executive of the new 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.¹⁰⁷

2 A Civil War? The Paris Commune Rises to Save the Republic

But, even if the National Assembly did opt for humiliating peace, others vowed to keep fighting, and yet another group of irregular combatants joined the circle of violence. 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

¹⁰¹ See Horne, *supra* note 99, at 103, 108.

¹⁰² S. Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (2015), at 90–91.

¹⁰³ Witt, *supra* note 11 at 192.

¹⁰⁴ As explained in Report Sent by German Minister of War Georg von Kameke to Bismarck, in Preparation for the Brussels Conference, 18 July 1874, folder R 901/ 28961, no. 46, German Foreign Office, National Archives, Berlin Lichtferlde: '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.'

¹⁰⁵ See the debates in the National Assembly, 17 February 1871–1 March 1871, 'Documents Publics Pour Servir à L'histoire de la Guerre de 1870–1871', in Chasteau, *supra* note 99, vol. 8, at 5–54.

¹⁰⁶ *Ibid.*, at 9 (authors' translation).

¹⁰⁷ *Ibid.*, at 11–16.

us'.¹⁰⁸ And in Paris and 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 10 more weeks until it was crushed by the Republican government.

The Parisians, out-voted in the National Assembly, refused to give up their arms,¹⁰⁹ while short-lived revolutionary communes also sprang up in a handful of cities beyond the capital.¹¹⁰ On 1 March 1871, reacting to the National Assembly's ratification of the Treaty of Versailles, the Central Committee of the National Guard issued a proclamation asserting its intention to 'defend the threatened Republic by all possible means'.¹¹¹ 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 300,000-strong guard was ready to save the republic.¹¹² 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'.¹¹³

When, on 18 March, 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 28 March 1871, after municipal elections. It lasted until 21 May, when the regular army entered the city, precipitating the 'biggest massacre in Europe of the nineteenth century' of Parisians who were believed to have taken part in the Commune's activities.¹¹⁴ The Commune sought protection under 'the laws of war and humanity' that would bestow prisoner of war status on its captured fighters. When rebuffed, the Communards retaliated by promulgating a law on hostages that authorized reprisals, condemning the government's 'disregard [for] the common usages of civilized nations'.¹¹⁵ And, in its final hours, the Commune invoked the government's refusal to recognize the Communards' legal entitlement to fight, as it prodded them to resist 'till the last cartridge': 'Show no pity ... you will not be saved anyway ... Woe to those who will be denounced as soldiers by law (*soldats-du-droit*)'.¹¹⁶

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

¹⁰⁸ Declaration of representatives read in the National Assembly on 1 March. *Ibid.*, at 37–38 (authors' translation).

¹⁰⁹ Merriman, *supra* note 99, at 18–38; Horne, *supra* note 99; Lissagaray, *supra* note 99; Tombs, *supra* note 99.

¹¹⁰ R.V. Gould, *Insurgent Identities* (1995), at 187–192; Tombs, *supra* note 99, at 57–58.

¹¹¹ Documents relatifs à la guerre franco-allemande 1871–1872, *Recueil de diplomatie et d'histoire*, 1873, Doc. no. 1136, vol. 1, at 33, Archives Diplomatiques. Versailles Peace Treaty 1919, 225 Parry 188.

¹¹² Documents relatifs à la guerre franco-allemande 1871–1872, *Recueil de diplomatie et d'histoire*, 1873, Doc. no. 1156, at 53, Archives Diplomatiques.

¹¹³ Zola, *supra* note 99, at 457.

¹¹⁴ Merriman, *supra* note 99, at 2.

¹¹⁵ Lissagaray, *supra* note 99, at 240. 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, as it warned: 'Woe to those who would be denied being soldiers by law (*soldats-du-droit*).' Proclamation in Horne, *supra* note 99 (opposite to page 315).

¹¹⁶ Horne, *supra* note 99, *id.*

restore order.¹¹⁷ On 25 May, 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.'¹¹⁸

3 *The Paris Commune and the European Social Order*

While the Commune was short-lived, it presented a serious challenge to the European leaders in the following decades. Adolphe Tiers portrayed the Communards as dangerous internationalists who threatened the entire economic, social and political order of Europe.¹¹⁹ But the Commune's audacious resolve made an equally lasting impression on socialists across Europe and on revolutionaries such as Karl Marx, then one of the leaders of the International Workingmen's Association (the International), established in 1864: 'history was to prove that the death of the Commune, with all the mythology it left behind, fanned by [Karl] Marx, was far more important than its life.'¹²⁰

The Communards were motivated by national sentiments that included anti-establishment and also even anti-national strains.¹²¹ While some of the anti-establishment sentiments remained local in their reach,¹²² other ideologies resonated across Europe: Proudhonism, which demanded local autonomy;¹²³ socialism, which promoted a transnational class struggle¹²⁴ that would ultimately replace the very existence of states;¹²⁵ 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.¹²⁶ Driven by social democratic ideology, the Commune

¹¹⁷ Tombs, *supra* note 99, at 107–111.

¹¹⁸ Circulaire, 25 May 1871, reprinted in Chasteau, *supra* note 99, 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 99, at 500.

¹¹⁹ Thiers' Circulaire, 20 March 1871, in Chasteau, *supra* note 99, at 56–57.

¹²⁰ Horne, *supra* note 99, at 430.

¹²¹ For an overview, see Taithe, *supra* note 98, at 15; Merriman, *supra* note 99, at 167; Gould, *supra* note 110, at 153, 165–171. See also Horne, *supra* note 99, at 430; Hobsbawm, *supra* note 49, at 167.

¹²² Gould, *supra* note 110, at 153.

¹²³ The Commune's Declaration to the French People, 19 April 1871, calls, *inter alia*, for '[t]he absolute autonomy of the Commune extended to all localities in France'. 'Declaration to the French People', 19 April 1871, reprinted in S. Edwards (ed.), *The Communards of Paris 1871* (1973), at 82. Proudhon and Bakunin advocated 'destroying oppressive state structure by devolving power to local democratic communities'. Tombs, *supra* note 99, at 117–118.

¹²⁴ As John Merriman notes, the Commune was a trans-European event, with only one-quarter of the Paris population that could be found classified as indigent. Merriman, *supra* note 99, at 2, 5.

¹²⁵ Tombs, *supra* note 99, at 125, 220–222; Merriman, *supra* note 99, at 12.

¹²⁶ As Arthur Lehning suggests in his introduction to Michael Bakunin's *Selected Writings*, '[t]his [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'. M. Bakunin, *Selected Writings*, edited by A. Lehning (1873), at 23–24.

promulgated laws that subjected private ownership to social needs.¹²⁷ This ideology did not merely challenge the existing economic order but also clashed with the Catholic 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’.¹²⁸ 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.’¹²⁹ There were even voices denouncing marriage as a type of slavery.¹³⁰ 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.¹³¹ For some – Zola’s protagonist, for example – ‘the Commune was impotent, being torn asunder by too many contradictory elements’.¹³² Yet, to many onlookers, it 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 insurrection or military insubordination’.¹³³ Eric Hobsbawm writes that the Commune had ‘frightened the wits out [of the bourgeoisie order] by its mere existence’.¹³⁴

Karl Marx was not alone in realizing the significance of the Commune as a rallying symbol for the rise of the international worker. Authority figures within the French government laid the blame for the violence on the proletariat. Alistair Horne quotes an influential cleric referring to the rise of the Commune as ‘the conquest of France by the worker’.¹³⁵ John Merriman cites 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’.¹³⁶ The official Parliamentary Commission of Inquiry set up to study the events also blamed socialists, specifically the International, and anarchists and the weakening influence of the Catholic Church for the ‘moral disorder’ of the Commune,¹³⁷ thereby confirming the other governments’ worst fears.¹³⁸

The fact that foreigners also joined the struggle by taking an active part in instigating uprisings and fighting the Prussian and French governments raised additional

¹²⁷ Marx describes the laws that abolished night work among bakers and prohibited the reduction of wages and the expropriation of workshops and factories. K. Marx, *The Civil War in France* (1871), at 85.

