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**The Role and Importance of the  
Hague Conferences:  
A Historical Perspective**

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## ***The Role and Importance of the Hague Conferences: A Historical Perspective***

War is nothing but a duel on a larger scale. Countless duels go to make up war, but a picture of it as a whole can be formed by imagining a pair of wrestlers.

Carl von Clausewitz, *On War*<sup>1</sup>

In his posthumous publication in 1832, Carl von Clausewitz, Prussian strategist widely regarded as the father of modern military thinking, likened war to duelling and wrestling. Despite the popular image to the contrary, Clausewitz did not advocate unlimited war. He saw war in real life as organized and rational human violence shaped by social conditions and used between States to pursue political ends.

Clausewitz's exposition preceded a period of sustained efforts to codify and develop the rules of war. These efforts, which began in the mid-nineteenth century, peaked with the 1899 and 1907 Hague Peace Conferences. Participating delegates adopted numerous binding instruments covering various aspects of peaceful dispute settlement and war-fighting. They were less successful on the limitation of armaments and military budgets.

This paper seeks to place the two meetings within the context of our endeavour to regulate warfare. Specifically, it will:

- summarize the conferences;
- identify the main factors that made them moderately successful;
- show how these factors have changed over time; and
- assess the conferences' contemporary relevance in view of such changes.

### **1. The Hague Peace Conferences and Their Results**

The Hague conferences came on the heels of several codification activities that Russia had spearheaded.

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<sup>1</sup> Carl von Clausewitz, *On War*, Michael Howard and Peter Petit (eds. trans.), Alfred A. Knopf, 1993, p. 83.

In 1868, Tsar Alexander II convened an international military commission at Saint Petersburg. That gathering adopted a declaration (The Saint Petersburg Declaration) banning explosive projectiles weighing less than 400 grams in war. Its preamble articulated the interplay between military necessity and humanity that was to guide the development of the law of war.

The Tsar also initiated the 1874 Brussels Conference. This gathering concluded with a non-binding declaration on numerous aspects of these laws (The Brussels Declaration). Six years later, the Institute of International Law, a private association of eminent jurists founded in 1873, issued a manual at Oxford (The Oxford Manual) in which they updated and augmented the Brussels Declaration.

### **1.1 First Peace Conference, 18 May–29 July 1899**

In 1898, Tsar Nicholas II, Alexander II's grandson, proposed a peace conference in The Hague. Twenty-six States<sup>2</sup> met from 18 May to 29 July 1899.

The Conference agreed on the adoption of the following instruments:

- I. Convention for the pacific settlement of international disputes;
- II. Convention for the adaptation to maritime warfare of the principles of the 1864 Geneva Convention;
- III. Convention with respect to the laws and customs of war on land;
- IV. Declaration concerning the prohibition of the use of bullets which can easily expand or change their form inside the human body such as bullets with a hard covering which does not completely cover the core, or containing indentations;
- V. Declaration concerning the prohibition of the discharge of projectiles and explosives from balloons or by other new analogous methods; and
- VI. Declaration concerning the prohibition of the use of projectiles with the sole object to spread asphyxiating poisonous gases.

However, the gathering left Nicholas II's principal disarmament objectives unfulfilled. The delegates failed to adopt instruments regarding the prevention of new types and calibres of rifles and naval guns. Nor were they able to agree on fixing the size of military forces and naval armaments or their budgets. Germany, as well as the US, then an emerging power that had just won the Spanish-American War (1898), dampened prospects of success.

In its final act, the conference urged governments to study these issues. The document also envisioned a subsequent meeting at which the rights and duties of neutrals, the inviolability of private property in maritime warfare, and naval bombardment of ports, towns and villages, might be considered.

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<sup>2</sup> They are: Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, the Netherlands, Persia, Portugal, Romania, Russia, Serbia, Siam, Spain, Sweden and Norway, Switzerland, Turkey, the United Kingdom of Great Britain and Ireland, and the United States of America.

## 1.2 Second Peace Conference, 15 June–18 October 1907

US President Theodor Roosevelt, Jr., proposed a follow-up conference in 1904. He then deferred to Nicholas II, whose country found itself embroiled in a war with Japan (1904–1905) at the time. The conference was convened by Queen Wilhelmina of the Netherlands, upon Nicholas II's invitation. Forty-three States—i.e., in addition to those present at the 1899 conference, newly independent Norway plus seventeen Latin American and Caribbean States<sup>3</sup>—participated.

The conference met from 15 June to 18 October 1907 with a view to improving the 1899 conventions, renewing the 1899 declarations, and drafting a new convention on the laws and customs of maritime warfare. Participants adopted thirteen conventions and one declaration:

- I. Convention for the pacific settlement of international disputes;
- II. Convention respecting the limitation of the employment of force for the recovery of contract debts (“Drago-Porter Convention”);
- III. Convention relative to the opening of hostilities;
- IV. Convention respecting the laws and customs of war on land;
- V. Convention relative to the rights and duties of neutral powers and persons in case of war on land;
- VI. Convention relative to the legal position of enemy merchant ships at the start of hostilities;
- VII. Convention relative to the conversion of merchant ships into war-ships;
- VIII. Convention relative to the laying of automatic submarine contact mines;
- IX. Convention concerning bombardment by naval forces in time of war;
- X. Convention for the adaptation to maritime warfare of the principles of the 1906 Geneva Convention;
- XI. Convention relative to certain restrictions with regard to the exercise of the right of capture in naval war;
- XII. Convention relative to the establishment of an International Prize Court;
- XIII. Convention concerning the rights and duties of neutral powers in naval war; and
- XIV. Declaration prohibiting the discharge of projectiles and explosives from balloons.

