

The Law of the Great War as an Ethical Paradigm, 1918–2038

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The law of war as recognizable to modern military leaders comes from World War I in both its form and practice. Though the basic rules guiding care for the wounded and sick and the protection of captured enemy combatants and civilians long predate the Great War, no historical inevitability dictated the makeup of the law of war as it has formed over the past hundred years.

The modern law of war is in many ways the Law of the Great War. The paradigm has strengths and weaknesses, but it was not inevitable that today's legal framework would come into force and play such an important role in military planning and operations. If this is understood, it makes it easier for military and civilian leaders to visualize contemporary rules as a paradigm shaped by events—but one that could have taken a different form and could do so in the future.

This chapter does not present an analysis of the current law of war. It provides the background and context for these rules that have been influenced so greatly by the Great War and its aftermath. The rules could change again, with or without strategic insight being employed to shape them, and with or without influential input from democratic states that strive to implement them. They could alter for better or worse.

Foundations (1863–1907)

Military leaders are accustomed to implementing laws of war as found in treaties such as the Geneva Conventions of 1949. Hopefully, they have the benefit of able counsel by judge advocates to help them interpret and apply the law. However, this paradigm is not timeless; it is one that solidified during and after World War I.

For many centuries, the rules of war were almost entirely contained in customary rules *applied on the battlefield*. Protection for captured and wounded combatants and civilians, hospitals, towns, property, and civilian infrastructure relied on combatant compliance with customary rules that had the force of law.¹ By 1914, a large part of the law of war was solidly founded in treaty-based rules. Whether the new trend to codify rules of war would survive a major military conflict, however, remained to be seen. The transformation from custom to treaty began 50 years earlier and did survive the challenge. It is useful to consider this transition; it provides an opportunity to compare and contrast the customary law paradigm from the treaty-centered one that exists today.

In 1859, Swiss businessman Henry Dunant found himself deeply engaged in work with civilians to care for surviving wounded soldiers carried from the battlefield in Solferino, Italy. In 1862, Dunant wrote *A Memory of Solferino* in which he called for the establishment of medical teams on the battlefield. His tireless work following the book's publication led to the founding of the International Committee of the Red Cross and the first national Red Cross societies in 1863.² One element of familiar modern humanitarianism—the role of nonstate actors—was thus established. In 1863, a key element of modern military practice also took form with the first comprehensive codification of rules of war promulgated for the U.S. Army, then engaged in the American Civil War.

That codification, officially titled General Orders No. 100 and more generally known as the Lieber Code, became influential in shaping thought and practice on implementing the law of war. This process accelerated with

the adoption of the first Geneva Convention in 1864, which established protected status for military medical workers and civilians caring for wounded and sick on the field.³ The move from application of centuries-old customary law on the battlefield to the implementation of explicit, codified rules was under way. Though customary law remains a potentially important element in current and future rules of war, this form of international law began moving into the open by the late 19th century.

In the same era, diplomats and private organizations claimed a prominent role in promotion and development of this growing system of treaty-based rules for application in both peace and war. The transportation and communication revolutions of the mid-19th century (steamships, railroads, telegraph) opened new possibilities in international relations. One consequence was that civilians gained significant influence in developing the law of war and were no longer confined to describing it in scholarly writing as had been the case in earlier generations.

In 1907, the *American Journal of International Law* published an optimistic article titled “The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World.”⁴ While the author identified only a miniscule handful of instances where international conferences were held between the Middle Ages and 1840s, he found more than 300 held between 1850 and 1906 on a wide range of subjects. Some of the latter were state sponsored, such as the International Peace Conference at The Hague in 1899 that adopted the world’s first systematic series of treaties to regulate warfare, and others were conducted by private organizations today known as nongovernmental organizations (NGOs).⁵

In the late 19th century, an international peace movement emerged that promoted the building of international institutions and writing international law to resolve disputes. This new form of advocacy was exemplified by initiation of the long-running annual Mohonk conferences on international arbitration that began in 1895. Edward Everett Hale, the prominent 19th-century American clergyman and writer, was a driving force in promoting law as the preferred mode to resolve international disputes.⁶ He

argued for the emerging wisdom of international law at the first Mohonk conference: “Why was not Henry IV. [*sic*] right in proposing a United States of Europe? Why not have a Permanent Tribunal to which all questions now leading to war might be referred?”⁷ The international reach of this view was not only supported by the groundbreaking conference of 1899 but also reaffirmed at the Second International Peace Conference at The Hague in 1907, which generated new and replacement law of war treaties building on those adopted in 1899.⁸ By 1914, the rules of war were shifting, gradually but noticeably, from custom to treaty, and civilians were beginning to have their say in the interpretation and application of international law.