¹²⁸ Merriman, *supra* note 99, at 11, 97–115.

¹²⁹ Tombs, *supra* note 99, at 132.

¹³⁰ *Ibid.*, at 105–106.

¹³¹ Horne, *supra* note 99 (opposite of page 315).

¹³² Zola, *supra* note 99, at 474.

¹³³ Tombs, *supra* note 99, at 41.

¹³⁴ Hobsbawm, *supra* note 49, at 167.

¹³⁵ Horne, *supra* note 99, at 292.

¹³⁶ Merriman, *supra* note 99, at 11, 251.

¹³⁷ *Ibid.*, at 248.

¹³⁸ Enquête parlementaire sur l’insurrection du 18 mars, *Rapports*, 3 volumes (1872), available at <https://archive.org/details/enquete-parlement00marsgoog>.

concerns among neighbouring governments. Among the Communards were 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 the south of France during the autumn of 1870.¹³⁹ One of the former leaders of the Polish uprising against the Russians in 1863 became commander-in-chief of the Communard troops, leading about 800 Polish emigrants, before he was killed in action.¹⁴⁰

Horne writes that ‘overnight Marx ... achieved universal notoriety as the “Red Terrorist Doctor”’.¹⁴¹ Marx’s observation that ‘[c]lass rule [was] no longer able to disguise itself in a national uniform’ and that all of 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’¹⁴² and that the Commune was ‘the glorious harbinger of a new society’ reverberated across Europe.¹⁴³ 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’.¹⁴⁴ The 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. Field Marshal Helmuth von Moltke stated 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: ‘[W]hat Government could allow its rights to be vindicated by foreign bayonets?’¹⁴⁵ Because the armistice conditions rendered the French forces ‘almost defenseless’, the Germans allowed reinforcements of French troops and even released prisoners of war.¹⁴⁶ 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’.¹⁴⁷

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.¹⁴⁸ Meanwhile, German Socialists

¹³⁹ Taithe, *supra* note 98, at 32; Horne, *supra* note 99, at 316.

¹⁴⁰ Żurawski Vel Grajewski, ‘Poland in the Period of Partitions 1795–1914’, in E. Bielawska-Batorowicz (ed.), *Poland: History, Culture and Society, Selected Readings* (2015) 115.

¹⁴¹ Horne, *supra* note 99, at 429–430; G. Stedman Jones, *Karl Marx, Greatness and Illusion* (2016), at 507–508.

¹⁴² Marx, *supra* note 127, at 104.

¹⁴³ K. Marx, *The Paris Commune*, edited by F. Engels (1891), at 105.

¹⁴⁴ Stedman Jones, *supra* note 141, at 511.

¹⁴⁵ *Ibid.*, at 407.

¹⁴⁶ *Ibid.*, at 408.

¹⁴⁷ *Ibid.*

¹⁴⁸ Horne, *supra* note 99, at 314.

were invoking the duty of solidarity between the German and French workers and calling for an ‘honorable peace with the French Republic’.¹⁴⁹ While ‘lurid pictures of the excesses of the *Commune* shocked the propertied classes’ in Germany,¹⁵⁰ the German socialist August Bebel declared in the Reichstag that ‘before many decades have gone by, the battle cry of the Parisian proletariat – “[w]ar on palaces, peace to cottages, death to poverty and idleness!” – will be the battle-cry of the entire European proletariat’.¹⁵¹

To pre-empt the rise of the German Social Democrats, Bismarck imprisoned those who called for German-French solidarity on the charge of ‘inciting to high treason’.¹⁵² Later, he acknowledged that his hostility towards Social Democracy stemmed from hearing ‘one of its leading members in an open sitting of the Reichstag express his sympathy for the Paris Commune’.¹⁵³ Despite Bismarck’s efforts, the German Socialists considerably strengthened their position in the 1870s, aided by the growth of industry in Germany, which brought increasing numbers of disgruntled workers to support the socialist cause. Acting on his earlier suspicions, Bismarck introduced anti-socialist legislation in the Reichstag in 1878.¹⁵⁴

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 April 1872, Bismarck expressed concerns about the recent election of a radical mayor in Lyon, expecting the worst.¹⁵⁵ Such fears, along with his own geopolitical interests,¹⁵⁶ motivated Bismarck to corral the monarchs of Austria, Russia and Germany to support the League of the Three Emperors of 1873.¹⁵⁷ He would again call on European powers to act collectively to suppress ‘the forces of anarchy

¹⁴⁹ 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’. Hayes, ‘The History of German Socialism Reconsidered’, 23 *The American Historical Review* (1917) 62, 72–73. 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 C. Stegmann and C. Hugo, *Handbuch des Socialismus*, (1897), Art. ‘Eisenacher’, at 170.

¹⁵⁰ Stedman Jones, *supra* note 141, at 555.

¹⁵¹ Cited in S. Miller and H. Potthoff, *A History of German Social Democracy from 1848 to the Present* (1986), at 31.

¹⁵² Hayes, *supra* note 149, at 72–73.

¹⁵³ Perrin, ‘The German Social Democracy’, 192 *North American Review* (1910) 464.

¹⁵⁴ Hayes, *supra* note 149, at 75.

¹⁵⁵ Le Général le Flô, Ambassadeur de France à Saint-Petersbourg, à M. De Rémusat, Ministre des Affaires Étrangères to M. Thiers, Saint-Petersbourg, 2 May 1873, reprinted in Ministère des affaires étrangères, *Documents Diplomatiques Français 1871–1914* (1929), Series 1 (1870–1900), vol. 1, at 234; C.G. Schott, *Mission to Saint Petersburg* (2011), ch. 10.

¹⁵⁶ Taylor, *supra* note 34, at 219.

¹⁵⁷ Hobsbawm, *supra* note 49, at 167; Tombs, *supra* note 99, at 181.

and destruction’ when Alexander II of Russia was assassinated by Nihilists in 1881.¹⁵⁸ Understandably, the Russian government – the least democratic of the European regimes – was also deeply worried by the challenge that the Commune represented.¹⁵⁹ Historian Gudrun Persson has examined the Russian government’s strategic plan of national defence, prepared in 1873. She quotes John Keep, who noted that ‘Sedan was almost a second Sevastopol for the Russian military establishment’.¹⁶⁰ The Russians were worried about the threat from the West, not due to ‘personal quarrels among the European sovereigns’ but, rather, to ‘significant political differences’,¹⁶¹ and expressed concerns over the potential involvement of insurgent Polish rebels in a possible attack on the Tsar’s regime.¹⁶²

The British also shared Bismarck’s concerns that France was dangerously unstable. But, while Bismarck had faith in Thiers (by then France’s president) and was concerned that he would be replaced by ‘radical republicans [who] would then make France the center of European revolution’,¹⁶³ Lord Lyons, the British ambassador to France, believed Thiers’s rule promised continued instability: ‘little doubt was felt that, with or without any error of policy on [Thier’s] own part, the country was gradually drifting towards communism’.¹⁶⁴ 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 advance of the 1873 elections, he told a cheering crowd of some 6,000 in Grenoble that it was time for a ‘new social stratum’ to rule France.¹⁶⁵ Coincidentally, Gambetta’s speech was heard by the Russian interior minister, Alexander Timascheff, who was in France to observe and congratulate Thiers on the speedy recovery of the French economy. ‘Gambetta’s Grenoble tirade’, as Carl Schott notes, ‘prompted Timascheff to warn Thiers that Europe would not look kindly on France becoming a hotbed of revolution once again’.¹⁶⁶ Indeed, Gambetta’s candidacy was reported widely in the European press,¹⁶⁷ raising fears across Europe that, once the German occupying forces left, France’s government would again be plagued by radicals.¹⁶⁸

¹⁵⁸ Perrin, *supra* note 153.

¹⁵⁹ Schott, *supra* note 155, ch. 6; see also Le Général le Flô, Ambassadeur de France à Saint-Petersbourg to M. De Rémusat, Ministre des Affaires Étrangères, Saint-Petersbourg, 6 August 1871, reprinted in *Documents Diplomatiques Français 1871–1914*, *supra* note 155, vol. 1, at 55; Taylor, *supra* note 34 at 214.