Notably absent from the agenda were topics concerning limitations on armaments and military budgets. This time, it was Russia that found itself busy rebuilding its armed forces after the Russo-Japanese War and less inclined to pursue such ideas. The 1907 conference's final act merely confirmed the resolution of its 1899 predecessor and declared it “eminently desirable that the Governments should resume the serious examination of this question”. Although a third conference was envisaged, it was not to be, owing to the breakout of the First World War.

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<sup>3</sup> They are: Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

## 2. Spirit of Their Times

Although the 1899 and 1907 conferences achieved nothing significant on the limitation of armaments and military expenditure, they proved relatively productive on institutionalizing the peaceful settlement of international disputes, as well as codifying and developing the rules of war.

Four major factors combined to make these conferences the “first truly international assemblies meeting in time of peace for the purpose of preserving peace”<sup>4</sup> a reality.

### 2.1 Clausewitz’s Shadows

Those attending the conferences were mostly diplomats, military officers and international lawyers. They shared perceptions about war that were broadly Clausewitzian in character. Three aspects of these perceptions are highlighted here.

First, war as understood by Clausewitz only occurred between States. Prussia’s then prevailing intellectual sentiment regarded the State as the higher and unifying expression of communal life and the basic unit of interaction with other similarly organized communities.<sup>5</sup> War formed an integral part of that interaction. To be sure, numerous war-like events, such as uprisings and revolutions, did take place. The point is that Clausewitz *limited* his reflections to those instances of human violence in which two or more States fought one another.

International law in the nineteenth century also limited itself to regulating interactions between States. What occurred within the territory of a State remained an internal matter for its government. Of the instruments in question, the Oxford Manual was perhaps the most explicit: “The state of war does not admit of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts”. Consequently, conflicts not exclusively involving two or more States were largely left aside. The American Civil War (1861–1865) is a notable exception in this regard. In 1863, US President Abraham Lincoln issued the so-called Lieber Code, then the most comprehensive codification of the rules of war, to regulate the conduct of Union forces. Many European powers later adopted the code; it also influenced subsequent codification efforts at Brussels and Oxford.<sup>6</sup>

Second, Clausewitz portrayed war as essentially about weakening enemy military strength. It followed that economy of force would become a major consideration: “If ... civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct”.<sup>7</sup> For Clausewitz,

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<sup>4</sup> James Brown Scott, “Prefactory Note”, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts: The Conference of 1899*, Oxford University Press, 1920, p. v.

<sup>5</sup> Azar Gat, *A History of Military Thought: From the Enlightenment to the Cold War*, Oxford University Press, 2001, p. 241.

<sup>6</sup> Patryk I Labuda, “Lieber Code”, *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2014.

<sup>7</sup> Clausewitz, p. 85.

committing needless brutalities such as those just listed was first and foremost a sign of ineffective and unintelligent fighting.

Similarly, codifiers sought to ensure that war involved armed violence between duly authorized personnel. The Oxford Manual underscored the importance of a “distinction between the individuals who compose the ‘armed force’ of a State and its other ‘ressortissants’”. The manual then defined the armed forces as comprising the army and bodies such as irregular forces that fulfilled certain conditions. Substantively comparable provisions were inserted into the Brussels Declaration, as well as the 1899 and 1907 Hague Regulations on land warfare.

The Saint Petersburg Declaration proclaimed, among other things, that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy” and that, “for this purpose it is sufficient to disable the greatest possible number of men”. Both the Brussels and Oxford documents contained a disclaimer that “[t]he laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy”, followed by prohibitions of conduct deemed needlessly harmful. This formula was retained in the 1899 and 1907 Hague Regulations.

Third, Clausewitz considered war susceptible to reason and responsible political authority. In his view, war contained an “element of subordination, as an instrument of policy, which makes it subject to reason alone ... [war’s] political aims are the business of government alone”. These observations echoed the contemporaneous rise of the centralized State, and the incorporation of various armed units into a single army placed at its disposal.<sup>8</sup>

The nineteenth century instruments generally assumed a State to be in control of its army. Their treatment on irregular forces was more cautious. To possess rights and duties under the laws of war, such formations must, *inter alia*, be placed under command responsible to a belligerent party. The Oxford Manual also specified that “[e]very belligerent armed force is bound to conform to the laws of war”. Both the 1899 and 1907 Hague Conventions on land warfare bound their contracting parties to “issue instructions to their armed land forces” that are in conformity with the regulations annexed thereto. The 1907 convention also stipulated that each belligerent party is “responsible for all acts committed by persons forming part of its armed forces” and that it is to pay compensation for unlawful acts committed by them.

