

THE TRANSFORMATION OF THE LAWS OF WAR INTO HUMANITARIAN LAW

A. The Limitation of War and the Religion of Human Suffering

The latter half of the nineteenth century and the beginning of the twentieth century witnessed a prodigious ‘codification,’ of the modern laws of war. This codification, which began but did not end as a European phenomenon, took place through such instruments as the pact of Paris of 1856,¹ the Lieber Code of 1863,² the Geneva Convention of 1864,³ the St-Petersburg Declaration of 1868,⁴ and the Hague Conventions of 1899 and 1907.⁵ Though, in large measure, this codification was the work of international (and national) law, the nineteenth century protagonists of a *droit humain* were not satisfied with tracing the developments in the laws of war to treaties or other instruments deriving their binding force from the sovereign will of states. Nor, despite whatever sensitivities they had to questions of shared customs and geo-politics, were they willing to trace the codification of norms allowing for the limitation of war to the comprehensive effect of a European spatial order. Rather, according to them, the overcoming of the wars of extermination of earlier times and of less civilized or uncivilized peoples was an accomplishment

¹ The Pact abolished privateering, provided for the protection of enemy goods under neutral flags and neutral goods under enemy flags, and provided that blockades must be effective to be binding. Declaration Regarding Maritime Law, 16 April 1856, 115 Consolidated Treaty Series 1.

² Drawn up for the conduct of war within the civil war of the US but used as a model for later international treaties. “Instructions for the Government of Armies of the United States in the Field,” 24 April 1863 reprinted in Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983) at 45.

³ The Geneva Convention provided for the neutrality and protection of medical personnel on the battlefield. Geneva Convention for the Amelioration of the Condition of Wounded Armies in the Field (1864), 22 Stat 940 (1865).

⁴ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868, 138 Consolidated Treaty Series 297.

⁵ The first Hague Convention of 1899 dealt with the pacific settlement of disputes. The second Hague Convention dealt with the laws and customs of war on land. The third Hague convention dealt with the adaptation to maritime warfare of 1864 Geneva Principles. The fourth Hague Convention prohibited the launching of explosives and projectiles from balloons. See, in particular, Convention with Respect to the Laws and Customs of War on Land, 29 July 1899, 1 Bevans 247. See also Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, 205 Consolidated Treaty Series 277.

of modern, civilized man who had learnt to limit war *via* his progressive discovery and articulation of a *droit humain*. International law was merely the vehicle of this law of humanity – a law which was as yet insufficiently distinct to serve as the proper object of an independent science.

Though the two world wars did much to dispel the illusion of the so-called limited nature, or humanity, of modern wars fought by civilized states, the laws of war have not let go of that aspiration. On the contrary, the laws of war have themselves become ‘humanitarian’ and embraced their belonging to laws of humanity. In the late twentieth century, with the 1977 Protocols Additional to the Geneva Conventions, the laws of war have been re-named ‘humanitarian law’ (the full name being ‘international humanitarian law of armed conflict’) - though not without some controversy or dissension. This re-naming of the laws of war points to the supreme ground, or principle, of limitation at the heart of the contemporary laws of war: humanity or humaneness.⁶ Though this re-naming raises the possibility of alternative ways of conceiving or grounding limitation, it also raises the question of the very identity of these ‘laws of war’ as, primarily, laws of *war*. The full name of this body of law does away with the word ‘war’ whereas the abbreviated version even lets ‘armed conflict’ slip from sight.

We, of the late twentieth and early twenty-first century, have so taken for granted ‘humanitarian law’ (for the abbreviated version of the name has quickly taken hold) as

⁶ See, e.g., the title of Geoffrey Francis Andrew Best, *Humanity in Warfare* (New York: Columbia University Press, 1980).

the proper way to name the contemporary laws of war that we do not let the name strike us as it could - and as it should. The name does not, in itself, suggest a body of law governing the waging of war. Rather, one might think of a body of law governing any and all humanitarian action, i.e. a body of law governing charitable or philanthropic action (to confound charity and philanthropy for a moment). One might also, emphasizing the quality of humaneness that led to the growth of humane societies, think of humanitarian law in a slightly more restricted sense: as a body of law governing the relief of pain or suffering,⁷ perhaps including that of animals. The laws of war, though, govern the permissible infliction of pain and, for this reason, would appear to be more akin to penal or criminal law.⁸ Indeed, like the laws of war, penal law too was 'humanized' with the advent of modernity.

Both charity and pain reveal themselves to be at the heart of the idea of a 'humanitarian law', and of modern humanitarianism more generally. However, for both humanitarian law and modern humanitarianism to become possible, understandings of charity and pain had to change radically. Charity was transformed from the prime theological virtue, signifying friendship with God, into the 'sentiment of humanity.' Charity, the love of God located within the Christian religion, was replaced by philanthropy, the love of man located within the 'religion of humanity.'⁹ Pain was also transformed: from a potential spiritual good that could bring one

⁷ Suffering points to passivity, to being subject to or undergoing something. In modern times, we understand suffering as undergoing something 'bad.' Pain comes from the latin *poena* and carries the sense of penalty for wrongdoing. See Philippe Nonet, "Sanction" (1995) 25 Cumberland Law Review 489.

⁸ See Nonet, "Sanction" for an account of punishment *as* punishment rather than as a means to prevention or deterrence etc.

⁹ The first sense of 'humanitarian' provided by the on-line Oxford English Dictionary (<www.oed.com>) is "One who affirms the humanity (but denies the divinity) of Christ." The second sense provided is "One who professes the 'Religion of Humanity,' holding that mankind's duty is chiefly or wholly comprised in the advancement of the welfare of the human race."

closer to God into something unintelligible and unacceptable – to be calculated and eliminated.¹⁰ Together, these twin transformations of charity into humanity and of pain into *the* objection to life combine to form what Nietzsche called “*la religion de la souffrance humaine*,”¹¹ the religion of human suffering, of which compassion in its immediacy is a, if not *the*, constitutive element. Humanitarian law, the contemporary law of war, belongs to this religion, to this ‘natural religion’ of modern man. And this immediacy of compassion, this sharing of human beings in the sensible experience of pain, emerges as one possible, if not the principal, ground of the solidarity of modern humanity - a ground that determines our manner of conceiving the modern laws of war.

‘Humanity’ is the first principle of the International Committee of the Red Cross, the mission of which is “to prevent and alleviate human suffering wherever it may be found.”¹² The International Committee of the Red Cross, associated with the world’s largest charity, has been one of the greatest sponsors and caretakers¹³ of the laws of war. Its centrality to the laws of war reflects their being re-named humanitarian law. The Red Cross and its symbol are some of the most visible aspects of today’s ‘religion of human suffering.’ Henri Dunant, one of the founders of what later became the International Committee of the Red Cross, is revered as a patron saint

¹⁰ Though the two have been confounded in modern times, calculability is not the same as intelligibility.

¹¹ Friedrich Wilhelm Nietzsche, *Beyond Good and Evil; prelude to a philosophy of the future* (New York,: Vintage Books, 1966) at 30 (and 54). See also Friedrich Wilhelm Nietzsche, *On the Genealogy of Morals* (New York,: Vintage Books, 1967) at 159.

¹² The seven principles of the International Committee of the Red Cross (adopted by the Twentieth International Conference of the Red Cross in 1965) are: humanity, impartiality, neutrality, independence, voluntary service, unity, universality.

¹³ Geoffrey Francis Andrew Best, *War and Law since 1945* (Oxford, England: Clarendon Press, 1994) at viii notes that the Red Cross is the world’s biggest charity and describes the International Committee of the Red Cross as the “curator” of international humanitarian law.

for his spontaneous and sympathetic reaction to the suffering he saw at the battle of Solferino. His account of the battle and the proposals he included therein led to the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field and gave rise to what has become known as the Geneva law, that branch of the laws of war concerned with the protection of victims of war.

The transformation of the laws of war into humanitarian law seals the belonging of the laws of war to the religion of human suffering. Though it predates the change in name of this body of law, the prohibition against the infliction of unnecessary suffering is properly understood as *the* key principle of humanitarian law – even “perhaps the only undisputed rule of warfare.”¹⁴

Understood one way, the principle is a part of the law of weaponry, and of that branch of the laws of war known as the Hague law, i.e. the law governing the means and methods of warfare.¹⁵ However, writ large, it is properly seen as the foundational principle of humanitarian law more generally. Other principles of the laws of war, such as proportionality,¹⁶ easily fall under its scope. The principle of discrimination, that one must distinguish combatants from civilians and target only the former, though often considered to be the essence of humanitarian law, can also be understood as falling under the scope of the ‘unnecessary suffering principle’: the suffering of

¹⁴ “This [prohibition of unnecessary suffering] is perhaps the only undisputed rule of warfare, and perhaps it is undisputed because opinions widely differ about what is necessary and what is unnecessary.” Bert V.A. Roling, “The Significance of the Laws of War” in A. Cassese ed., *Current Problems of International Law: Essays on U.N. Law and on the Law of Armed Conflict* (Milano: Dott. A. Giuffrè Editore, 1975) at 142.