¹⁶⁰ J.L.H. Keep, *Soldiers of the Tsar: Army and Society in Russia 1462–1874* (1985), at 276.

¹⁶¹ Persson, *supra* note 85, at 147.

¹⁶² *Ibid.*, at 159.

¹⁶³ Schott, *supra* note 155, ch. 9.

¹⁶⁴ Lord Lyons to Lord Granville, Paris, 4 March 1873, reprinted in Lord Newton (ed.), *Lord Lyons: A Record of British Diplomacy* (1913), vol. 2.

¹⁶⁵ Quoted in Schott, *supra* note 155, ch. 9.

¹⁶⁶ *Ibid.*

¹⁶⁷ ‘M. Gambetta’s Constitution’, *The Spectator* (1 March 1873), at 6; ‘Election in Paris: M. Gambetta in Belleville’, *London Daily News* (24 April 1873), at 14.

¹⁶⁸ In a letter to Thiers, Gontaut-Biron, the French Ambassador in Berlin, wrote about Bismarck’s concerns regarding ‘revolutionary agitations’. M. De Gontaut-Biron, Ambassadeur de France Berlin to M. Thiers, Président de la République, Berlin, 9 March 1873, reprinted in *Documents Diplomatiques Français 1871–1914*, *supra* note 154, vol. 1, at 213.

B The Response: The Brussels Declaration

Disputes concerning compliance with the laws of war arose throughout the different phases of the Franco-Prussian War. Notably, the French Imperial Army failed to comply with the 1864 Geneva Convention,¹⁶⁹ and prominent international lawyers questioned the lawfulness of specific measures. Jurist Johann Caspar Bluntschli criticized the destruction of residential areas and cultural heritage sites within besieged French cities.¹⁷⁰ Elsewhere, Paul Pradier-Fodéré and Gustave Rolin-Jaequemyns argued against the taking of property by the Prussian occupier and the use of other harsh measures to silence resistance, and especially the legal status of the *francs-tireurs*, the National Guardsmen and the Communards.¹⁷¹

Conversely, in the wake of the events of 1870–1871, both German commanders and French intellectuals expressed concerns about the destabilizing forces of democratization. As noted earlier, the practice of the Prussian forces was to shoot *francs-tireurs* on sight,¹⁷² and the Versailles government adopted that same policy vis-à-vis captured Communards. Reflecting on the war of 1870–1871, Field Marshal von Moltke lamented that '[g]enerally speaking, it is no longer the ambition of monarchs which endangers peace; but the impulses of a nation'.¹⁷³ 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'.¹⁷⁴

The 1874 conference in Brussels was an opportunity to address these opposing reactions to the recent conflict. Echoing humanitarian sentiments, the immediate precursor to the Russian invitation to Brussels was a proposal from a French 'International Society for the Amelioration of the Condition of POWs', with which Henry Dunant was associated.¹⁷⁵ Yet, the motivation of stronger European governments around the negotiating table at Brussels was to secure their bases of power by excluding civilians from the battlefield, thereby ensuring governmental control over the exercise of violence. Their position was reflected in the exclusion of civil society representatives from the meetings and in the content of the text itself: the declaration exclusively regulated inter-state conflicts and *de-facto* endorsed the Prussian position concerning irregular fighters. While the 1856 Paris Declaration abolished privateers at sea, the Brussels

¹⁶⁹ See *supra* note 77 and accompanying text.

¹⁷⁰ Criticized by Bluntschli in his lecture of November 1870. See J. Bluntschli, *Das moderne Völkerrecht in dem französisch-deutschen Kriege 1870* (1870), at 15–17.

¹⁷¹ See P. Pradier-Fodéré, *Commentaire sur le code de justice militaire* (1873), at 596–600; G. 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* (1871), at 47–54.

¹⁷² See *supra* note 104.

¹⁷³ *Ibid.*, at 1, 2.

¹⁷⁴ A. Sorel, *Histoire Diplomatique de la Guerre Franco-Allemande* (vol II, 1875), at 363–373.

¹⁷⁵ See Milyutin's Diary (authors' translation); Boissier, *supra* note 39, at 288–289; G. Werner, 'Les prisonniers de guerre', in The Hague Academy of International Law, *Collected Courses of the Hague Academy of International Law* (vol 21., 1928), available at: https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789028605824_01.

Declaration abolished, in so many words, privateers on land and, by implication, all other individuals who took up arms.¹⁷⁶

Several grassroots initiatives to revisit the laws of war sprang up in the aftermath of the Franco-Prussian War. But, as Baron Jomini, the Russian chairman, stated in his opening speech, when private societies took the initiative, it appeared preferable to the imperial government that the matter be resolved ‘by the Governments themselves, because it trenches on their rights and their interests’.¹⁷⁷ Indeed, non-governmental parties were intentionally excluded from participating in the Brussels Conference.¹⁷⁸ Furthermore, this was the German precondition for coming to Brussels since, they believed, those private actors were ‘notorious enemies of the German Reich’.¹⁷⁹ The instructions for the German delegates in Brussels 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’.¹⁸⁰

The conference participants agreed at the outset that only state representatives would take part in it,¹⁸¹ and their deliberations were supposed to be confidential (indeed, they would have remained so, had they not been leaked to, and made public by, Leon Gambetta).¹⁸² Germany sent five delegates (compared to only one or two delegates from other countries).¹⁸³ The head of the German delegation, General von Voigts-Rhetz, wrote of his impression that the delegates from Russia, Italy and France had been instructed to endorse the German position.¹⁸⁴ Jomini began the proceedings by pointing out the need to ‘control patriotic aspirations’.¹⁸⁵ 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

¹⁷⁶ As the Lieber Code did in the context of the Civil War. See Witt, *supra* note 11, at 193.

¹⁷⁷ Opening speech, reprinted in *Brussels Conference Protocols*, *supra* note 19, Nos 2 and 7.

¹⁷⁸ *Brussels Conference Protocols*, *supra* note 19, Nos 2 and 7.

¹⁷⁹ Letter from unknown author to Bernhard von Bülow, State Secretary of the Foreign Office, 7 July 1874, folder R 901/ 28961, no. 17, German Foreign Office, National Archives, Berlin Lichterfelde: ‘[T]he 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’ (authors’ translation).

¹⁸⁰ Letter from Bernhard von Bülow, State Secretary of the Foreign Office and Georg von Kameke, Minister of War, to William I, German Emperor, 18 July 1874, Folder R 901/ 28961, no. 46, the German Foreign Office, National Archives Berlin Lichterfelde) (authors’ translation).

¹⁸¹ *Brussels Conference Protocols*, *supra* note 19, Nos 3, 14 and 15.

¹⁸² 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, 24 August 1874, folder R 901/ 28963, no. 8, the German Foreign Office, National Archives, Berlin Lichterfelde.

¹⁸³ F. Despagnet, *La Diplomatie de la Troisième République et le Droit des Gens* (1904), at 113.

¹⁸⁴ Letter from Konstantin Bernhard von Voigts-Rhetz, First German delegate to the conference to Bernhard von Bülow, State Secretary of the Foreign Office, 31 July 1874, folder R901/ 28962, no. 9, German Foreign Office, National Archives, Berlin Lichterfelde.