The law of war and its modern context were taking form. However, this trend could have been snuffed out by the Great War. Instead, the combatants began applying the new rules in the best case, and in the worst arguing that their actions were at least compatible with international law even when they were not. World War I was the watershed that secured the emergence of the law of war paradigm that we know today.

The Law of the Great War (1914–1918)

Modern state practice in communicating the purpose of going to war began moving decisively to an international law context in 1914. The deliberations by the British cabinet, and ultimate declaration of war by England against Germany, were as strongly influenced by the German breach of Belgian neutrality in violation of international law as by security concerns. That breach of international law also turned world opinion against Germany.⁹

Proof that an international law paradigm was also coming to play a role in American public thinking comes from the title and content of James M. Beck’s *The Evidence in the Case: An Analysis of the Diplomatic Records Submitted by England, Germany, Russia and Belgium in the Supreme Court of Civilization, and the Conclusions Deducible as to the Moral Responsibility for the War*, which was published in 1914. Beck, although now largely forgotten, was once a prominent member of the American bar.¹⁰ The ideas presented in his book were widely circulated in magazine form even before the book’s

publication, and his writings offered early notice that international law had assumed a place in public thinking on war and international relations.¹¹

That influence grew as U.S. opinion turned negative toward Germany's aggressive submarine campaign against neutral trade. Between 1915 and 1917, international law assumed a growing place in public and official views. Ultimately, growing diplomatic tensions that followed the sinking of commercial vessels with large-scale loss of civilian lives led to the U.S. declaration of war against Germany.¹² The British decision to go to war in 1914, and the U.S. decision to follow 3 years after, was shaped by international law, and not by just war theory, theology, or ethics.

International law as applied in land warfare also played a prominent role in the fight for world opinion. This field of application still balanced between customary practice and application of the new Hague Rules of 1907. The harsh German military government in occupied territory resulted in extensive reports of breaches of customary and treaty law and turned opinion against Germany.¹³

Neither side resolved emerging issues relating to the application of international law to new technologies and domains. They did not arrive at answers to the legality of chemical weapons, and they grappled with practical issues that came up regarding aerial targeting and overflight of neutral airspace. Despite the slow start in addressing these challenges, by 1918 it was clear that international law was more than a side issue in the planning and execution of war; it was a major factor in strategic political and operational military planning.

In principle and sometimes in practice, international law was now a key factor in ethical decisionmaking. To that extent, modern military practitioners would find the role of the law of war as it existed by the end of World War I quite familiar. The institutional and political context in which the law of war developed by 1918 would also be familiar. However, the experience of the Great War strengthened the trend toward treaty-making as the dominant paradigm used for ethical problem-solving in war. The influence of that paradigm has endured ever since.

The Law of the Great War as the Dominant Ethical Paradigm (1918–2019)

The centennial of the armistice also brings us close to another noteworthy anniversary that helped shape modern influences on the law of war. The adoption of the United Nations (UN) Charter in 1945 is seen as a historic moment in the development of international institutions. However, the starting point for universal reliance on international organizations such as forums for ethical deliberation traces to the founding of the League of Nations. At the strategic level, law of war practitioners need to consider the diplomatic domain, in which trends favorable or unfavorable to the credibility and utility of those rules play out.

Part I of the Treaty of Versailles of 1919 was the Covenant of the League of Nations.¹⁴ Though the organization ultimately failed as a source of international security, in concept it assumed missions similar to those of the UN as a matter of law and diplomatic practice. Article 10 of the covenant states that the “Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.”¹⁵

In addition to military security, the administrative units of the league included staff sections that were responsible for human rights and humanitarian responsibilities not unlike those now assigned UN staff. As successor to the league, the diplomatic and operational role of the UN cannot be disregarded as a source of influence on application and interpretation of the law of war. The league’s administrative units included some responsible for “minorities questions,”¹⁶ the still-remembered and controversial mandates governing colonies,¹⁷ health,¹⁸ social questions (that included trafficking in women and children¹⁹), and disarmament.²⁰ There was also a refugee service first known as the High Commissioner for Refugees and later as the Nansen International Office for Refugees.²¹

War crimes trials were not an entirely new development by the outbreak of World War I. However, they were not commonplace and were not a general object of attention in popular or official thinking about international events. This component of the law of war is also a legacy of the Great War. The Versailles Treaty provided for the trial of the former German emperor “for a supreme offence against international morality and the sanctity of treaties”²² and of other Germans “accused of having committed acts in violation of the laws and customs of war.”²³ Under pressure by the Allied powers, 12 defendants were tried in German courts with 6 convicted and given light sentences.²⁴