¹⁵ See, e.g., Christopher Greenwood, “The Law of Weaponry at the Start of the New Millennium” in L. C. Green ed., *The Law of Armed Conflict: Into the Next Millennium* (Newport, Rhode Island: Naval War College, 1998). Greenwood outlines general principles of the law of weaponry (unnecessary suffering, discrimination, prohibition of perfidy, environmental protection).

¹⁶ Greenwood explains that the “[p]rinciple of proportionality ... involves a balancing of the military advantages to be gained from an attack upon a military target against expected civilian losses and damage.” Greenwood, “The Law of Weaponry at the Start of the New Millennium” at 201.

civilians, of those unable to inflict damage on opposing forces, has, in itself, become regarded as unnecessary. Together, the prohibition against the infliction of unnecessary suffering and the principle of discrimination point to the modern recognition “[t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”¹⁷ Writ even larger, the idea of unnecessary suffering brings the laws of war back to the idea of ‘humanitarian law’ *tout court* and to modern humanitarianism generally, the essence of which is the relief, reduction, and elimination of all (unnecessary) suffering – in and out of war. Whereas men of other epochs may have espoused principles akin to these, it belongs to modern man to have articulated them and to have identified ‘humanity’ as their ultimate ground.

The centrality of modern humanitarianism to contemporary laws of war can be seen in yet another way. At least since their nineteenth century codification, modern laws of war have been widely regarded as a delicate attempt to balance the requirements of humanity or civilization with those of military necessity.¹⁸ The question of how one can ‘balance’ anything with necessity has not been sufficiently asked. Thus, some commentators have eschewed the idea of a balancing of humanity and military necessity and have understood humanity and military necessity as merely expressions of the same thought or requirement. After all, only ‘unnecessary’ pain (pain inflicted in the pursuit of a goal that is not militarily necessary *or* pain that is inflicted in excess of what would have been necessary to pursue a proper military goal) is

¹⁷ Preamble to 1868 St-Petersburg Declaration reprinted in Adam Roberts and Richard Guelff, eds. *Documents on the Laws of War* (Oxford, Oxford University Press, 2000) at 53.

¹⁸ For example, the 1868 St. Petersburg Declaration speaks of the necessities of war and the laws of humanity. *Ibid.*

regarded as inhumane.¹⁹ Some commentators have argued that military necessity is actually a “misnomer” and does not point to necessities in any technical sense.²⁰

To begin to distinguish ‘necessity’ from ‘military necessity’ is to begin to leave the laws of war behind or to see ‘war’ as merely one domain of the application of the ‘unnecessary suffering principle’ and of a more general ‘humanitarian law.’ Furthermore, when military necessity is left behind the door opens to stricter prohibitions regarding specific courses of action. Indeed, the idea that ‘humanity’ can be a source of absolute restrictions rather than of imperatives to be balanced with military purposes or requirements has already found its way into the laws of war. The principle of discrimination is itself thought of as the source of an absolute prohibition and the thrust of much modern humanitarian law is to replace balancing requirements with absolute prohibitions or requirements.

Crimes against humanity are the paradigmatic violations of the contemporary laws of war. A crime against humanity involves the simultaneous violation of two of humanitarian law’s foundational principles. On the one hand, crimes against humanity violate the principle of discrimination and involve an attack on a civilian population. On the other hand, the specific acts committed in the context of this attack and considered to be crimes against humanity are all grasped as being essentially ‘inhumane.’ As opposed to ‘crimes against humanity,’ ‘war crimes’

¹⁹ Louise Doswald-Beck, “The Civilian in Crossfire” (1987) 24 *Journal of Peace Research* 251 at 252 asserts that the concept of military necessity and that of humanity are the same.

²⁰ Thus, Schwarzenberger asserts that military necessity is a misnomer and that it means in fact “freedom from legal restraints.” According to him, “the necessities of war or any of their synonyms are nothing more, nor less, than the assertion of wartime sovereignty.” Georg Schwarzenberger, “Military Necessity: A Misnomer” *Mélanges Sefériadès* (Athens: 1961) at 13. In this manner, he brings the idea of military necessity back to that of *raison d’état*. As he says at 20: “If the necessities of war were a particular type of necessity in the technical sense, this constant give and

need not be committed against civilians and, though war crimes are practically always grasped as ‘inhumane,’ they are not always so described in positive law.

However, crimes against humanity are not merely the focal point through which the universe of the contemporary laws of war is best captured and brought to visibility. In addition, they mark the point of dissolution of the laws of war – the point at which humanitarian law is brought to address violence and suffering as such regardless of whether there is or is not a war or armed conflict. In positive law, crimes against humanity require only an ‘attack’ and not a war, or even an armed conflict. Further, the phrase ‘crimes against humanity’ is now commonly stretched – albeit not yet in positive law - to refer to ‘mass violations of human rights’ that need not involve even an ‘attack.’ ‘Famine crimes’²¹ may be the next ‘crimes against humanity.’

The remainder of this essay charts the transformation of the laws of war into ‘humanitarian law.’ The aim here is not to provide a comprehensive and historical introduction to the laws of war but, rather, to highlight some aspects of that history that point to the articulation of humanity as the ‘new’ principle or ground of limitation. Though the actual change in name took place only in the late twentieth century, we have seen how the identification of ‘humanity’ as the ground of all progress in the laws of war had already taken place in the latter half of the nineteenth century. The protagonists of a law of humanity in the nineteenth century envisaged their law of humanity as the scientific and juridical successor to the natural law of the late Scholastics and Grotius.

take in the relations between the standard of civilization and the necessities of war would be hard to explain. If, however, the necessities of war are recognized as a synonym of sovereignty at large, the mystery vanishes.”

²¹ See, e.g., A de Waal, *Famine Crimes: Politics and the Disaster Relief Industry In Africa* (Bloomington, Indiana: Indiana University Press, 1997).

And, indeed, it is to the late Scholastics and to Grotius that one must look to trace the transformation of charity into humanity.

Scholars such as Haggenmacher and Johnson point to this connection between modern humanitarian law and the late Scholastics – though Haggenmacher, in particular, is very careful not to cast Grotius in a modern light. Nevertheless, Haggenmacher asserts that the concept of unilateral, punitive wars in the ‘just war tradition’ (found in the late Scholastics and in Grotius) served to put ‘brakes’ on the infliction of violence by way of the principle of proportionality.²² Haggenmacher locates Grotius within the medieval context of the *ius armorum*, or law of arms, and not within the modern context of an international law of war.²³ Haggenmacher further refuses to follow Lauterpacht in apprehending Grotius as, principally, a ‘humanizer’ of the laws of war.²⁴ Nevertheless, Haggenmacher still sees the germ of modern humanitarian law in the *temperamenta*, the exhortations to moderation, of the just war tradition. According to Haggenmacher, these *temperamenta* are tied to the re-emergence of Cicero’s *humanitas* in the late Scholastics and later in Grotius where *humanitas* was placed in conjunction with *caritas* and *pietas*.²⁵ Along the same lines, Johnson points to “the latent influence of charity in the just war tradition” as one entry point “into international law of the concept of a humanitarian law.”²⁶

²² Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses universitaires de France, 1983) at 599.

²³ *Ibid.* at 604.

²⁴ *Ibid.* at 599-600. Haggenmacher is also unwilling to describe the work of Grotius in terms of the modern juxtaposition of humanity and military necessity.

²⁵ *Ibid.* at 602.

²⁶ “It is also possible to trace [the concept of a humanitarian law] to the latent influence of charity in the just war tradition.” James Turner Johnson, *Ideology, Reason, and the Limitation of War. Religious and Secular Concepts 1200-1740* (Princeton, New Jersey: Princeton University Press, 1975) at 262 footnote 1.

Section B, then, describes the displacement of charity by humanity, or rather, the transformation of charity into humanity. Section B concludes with the identity of humanity and compassion in Rousseau.