¹⁸⁵ *Brussels Conference Protocols*, *supra* note 19, at 2, 7.

know'.¹⁸⁶ While many have cited these words as being inspired by humanitarian concerns, we wish to highlight another motivation. As this part will show, the deliberations in Brussels and their outcome could never have come about exclusively on the premise of humanitarian concerns. The dominant governments (differences between governments will be fleshed out in our analysis) were seeking to (i) have international law regulate only interstate warfare; (ii) tightly regulate access to the battlefield and eliminate any other insurrectional challenge to the participating states; (iii) ensure the stability of the European legal political and economic order in an occupied territory; while (iv) offering little protection to civilians from the harms of war.¹⁸⁷

1 Codifying the Law for Interstate Wars Only: Refuting the Communards' Claims

At the dawn of the Brussels negotiations, the French government's position not to abide by the laws of war in quelling the Commune's insurrection was hardly beyond dispute. It was not compatible with that of central humanitarian interlocutors who challenged the possibility of distinguishing between civil and inter-state wars. In Victor Hugo's *Les Misérables* (1862), the character Marius Pontmercy pondered the distinction: 'Civil war? What does this mean? Is there any foreign war? Is not every war between men, war between brothers? War is modified only by its aim. There is neither foreign war, nor civil war; there is only unjust war and just war.'¹⁸⁸

The public debate about regulating internal warfare was also reflected in legal texts in the years preceding the Franco-Prussian War. While a few contemporaneous scholars rejected the applicability of the laws of war to civil wars,¹⁸⁹ several others strongly endorsed it. The Lieber Code, which inspired the young Russian jurist Fedor Martens (who authored the Russian draft for the Brussels Conference),¹⁹⁰ implied that the laws of war could apply in certain internal armed conflicts.¹⁹¹ One of President Lincoln's advisors, Anna Ella Carroll, asserted boldly in 1861 that, in the case of a civil war, the US army was 'obliged to observe, at the same time, all the established usages of war. For the same enlightened maxims of prudence and humanity are as obviously applicable to a civil war as to any other'.¹⁹² The same principle was also endorsed by the US Supreme Court in the so-called Prize Cases of 1863.¹⁹³ Bluntschli's 1866 code

¹⁸⁶ *Ibid.*, at 14, 34.

¹⁸⁷ The text also sought to ensure discipline within the military by, *inter alia*, prohibiting the looting and ransoming of enemy soldiers. See Benvenisti and Cohen, *supra* note 2.

¹⁸⁸ V. Hugo, *Les Misérables: A Novel*, translated by Charles Wilbour (1960), at 164–165.

¹⁸⁹ See, e.g., A. Heffter, *Das Europäische Völkerrecht* (3rd ed., 1855), at 204 [114].

¹⁹⁰ F. de Martens, *La Paix et la guerre*, translated by N. de Sancé (1901), at 77–78. Baron Jomini noted that the Russian idea for the convention came from what transpired in the USA during the War of Secession and the rules of President Lincoln. *Brussels Conference Protocols*, *supra* note 19 No 2, at 7.

¹⁹¹ General Orders no. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Arts 149–151 ('Lieber Code') (distinguishing among types of non-international armed conflicts); S. Neff, *War and the Law of Nations* (2009), at 256–257.

¹⁹² A. Carroll, *The War Powers of the General Government* (1861), at 7, quoted in Armitage, 'Civil War Time: From Grotius to the Global War on Terror', delivered at the Nineteenth Annual Grotius Lecture (12 April 2017), at 11.

¹⁹³ *The Prize Cases* (1863) 67 US 635, at 666–671 (1862), cited in Armitage, *supra* note 192, at 10.

of ‘the modern war’,¹⁹⁴ (mostly an adaptation of Lieber’s Code)¹⁹⁵ extended the definition of ‘war’ to include an armed conflict with ‘an organised non-state party operating in good faith according to public law’.¹⁹⁶ Some of those associated with the Red Cross were also open to the application of the law to civil wars. General Guillaume Dufour, the commander of the Federal Swiss Army during the 1847 civil war of Sonderbund, demanded equal protection for fellow countrymen.¹⁹⁷ Dufour would later be the chairman of the Committee of Five (the precursor of the ICRC) and would preside over the 1864 Geneva Convention. Dr Nicasio Landa, a founder and ‘indefatigable champion’ of the Spanish Red Cross,¹⁹⁸ drew on the US precedent in urging the applicability of the Geneva Convention to rebels in the Third Carlist War in Spain (1872–1876),¹⁹⁹ noting that ‘it is very difficult to accept that our compatriots, however misguided, can be treated more harshly than foreigners’.²⁰⁰

The official position of the ICRC, seeking to avoid confrontation with European governments, was far less supportive of international regulation of internal wars.²⁰¹ Even after the Franco-Prussian War, the official Red Cross bulletin declared in 1873 that ‘[t]he Geneva Convention, for its part, [did] not in any way concern civil wars’,²⁰² and,

¹⁹⁴ J. Bluntschli, *Das moderne Kriegsrecht der civilisirten staten* (1866).

¹⁹⁵ See *Ibid.*, at vorwort, iii–iv id, and the many references to the Code throughout. See also B. Röben, *Johann Caspar Bluntschli, Francis Lieber und das modern Völkerrecht 1861–1881* (2003); Schindler, ‘J.C. Bluntschli’s Contribution to the Law of War’, in M. G. Kohen and M. Kohen (eds.), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (2007) 437, at 454.

¹⁹⁶ *Ibid.*, at [1]: ‘Begriff des Kriegs. Kriegsparteien. Kriegsursachen. Kriegserklärung...; at [3]: ‘...Eine bewaffnete Partei, welche nicht von einer bestehenden Staatsgewalt zur Gewaltübung ermächtigt worden ist, wird dennoch insofern als Kriegspartei betrachtet, als sie als selbständige Kriegsmacht organisirt ist und an States Statt in gutem Glauben für öffentliches Recht streitet. Völker, welche ihre Heimat verlassen und damit ihren bisherigen Stat aufgeben, können so zu Kriegsparteien werden, bevor sie einen neuen Stat gegründet haben; at [5]: Das heutige humaner gewordene Völkerrecht ist geneigt auch eine aufständische thatsächlich als Kriegsmacht geordnete Partei und die Freischaaeren, welche ihr zu Hülfe kommen, ungeachtet dieselben nicht als selbständiges Volk organisirt und von keiner Staatsgewalt ermächtigt sind, dennoch als Kriegspartei zu betrachten und zu behandeln, wenn ihnen der gute — obwohl vielleicht irrthürliche — Glaube an die Gerechtigkeit ihrer Sache nicht abzusprechen ist und sie ihrerseits in der Kriegsführung die Hechte des civilisirten Kriegsrechts beachten’.

¹⁹⁷ ‘... [p]risoners, and the wounded above all, are entitled to your respect and compassion, the more so because you have often been with them in the same camps.’ Proclamation to the Army, 5 November 1847, quoted in *Recommendations to Divisional Commanders on the Treatment of the Population and of the Sonderbund Forces*, 4 November 1847, reprinted in Siordet, ‘The Geneva Conventions and Civil War’, 3(8) *Revue internationale de la croix-rouge et bulletin international des sociétés de la croix-rouge – supplement* (1950) 132, at 135.

¹⁹⁸ ‘Espagne: La Guerre Civile’, 6(24) *Bulletin international des sociétés de secours aux militaires blessés* (1875) 34, at 34. Dr Landa was an acquaintance of Moynier. He was one of two delegates for the Spanish government at the Geneva conference in October 1863 and again at the Paris conference in August 1867.

¹⁹⁹ Landa, ‘La Charité Dans Les Guerres Civiles’, 1(4) *Bulletin international des sociétés de secours aux militaires blessés* (1875), at 175–77.

²⁰⁰ *Ibid.*, at 176. See also ‘Regards vers le Passé: La Belle Figure Morale du Dr Nicasio Landa’, 35 *International Review of the Red Cross* (1953) 195, at 203. This source analyses a renowned letter written by Landa entitled ‘La charité dans les guerres civiles’ and published by the ‘Gaceta Popular’ on 25 August 1873 in Madrid.

²⁰¹ See discussion of the ICRC Meeting of 17 February 1863, minutes reprinted and translated in 3 IRRC 63, 67 (1963), in S. Sivakumaran, *The Law of Non-International Armed Conflict* (2012), at 30.