## 2.2 Litigation of Nations

By the nineteenth century, Europe’s medieval just war theory—whereby only prior injustice would entitle a State to go to war—had rescinded into the background. In its place came the acknowledgement that States had the right to resort to war as a means of settling disputes between them.

Warring sovereigns were as anxious to ensure fairness in their violent contestations through previously agreed-upon rules, as they were to reduce risks of war and to minimize its needless cruelty. The so-called general participation clause limiting the application of

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<sup>8</sup> Gat, p. 247.

law of war treaties to situations where all States involved were bound by them, echoed the notion that the rules existed at least in part to ensure fairness between belligerents. According to the Final Protocol adopted at the 1874 Brussels conference:

War being thus regulated would involve less suffering, would be less liable to those aggravations produced by uncertainty, unforeseen events, and the passions excited by the struggle; it would tend more surely to that which should be its final object, viz., the re-establishment of good relations, and a more solid and lasting peace between the belligerent States.

This, together with the growing enthusiasm for international arbitration, reinforced the idea that peace and war stood at the opposite extremes of a spectrum in the communal life of sometimes disputatious nations. Much of their attention was devoted to anchoring the commencement and prosecution of war firmly at the end of interstate dispute settlement processes.

The 1899 Convention for the pacific settlement of international disputes set up a series of non-obligatory techniques. They included good offices and mediation, commissions of inquiry, and arbitration. A Permanent Court of Arbitration was also created to facilitate the latter. The 1907 Convention left these features fundamentally untouched. Attempts at making arbitration obligatory and creating a standing court failed in both 1899 and 1907.<sup>9</sup>

None of these options changed the fact that States retained the right to go to war as a settlement of last resort. Though admittedly crude, expensive and distasteful, war had truly become a “litigation of nations”.<sup>10</sup> As litigants “in the court of battle”, States proved unenthusiastic about creating a quantitatively level field in terms of armament, manpower and budget without verification measures.<sup>11</sup>

### 2.3 State-Centricity and the Limits of Codification

The motives behind the convening of the 1899 conference remain disputed. Some believe Nicholas II was influenced by Jan Bloch’s work on the mounting burdens of modern war on society.<sup>12</sup> Sceptics note Russia’s military inferiority at the time vis-à-vis its European rivals, and characterize the conference as an attempt to narrow the difference.<sup>13</sup> The truth may very well lie somewhere in the middle.<sup>14</sup>

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<sup>9</sup> David D. Caron, “War and International Adjudication: Reflections of the 1899 Peace Conference”, *American Journal of International Law*, vol. 94, no. 4 (2000), pp. 20–22.

<sup>10</sup> Ian Brownlie, *International Law and the Use of Force by States*, Oxford University Press, 1961.

<sup>11</sup> Scott Andrew Keefer, “Building the Palace of Peace: The Hague Conference of 1899 and Arms Control in the Progressive Era”, *Journal of the History of International Law*, vol. 8, no. 1 (2006), pp. 16–17.

<sup>12</sup> Betsy Baker, “Hague Peace Conferences (1899 and 1907)”, *Max Planck Encyclopedia of Public International Law*, 2009.

<sup>13</sup> Thomas K. Ford, “The Genesis of the First Hague Peace Conference”, *Political Science Quarterly*, vol. 51, no. 354 (1936); Chris af Jochnick and Roger Normand, “The Legitimation of Violence: A Critical History of the Laws of War”, *Harvard International Law Journal*, vol. 35, no. 49 (1994), pp. 69–70.

<sup>14</sup> Geoffrey Best, “Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After”, *International Affairs*, vol. 75, no. 619 (1999), pp. 621–622; Detlev F. Vagts, “The Hague Conventions and Arms Control”, *American Journal of International Law*, vol. 94, no. 31 (2000), p. 33.

Vulnerable States looked to law as a tool with which to buttress national security vis-à-vis their more dominant counterparts. In 1899, Fyodor Fyodorovich Martens spoke for the former group when he said:

Do the weak become stronger because the *duties* of the strong are not determined? Do the strong become weaker because their *rights* are specifically defined and consequently limited? I do not think so. I am fully convinced that it is particularly in the interest of the weak that these rights and duties be defined. It is impossible to compel the stronger to respect the rights of the weaker if the *duties* of the latter are not recognized.<sup>15</sup>

Be that as it may, the two Hague conferences were State-centric affairs. As noted earlier, international law was strictly a set of rules that regulated the interaction among sovereigns. This, admittedly, is not to suggest that they took place in a vacuum where civil society was absent. By 1899, various peace movements had already organized their congresses. The advent of the Industrial Revolution, as well as the rise of nation states investing in large, standing armed forces with more destructive weapons, led Western intellectual elites to view war as increasingly untenable and undesirable. The idea of diplomatic endeavours to enhance prospects of peace and reduce risks of war resonated with the popular opinion at the time. Quakers, individual peace activists and members of the press actively sought to influence and report on the deliberations.<sup>16</sup>