To grasp 'humanity' as compassion, or suffering-with, raises the question of the 'ethical status' of the sensible experience of pain. 'Civilization' was a central juridical category in the work of the nineteenth century protagonists of a 'law of humanity.' More than a juridical category, however, 'civilization' was a manner of grasping (modern) man's way of being in the world. As captured in the work of such nineteenth century figures as Nietzsche and J.S. Mill, the great sensitivity of civilized individuals to the experience, and even the sight, of pain was central to the nineteenth century idea of 'civilization.' Though Rousseau does not celebrate 'civilization,' pain occupies an equally important place in his work. Thus, the avoidance of pain as constitutive of human ethical comportment is inextricably tied to the emergence of a 'humanitarian law' – regardless of whether this 'humanitarian law' emerges out of civilization or is tied to some kind of recovery of 'natural man.' The point here is to identify the conditions of the possibility of a 'humanitarian' law and not, for example, to celebrate pain. Together, then, sections B and C begin to show how the rise of modern humanitarianism involves this twin transformation of charity and pain.

Section D describes the late nineteenth century context surrounding the birth of the modern laws of war and emphasizes the civilizing and humanizing mission of these laws. It begins by describing the centrality of 'humanity' in Rousseau's thought and in explicating his assertion that organized, political violence does not belong to man *qua* man. It then traces the categories of

‘humanity’ and ‘civilization’ in the emergence of both the Geneva law and the Hague law. Section E moves to the late twentieth century context when the laws of war were actually re-named ‘humanitarian law.’ In an era of de-colonization, ‘humanity’ detached itself from ‘civilization’ as principal ground of the laws of war. This time saw a conceptual merger of Geneva and Hague law into one body of ‘humanitarian law.’

B. From Charity to Humanity

In her study on *Caritas* in early Christianity, H el ene P etr e explains that Roman *humanitas* could have become Christian *caritas* but did not. Already in Cicero, *humanitas* designated goodness beyond justice and, in Seneca, one could find the idea that “this name of man, *homo*, suffices to ground all duties, that of beneficence like that of strict justice, and that no one is deprived, not even the slave, from the right to receive a benefit.”²⁷ Nevertheless, “though both *humanitas* and *caritas* pointed to beneficence, *caritas* did not point to the modern humanitarian ideal²⁸: in *caritas* the doing well was done out of love of God whereas in *humanitas* it was done out of love of man.”²⁹ P etr e writes, “Moli ere’s Don Juan, libertine, atheist, will give alms ‘for the love of humanity’: it is for the love of God that a Christian rescues misery. However, the word *humanitas* has always designated rather the first form of beneficence than the second.”³⁰

Whereas *humanitas* gave way to *caritas* under the sway of Christendom, in modern times *caritas*

²⁷ H el ene P etr e, *Caritas:  tude sur le vocabulaire latin de la charit e chr tienne* (Louvain: Universit  catholique, 1948) at 205.

²⁸ *Ibid.* at 207.

²⁹ *Ibid.* at 214. At 219: “...*humanitas* n’est jamais devenu tout   fait chr tien.”

³⁰ *Ibid.* at 220-221.

collapses into *humanitas*. Within this transformation of *caritas* into *humanitas*, it becomes possible to grasp the laws of war as ‘humanitarian law.’

Various scholars have described the origins of the modern laws of war in the transformation of medieval chivalry into norms of discipline for professional soldiers.³¹ The Christian and chivalric ideas of charity and mercy appear as cornerstones of the medieval laws of war and as the antecedents of civilization and humanity in the modern laws of war.³² This section outlines the transformation of charity in Aquinas to humanity in Rousseau by way of Grotius and Pufendorf. For the most part it does not concern the substance of the laws of war, but rather the transformation of their ground. This section does not aim, among other things, to provide an account of all that *caritas* entailed with respect to laws of war.

As John Finnis notes, the Catholic natural law tradition’s “classic treatments of war are found in the treatises on *caritas*, precisely on love of neighbor.”³³ Much more than love of neighbor, however, charity is love of God. In Aquinas, charity appears as a property of the soul, uniting the soul with God, the “author of charity.”³⁴ With faith and hope, charity is one of the theological virtues. Moreover, charity is the most excellent of the virtues and the very form of

³¹ See, e.g., James Turner Johnson, *Just War Tradition and the Restraint of War. A Moral and Historical Inquiry* (Princeton, New Jersey: Princeton University Press, 1981) at 179, 295.

³² *Ibid.* at 6-10, 93. See also Roling, "The Significance of the Laws of War" at 140-141.

³³ John Finnis, "The Ethics of War and Peace in the Catholic Natural Law Tradition" in T. Nardin ed., *The Ethics of War and Peace. Religious and Secular Perspectives* (Princeton: Princeton University Press, 1996) at 17.

³⁴ Thomas Aquinas, *Summa Theologica* (London: Burns Oates & Washbourne Ltd., 1927) Part II, Second Part, Question 23, Second Article, Reply Obj. 3.

virtue since it “directs the acts of all other virtues to the last end,”³⁵ i.e. to its own end, God.

Charity is parallel to justice: just as justice is a general virtue directing man toward the common good (and thus all acts of virtue pertain to justice, justice being chief of the moral virtues), charity infuses all the other virtues and directs man towards the ultimate good, God. Without charity, no true virtue is possible.

War, being contrary to peace and to divine Precept, would then seem to be contrary to charity.

But Aquinas, following Augustine, does not assert the inherent sinfulness of war. Rather, he defends the possibility of a just war and articulates its conditions.³⁶ The rectitude of intention necessary for a just war involves aiming for peace. Following Augustine, Aquinas shows that such things as lusting for power or having the passion for inflicting harm are not permitted in a just war.³⁷ Nevertheless, Aquinas has very little to say about rules governing how wars ought to be waged, i.e. about what has come to be known as the *jus in bello*.³⁸ However, he recognizes that human law can be divided “according to the different kinds of men who work in a special way for the common good: e.g. priests, by praying to God for the people; princes, by governing the people; soldiers, by fighting for the safety of the people. Wherefore certain special kinds of law are adapted to these men.”³⁹

³⁵ *Ibid.* Part II, Second Part, Question 23, Eighth Article, Answer.

³⁶ These conditions are: that the war be declared by a public authority, that it be declared on account of a just cause, i.e. a fault on the other side, and that “the belligerents should have a right intention.” *Ibid.* Part II, Second Part, Question 40, First Article, Answer.

³⁷ *Ibid.*

³⁸ Cole argues that Aquinas did not articulate rules because, according to a virtue-centered account, what is right to do varies with the circumstances and with local custom. Darrell Cole, "Thomas Aquinas on Virtuous Warfare" (1999) 27 *Journal of Religious Ethics* 57.

³⁹ Aquinas, *Summa Theologica* Part II, First Part, Question 95, Fourth Article, Answer.

In the late Middle Ages, the special law for soldiers was the *jus militare* or *jus armorium* in which soldiering was regarded as “the Christian vocation of a noble class.”⁴⁰ Together with honour, mercy played a central role in chivalry. Theodor Meron refers to mercy “as a secular counterpart and reflection of the Christian concept of charity or *caritas*.”⁴¹ He writes:

In addition to frequent references to mercy, Shakespeare’s plays are replete with references to honour, a concept central to the enforcement of chivalric rules in the Middle Ages. Honour and mercy, combined, formed potent forces for civilized behaviour in times of war. The medieval concept of mercy on which the dramatist drew evolved into the concept of obligations of humanity in the modern law of war. What, after all, are obligations of humanity if not legally binding progeny of mercy?⁴²

Along similar lines, Johnson describes a fourteenth century synthesis of canon law and chivalry articulated in the work of such individuals as Bonet. However, he believes that in canon law, non-combatants were protected as of right whereas their protection in chivalry was due to *noblesse oblige*.⁴³ To moderns, the ‘condescension’ of this kind of mercy, the way in which protection is granted as a gift from superiors to inferiors is both foreign and unpalatable. As Meron’s quote makes clear, much of the thrust of humanitarian law is precisely to turn ‘non-binding,’ ‘moral,’ or ‘imperfect’ duties into legally binding or perfect duties owed by *man* to *man* and not by individuals of one status to individuals of another.

⁴⁰ M.H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge & Kegan Paul, 1965) at 246.

⁴¹ Theodor Meron, *Henry's Wars and Shakespeare's Laws. Perspectives on the Law of War in the Late Middle Ages* (Oxford: Oxford University Press, 1993) at 78. See also Theodor Meron, *Bloody Constraint. War and Chivalry in Shakespeare* (Oxford: Oxford University Press, 1998) at 132 and 203.

⁴² Meron, *Henry's Wars and Shakespeare's Laws. Perspectives on the Law of War in the Late Middle Ages* at 216.

⁴³ Johnson, *Just War Tradition and the Restraint of War. A Moral and Historical Inquiry* at 139. (See also Johnson, *Ideology, Reason, and the Limitation of War. Religious and Secular Concepts 1200-1740* at 64, 70.) Nevertheless, mercy appears in Aquinas as one of the interior acts of charity whereby one pities another on account of some defect of the other. Aquinas, *Summa Theologica* Part II, Second Part, Question 30, Article 2.