²⁰² ‘Sociétés de secours’, 4(16) *Bulletin international des sociétés de secours aux militaires blessés* (1873) 171, at 235.

in 1875, insisted that it did not bind states parties in respect of their own subjects.²⁰³ It was only in 1876 that Moynier, speaking on behalf of the ICRC, changed his mind regarding the applicability of the laws of war to internal armed conflict, in response to the refusal of Turkey to apply the convention in its war with Serbia.²⁰⁴ But, at the same time, the Red Cross neither deterred nor prohibited its national committees from insisting on the application of the laws of war in internal conflicts.²⁰⁵ To add further confusion to this debate, another doctrine, on belligerency, briefly came to the fore. This doctrine recognised the applicability of the laws of war in internal conflicts when directed against 'belligerents'. The scope and conditions of this doctrine were intensely debated. It was not clear what the necessary conditions for recognizing belligerents were and whether governments had discretion or were obliged to extend such a recognition. After the end of the US Civil War, this doctrine slowly fell into desuetude.²⁰⁶

The Brussels Conference will suppress these budding efforts to regulate non-international armed conflicts.²⁰⁷ Just like the conveners of the St. Petersburg Declaration,²⁰⁸ the drafters of the Brussels Conference did not use the opportunity to clarify the application of the laws of war to civil wars, at least not directly. Quite the opposite: the original Russian draft of the Brussels Declaration assured the invitees to Brussels that the conference would *not* address civil war, thereby implicitly accepting the French government's position during the days of the Paris Commune. The original Russian draft focused on the regulation of interstate warfare, reiterating the explicit reference in the St. Petersburg Declaration exclusively to wars '*between* civilized nations'.²⁰⁹ Jomini's

²⁰³ 'L'Insurrection dans la Herzégovine', 6(24) *Bulletin international des sociétés de secours aux militaires blessés* (1875) 175, at 175: '[C]ette Convention ne lie pas envers ses propres sujets.'

²⁰⁴ G. Ador and G. Moynier, 'Les Destinées de la Convention de Genève pendant de Guerre de Serbie', 7(28) *Bulletin international des sociétés de secours aux militaires blessés* (1876), at 166, 168.

²⁰⁵ When, in 1869 and 1870, an insurrection broke out in Dalmatia, the Vienna Committee endeavoured to help the wounded, and when the indigenous peoples of Borneo revolted against the Dutch colonialists in 1870, the Committee of Balavia assisted the Dutch expeditionary corps: see 'Sociétés de secours', *supra* note 202, at 235–236.

²⁰⁶ For the doctrine on belligerency, see Z. Bohrer, J. Dill and H. Duffy, *Law Applicable to Armed Conflict* (2020), at 36–44; E. Lieblich, *International Law And Civil Wars: Intervention and Consent* (2013), at 79–80; R. Oglesby, *Internal War and the Search for Normative Order* (1971), at ch 7. On international humanitarian law in civil wars, see, e.g., R. Dana (ed.), *Henry Wheaton, Elements of International Law* (1936), at 30; *The Three Friends* (1897) 166 US 1, at 63; 'Opinion of the Solicitor for the Department of State, 18 November 1909, MS Department of State, file 6369/698, cited in G. Hackworth, *Digest of International Law* (vol 1., 1940), at 321; Erik Castrén, *Civil War* (1966), at 208. We thank Ziv Bohrer, Eliav Lieblich and Ville Kari for helpful discussions on this matter.

²⁰⁷ In the 1877 edition of his work, Bluntschli continues to propose the extension of 'war' to civil wars as in his first edition. He expands on the rationale (incentive to limit atrocities on both sides) and states, without much supported evidence, that the growing recognition in international law for qualified status of civil wars as 'wars' is a progress. ('als ein Fortschritt des heutigen Völkerrechts zu betrachten, dass es geneigt ist, sowohl eine aufständische Partei wie geordnete Freischareu als Kriegspartei zu behandeln, obwohl es an statlicher Ermächtigung fehlt': J. Bluntschli, *Das moderne Völkerrecht der Civilisirten Staaten* (3rd ed., 1877), at 288–289 [512]).

²⁰⁸ 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': *St. Petersburg Declaration*, *supra* note 14, at preamble.

²⁰⁹ Brussels Declaration, *supra* note 14, Art. 1 (our emphasis).

opening statement points to ‘the unquestionable analogy’ between international wars and the war ‘which tore asunder the American Union’,²¹⁰ and he emphasized the ‘joint responsibility connected with all international interests’ to address (only) international conflicts. This statement underscores the conscious decision of at least some of the participants to evade questions relating to limits on the internal exercise of violence.

Indeed, the concern over the Commune or civil war, as such, was not expressly addressed at Brussels. The Prussians were running much of the show, and the French were ordered by their government to remain silent throughout the negotiations.²¹¹ The Declaration implicitly recognized the parties’ unfettered discretion in such circumstances, as was exercised by the Republican government in France against the Communards. It would not be until 1949, with the addition of Common Article 3 to Geneva Convention IV, that civil wars would be recognized as subject to international prescription.²¹² In hindsight, it was the decision in Brussels to keep civil war off the agenda that granted governments free hand to quell internal challenges.

2 *Keeping Civilians Away from the Battlefield*

The resistance of the *francs-tireurs* during the Franco-Prussian war brought to the fore a central problem associated with the rise of nationalism: that of fighters who were more eager to pursue the war than their leaders. This concern was not shared equally by all European nations. While the stronger governments of Germany and Russia wanted, with the law’s approval, to restrain such soldiers from fighting at will, smaller states were reluctant to endorse such constraints.

Having taken the Communards’ claims off the table, resolving the question of the status of irregular combatants such as the *francs-tireurs* now seemed, at least to Baron Jomini, within reach. He had anticipated that it would be straightforward to regulate (and thereby integrate) ‘free corps’ such as *les corps francs*, as part of the national army.²¹³ This was the aim of Article 9 of the Russian draft.²¹⁴ As it turned out, this quest proved tricky due to German opposition and the French silence over events during the Franco-Prussian War.²¹⁵ The outcome was regarded by the Germans as vindicating their practice of shooting irregular fighters on sight without procedure.

²¹⁰ *Brussels Conference Protocols*, *supra* note 19, No 2, at 7.

²¹¹ According to German sources, the French delegates were under instructions not to discuss the events of the previous war and to reach a fruitful understanding with Germany. Report I of the Conference to Bülow, State Secretary of the Foreign Office from Voigts-Rhetz, First German delegate to the Conference, Brussels, 31 July 1874, folder Akte 28962, no. 9, at 7, German Foreign Office, National Archives, Berlin Lichterfelde. Due to the skills of Voigts-Rhetz, any unpleasant discussions with the French delegates regarding the previous war were avoided. Wilhelm I, German Emperor from Philipsborn. German diplomat, 2 September 1874, folder Akte 28963, no. 18, at 4, German Federal Archives, Berlin lichterfelde.

²¹² Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

²¹³ Jomini Opening speech, *Brussels Conference Protocols*, *supra* note 19 No 2, at 7.

²¹⁴ The text of the proposed Art. 9 sought to prevent the killing of irregular fighters and instead subject them to judicial proceedings. Cf. Dowdeswell, ‘The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification’, 54 *Osgoode Hall Law Journal* (2017) 805, at 831.

²¹⁵ See *supra* notes 172, 211 and accompanying text.

Eventually, the final wording of 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 operations in accordance with the laws and customs of war.²¹⁶ According to Article 10, *levée en masse* (in the sense of a spontaneous mass uprising) among combatants who did not fulfil 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 occupied lands were required to conform to the rigidity of Article 9. These requirements meant that fighters such as *francs-tireurs* fighting against the occupier would be subject to the mercy of their enemy.

These requirements were tailored to serve those governments with big standing armies, most prominently Germany. 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 against 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).²¹⁷ The French were obviously on the side of the powerful, since their monarchist government sought to suppress revolutionary sentiment and went to great lengths to reassure foreign powers that it was against employing *francs-tireurs* and national guards.²¹⁸ 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'.²¹⁹

Eventually, the representatives of the weaker states agreed on a text that would remain silent on the right to resist, allowing them to argue that this right was recognized in customary law. As Baron Lambermont, the Belgian representative, stated: '[T]he 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.'²²⁰ All of the delegates agreed that the text should remain non-committal on these two issues – the citizen's right

²¹⁶ *Supra* note 15, Art. 9. 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 no. XII (Séance du 14 August 1874) 128, at 138; intervention of Baron de Schoenfeld (Austro-Hungary) accepted by the German delegate de Voigts-Rhetz.