States were unable to codify all aspects of their belligerent conduct. Matters left uncodified at the time included the treatment of populations in territories facing invasion and occupation. At the 1899 conference, Belgium highlighted the predicament of small States often falling victim to occupation. It urged that the conference omit or revise several provisions of the 1874 Brussels Declaration with a view to restricting the rights of occupying armies on taxes and requisitions. Belgium also proposed leaving the right of populations to resist invaders with arms “under the governance of that tacit and common law which arises from the principles of the law of nations”.<sup>17</sup> The UK proposed explicitly affirming the affected population’s right of resistance, only to be met with Germany’s objection that “it is absolutely impossible ... to go one step further and follow those who declare for an absolutely unlimited right of defense”.<sup>18</sup>

In a spirit of compromise, Martens suggested a proclamation that “in cases not included in the present agreement, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience”.<sup>19</sup>

The 1899 and 1907 Conventions on land warfare incorporated into their preambles a savings clause that has come to be named after Martens. The text reads:

It has not ... been found possible at present to concert regulations covering all the circumstances which arise in practice;

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<sup>15</sup> *Proceedings of the Conference of 1899*, p. 506.

<sup>16</sup> Caron, pp. 15–16.

<sup>17</sup> *Proceedings of the Conference of 1899*, p. 502.

<sup>18</sup> *Ibid.*, p. 420.

<sup>19</sup> *Ibid.*, p. 548.

On the other hand, the high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written understanding, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rules of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

Various versions of the clause can now be found in contemporary treaties dealing with the rules of war and weapons regulations. The most recent formulation appears in the preamble of the 2008 Convention on Cluster Munitions.

## **2.4 Necessary and Unnecessary Evil**

The Hague undertakings were driven by the “desire to diminish the evils of war so far as military necessities permit” (preamble of the 1899 Convention on land warfare). It is military requirements that set the parameters within which war’s evils would be diminished, not the other way around. Preserving room for militarily necessary violence and destruction was a foregone conclusion once States had entrenched war as a legitimate mode of settling disputes between them.

As noted above, in those days, disabling the greatest possible number of enemy soldiers was the essence of war-fighting. States met in The Hague to delineate where war’s necessary evils ended and unnecessary ones began. It is not difficult to see how they agreed on some means of warfare deemed ripe for a ban or restriction (e.g., projectiles for spreading asphyxiating gasses) but not on some others (e.g., submarines). One critical account of the two Hague conferences concludes:

Despite a public outcry for humane limits on warfare at the turn of the century, the sovereign nations that drafted the Hague laws were overwhelmingly concerned with protecting their military interests. Predictably, the resulting laws banned only those means and methods of combat that had no military utility while permitting new and destructive technologies, like aerial warfare, to develop unhindered.<sup>20</sup>

This sombre task characterizing “Hague law” instruments stood in contrast to the spirit animating the 1864 Geneva Convention and its successors known as the “Geneva law”.

At stake for Henri Dunant and his fellow Swiss philanthropists was the humane treatment of wounded and sick soldiers abandoned in the field, and the facilitation of relief work by medical personnel and local volunteers. There was no need to distinguish war’s necessary evils from those that were unnecessary. Both the 1899 and 1907 conferences adopted without much controversy conventions expanding the principles of the 1864 Geneva Convention and its 1906 update, respectively, to naval warfare.

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<sup>20</sup> Jochnick and Normand, p. 68.

### 3. The March of History

The post-First World War era witnessed renewed attempts at limiting naval armaments among major sea powers, with mixed results. The League of Nations conference on general disarmament ended in failure amid the rise of authoritarianism and the arms race that accompanied it. The United Nations General Assembly has held three special sessions on disarmament to date, yet failed to advance the ambitious program of action first adopted in 1978. In a similar vein, the Conference on Disarmament, the world's only permanent body to negotiate multilateral disarmament, has been deadlocked for nearly two decades.

Some progress on nuclear disarmament has been made since the 1960s. Nuclear-armed States have also endeavoured to limit and reduce their arsenals. Despite these developments, however, a world free of nuclear weapons remains an unfulfilled promise.

Among the Hague law instruments, the 1899 and 1907 regulations on land warfare are perhaps of the most enduring value today. Their provisions on occupation and the conduct of hostilities have attained customary status, a fact affirmed as early as 1945 by the International Military Tribunal in Nuremberg<sup>21</sup> and reflected in their further elaboration through the 1949 Fourth Geneva Convention and the 1977 First Additional Protocol. The same may be said of some of the core weapons restrictions agreed upon at The Hague. It is widely accepted that customary law prohibits expanding bullets, insofar as they cause superfluous injury and unnecessary suffering, in armed conflicts. The 1925 Geneva gas protocol ushered in a general decline in the use of chemical weapons. This trend, together with the adoption of the 1993 Chemical Weapons Convention and the implementation mechanism established under it, continues notwithstanding some erosion of the norms witnessed recently.