In time, charity and chivalry declined as grounds of rightful conduct in war. As Keen explains, by the end of the Hundred Years War, "...the open profiteering of professional soldiers had debased the old principle, that spoils of war were the equitable reward of the man who risked his life in a just cause."⁴⁴ Keen further notes that "[t]he idea of chivalry, of a united order of Christian soldiers pledged to the armed defence of justice, was a legacy of the age of the crusades; it had little significance in the contemporary world of emergent nation states."⁴⁵ The public law of Europe was born at the time when the Reformation unleashed violent wars of religion. Then began a striving to find a non-religious ground for the regulation of war. Charity began to yield to humanity as a 'general society of humankind' came to be articulated.

During the Thirty Years war, Grotius wrote the Law of War and Peace. Among other things, he set out to refute the belief that laws did not obtain in war. Though much of the book consists of an account of the state of the law at the time, Grotius also preached various forms of 'moderation' in warfare (the *temperamenta* of the 'just war tradition'). Under existing law, Grotius noted, the license to injure was virtually unlimited, extending beyond the enemy bearing arms:

...this right of doing what is permissible has a wide application. In the first place it extends not only to those who actually bear arms, or are subjects of him that stirs up the war, but in addition to all persons who are in the enemy's territory ... The reason is that injury may be feared from such persons also...⁴⁶

Nevertheless, Grotius explained that:

⁴⁴ Keen, *The Laws of War in the Late Middle Ages* at 246.

⁴⁵ *Ibid.*

⁴⁶ Hugo Grotius, *The Law of War and Peace* (Oxford: Clarendon Press, 1925) at III.IV.VI.

The canons, teachers of humanity, established these practices for the imitation of all Christians, as those who ought to exercise and who profess a greater degree of humaneness than others; and so they seek to protect from the perils of war not merely the farmers, but also the animals which they use in cultivation and the seeds which they keep for sowing.⁴⁷

Thus Grotius anticipated the modern protection of civilians and of civilian objects.

Two points must be underlined. First, Grotius distinguishes what is required by law or strict justice from what is required by charity or humanity.⁴⁸ Grotius divides rights into perfect and imperfect. The kind of justice that belongs to imperfect rights “is associated with those virtues which have as their purpose to do good to others, as generosity, compassion, and foresight in matters of government...”⁴⁹ The duties required by perfect rights are enforceable whereas those required by imperfect rights, encompassed by the ‘law of love,’ are not. Nevertheless, contrary to modern man’s way of grasping such matters, the difference in enforceability does not mean that perfect rights are more important or of a higher order than imperfect rights.⁵⁰ Second, what Grotius expects of Christians is that they display a greater amount of something that is accessible to all human beings: humanity. Just as Grotius sought to extend duties of charity or humanity to recipients beyond the bounds of Christianity, so too did he seek to impose duties of charity or humanity onto human beings and not simply Christians. Indeed, in the *Law of War and Peace*, there are many more references to humanity than to charity. For example, Grotius appeals to “humanity” with respect to the sparing of sacred buildings and of goods, to the treatment of

⁴⁷ *Ibid.* at III.XII.IV.4.

⁴⁸ *Ibid.* at, e.g., III.XIII.IV.

⁴⁹ *Ibid.* at I.I.VIII.2.

⁵⁰ See, e.g., J.B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge: Cambridge University Press, 1998) at 80.

slaves, to the setting of ransom and more.⁵¹ The following quote captures both of the above points:

Even when justice, strictly speaking, is not violated, one may sin against the duty which consists of loving others, especially the duty prescribed by the Christian law. A case of this character might arise if it should be apparent that plundering by such persons [those serving in the army at their own expense] would not be especially harmful to the enemy as a whole, nor to the king, nor to those who are in fact guilty, but would harm innocent persons, and in fact to such an extent that it would plunge them into the greatest misfortunes, into which it would be the negation of mercy to cast those who are privately indebted to us. Now if to this is added the consideration that such plundering will have no notable effect in ending the war, or in weakening the public strength of the enemy, then gain acquired solely in consequence of the unhappy condition of the times ought to be considered unworthy of a just man, and especially of a Christian.⁵²

Thus, though charity is still distinguished from humanity it begins to collapse into it as what is expected of good men as such, uninfused by the grace of God. Echoing Aquinas with respect to the requisite right intention in the use of force, Grotius writes

...all engagements, which are of no use for obtaining a right or putting an end to a war, but have as their purpose a mere display of strength, that is, as the Greeks say, 'an exhibition of strength rather than a combat against the enemy', are incompatible both with the duty of a Christian and with humanity itself. Consequently rulers, who must render account of the useless shedding of blood to Him in Whose name they bear the sword, should strictly forbid such combats.⁵³

Various commentators have noted the role of Grotius in the decline and transformation of Christian charity. Schneewind, situating Grotius within a history of moral philosophy, explains:

It is, I think, quite significant that what Grotius contrasts to justice is the virtue of love. The contrast is not, as it is in St. Thomas, with the traditional executive virtues – prudence, temperance, courage. Grotius has little to say about these virtues, but he makes a definite place for the virtue of love as a wholly natural

⁵¹ Grotius, *The Law of War and Peace* at III.XII-XIV.

⁵² *Ibid.* at III.XVIII.IV.

⁵³ *Ibid.* at III.XI.XIX.

way in which we are related to others. The law of love cannot yield the precise rights which characterize the realm of repletive justice. But love is to be counted on in ordinary human transactions. It is not a theological virtue; it is not treated as relating us first to God in friendship and only then to humans, and it is not dependent on grace, as it is in Aquinas. In treating Christian love in this naturalistic way, Grotius takes the first step towards transforming it into benevolence.⁵⁴

Johnson, situating Grotius within a history of the just war doctrine and of the limitation of war, argues in a similar vein:

First, it is notable that in spite of numerous parallels with his theologically oriented predecessors, especially Victoria, whom he in one place enthrones as a “Judicious Divine,” Grotius has effected a revolutionary change in the relation between nature and charity from that which they assumed. In spite of their energetic efforts to ground just war doctrine in natural law, both Victoria and Suarez remain bound by the Thomistic conception of charity, according to which charity is a higher morality in two senses: it embodies precepts that do not derive from the law of nature, and it conveys grace to do what these precepts require. In the Thomistic conception, natural law requires less than does the law of charity, for nature derives from grace and is less perfect than grace. But Grotius’ treatment of natural law and charity assumes an opposite relation. Nature becomes the fundamental reality; everything required of man is included in the natural. Charity is still grace, and it is still in a certain sense on a higher plane to act according to charity than to act according to nature. But for Grotius the higher morality provided by charity consists in a special sensitivity to the dictates of nature that only those possess who have charity. Victoria and Suarez find greatest support for their idea of charity in the position of Thomas Aquinas; Grotius finds support in a movement that in his lifetime was only beginning, and conceived Christianity to be the perfection of man’s natural religion...⁵⁵

Similarly, Lagrée writes that Grotius places an evangelical content (the primacy of charity with respect to the other virtues) within the Stoic form of universality (in which the love of self and neighbour gradually extends to all human beings).⁵⁶ She notes Pascal’s criticism of ‘natural

⁵⁴ J.B. Schneewind, “Philosophical Ideas of Charity: Some Historical Reflections” in J.B. Schneewind, ed. *Giving: Western Ideas of Philanthropy* (Bloomington: Indiana University Press, 1996) 54, at 58.

⁵⁵ Johnson, *Ideology, Reason, and the Limitation of War. Religious and Secular Concepts 1200-1740* at 228-229. See also James Turner Johnson, “Grotius’ Use of History and Charity in the modern Transformation of the Just War Idea” (1983) 4 *Grotiana* 21 at 23.

⁵⁶ Jacqueline Lagrée, “Grotius, Stoïcisme et Religion Naturelle” (1989) 10 *Grotiana* 80 at 88.

religion' for "naturalizing Christianity to the point of making it unrecognizable." Grotius, she explains, though he defended the authenticity of the Evangelical accounts of the life of Christ, did not insist on the divinity of Christ or on Christ as *the* way to God.⁵⁷ In this way, Grotius paved the way for the reduction of Christianity to man's natural religion.