²¹⁷ *Le General T, ... L'Angleterre et les Petits états à la Conférence de Bruxelles* (1875). In the protocols of the Brussels Conference, see, e.g., *Brussels Conference Protocols*, *supra* note 19, at Nos 1, 4, 10, 12, 14, 8, 11, 21–22, 24, 29, 32–34.

²¹⁸ Referring to the *francs-tireurs* and the national guards during the war, Despagne commented that 'France had no difficulty in accepting these perfectly just demands'. Despagne, *supra* note 183, at 116.

²¹⁹ 'Lord Derby's Dispatch on the Brussels Congress', reprinted in *United States Department of State/Executive Documents Printed by Order of the House of Representatives 1875–76* (1875–1876), at, 1042–1046; see also T.E. Holland, 'A Lecture on the Brussels Conference of 1874', All Souls College, 10 May 1876, at 20.

²²⁰ *Brussels Conference Protocols*, *supra* note 19, at Nos 14, 33.

to attack against an advancing army and the resistance to occupation.²²¹ This enabled Lambermont (Belgium) to argue that these questions were to be governed by the unwritten law of nations. Conversely, the German delegate responded by saying that he had offered to introduce a text that would explicitly deny such rights, implying that his position was not explicitly opposed. The Germans 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’.²²²

The implications of these negotiations over the drafting are reflected in the evolving editions of Bluntschli’s book. While, in his 1866 code of the modern war, he opined that free-shooters should be entitled to be regarded as ‘enemies’ (rather than criminals) even without state authorisation, as long as they resorted to open military practices in good faith,²²³ two years later this proposition became ‘more doubtful’.²²⁴ The 1871 war prompted Bluntschli to suggest, a year later, that those *francs-tireurs* engaged in guerrilla warfare had to satisfy several demanding conditions to be entitled to fight,²²⁵ and in 1877 he referred to the conditions stipulated in Brussels’ Article 9 as reflecting the law.²²⁶

3 *The Occupation Regime as Guarantor of the Political and Economic 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.²²⁷ Edgar Löning, a jurist who had served on the Prussian occupation administration in Alsace during the 1870–1871 war,²²⁸ stated that the Prussian Army had applied Heffter’s teachings.²²⁹ But the Prussian army also deviated from the emerging understanding of this concept, such as its declaration directed at the people of Alsace informing them

²²¹ *Brussels Conference Protocols*, *supra* note 19, No. 18, at 220 (Actes, 22 August 1874); see also Letter from Sir A. Horsford to the Earl of Derby, 26 August 1874, ‘Miscellaneous no. 1 (1875) Correspondence respecting the Brussels Conference on the Rules of Military Warfare’, no. 39, at 117, Akte R 901/ 28963, No 40 p. 3, Berlin Lichtenfelde.

²²² Von Kamenke to von Bismarck, *supra* note 104.

²²³ Bluntschli, *supra* note 194. (‘Die Parteigänger und die Freischaar werden insofern als Feinde betrachtet, als sie zu ihrem Unternehmen von einer Statsmacht beauftragt oder ermächtigt sind oder wenigstens in gutem Glauben an ihr politisches Recht eine Kriegsunternehmung wagen und als militärisch geordnete Truppen erscheinen und handeln’).

²²⁴ J. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten* (1868), at 318 [570(2)]. Although Bluntschli’s original proposition remains ‘the stronger view’.

²²⁵ J. Bluntschli, *Das moderne Völkerrecht der Civilisirten Staten* (2nd ed., 1872), at 320 [570a].

²²⁶ Bluntschli, *supra* note 207, at 322 [570a].

²²⁷ Benvenisti, *supra* note 5, at 27–28.

²²⁸ K.-P. Schroeder, ‘*Sie haben kaum Chances, auf einen Lehrstuhl befürden zu werden*’ *Die Heidelberger Juristische Fakultät und ihre Mitglieder jüdischer Herkunft* 161 (2017). Löning, who became a law professor, received the Iron Cross for this service.

²²⁹ E. Löning, *Die Verwaltung des General-Gouvernements im Elsass* (1874), at 13–15.

that the area was 'withdrawn, by the very occupation, from [French] imperial sovereignty, and instead German authority [was] established'.²³⁰

Gustave 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,²³¹ and where the fruits of those resources were accrued through regular use.²³² 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',²³³ including by resisting local pressures to modify the law or abolish the local political institutions. In 1875, the Institut de Droit International commended these new rules on occupation as being more favourable to submissive citizens and to public and private ownership in occupied territories than those that had been practiced thus far.²³⁴ The Institut subsequently adopted a very similar formulation in *The Manual on the Laws of War on Land* (1880).²³⁵

In other words, the occupation regime was essentially 'a pact between state elites, promising reciprocal guarantees of political continuity'.²³⁶ It also guaranteed the safety of the 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.

4 Exposing Civilians to the Harms of War

As we noted earlier, new weapons and means of communication and the growing reliance on draftees brought war closer to home, while the broadening of the franchise

²³⁰ Declaration of 30 August 1870, quoted in A. Lorriot, *De la nature de l'occupation de guerre* (1903), at 76–77; see also the declaration to the people of Strasbourg, 8 October 1870, reprinted in Lorriot, *ibid.*, at 42.

²³¹ Rolin-Jaequemyns, 'Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international', 3 *Revue de droit international et de législation comparée* (1871) 335.

²³² *Ibid.*, at 357.

²³³ See Brussels Declaration of 1874, arts 2, 3, 6, 7, 8.

²³⁴ Rolin-Jaequemyns, 'Examen de la Déclaration de Bruxelles de 1874', in Session de La Haye, *Justitia et Pace Institute de Droit International* (1875).

²³⁵ *Oxford Manual*, *supra* note 15.

²³⁶ Benvenisti, *supra* note 5, at 71.

enhanced the voice of voters. This proved to be a double-edged sword: democracy and the rising influence of the civil society were now perceived as potentially instrumental in influencing military authority,²³⁷ and that potential provided the justification for directing the new arms towards civilians. The French General Le Blois, in his work *Fortifications in the Presence of the New Artillery* (1865),²³⁸ explained that:

When the shells fall in the various quarters [of a fortified town], the catastrophes are in proportion to the density of the population. Death hovers above the heads of all. Each individual feels threatened as to his own existence and that of all that he holds dear in the world, while at any moment his property may be destroyed by fire. The situation becomes intolerable to the masses, and the very excess of the sufferings to which they are exposed brings about their termination ... [Therefore] every general who wishes to attack a fortified town has the right to throw shells inside to hasten its surrender, and ... it is his duty to do so inasmuch as his sovereign orders him to save time and spare the blood of his soldiers.²³⁹

H. Sutherland Edwards, a British correspondent during the Franco-Prussian War, described the bombardment of Strasbourg in 1870 as 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 [sic] ... might force the inhabitants to bring such pressure to bear on the commandant that he would surrender forthwith.²⁴⁰

In a cruel twist, democracy had turned 'each individual' into a legitimate military target. The Franco-Prussian War brought with it the use of heavy artillery against besieged towns. The civilian population of Strasbourg, for instance, suffered heavy casualties,²⁴¹ and the Parisians experienced famine under relentless bombardment throughout the sub-zero 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 an unprecedented measure was 'authorized by the practice of war', it involved 'the death, with incidents of peculiar horror, of hundreds of thousands of non-combatants'.²⁴² Would the final text of the Brussels Conference criticize such practices as illegal under the laws of war?

²³⁷ See G. Best, *Humanity in Warfare* (1980), at 96.

²³⁸ I. Étienne de Blois, *De la fortification en presence de l'artillerie nouvelle* (1865) Vol. 1. Written by a French General, this book anticipates the bombardment of civilian targets in besieged towns to exert pressure on civilians, who are expected to press their military to surrender.