The Hague project's experiment with compulsory arbitration and standing courts bore fruit when the Permanent Court of International Justice was created in 1920 and the International Court of Justice (ICJ) in 1945. Many if not all of today's territorial and maritime boundary disputes—precisely the kinds of differences that could have led to wars in the past—are often resolved through arbitration and judicial settlement. States have set up standing bodies of a judicial or quasi-judicial character in areas such as human rights, war crimes prosecution, the law of the sea, trade and investment, as well as for administering international organizations and interpreting their founding treaties.

Nevertheless, each of the four historical circumstances that contributed to the Hague Conferences, as well as the instruments they produced on the rules of war, have changed over time. These changes help us assess the contemporary significance of what was achieved 110 years ago.

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<sup>21</sup> *United States of America et al. v. Herman Wilhelm Göring et al.*, International Military Tribunal, *Judgment*, 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945–1 October 1946*, Nuremberg 1947, Vol. 1, 171, p. 253.

### 3.1 Non-State Actors, Civilian Targeting, and Disorder

Civil wars and rebellions continued to occur after 1907. The age of decolonization struggles, combined with the onset of the Cold War, led generally to the decline of international armed conflicts and rise of non-international armed conflicts. Insurgencies, as well as armed engagements involving transnational networks of terrorists and other criminals, have multiplied.

These developments undercut Clausewitz's premise that war occurs between States. They also expose the State-centric focus of the laws of war to be an untenable fiction. Already during the Spanish Civil War (1936–1939), UK Prime Minister Neville Chamberlain and the Assembly of the League of Nations condemned deliberate bombardment of civilian residents of Barcelona.<sup>22</sup> Following the adoption of Article 3 common to the 1949 Geneva Conventions, the rules of war began the process of incremental, haphazard and awkward expansion into non-international armed conflicts. Seeking to regulate the belligerent conduct not only of State forces but also their armed oppositions has inevitably raised intractable questions regarding the latter's international law status.

Today, the idea that hostilities should be limited to military objectives is often rejected outright, ignored or stretched. Some fighting forces influenced by extreme ideologies or ethnic animosities deliberately target civilians. Others, such as child soldiers and bandits, may lack awareness of the notion. Yet others exploit the ambiguities in what constitutes legitimate military objectives.

Here, too, Clausewitz's belief in intelligent and efficient fighting between like-minded and trained armies has come under strain. So has the premise of the 1899 and 1907 Hague Regulations that armed hostilities must be limited to opposing armed forces consisting of duly authorized individuals. The 1974–1977 Diplomatic Conference struggled to resolve the status of those fighting for national liberation against metropolitan forces. Similar difficulties arose in 2009 when the International Committee of the Red Cross (ICRC) sought to clarify how members of an organized armed group become targetable for the duration of their "continuous combat function", rather than only for each distinct instance of direct participation in hostilities on a spontaneous, sporadic or unorganized basis.<sup>23</sup>

Nor are wars necessarily amenable to reason or political control. Senseless slaughter, uncoordinated violence and general anarchy characterize some of today's armed conflicts as adequately as the engagement of highly organized fighting units answerable to responsible authorities does. This has weakened the contemporary relevance of Clausewitz's observation that war is a rational activity subordinated to government policy. Correspondingly, the idea underpinning the Hague law's enforceability—i.e., that States place their armed forces under responsible command, issue instructions on compliance

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<sup>22</sup> See United Kingdom, House of Commons Debate 23 March 1938, vol. 333 cc1177; "Reduction and Limitation of Armaments and Protection of Civilian Populations against Bombing from the Air in Case of War", 30 September 1938, *League of Nations Official Journal, Special Supplement* 183 (1938), pp. 135–136.

<sup>23</sup> International Committee of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 2009, pp. 33–36, 71–73.

with the rules of war, and assume liability for the unlawful conduct of their personnel—has become harder to uphold.

### 3.2 From Litigation to Self-Defence

The Drago-Porter Convention prohibited States from using force against other States to recover contract debts. By branding Germany as the aggressor, the Versailles Peace Treaty implicitly restored the just war tradition. The Covenant of the League of Nations also obligated its members to settle serious disputes peacefully; not to go to war until three months after settlement is reached; and not to go to war against League members in full compliance with the settlement's terms.

None of these instruments extinguished war's lawfulness *per se*. It is the 1928 Kellogg-Briand Pact that condemned "recourse to war for the solution of international controversies" and renounced it "as an instrument of national policy" in inter-state relations. The Nuremberg Tribunal affirmed that the pact outlawed a war of aggression and that aggression was also a crime for which individuals might be punished under international law.<sup>24</sup>

The UN Charter reiterates the duty to settle international disputes by peaceful means, and strengthens the ban on resorting to force. Its Article 2(4) reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This prohibition is subject to two widely accepted exceptions. First, States may act in individual or collective self-defence in the event of an armed attack. Second, States may use force when duly authorized by the UN Security Council acting under Chapter VII.

These developments have made it odd to regard war as a transaction involving opponents of equal standing, and its rules as safeguarding procedural fairness between them. This awkwardness was not lost on the UN International Law Commission. At its first session in 1949,

[t]he Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant ... The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.<sup>25</sup>

In the event, the need to codify and develop the rules of war only grew. Yet, the supposed legal parity between States in their belligerent conduct sits uneasily with the fact that one of them illegally resorted to arms against the other, and that the latter was exercising its right of self-defence. This difficulty calls the strict separation between *jus ad bellum* (law

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<sup>24</sup> Göring et al., pp. 220–224.