Though he differs from Grotius in many respects, these matters appear in much the same way in Pufendorf. Pufendorf recognizes the great latitude granted belligerents in the laws of war⁵⁸ but follows Grotius in calling for a higher degree of humanity than that provided by the law of nations.⁵⁹ For example, he writes:

As for force used in war against an enemy and his property, one must distinguish between what an enemy may suffer without wrong and what we ourselves may inflict without loss of humanity. When a man has declared himself my enemy, he has by that fact made known his intention to inflict the last degree of suffering on me, and by that same fact he grants me, so far as he can, an unlimited right against himself. Humanity however requires that so far as the momentum of warfare permits, we should inflict no more suffering on an enemy than defence or vindication of our right and its future assurance requires.⁶⁰

With Pufendorf, *all* of the limits to the infliction of violence reside in the law of love or humanity. As with Grotius, though, charity and strict justice are distinguished:

The law of humanity or charity, and the agreements of men, mutually supplement each other by way of their duties and guaranties, in that what is not or cannot be

⁵⁷ *Ibid.* at 92-93.

⁵⁸ Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (Cambridge: Cambridge University Press, 1991) at 171: "The extent of war is such that, however far one may have gone beyond the bounds of humanity in slaughter or in wasting and plundering property, the opinion of nations does not hold one in infamy nor as deserving of being shunned by honest men. However, the more civilized nations condemn certain ways of inflicting harm on an enemy: for instance, the use of poison or bribing the citizens or soldiers of other rulers to assassinate them."

⁵⁹ *Ibid.* at 68-69 where Pufendorf outlines the difference between duties of humanity and duties rooted in promises.

⁶⁰ *Ibid.* at 169.

secured by charity is secured by agreements, while in cases where agreements are not possible, charity offers its services.⁶¹

Referring to the Pufendorf passage just quoted, Schneewind explains:

It is significant that Pufendorf uses the term “charity” here. He is following Grotius in transforming the theological virtue of charity into a secular virtue, detaching it from its Thomistic sense of friendship with God, and seeing its importance not in its role in personal salvation, but in its ability to improve social life. It is equally important that he does not say that love should infuse the other areas of the moral life. Perfect duties, or duties of justice, need not be carried out in a loving spirit. They are fully executed when a perfect right is respected, and the man who regularly carries out all his perfect duties is a just man even if he dislikes acting justly. What matters is the performance, not the spirit behind it.⁶²

Though they use the word ‘charity,’ both Grotius and Pufendorf begin to transform charity into the secular virtue of humanity. It is with the Scottish Enlightenment’s theory of moral sentiments and – more importantly for our purposes - with Rousseau, that the transformation of charity into humanity is completed and that modern humanitarianism becomes possible - and is able to remove Christianity from its position as the spring of laws. Humanity (or philanthropy) is then understood sentimentally and in a this-worldly fashion. Christianity is reduced to a perfection of man’s natural religion.

In Rousseau, humanity is grounded in pity. Rousseau understands pity as “an innate repugnancy to see one’s fellow [*semblable*] suffer.”⁶³ Humanity is pity writ large, pity extended to all human

⁶¹ Samuel Pufendorf, *The Law of Nature and Nations* (Oxford: Clarendon Press, 1934) at 380. As Schneewind points out, in Pufendorf’s understanding, one cannot assert that justice is of a higher order than charity. Schneewind explains that perfect rights tied to justice are those necessary for society to exist at all whereas imperfect rights are necessary for the “improved existence” of men. J.B. Schneewind, “Pufendorf’s Place in the History of Ethics” (1987) 72 *Synthese* 123 at 142.

⁶² Schneewind, “The Misfortunes of Virtue” at 50.

⁶³ Jean-Jacques Rousseau, *Discours sur l’origine et les fondements de l’inégalité parmi les hommes* (Paris: Gallimard, 1969) at 84.

beings: “In effect, what are generosity, clemency, humanity, if not pity applied to the poor, the guilty, or the human species in general?”⁶⁴ Indeed, Rousseau points to commiseration, to sympathy as the “first sentiment of Humanity.”⁶⁵ Pity (or humanity) even replaces the golden rule.⁶⁶ Conscience itself is grounded in sentiment.⁶⁷ Theologically, this grounding of morality in nature constitutes a denial of original sin and an assertion of man’s “natural goodness or innocence”: “The fundamental principle of all morals on which I have reasoned in all my writing,” asserts Rousseau, “is that man is a being that is naturally good.”⁶⁸

Clifford Orwin points to Rousseau as the thinker who most “promoted the rise of compassion in the modern era,” as a natural and sentimental substitute for Christian charity:

Although many factors have promoted the rise of compassion in the modern era, that thinker whose contribution was greatest was Rousseau. He presided over the dawn of political compassion: we might almost say he staged it. Christian charity long antedates him, but charity is not compassion, however we may tend to confuse them. Charity is divine in origin and otherworldly in intention: to love one’s fellow as Christ loves him is to strive for the salvation of his soul. Compassion by contrast is purely human (humanity is almost a synonym for it) and is altogether this-worldly. Whereas charity requires that the Christian rise above his sinful human nature (invoking the assistance of divine grace), compassion is a merely natural sentiment, which attests to the goodness or innocence of our nature. As such it is from the Christian perspective self-indulgent: a form of pride or even idolatry.⁶⁹

⁶⁴ *Ibid.* at 85.

⁶⁵ *Ibid.* at 86.

⁶⁶ Instead of neighborly love, pity (or humanity) commands us to pursue our own good while doing the least harm to others. Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* at 86. In *Emile*, pity gives a new ground to the Golden Rule. Jean-Jacques Rousseau, *Émile ou De l'éducation* (Paris: Gallimard, 1969).

⁶⁷ See, e.g., Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* at 476-477.

⁶⁸ “Jean-Jacques Rousseau citoyen de Genève à Christophe de Beaumont, archevêque de Paris” in Jean-Jacques Rousseau, *Oeuvres complètes* (Paris: Gallimard, 1959-1969) at 935-936 as found and translated in Arthur M. Melzer, *The Natural Goodness of Man* (Chicago: University of Chicago Press, 1990) at 15.

⁶⁹ Clifford Orwin, “Rousseau and the Discovery of Political Compassion” in N. Tarcov ed., *The Legacy of Rousseau* (Chicago: University of Chicago Press, 1997) at 296, 296.

Though modern man often regards justice as the most important virtue, humanity or compassion emerges as a strong challenger. Indeed, the Thomist thesis of the incompleteness of justice without charity is paralleled in the modern attempt to complete and, sometimes, indeed, ground justice in humanity. The idea of a humanitarian law is the idea of a law that, progressively but surely, makes all duties of humanity perfect, i.e. binding as matters of law and justice.

C. PAIN AND CIVILIZATION

At one and the same time, the language of ‘humanity’ points to a natural ground of ethics and to an idea or standard of civilization in which civilized man is distinguished from the savage, among other things, precisely by his attitudes towards pain. Humanitarianism, despite its ‘natural’ and ‘spontaneous’ character, emerges as part a broader civilizing mission, a civilizing mission Nietzsche, and even others such as J.S. Mill, understood, at least in part, as a threat to man’s humanity. It is within this broader civilizing mission that the laws of war were codified in the late nineteenth century. Though honour and other principles continued to be understood as constitutive of the laws of war, humanity emerged as the ultimate ground and very *raison d’être* of the laws of war. Before turning to this late nineteenth-century ‘re-birth’ of the laws of war, then, it is necessary to consider the ‘ethical status’ of pain in both Rousseau and in the nineteenth century idea of civilization.

In Rousseau, both natural man and social man experience compassion – but each in his own way. Rousseau describes sympathy as “an obscure but vivid [*vif*] sentiment in savage man but feeble

in civilized man [*homme civil*].”⁷⁰ Social man shares natural man’s abhorrence at the suffering of others, but he is less able to identify with others so as to feel their pain in himself. Thus, modern man can cover his ears when someone is being killed below outside his window.⁷¹ The abhorrence of pain is naturally prior to any giving of reasons for pain. But modern man must fight his *amour-propre* - and his reason - if he is to respond appropriately to the pain of others. Reason itself has become an obstacle to the relief of suffering, and a (partial) recovery of natural man emerges as a possible aim of civilization.⁷² The ‘return’ to natural man is also a ‘return’ to sentiment as the ground of right. It signifies a reduction of the good life to life itself, in the words of Aristotle, of *eu zen* to *zen*. Thus, in *Émile*, Rousseau can assert that “The happiness [*bonheur*] of natural man is as simple as his life: it consists in not suffering.”⁷³

This senselessness of pain to modern man also appears in the nineteenth century idea of ‘civilization,’ so central to nineteenth century international law and to the rise of a *droit humain*. Increased sensitivity to pain emerges as an attribute of modern man brought about by the “civilizing process.”⁷⁴ J.S. Mill, in his essay entitled “Civilization,” remarks that:

One of the effects of civilization (not to say one of the ingredients in it) is, that the spectacle, and even the very idea, of pain, is kept more and more out of the sight of those classes who enjoy in their fullness the benefits of civilization.... All those necessary portions of the business of society which oblige any person to be the

⁷⁰ Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* at 85.