Attempts to have the postwar Turkish government secure justice for massacres perpetrated by the Ottoman government were also inconclusive. Three Ottoman leaders were convicted and sentenced to death in absentia. The executions were never carried out (two of the defendants were assassinated along with other Ottoman officials implicated in massacres of Armenians.²⁵) An international tribunal led by England was supposed to try other Ottoman defendants but never came to fruition.²⁶ These outcomes were not without longer term impact. Moreover, this uncertain start was followed by historically and legally important trials following World War II. Between 1945 and 1948, over 8,000 war crimes trials were conducted across Europe and Asia.²⁷

The Great War might have ended the move toward codification of the law of war, but it did not. If anything, it encouraged a move to expand the range of issues and technologies covered by treaty. Treaties adopted into the 1920s addressed chemical and bacteriological weapons and attempted to address submarine and aerial warfare with treaties that were never adopted and thus did not go into force.²⁸ Though not adopted, they did validate the assumption that treaties were the required approach to address emerging law of war challenges.

The treaty-based approach to humanitarian protection and to restrictions on means and methods of war was also validated in the postwar era. In 1929, experience with prisoners of war led to the adoption of the Geneva

Convention relative to the Treatment of Prisoners of War, the first treaty specifically dedicated to their protection. In 1938, on the eve of World War II, the 16th International Red Cross Conference in London called for adoption of a treaty for the protection of civilians in wartime.²⁹

The treaty-based paradigm continued to dominate after World War II with the adoption of four new Geneva Conventions in 1949. These replaced their predecessor treaties and apply to the protection of the wounded, sick, and shipwrecked of armed forces, prisoners of war, and civilians. Since then, some 20 other treaties and protocols have been negotiated that address varied aspects of the law of war.³⁰

The Implications for Future Rules of War (2019–2038)

The existing law of war paradigm is centered on treaties, public international organizations, and war crimes tribunals. It is founded on expectations, new a hundred years ago but certainly not any longer, that international law is the preferred mode to address humanitarian challenges in war. It has prevailed to the point of being the default ethical paradigm in war. This paradigm has the virtue of specificity. The rules of war are now extensively set out in treaty form. No treaty can ever anticipate all challenges, but the rules in place provide more guidance than can be obtained from customary law. The weakness is that reliance on treaties and, most recently, on war crimes tribunals has perhaps stifled initiative that could advance humanitarian practice in war by an appeal to the ethical dimension of the profession of arms. The center of gravity on military ethics in war has also shifted, in some respects, to NGOs and international organizations that interpret the law without necessarily accepting it as a source of authority for legitimate military action.

Over the next generation, we should expect continuing trends that challenge the law of war construct and thus the still-powerful Great War legal paradigm. These trends will include persistent use of international law in information warfare against democratic societies, fragmentation of war by the addition of newly emerging nonstate actors, continuation

of the scourge of mass atrocities and genocide, and proliferation of new technologies that defy efforts to draw a hard line between war and peace.

Cyber war illustrates the technological challenge in drawing an ethical or legal framework for new capabilities and domains. As often observed, attacks conducted in cyberspace are potentially as devastating as those launched with kinetic weapons but do not require state actors or state sponsorship. Globalization has created other challenges. Terrorist organizations projecting regional and global military threats defy traditional categorization of war as either internal (for example, civil wars) or international, thereby confounding attempts to address terrorism with reference to established rules of war.³¹

Informational misuse of international law and brutal violations of the rules of war by some state and nonstate actors are endemic. States that do not respect the rule of law domestically are sometimes quick to use international law as a blunt propaganda instrument against those that do. This is highlighted by the persistent misuse of international human rights law and the law of war for propaganda purposes by some states—seated on the UN Human Rights Council—that oppress and brutalize their own populations at home.³² Some state and nonstate actors continue to commit mass atrocities and genocide.³³

The armed forces of democratic societies and diplomatic services of their governments need to maintain effective advocacy that supports principled use of military force. Principled use does not mean hesitant or ineffective use. However, in light of the informational challenges before us, it will take real work to maintain the distinction between practical and impractical application of the rules of war. The proliferation of new combat environments and actors will continue to challenge familiar military experience and, sometimes, the utility of existing international law.

New interdisciplinary methodologies should also be nurtured to incorporate ethical decisionmaking and religious considerations, along with law of war training and education, to prepare members of the armed forces for humanitarian decisionmaking in war. Such preparation will also be

required for ethical decisionmaking in scenarios that defy traditional categorization as either war or peace. Despite these changes, the Law of the Great War paradigm still offers indispensable protection and proof that the world still needs the law of war.