<sup>25</sup> *Report of the International Law Commission on the work of its first Session, 12 April 1949, Official Records of the General Assembly, Fourth Session, Supplement No. 10, A/CN.4/13 and Corr. 1–3, para. 18.*

concerning recourse to force) and *jus in bello* (law concerning belligerent conduct), a veritable article of faith among most international lawyers, into question.

For this inevitably raises issues about the need to distinguish harm that is militarily necessary from that which is unnecessary. Surely, no aggressor should be entitled to claim that its action is necessary? At Nuremberg, some Allied prosecutors argued, unsuccessfully, that Germany should not benefit from the rules of war. Conversely, those fighting for the “good” side should be given greater leeway in determining what is indispensable for the accomplishment of their mission, should they not? During the Kosovo crisis (1999), it was sometimes suggested that NATO should be permitted to broaden the range of objects constituting military objectives. Whether, by extension, individual soldiers who fight for an aggressor and those who fight for its victim are morally equal, is also a matter that inspires debates amongst philosophers and lawyers alike.

### 3.3 New Modes and Dynamics of International Law-Making

States formally remain the sole makers of international law. Its three primary sources—i.e., treaties, custom, and general principles of law—all require State involvement. For the most part, only States are competent to conclude treaties binding on themselves. Customary rules are formed, in principle, only when States exhibit sufficiently consistent behaviour and conviction that they are entitled or duty-bound to do so. General principles are typically found among those well-established in domestic legal systems.

Substantively, however, civil society actors have influenced the development of modern international law in the regulation of warfare.<sup>26</sup> What is remarkable is their growing impact.

The method’s origin may be traced to the earliest days of Geneva law. At the urging of a group of private Swiss citizens who would eventually form the ICRC, Switzerland convened a diplomatic conference at which participating States adopted the 1864 Geneva Convention. Thereafter, the ICRC and the Red Cross and Red Crescent Movement played leading roles in the adoption of subsequent Geneva Conventions, additional protocols and several weapons-related instruments. Non-State initiatives were the driving force behind many other treaties, such as the 1928 Havana Convention on Maritime Neutrality,<sup>27</sup> the so-called 1935 Roerich Pact on artistic and scientific institutions and historic monuments,<sup>28</sup> the 1948 Genocide Convention,<sup>29</sup> the 1998 Rome Statute of the International Criminal Court,<sup>30</sup> and the 2013 Arms Trade Treaty.<sup>31</sup>

Recently, NGOs have become even more prominent in multilateral treaty-making efforts undertaken outside of formal inter-governmental disarmament forums when the latter proved unable to take the matter forward themselves. The 1997 Ottawa treaty on anti-

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<sup>26</sup> Alan Boyle and Christine Chinkin, *The Making of International Law*, Oxford University Press, 2007.

<sup>27</sup> Based on the work produced at a meeting of the American Institute of International Law in Havana, Cuba, in 1917.

<sup>28</sup> Developed through the work of Nicholas Roerich, the Roerich Museum of New York and Georges Chklaver.

<sup>29</sup> Based primarily on the work and lobbying of Rafał Lemkin.

<sup>30</sup> Owing in large part to the work of a coalition of NGOs known as the Coalition for an International Criminal Court.

<sup>31</sup> Developed through the advocacy of Óscar Arias and an NGO umbrella organization called Control Arms.

personnel landmines<sup>32</sup> and the 2008 Oslo convention on cluster munitions<sup>33</sup> are noticeable examples in this regard. It may be said that the two UN conferences scheduled in 2017 for the negotiation of a treaty banning nuclear weapons also form part of this broad trend.<sup>34</sup>

Besides civil society's growing input in its development, international law is undergoing transformations in its methodology. The Martens Clause's recent re-imagination becomes relevant here. As noted earlier, States originally introduced it in 1899 with a view to safeguarding the development of law through custom, and pre-empting disingenuous suggestions that only codified rules bound States. This remains the clause's most conservative, and least controversial, interpretation today.

In the *Kupreškić* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) considered whether belligerent reprisals directed against civilians during hostilities were customarily prohibited.<sup>35</sup> The Trial Chamber suggested that the Martens Clause requires provisions granting belligerents discretionary power to be interpreted "so as to construe [such power] as narrowly as possible ... and, by the same token, so as to expand the protection accorded to civilians".<sup>36</sup> This interpretation, if correct, arguably extinguishes a long-held international law principle that a State remains free to act unless specifically prohibited by a rule.<sup>37</sup>

Some take the matter further. For them, the Martens Clause renders the principles of humanity and the dictates of public conscience directly applicable as normative restraints to belligerent conduct.<sup>38</sup> This is only a small step away from replacing the presumed freedom of action with the presumed absence of such freedom (unless consistent with these principles and dictates). Such a reversal can generate far-reaching consequences, as will be seen below.