²³⁹ *Ibid.*, at 36–37, 74 (translated and discussed by 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* (1874), at 304–306). See also discussion in 'De la fortification en presence de l'artillerie nouvelle', in *Le Spectateur Militaire, recueil de science, d'art et d'histoire militaires* (Third Ser., 9th Vol., 1867), 51, at 56 et seq. (discussing General de Blois's approach).

²⁴⁰ Edwards, *supra* note 239, at 165–168.

²⁴¹ Bluntschli's 1870 lecture criticizes the bombardment and calls for proportionality in war: see *supra* note 170.

²⁴² 'Letter from Earl Granville to Lord Loftus, 20 October 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* (1871), at 160. Command Papers, 19th Century House of Commons Sessional Papers.

These practices were not incidental to the Franco-Prussian War but reflected the technological innovations in weaponry of the time and were bolstered by the new winds of democracy that amplified the voices of the affected civilians.²⁴³ The parties to the Brussels Declaration disagreed on the scope and content of the limitations they wished to impose on their armed forces in light of these changes. The final text reflected the triumphant, yet not the only, position around the negotiating table. 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.²⁴⁴ But this fundamental principle is missing from the final text of the Brussels Declaration. Perhaps, as reflected also in the Lieber Code’s identifying of the ‘citizen or native of a hostile country [as] thus an enemy’,²⁴⁵ the rise of nationalism had strained the older distinction between state and citizen. The German delegates to Brussels were convinced that warfare could not, 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.’²⁴⁶

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 also to take the necessary precautions to protect religious, artistic and scientific sites,²⁴⁷ the adopted text watered-down these obligations considerably, at the insistence of the German delegation.²⁴⁸ 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.²⁴⁹ During the deliberations on this topic, the Belgian delegate presented a petition submitted by inhabitants of Antwerp.²⁵⁰ 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

²⁴³ See *supra* notes 233–234.

²⁴⁴ 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*, *supra* note 19, Nos 1, 4.

²⁴⁵ The Lieber Code, *supra* note 191, at Art 21.

²⁴⁶ See von Kameke to von Bismarck, *supra* note 104.

²⁴⁷ *Brussels Conference Protocols*, *supra* note 19, Nos 1, 5. See text of the Russian draft, at [14]–[16].

²⁴⁸ Bordwell, *supra* note 20, at 89.

²⁴⁹ *Brussels Conference Protocols*, *supra* note 19, No 17. (The second meeting takes place on 31 July and is reconsidered on 1 August).

²⁵⁰ *Brussels Conference Protocols*, *supra* note 19, Nos 1–3, 8–10.

would consider the respecting of private property a sacred duty, as long as local circumstances and the necessities of war permitted it.²⁵¹ 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.²⁵²

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 non-state challenges. It would take another 100 years before the prohibitions against attacking non-military 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.²⁵³

C Beyond the Brussels Conference: International Law in the Service of the European Order

The Brussels Declaration was never ratified as a binding convention by the states that participated in its creation.²⁵⁴ Weary of conventions that only raised recriminations about violations, a text that simply stated the law seemed more effective in eliciting compliance.²⁵⁵ The final protocol called for the continuation of deliberations towards

²⁵¹ '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*, *supra* note 19, Annex 4, at 55–56. *Brussels Conference Protocols*, *supra* note 19, No 17: '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.'

²⁵² See second reading, session of 21 July 1874, *Brussels Conference Protocols*, *supra* note 19, Nos 17, 42 (second reading, 21 July 1874), at 202.

²⁵³ On the evolving narrowing down of the concept of 'military necessity' since the mid-19th century, see Luban, *supra* note 71. The new law was first reflected in the Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3. For the political background of the Additional Protocols and the influence of these two blocs, see Alexander, 'International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I', 17 *Melbourne Journal of International Law* (2016) 1; Kinsella, 'Superfluous Injury and Unnecessary Suffering: National Liberation and the Laws of War', in T. Barkawi and G. Lawson (eds), *International Origins of Social and Political Theory* (2017) 205; Baxter, 'Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law', 16 *Harvard International Law Journal* (1975) 1, at 22; Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law', 3 *Pacific Basin Law Journal* (1984) 55, at 69–71, 102–103.

²⁵⁴ See ICRC, *Introduction to the Brussels Declaration*, available at <https://ihl-databases.icrc.org/ihl/INTRO/135>.

²⁵⁵ On the concerns about recriminations, see *supra* notes 77–78 and accompanying text.

common accord.²⁵⁶ It reiterated the hope that the Brussels Conference would contribute to maintaining the European order that would be ‘less subject to the aggravations brought about by uncertainty, the unexpected, and the passions excited by the struggle’.²⁵⁷

While the deliberations exposed disagreements between the strong and the weak and reflected tensions between humanitarian sensibilities and those who opposed them, the outcome was sufficiently clear: the stronger countries saw in the Declaration a vindication of their position. For them, 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.²⁵⁸ Implicitly, it was understood that the Brussels outcome reflected the rights of the powerful during war. The *Pall Mall* newspaper suggested that this result was exactly what the Russians had been aiming for when they initiated their project.²⁵⁹ 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.²⁶⁰

Following the conference, most armies adopted military manuals that reflected the Brussels rules.²⁶¹ For the German delegates of the first Hague Peace Conference of 1899, the proposed text reflected the Brussels law and hence added nothing

²⁵⁶ *Brussels Conference Protocols*, *supra* note 19, Nos 4, 49.

²⁵⁷ *Brussels Conference Protocols*, *supra* note 19 (Final, 1874), Annexe 19, 63, in the *British and Foreign State Papers* (vol. LXV), at 1110. See printed also in E. Hertslet, *Map of Europe by Treaty* (1974), and G. von Martens in *Nouveau Recueil Général des Traités* (vol., IV, 2nd ser., 1899), at 226 (authors’ translation).

²⁵⁸ ‘Observations by Prince Gortschakoff, on the Dispatch of Lord Derby to Lord Augustus Loftus dated from the Foreign Office, 20 January 1875’, in *United States Department of State / Executive Documents Printed by Order of the House of Representatives, 1875–76* (1875–1876), 1048–1051.

²⁵⁹ *The Military Powers and the Usage of War* (from the *Pall Mall Gazette*, 5 December 1874), reprinted in *United States Department of State / Executive Documents*, *supra* note 258, at 1032–1033.

²⁶⁰ Benvenisti, *supra* note 5, at 41. Hague Convention for the Pacific Settlement of International Disputes 1899, 1 *AJIL* 103 (1907).

²⁶¹ 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 that it issued to its officers for its war in France in 1870. R.S. Hartigan, *Lieber’s Code and the Law of War* (1983), 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 20, at 115–116 (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 5 August) and the Italian code (session of 22 August). *Brussels Conference Protocols*, *supra* note 19, at 14–15, 43. For further discussion, see Stirk, *supra* note 99, 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’. Nys, ‘The Codification of International Law’, 5 *AJIL* (1911) 895.

of significance.²⁶² As noted earlier, it would take 100 years for the laws of war to finally endorse the Rousseau–Portalis doctrine, in the Additional Protocols to the 1977 Geneva Conventions.²⁶³ In the years immediately following 1874, civilians of the opposing side 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,²⁶⁴ their property was seized²⁶⁵ and they could even be interned,²⁶⁶ forced to remain in a besieged town²⁶⁷ or made the target of bombardment (on the premise that their suffering might lead to their government’s surrender).²⁶⁸ The rejection of the Antwerp petition may have been felt later on in London, Dresden, Hiroshima and many other cities.