⁷¹ *Ibid.* at 86.

⁷² But note the following words of Rousseau: “Celui qui dans l’ordre civil veut conserver la primauté des sentimens de la nature, ne sait ce qu’il veut. Toujours en contradiction avec lui-même, toujours flottant entre ses penchans et ses devoirs il ne sera jamais ni homme ni citoyen; il ne sera bon ni pour lui ni pour les autres. Ce sera un de ces hommes de nos jours; un François, un Anglois, un Bourgeois; ce ne sera rien.” Rousseau, *Émile* at 85-86.

⁷³ Rousseau, *Émile* at 280. At 139, Rousseau writes that “Tout sentiment de peine est inséparable du désir de s’en livrer.”

⁷⁴ See generally Norbert Elias, *The Civilizing Process* (New York: Pantheon Books, 1982).

immediate agent or ocular witness of the infliction of pain, are delegated by common consent to peculiar and narrow classes: to the judge, the soldier, the surgeon, the butcher, and the executioner.⁷⁵

J.S. Mill points to this, in part, to draw attention to the lack of heroism or manliness of modern men who, though they may have learnt to endure pain are no longer able to seek it out when it is right and necessary to do so.⁷⁶ But the general point here is that modern man seeks to banish pain from his sight, from his thoughts, and from his experience.

Nietzsche best captures the utter novelty of modern man's accrued sensitivity to pain, and points to its roots in pain's newfound unintelligibility:

What properly arouses outrage against suffering is not suffering as such but the senselessness of suffering: but neither for the Christian, who has interpreted a whole mysterious machinery of salvation into suffering, nor for the naïve man of more ancient times, who understood all suffering in relation to the spectator of it or the causer of it, was there any such thing as *senseless* suffering.⁷⁷

In pointing to pain's senselessness, Nietzsche objects to the belief that suffering itself is something like *the* objection to life. Indeed, “[m]an, the bravest of animals and the one most accustomed to suffering, does *not* repudiate suffering as such; he *desires* it, he even seeks it out, provided he is shown a *sense* for it, a purpose of *suffering*.”⁷⁸ Thus, rather than point to a

⁷⁵ John Stuart Mill, "Civilization" in J. B. Schneewind ed., *Mill's Essays on Literature and Society* (New York: Collier Books, 1965) at 162, 163. J.S. Mill's comments point to Spierenburg's thesis about the "spectacle of suffering." Pieter Spierenburg, *The Spectacle of Suffering. Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience* (Cambridge: Cambridge University Press, 1984).

⁷⁶ Mill, "Civilization" at 163.

⁷⁷ Nietzsche, *On the Genealogy of Morals* at 68. I have replaced "outrage" for "indignation" to address the German "empört." At 162, of man "apart from the ascetic ideal," Nietzsche writes "...but his problem was *not* suffering itself, but there was no answer to the crying question, "why do I suffer?"

⁷⁸ *Ibid.* at 162. I have replaced 'meaning' with 'sense' in the translation. See also Friedrich Wilhelm Nietzsche, *Ecce Homo* (New York: Random House, 1967) at 329: "The senselessness of suffering, *not* suffering itself, was the curse that lay over mankind so far..." I have replaced 'meaninglessness' with 'senselessness' in the translation of "Sinnlosigkeit."

recovery of man's humanity, natural – or modern – man's insensitivity to pain might point to a denial of man's humanity proper.

When suffering as such becomes senseless, all suffering is *prima facie* an evil to be abolished. Thus, the unintelligibility of suffering to modern man elevates pain to the rank of the guiding principle of right action. As Shoemaker explains in the context of a discussion of punishment: "No longer does pain offer otherworldly promise. Further, pain is no longer a natural feature of striving prompted by a desire for the good, but comes to be seen as that which itself prompts human action. Now pain is to be measured, regulated, and, where no longer a necessity, negated."⁷⁹ When sympathy, suffering-with, becomes the ground of ethics, modern humanitarianism has become sovereign. The point here is not to celebrate pain and war. Nor is it to discredit sympathy as one mode of being with-others. Rather, it is to identify the way in which humanity as the ground of the laws of war privileges pain and passivity, signifying that sympathy has established itself as *the* mode of being with-others.

D. LATE NINETEENTH-CENTURY CODIFICATION OF THE MODERN LAWS OF WAR

The modern laws of war were codified during the last period of the public law of Europe.

Schmitt rightly emphasizes that during this time, such key words as 'humanity' and 'civilization' referred to *European* humanity and civilization. In this period, European humanity was thought

⁷⁹ Karl Shoemaker, "The Problem of Pain in Punishment: Historical Perspectives" in A. Sarat ed., *Pain, Death, and the Law* (Ann Arbor: University of Michigan Press, 2001) at 35. At 17-18, Shoemaker explains that in modern times, pain is understood as (i) a motive for human action, (ii) to be imposed externally by authority, (iii) as a necessary, though perhaps evil, means to achieve social ends. Earlier: (i) pain derived from relation of human soul to the good (ii) was primarily an internal strife of the soul rather than externally imposed, (iii) and was not necessarily an evil but a constituent element of the human condition,

to be civilized precisely because it was able to recognize the inherent rights of men *as men*, because it could see the man behind the enemy, behind the citizen of an opposing country – and because it attached significant ‘value’ to this ‘mere humanity.’ Barbarians and savages, by contrast, had not learnt to do this.

In a passage from the *Social Contract* that closely echoes his statements in *L'État de Guerre* and in his fragments on war, Rousseau writes:

War is then not a relation of man to man, but a relation of State to State, in which particulars are enemies only accidentally, not as men, nor even as citizens, but as soldiers... The end of war being the destruction of the enemy State, one has the right to kill its defenders so long as they have arms in hand; but as soon as they lay them down and give themselves up, ceasing to be enemies or instruments of the enemy, they once again become simply men, and one no longer has a right to their life.⁸⁰

Though Grotius, Vattel and others are often identified as providing much of the impulse underlying the modern laws of war, this statement of Rousseau’s is usually taken as best capturing the originating spirit of humanitarian law and the aspiration that non-combatants be spared the violence of war. Rousseau grasps the state and sovereign as moral beings existing only by virtue of a certain manner of the being-together of flesh and blood human beings. In principle, though probably rarely in practice, the state or sovereign could be defeated and destroyed without the wounding or killing of any human being.

The full sense and importance of Rousseau’s statement must be gleaned from his polemic against Hobbes. Against Hobbes, who claimed that war was a condition that belonged to man *as man*, Rousseau claimed that war was a condition that belonged only to man in a social state.

⁸⁰ Jean-Jacques Rousseau, *Du Contrat social* (Paris: Gallimard, 1964) at 179.

Rousseau's first title to his short *L'État de Guerre* was *Que l'état de guerre naît de l'état social*. Rousseau's actual beliefs regarding the possibility and desirability of recovering the attributes of natural man within social man are various, ambiguous and often difficult to decipher.⁸¹ Similarly ambiguous are his views regarding the possibility of perpetual peace as sketched out in plans such as that proposed by the Abbé de St-Pierre. Nevertheless, the key aspect of the above statement is the manner in which it dissociates war - organized political violence but not sporadic violence - from man *as* man.

To recognize the mere or sheer humanity of another, without the trappings of citizenry or soldiery, was to open the door to a humanization of war, i.e. to a limitation of violence or cessation of hostilities on the ground of 'humanity.' This recognition could also be taken as an invitation to experience civilized forms of one of these sentiments so integral to natural man: sympathy. The cultivation of humanity appears in the nineteenth century as practically identical to civilization. Whereas Rousseau may have believed that war emerged only in the social state of men, the men of the nineteenth century believed that as men had become more civilized, wars had become more limited and humane. Some of them also believed that the possibility of banishing war had arisen. In the nineteenth century, the dictates of humanity or civilization (the two being practically interchangeable) were supposed to mitigate or balance 'military necessity.'

The birth of the modern laws of war was precipitated by the work of Henri Dunant, a Swiss businessman. While on a business trip in Italy, Dunant arrived in Castiglione della Pieve on the

⁸¹ See *supra*, note 72.

same day in June of 1859 as the Battle of Solferino⁸² was being fought nearby. As an International Committee of the Red Cross booklet puts it: “When the town filled with casualties and the army medical services available at that point proved to be inadequate, it was wholly natural for Dunant to try to relieve the pain and suffering of the wounded.”⁸³ Marked by his experience, Dunant wrote and published “A Memory of Solferino,” an account of the battle and of its aftermath. Dunant ended his little book with a plea and proposal: “Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?”⁸⁴

Dunant wrote that “[I]eaving all questions of strategy and glory aside, this battle of Solferino was thus, in the view of any neutral and impartial person, really a European catastrophe.”⁸⁵ He seemed to accept the inevitability of war⁸⁶ and called for an investigation of his idea “both from the humane and Christian standpoint.”⁸⁷ “Is it not clear,” he asked “that in order to try and reach this noble goal, the first necessity is that the idea should be presented to the different branches of the great European family, and that it should secure the attention and the sympathy of all lofty souls, of all hearts which can be stirred by the sufferings of their fellow-men?” His proposed “committee would appeal to everybody who, for sincerely philanthropic motives, would

⁸² The International Committee of the Red Cross Museum website notes that “the battle in which 40 000 men were killed or wounded in a single day as the French and Piedmontese drove the Austrians out of the North of Italy” (<http://www.micr.ch/e/exhib/explore_battle_e.html>).