Both customary and treaty-centered rules of war evolved to meet real problems. They evolved in a state-centric world that is not going away any time in the near future, even though new actors and capabilities challenge the international system. The established law of war is essential to preservation of humanity in military conflict, but we should look to ethical and religious sources of authority for a fresh perspective and perhaps new approaches.

We should not assume, without reflection, that the Law of the Great War is our only paradigm; there may be others. Our best approach to advance humanitarian protection in war may encompass a new, interdisciplinary paradigm. If we construct that paradigm, we can reinvigorate the law of war legacy of the Great War for continuing humanitarian effect through the rest of this promising and transformative century.



Notes

¹ Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980), 59–67.

² Pierre Boisser, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute, 1978), 47–49, 70–83.

³ Best, *Humanity in Warfare*, 150–156.

⁴ Simeon E. Baldwin, “The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World,” *American Journal of International Law* 1, no. 3 (July 1907), 565–578, available at <www.jstor.org/stable/2186820>.

⁵ Ibid.

⁶ “Edward Everett Hale,” *The Advocate of Peace* 71, no. 7 (July 1909), 150–151, available at <www.jstor.org/stable/20665757>.

⁷ “Edward Everett Hale’s Address,” in “Proceedings of the Mohonk Arbitration Conference,” *The Advocate of Peace* 57, no. 7 (July 1895), 163, available at <www.jstor.org/stable/20665330>.

⁸ Best, *Humanity in Warfare*, 139–141.

⁹ Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law During the Great War* (Ithaca, NY: Cornell University Press, 2014), 33–41.

¹⁰ “Majority of James M. Beck Papers Now Available Online,” Princeton University Archives, available at <<https://blogs.princeton.edu/mudd/2016/02/majority-of-james-m-beck-papers-now-available-online/>>.

¹¹ James M. Beck, *The Evidence in the Case: An Analysis of the Diplomatic Records Submitted by England, Germany, Russia, and Belgium in the Supreme Court of Civilization, and the Conclusions Deducible as to the Moral Responsibility for the War* (New York: G.P. Putnam’s Sons, 1914), publisher’s note, unnumbered page, 195–200.

¹² Hull, *A Scrap of Paper*, 259–265.

¹³ James Wilford Garner, *International Law and the World War*, vol. 2, rpt. ed. (London: Longman’s, Green and Co., 1920), 58–185.

¹⁴ “The Versailles Treaty: June 28, 1919,” Part I, Yale Law School, Avalon Project, available at <<http://avalon.law.yale.edu/imt/parti.asp>>.

¹⁵ “The Versailles Treaty,” Part I, Article 10, available at <<http://avalon.law.yale.edu/imt/parti.asp>>.

¹⁶ Egon F. Ranshofen-Wertheimer, *The International Secretariat: A Great Experiment in International Administration* (Washington, DC: Carnegie Endowment for International Peace, 1945), 109–111.

¹⁷ Ibid., 116–117.

¹⁸ Ibid., 120–123.

¹⁹ Ibid., 125–126.

²⁰ Ibid., 128–130.

²¹ Ibid., 86.

²² “The Versailles Treaty,” Part VII, Article 227, available at <<http://avalon.law.yale.edu/imt/partvii.asp>>.

²³ Ibid., Article 228.

²⁴ Thomas J. Shaw, *World War I Law and Lawyers: Issues, Cases, and Characters* (Chicago: ABA Publishing, 2014), 388–392.

²⁵ Ibid., 394–395.

²⁶ Ibid.

²⁷ Dan Plesch, *Human Rights after Hitler: The Lost History of Prosecuting Axis War Crimes* (Washington, DC: Georgetown University Press, 2017), 90–91.

²⁸ Hull, *A Scrap of Paper*, 272–274.

²⁹ André Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute, 1978), 383–389.

³⁰ Office of General Counsel, *Department of Defense Law of War Manual* (Washington, DC: Department of Defense, June 2015, updated December 2016), 1148–1154, available at <www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>.

³¹ Michael H. Hoffman, “Rescuing the Law of War: A Way Forward in an Era of Global Terrorism,” *Parameters* 35 (Summer 2005): 18–35, available at <<http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/05summer/hoffman.pdf>>.

³² “President Donald J. Trump Is Standing Up for Human Rights at the UN,” fact sheet, June 21, 2018, available at <www.whitehouse.gov/briefings-statements/president-donald-j-trump-standing-human-rights-u-n/>.

³³ U.S. Holocaust Memorial Museum, Simon-Skjoldt Center for the Prevention of Genocide, available at <www.ushmm.org/confront-genocide/about>.