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<sup>32</sup> Resulted from the work of the International Campaign to Ban Landmines, an NGO coalition, together with the ICRC, the Red Cross and Red Crescent Movement, and a group of like-minded States; accelerated after the 1996 review conference of the Convention on Certain Conventional Weapons (CCW) failed to adopt a protocol banning anti-personnel landmines.

<sup>33</sup> Resulted from the work of the Cluster Munitions Coalition, the ICRC, the Red Cross and Red Crescent Movement and in cooperation with like-minded States; accelerated after efforts to adopt a CCW protocol regulating cluster munitions during the early 2000s were blocked.

<sup>34</sup> UN General Assembly resolution 71/258 "Taking forward multilateral nuclear disarmament negotiations", 23 December 2016 (A/RES/71/258). Co-ordinated largely through the International Campaign to Abolish Nuclear Weapons, a civil society coalition, in cooperation with the ICRC, the Red Cross and Red Crescent Movement, and like-minded States; brought to the UN General Assembly framework after the 2015 review conference of the Treaty on the Non-Proliferation of Nuclear Weapons ended without agreement on the desirability of a ban treaty.

<sup>35</sup> *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, *Judgment*, 14 January 2000. Hereinafter, "*Kupreškić* Trial Judgment".

<sup>36</sup> *Kupreškić* Trial Judgment, para. 525.

<sup>37</sup> *The Case of the S.S. "Lotus"*, *Publications of the Permanent Court of International Justice, Series A-No. 10, September 7th, 1927, Collection of Judgments*, p. 18.

<sup>38</sup> Louise Doswald-Beck, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice", *International Review of the Red Cross*, vol. 316, no. 35 (1997), p. 49; Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", 316 *International Review of the Red Cross*, vol. 316, no. 125 (1997), p. 126.

In the era of non-international conflicts, the idea that the rules of war protect geo-strategically vulnerable States against the arbitrary behaviour of hegemon has become less salient. Nowadays, it is often peripheral States that demand a freer hand in dealing with rebels and feel needlessly burdened by their international obligations. This, in addition to the maintenance of law and order being within their *domaine réservé*, explains the troubled genesis, narrow scope and limited content of 1977 Second Additional Protocol. Many of the same newly independent States that so firmly insisted on upgrading national liberation struggles to international armed conflicts under the 1977 First Additional Protocol found themselves vehemently opposed to according any appearance of legitimacy to their own domestic foes.

Meanwhile, discussions as to whether organized armed groups are bound by the rules of war and, if so, how they may be induced to comply with them, have arisen. During the Yugoslav crisis (1991–1995), representatives of self-proclaimed political entities signed agreements under the ICRC auspices pledging adherence to the law.<sup>39</sup> There is growing authority for the view that at least some of the rules indeed bind non-State entities, although opinions differ as to why they do so. Civil society efforts such as Geneva Call engage armed groups by encouraging and rewarding law-abiding behaviour. Some argue that they should be given a sense of ownership in the law's development and compliance through the recognition of some formal standing.

### 3.4 Stigmatizing Armed Violence

Commentators note that the rules of war have become “humanized”, or “homo-centric”, over time.<sup>40</sup> The emergence of international human rights law after the Second World War is a major contributing factor. In the late 1960s, respect for human rights in armed conflict became a global concern.<sup>41</sup> The body of rules previously known as the “laws and customs of war”, “laws of war”, and the like, gradually changed its name to “international humanitarian law” (IHL). The emphasis now is how humanitarian considerations constrain belligerent conduct, rather than what humanity can be preserved amid war's necessities.

This trajectory also finds support in more recent rulings of international courts. In 1995, the ICTY held:

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus*

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<sup>39</sup> See, e.g., agreements of 22 May 1992 and 1 October 1992, both signed in Geneva between representatives of the government of Bosnia and Herzegovina, the Serbian Democratic Party and the Croatian Democratic Community.

<sup>40</sup> Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, vol 94, no. 239 (2000); Robert Kolb, “The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions”, in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds.), *Searching for a ‘Principle of Humanity’ in International Humanitarian Law*, Cambridge University Press, 2013, pp. 52–55.

<sup>41</sup> International Conference on Human Rights resolution XXIII “Human rights in armed conflict”, adopted at Tehran, 12 May 1968 (A/CONF.32/41), p. 18; UN General Assembly resolution 2444 (XXIII) “Respect for human rights in armed conflicts”, 19 December 1968 (A/RES/2444(XXIII)).

*constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.<sup>42</sup>

In its *Nuclear Weapons* advisory opinion issued the following year, the ICJ observed that “the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity—make the conduct of armed hostilities subject to a number of stringent requirements”.<sup>43</sup>

The so-called “capture rather than kill” debate<sup>44</sup> illustrates the privileged position to which humanitarian considerations have arguably ascended vis-à-vis military considerations. Where an adversary can be captured or killed, must that adversary, even an able-bodied and non-surrendering enemy combatant, not be killed? Those who respond affirmatively to this question<sup>45</sup> believe that today’s rules of war are concerned with minimizing violence generally and that they require the employment of the least injurious means and methods of combat. In the ICRC’s words: “[T]he principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances”.<sup>46</sup> On this view, every belligerent act is a deviation from its peacetime counterpart, and every rule of war a necessity-driven derogation clause from its “more restrictive” peacetime counterpart.<sup>47</sup> From the latter rule, only that deviant instance which proves militarily necessary would, on a case-by-case basis, be eligible for derogation.<sup>48</sup>

Belligerent reprisals against civilians during hostilities are another example. When finding this technique customarily unlawful, the ICTY’s *Kupreškić* Trial Chamber stated:

The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation ... the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights.<sup>49</sup>

Some have taken issue with this ruling. According to the UK manual on the law of armed conflict, “the court’s reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the State practice that exists. The UK does not

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<sup>42</sup> *Prosecutor v. Duško Tadić a/k/a “Dule”,* Case No. IT-94-1, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 97.

<sup>43</sup> *Nuclear Weapons*, para. 95.

<sup>44</sup> Ryan Goodman, “The Power to Kill or Capture Enemy Combatants”, *European Journal of International Law*, vol. 24, no. 819 (2013); Michael Schmitt, “Wound, Capture, or Kill: A Reply to Ryan Goodman’s ‘The Power to Kill or Capture Enemy Combatants’”, *European Journal of International Law*, vol. 24, no. 855 (2013).

<sup>45</sup> Jean Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff Publishers/Henry Dunant Institute, 1985, pp. 75–76; ICRC, *Interpretive Guidance*, p. 82, n. 221.

<sup>46</sup> ICRC, *Interpretive Guidance*, p. 79.

<sup>47</sup> Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, 2008, p. 287.

<sup>48</sup> But see Geoffrey S. Corn, Laurie R. Blank, Chris Jenks and Eric Talbot Jensen, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule”, *International Law Studies*, vol. 89, no. 536 (2013).

<sup>49</sup> *Kupreškić* Trial Judgment, paras. 528–529.

accept the position as stated in this judgment”.<sup>50</sup> One commentator complains of “a clear propensity” to inflate humanity vis-à-vis military necessity: “the ICTY has admitted as much. When they engage in such activism, international tribunals supplant States in their role as the arbiter of the balance”.<sup>51</sup>

This shift is not confined to methods of combat. Both anti-personnel landmines and cluster munitions were banned on account of their unacceptably inhumane effects, amid objections by States that ascribed overriding military value to their use. The same may be said of the widening rift between those advocating a ban on nuclear weapons on humanitarian grounds and those opposed to it on security grounds.

#### **4. The Hague’s Legacy**

With the benefit of hindsight, it is easy to praise the 1899 and 1907 Hague conferences as towering successes or dismiss them as dismal failures. Our discussion counsels caution against rushing to such conclusions.

The two gatherings were very much products of their own era. While the articulation of war rules and weapons regulations were indeed their major achievements, the Hague law of the late nineteenth century and the early twentieth century limited itself to wars between States, and then only to matters around which their mutual interests converged. The Hague conferences successfully developed key techniques and institutions of peaceful dispute settlement, but they did so only to the extent that war remained available as a measure of last resort.

Some of their objectives, such as limiting general levels of armaments and military budgets, stood limited chances then, as they do today. Whether as a means of settling disputes or self-defence, most States have chosen to maintain their arms rather than entrust themselves entirely to compulsory arbitration or judicial settlement. Weapons considered by technologically advanced States to offer overriding military value have eluded meaningful restrictions.

Our era has a very different outlook. Modern wars not only involve States, but also, and with an increasing frequency, organized armed groups. Distinction between military objectives on the one hand and civilian persons and objects on the other, a sign of economy of force as well as a fundamental IHL principle, is increasingly blurred through normative erosion, relentless advancement in military technology and rapid evolution of warfare. Contemporary conflicts are often characterized by chaos lacking in political control and accountability.

We also have different expectations of how the rules are made, and what they contain. Civil society input has become more vocal and influential. Non-State entities carry more weight, both as duty-bearers and stakeholders, in the law’s development and

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<sup>50</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004, para. 16.19.2, n. 62.

<sup>51</sup> Michael N Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law*, vol. 50, no. 795 (2010), p. 822.

implementation. Neither fairness between warring parties nor military necessity may be so readily accepted as a controlling consideration in IHL norm-creation.

These observations point to the potential, indeed imperative, of multilateral law-making attuned to the needs and dispositions of the time. What should today's equivalent to the 1899 and 1907 Hague conferences and their outcomes, in terms of scope, composition, modality, and contribution to international society, look like? The second conference's 110th anniversary is a fitting moment to reflect on this question.



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## **The Role and Importance of the Hague Conferences: A Historical Perspective**

A period of sustained efforts to codify and develop the rules of war, which began in the mid-nineteenth century, peaked with the 1899 and 1907 Hague Peace Conferences. Participating delegates adopted numerous binding instruments covering various aspects of peaceful dispute settlement and war-fighting.

This paper places the two Hague Peace Conferences within the context of humanity's attempts to regulate warfare. It identifies the main factors that made them successful at the time; shows how these factors have changed over time; and assesses the conferences' contemporary relevance in view of such changes.