⁸³ Henry Dunant, *A Memory of Solferino* (Geneva: International Committee of the Red Cross, 1939) at 8.

⁸⁴ *Ibid.* at 115.

⁸⁵ *Ibid.* at 106.

⁸⁶ *Ibid.* at 116.

⁸⁷ *Ibid.*

undertake to devote himself for the time to this charitable work.”⁸⁸ Dunant even explained that “[s]pontaneous devotion of this kind” would not be that hard to find.⁸⁹ He cited some precedents including John Howard’s sanitary reform of prisons⁹⁰ and, most tellingly, Miss Florence Nightingale’s “passionate devotion to suffering humanity.”⁹¹ He explained that “[h]umanity and civilization call imperiously for such an organization as is here suggested.”⁹² Throughout these passages, one can see the dualisms of humanity (or philanthropy) and Christianity, and of humanity and civilization.

Dunant’s experience led to the creation of the *Comité international de secours aux militaires blessés* (the future International Committee of the Red Cross), to the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in the Field, and to Geneva law more generally. The Russian jurist Martens noted that the extension of protection to the wounded had been the object of bilateral treaties since the sixteenth century but that the merit of the Geneva Convention was its multilateral and prospectively obligatory character on all signatories.⁹³ The 1864 Geneva Convention provided for the neutrality and protection of medical personnel on the battlefield and introduced the famous symbol of the Red Cross. The humanization of war was

⁸⁸ *Ibid.* at 117.

⁸⁹ *Ibid.* at 118.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* at 120.

⁹² *Ibid.* at 126.

⁹³ F de Martens, *Traité de droit international* (Paris: Librairie Marescq Ainé, 1887) volume three at 239.

understood in the nineteenth century, at least by some, as the formal extension of this kind of Geneva protection to non-combatants.⁹⁴

Dunant's primary aim was not the direct regulation of hostilities but the establishment of a space for private and charitable action⁹⁵ - for a kind of salvation army comprised of private individuals who would respond to the suffering of other human beings. Though, in their early years, national Red Cross societies were largely integrated into their national militaries,⁹⁶ one of the greatest legacies of Dunant's proposal was the Red Cross and the centrality of this 'non-governmental organization' to the progressive elaboration and elucidation of a body of law binding on states. Because laws of humanity, including the laws of war, are thought to be rooted in the 'conscience of humanity,' the agreement of states is not grasped as their proper juridical foundation.

The other founding branch of the contemporary laws of war, the Hague law, was directly concerned with the regulation of hostilities. Though the birth of Geneva law is most responsible for the possibility of a 'humanitarian law,' Hague law too resonated with the language of humanity – and civilization. The paternity of the Hague law is usually ascribed to Francis Lieber, a Prussian immigrant to the United States who drafted a code on the law of war (and, in

⁹⁴ G Rolin-Jaequemyns, "Article on the Franco-Prussian war" (1872) 4 *Revue de droit international et de législation comparée* 481 at 522.

⁹⁵ The hallmark of Geneva law is the protection of victims of war by way of the identification of protected spaces. One commentator explains that the Geneva law aims firstly to protect the victim once affected by war: "the wounded, the shipwrecked, the prisoner of war or the civilian under the power of an adverse party." François Bugnion, "Droit de Genève et droit de La Haye" (2001) 83 *International Review of the Red Cross* 901 at 905. Most of the provisions of the 1949 Geneva Conventions focus on the protection of civilians in specific spaces: occupied territories, civilian medical establishments and internment or detainee camps.

addition, was the author of a manual of political ethics and of an important work on legal and political hermeneutics). In 1863, in the context of the American Civil War, Lieber's code was issued to the Union Army as General Orders No. 100 Instructions for the Government of Armies of the United States in the Field. Lieber's code has been described as the "first modern codification of the laws of war adopted by a state."⁹⁷ Though it was first applied in the context of a civil war, it was soon applied to international war as well.

Like Grotius, Pufendorf and others, Lieber's code acknowledges 'military necessity'⁹⁸ quite broadly by today's standards and regards all citizens on the other side as part of the enemy.⁹⁹ However, this great latitude is meant to be tempered by norms of "civilization" that spare the private unarmed person.¹⁰⁰ Thus, Lieber notes that "protection" is the exception with uncivilized people¹⁰¹ and explains that in "[i]n modern regular wars of the Europeans, and their descendants

⁹⁶ John F. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross* (Boulder, Colorado: Westview Press, 1996).

⁹⁷ James F. Childress, "Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought" (1976) 21 *American Journal of Jurisprudence* 34 at 36.

⁹⁸ Lieber's code (or "General Orders No. 100") is reproduced in Hartigan, *Lieber's Code and the Law of War* at 45-71. At 48, articles 14 and 15 define military necessity. Article 14 states: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." Article 15 states: "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance of means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deceptions as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in a public war do not cease on this account to be moral beings, responsible to one another and to God."

⁹⁹ See article 21. *Ibid* at 49.

¹⁰⁰ See articles 22 and 23. *Ibid*.

¹⁰¹ Article 24. *Ibid* at 49-50.

in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.”¹⁰²

Leading international jurists of the nineteenth century, such as Frederic de Martens and Bluntschli, hailed Lieber’s code as the first codification of the laws of war. Lieber’s code was the predecessor to European efforts to codify the laws of war such as the 1874 Brussels Conference (at which only European states were present),¹⁰³ and the 1880 manual put out by the Institute of International law.¹⁰⁴ As Schmitt points out, the European ambiance of the 1899 Hague Conference, where Lieber’s code was first translated into positive law, had dissipated by the time of the more international 1907 Hague Conference.¹⁰⁵ Both Lieber’s code and Dunant’s account of the battle of Solferino conceive the community of civilized states as including Europe, but not extending to all of humanity.¹⁰⁶ Both, in their own way, regard the principle of protection as the hallmark of civilized, i.e. European, warfare. For example, in the nineteenth century, the norms of civilized warfare excluded the use of barbarian or savage troops in wars fought between civilized European states. Thus, though the preambles to both the 1899 and 1907 Hague treaties make reference to serving the “interests of humanity” and the “needs” or

¹⁰² Article 25. *Ibid* at 50. See also article 68 (at 58) : “Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful.”

¹⁰³ G Rolin-Jaequemyns, "Article on the Brussels Conference" (1875) 7 *Revue de droit international et de législation comparée* 87 at 89-90.

¹⁰⁴ See, e.g., Elihu Root’s 1913 address as President of the American Society of International Law at the Society’s Seventh Annual Meeting. Elihu Root, "Francis Lieber" (1913) 7 *American Journal of International Law* 453 at 456-457.

¹⁰⁵ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003) at 231.

¹⁰⁶ Rolin-Jaequemyns, "Article on the Franco-Prussian war" at 521.

“requirements” of “civilization”¹⁰⁷ it is important to keep in mind the concrete, i.e. for the most part European, referent of ‘humanity’ and ‘civilization.’

Nevertheless, aside from their contribution to the codification and elaboration of positive law, it is precisely references to ‘humanity’ and ‘civilization’ that constitute *the* key contribution of the 1899 and 1907 Hague Treaties. Important parts of the preambles of the 1899 and 1907 Hague Treaties have become known as the ‘Martens clause’ after the name of their draftsman, the Russian jurist Martens. The 1899 version of the Martens clause reads as follows:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience...¹⁰⁸

Though it was originally drafted to address the situation of residents of occupied territories, the Martens clause has achieved a wider prominence in the laws of war and, already in 1899, pointed forward to the transformation of the laws of war into humanitarian law,¹⁰⁹ and of ‘war crimes’ into ‘crimes against humanity.’ Thus, in an account of the Franco-Prussian war predating the Martens clause, Rolin-Jacquemyns remarked that the “bombing of Paris, with or without

¹⁰⁷ The preamble to the 1899 Hague treaty regarding the laws of war on land makes reference to the “desire to serve ... the interest of humanity and the ever increasing requirements of civilization” while the 1907 Hague treaty makes reference to the “desire to serve ... the interests of humanity and the ever progressive needs of civilization.”