While the Brussels text, like its antecedents, graciously nodded towards the common soldier, it was also – if not primarily – an inter-elite endeavour aimed at enhancing the collective control of European governments over their respective 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. Citizens 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.²⁶⁹ This sentiment was shared by other members of that social elite – the international lawyers – who thought that international law would tame the ‘bestial urges’ of soldiers²⁷⁰ and suppress the sentiments of the ‘unfortunate peasants’ who were ‘obeying an instinctive feeling and almost irresistible

²⁶² Colonel Groß von Schwarzhoff, Final Report on the Revision of the Brussels Declaration, The Hague, 12 July 1899, no. 30, IAAa 37 N° 3 b N° 2, R 145, at 72–85, Bayerisches Hauptstaatsarchiv (reference files: the revision of the Brussels declaration from 1874); see also Analysis by Foreign Minister von Bürlow and War Minister Grossler, Berlin, 21 November 1899, folder Minister of War II, 5–III, at 7, Bayerisches Hauptstaatsarchiv (the German Ministry of War emphasizes that it can accept the proposed text since it is a ‘[c]odification of principles which regulated until now our behaviour in wartime’).

²⁶³ Additional Protocol I, *supra* note 253; Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609.

²⁶⁴ M. Domke, *Trading with the Enemy in World War II* (1943); A.A. Blum and I. Roskin Levy, *The Law Relating to Trading with the Enemy* (1940); C.H. Huberich, *The Law Relating to Trading with the Enemy* (1918).

²⁶⁵ Lord A. McNair and A.D. Watts, *The Legal Effects of War* (4th edn, 1966), at 332; M. Domke, *The Control of Alien Property* (1943); Mann, ‘Enemy Property and the Paris Peace Treaties’, 64 *Law Quarterly Review* (1948) 492.

²⁶⁶ Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949, 75 UNTS 287, Art. 41.

²⁶⁷ *US v. Wilhelm von Leeb, et al.*, High Command Case, US Military Tribunal, Nuremberg, 27–28 October 1948.

²⁶⁸ See Part 3.B.3.

²⁶⁹ On the disciplining function of the laws of war, see Benvenisti and Cohen, *supra* note 2.

²⁷⁰ Bluntschli, *supra* note 170, at 16–17: ‘[D]er Krieg deckt ... die ursprüngliche Ildheit wiederauf, welche die Menschennatur mit der thierischen Natur verbindet.’

patriotism'.²⁷¹ Ostensibly responding to the demands of civil society actors, invoking the spirit of Solferino and acting paternally to protect their citizens, the governments of the European empires were actually defending themselves against those domestic contesters whom they feared the most.

Perhaps not coincidentally, the need for, and utility of, international law as a tool to tame civilian challenges and consolidate the European order prompted developments in other areas of international law. The efforts to reduce the legal avenues of non-state parties to resort to force, which began in the 1856 Paris Declaration with the prohibition on privateers,²⁷² continued in the 1870s with the development of the laws on neutrality that prohibited states from intervening in civil wars.²⁷³ A seemingly unrelated development – but one with clear implications – took place in the context of the nascent law of treaties. In the autumn of 1870, as the French Republic vowed to keep on fighting despite Napoleon III's surrender, Russia 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 major European powers found it necessary to formally and irrevocably commit for the first time to the principle of *pacta sunt servanda* – regarded until then as a moral duty – as binding international law. The London Declaration of 17 January 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'.²⁷⁴ While some, especially the British opposition and newspapers advocating war with Russia,²⁷⁵ derided the London Declaration as a sign of weakness, others, such as John Stuart Mill, saw Russia's assertion as raising a serious shared concern.²⁷⁶ The reaction of some governments to the declaration demonstrates its importance.²⁷⁷ The French representative, who came to London to sign the declaration once the political situation

²⁷¹ See Rolin-Jaequemyns, *supra* note 168, at 26; 'Rapport de M. Rolin-Jaequemyns', 7(1) *Revue Droit International et de Legislation Comparée* (1875) 447, at 452.

²⁷² See text accompanying note 176 *supra*.

²⁷³ See generally Rougier, 'La théorie de l'intervention d'humanité', 17 *RGDIP* (1910) 468; Carlos Calvo, *Derecho Internacional teórico y práctico de Europa y América* (vol 1., 1968), at 456–457. On the evolution of the law on non-intervention in civil wars, see E. Lieblich, *supra* note 206.

²⁷⁴ H. Augustus Oakes, *The Great European Treaties of the Nineteenth Century* (1918), at 11. The signatories were the United Kingdom, Germany, Austro-Hungary, France, Italy, Russia and Turkey.

²⁷⁵ See, e.g., HC Deb (vol. 205 30 March 1871), 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.g., 'Editorial Article 1 – No Title', *The Manchester Guardian* (14 March 1871), at 5; 'Editorial Article 3 - No Title', *The Manchester Guardian* (15 March 1871), at 4.

²⁷⁶ J. Stuart Mill, 'The Treaty of 1856', *The Times* (19 November 1870), at 5; J. Stuart Mill, 'The Treaty of 1856', *The Times* (24 November 1870), at 3.

²⁷⁷ Letter from Austrian Minister–President Count Friedrich Ferdinand von Beust to Count Chotek, 7 December 1870 (correspondence respecting the Treaty of 30 March 1856, London, 1871), at 60–61 *Command Papers*, 19th Century House of Commons Sessional Papers: '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.' Bederman, 'The 1871 London

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’.²⁷⁸ 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’.²⁷⁹

The evolving laws of war, and the laws on treaties, together with the laws on neutrality and on non-intervention in the internal affairs of other states, proved useful to the effort to secure the imperial legal order in Europe. International law-making, divorced from natural law, became a distinctly interstate endeavour, one that excluded representatives of civil society. 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 non-combatants from bombardment, which was generally understood as sanctioning the German interpretation of the law. It was Germany’s consent to the law that ultimately mattered.

4 Conclusion

The democratization processes of this formative period (1856–1874) introduced counter-authoritarian values, set in motion civil society initiatives and pushed critical visionaries such as Dunant and Nightingale to become humanitarian entrepreneurs. The phenomenon of civilians-turned-soldiers transformed wars from pitched battles to national wars subject to the public’s attention and concern. 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. 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.

The revolutionary and deeply destabilizing potential of those counter-authoritarian menaces reached its zenith with the Franco-Prussian War and the Paris Commune. These proved to be transformative events because they exposed the great potential and dangers of nationalism, socialism and democracy for the governments holding power in Europe. It was this experience that led governments to move to codify the laws of

Declaration, *Rebus Sic Stantibus* and a Primitivist View of the Law of Nations’, 82 *AJIL* (1988) 18, at 20 (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 M.S. Andersen, *The Eastern Question: 1774–1923* (1966), at 172.

²⁷⁸ *Protocols of Conference Held in London Respecting the Treaty of March 30, 1856* (1856), at 38.

²⁷⁹ Hinsley, *supra* note 46, at 243.

war in an effort to tame civilian challenges to their authority on the battlefield and beyond.

These laws of war, in their formative stage, imposed minimal constraints on the use of violence and fell short of protecting the lives of civilians in times of armed conflict. 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. Hence, while the turn to the codification of the laws of war was indeed initially inspired by humanist visionaries, it was then eclipsed by an aristocratic project bent on upholding the European order.

The Franco-Prussian War would be conveniently forgotten, the memory of the Paris Commune suppressed (although only in Western Europe) and the Brussels Declaration, if mentioned at all, would be belittled as having failed to produce a legally binding text. Future narratives on the laws of war would focus on the vision and mobilization efforts of civil society agents. Such narratives are problematic in the various ways we have mentioned here, but they also went on to gather an important political and normative force that we wish neither to undermine nor dismiss. In subsequent years, civil society agents, both in consortium with state actors and without them, were to advocate an interpretation and application of these codified laws in ways compatible with the humanitarian values their predecessors were hoping to achieve. Just like their predecessors, civil society agents – lawyers, judges, activists – would continue to echo the suppressed humanitarian motivation in future codification projects, challenging the attempts of stronger states to monopolize the process and its outcomes.

Our conclusion invites caution among those who might over-romanticize the project of the laws of war in its formative stages. Nevertheless, this article is meant to help us better understand the past and, in doing so, shed light on the meaningful efforts to insert humanitarian values into the interpretation of the laws of war. Those who were called to give meaning to the codified laws of war of the late 19th century often opted to defy the original intentions we unearthed. Their projects would, in turn, be challenged by governments facing asymmetric forces once again. The histories of these subsequent interpretations, successful or not, are waiting to be told.