¹⁰⁸ The 1907 version reads as follows: “Until a more complete code of the laws of war is 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 rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

¹⁰⁹ “It can be argued ... that [the Martens clause] is the point of entry into international law of the concept of a humanitarian law.” Johnson, *Ideology, Reason, and the Limitation of War. Religious and Secular Concepts 1200-1740* at 262 footnote 1.

warning, has been represented as a crime against humanity [*lèse-humanité*] and a crime against civilization [*lèse-civilisation*].”¹¹⁰ The Martens clause captures the centrality of the principle of protection to the laws of war and, aside from usages among civilized states, names the laws of humanity and the requirements of the public conscience as its juridical source. In so doing, the Martens clause builds into the positive laws of war the necessity of their progressive development and humanization.

Moreover, the Martens clause soon began to find its way into positive law. After World War I, the Allied powers sought to try Wilhelm II for acts that provoked the war. In addition, the Allied powers discussed the possibility of trials for alleged “violations of the laws and customs of war and the laws of humanity.”¹¹¹ The Allied powers (in this instance the Americans) emphasized, among other things, the “inhumanity of submarine warfare” as the U-boat warfare waged by the Germans exceeded “all restraints of law or of humanity.”¹¹² In its report presented to the Preliminary Peace Conference, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties proposed the trial of war criminals before a tribunal and recommended that “[t]he law to be applied by the tribunal ... be “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of

¹¹⁰ G Rolin-Jaequemyns, "Article on the Franco-Prussian war" (1871) 3 *Revue de droit international et de législation comparée* 288 at 302.

¹¹¹ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, "Report Presented to the Preliminary Peace Conference" (1920) 14 *American Journal of International Law* 95 at 118.

¹¹² As found in Gary Jonathan Bass, *Stay the Hand of Vengeance. The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000) at 97.

humanity and from the dictates of public conscience.”¹¹³ Along these lines, Bass mentions that “...Ernest Pollock, the British solicitor general, said while preparing lists of German war crimes suspects in 1919: “The test that had been applied by himself and his French colleagues was: ‘Do these charges shock any plain man’s conscience?’”¹¹⁴

However, in their memorandum of reservations to the Report, the American members of the Commission emphasized the question of justiciability and the difference between law and morality. The American representatives believed that the Commission had gone beyond its mandate as its duty was “to determine whether the facts found were violations of the laws and customs of war. It was not asked whether these facts were violations of the laws or principles of humanity.”¹¹⁵ The American representatives objected to the inclusion of references to the “laws and principles of humanity”:

The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.¹¹⁶

Further:

...war was and is by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further

¹¹³ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, "Report Presented to the Preliminary Peace Conference" at 122.

¹¹⁴ As found in Bass, *Stay the Hand of Vengeance* at 21.

¹¹⁵ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, "Report Presented to the Preliminary Peace Conference" at 133.

¹¹⁶ *Ibid.* at 134.

objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity. The law of humanity, or the principle of humanity, is much like equity, whereof John Selden, as wise and cautious as he was learned, aptly said:

Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.¹¹⁷

After the First World War, the attempt to try alleged German war criminals before an international tribunal failed. Instead, the Allied powers "grudgingly agreed"¹¹⁸ to let the Germans try their own in what are now remembered as the 'unsuccessful' Leipzig trials: the Martens clause was *not* treated as a source of law in post-War trials.

However, after the Second World War, the Martens clause was explicitly invoked as a "legal yardstick" in one of the cases before the American military tribunals:

It [Martens clause] is a general clause, making the usages established among civilised nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.¹¹⁹

¹¹⁷ *Ibid.* at 144-145.

¹¹⁸ Bass, *Stay the Hand of Vengeance* at 59.

¹¹⁹ The *Krupp* case, 9 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 at 133.

Thus, the language of humanity not only played a prominent role in the codification of the laws of war in the late nineteenth century, it also served as a source of, or even kind of, law.

Nevertheless, the emergence of this language of ‘humanity’ – in both the Geneva and Hague branches of the laws of war – only prepared the way for the re-naming of the laws of war. It was in the late twentieth century that the laws of war were transformed into ‘humanitarian law.’

E. Humanitarian Law

i. The Transformation of the Laws of War into Humanitarian Law

The years following the 1949 Geneva Conventions saw a relative neglect of the laws of war by the United Nations. The Charter of the United Nations, with its prohibition against the ‘use of force,’ led to the avoidance of the word ‘war.’ In addition, in 1947, the International Law Commission decided, in the words of one of its members, that “it should refrain from taking up the question of the law of war because if it did so its action might be interpreted as a lack of confidence in the United Nations and the work of peace which the latter is called upon to carry.”¹²⁰ After this period of relative neglect, at the 1968 Teheran International Conference on Human Rights, the Conference adopted a resolution “requesting the General Assembly to invite the Secretary-General to study ‘the steps which could be taken to secure the better application of existing humanitarian conventions and rules’ and ‘the need for additional humanitarian international conventions or of [*sic*] possible revision of existing conventions’ to ensure the better protection of civilians and other war victims.”¹²¹ The Secretary-General submitted three reports in 1969, 1970, and 1971. According to one commentator, the International Committee of

¹²⁰ J.L. Brierly quoted in Keith D. Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making* (New York: St-Martin's Press, 1984) at 42.

¹²¹ R.R. Baxter, "Humanitarian Law or Humanitarian Politics?" (1975) 16 *Harvard International Law Journal* 1 at 5.

the Red Cross saw the activity of the United Nations General Assembly as a threat to its curatorship of international humanitarian law and thus “responded with alacrity to the challenge posed by the rival humanitarian action of the General Assembly.”¹²² The International Committee of the Red Cross convened a conference of experts in 1971 and prepared two draft protocols to the 1949 Geneva Conventions. It held a second conference of experts and then drafted the texts that were to form the basis of the 1974 Diplomatic Conference.

The adoption of the Protocols Additional to the Geneva Convention¹²³ is often regarded as a landmark event in the history of the laws of war. With the First Protocol, applicable to international armed conflicts,¹²⁴ civilians are finally protected by law from the aerial bombardments that proved to be so devastating in the Second World War. The First Protocol also enshrines the basic rule of discrimination and the principle of proportionality.¹²⁵ Not only does the First Protocol purport better to protect civilian populations through its ‘absolute’ prohibition against the targeting of civilians,¹²⁶ it is also the first international treaty actually to

¹²² *Ibid.* at 6.

¹²³ The Protocols Additional to the Geneva Convention are treaties that build on the Geneva Convention and seek to further its purposes purposes.

¹²⁴ Which the Protocol defines to include wars of national liberation, itself a significant change.

¹²⁵ Article 48 of the Second Protocol identifies the principle of discrimination as the “basic rule” relative to the “general protection of civilians against effects of hostilities.” In addition, Article 51(4) specifically prohibits “indiscriminate attacks.” And Article 5(b) articulates the principle of proportionality, identifying attacks on military targets resulting in disproportionate civilian casualties or damage to civilian objects as “indiscriminate.” This codification is significant even if the principles of proportionality and discrimination were thought to be customary law already.

The Second Protocol, applicable to non-international conflicts, includes the principle of discrimination (Article 13(2)) but not the principle of proportionality in regard to civilian casualties. However, it may be argued that customary international law requires that the principle of proportionality be respected in non-international armed conflicts.

¹²⁶ The legality of the use of nuclear weapons remains an important and unresolved issue. See, e.g., Leslie Green, “What Is - Why Is There - The Law of War?” in L. C. Green ed., *The Law of Armed Conflict: Into the Next*

define the category of civilian.¹²⁷ Because, at the 1974 Diplomatic Conference, no agreement was reached regarding the humane or inhumane character of specific weapons, the Protocol also enshrines the prohibition against the infliction of unnecessary suffering.¹²⁸ The Second Protocol consists of an addition to and elaboration of Common Article Three of the Geneva Conventions of 1949, also known as the ‘bill of rights’ for non-international armed conflicts. Though the Second Protocol does not go nearly as far as the First in regulating the actions of belligerents, it further extends the laws of war beyond war among states, to armed conflict within states.

The adoption of Additional Protocols also provided the setting for the official re-naming of the laws of war. One can find this new name of the laws of war in the title of the conference that led to the Protocols: the 1974-1977 “Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.” Though the 1949 Geneva Conventions speak of “humanitarian activities” and “humanitarian organizations,” they make no reference to “humanitarian law.” Nevertheless, under the influence of the International Committee of the Red Cross the phrase and concept of “humanitarian law” gained currency

Millenium (Newport, Rhode Island: Naval War College, 1998) at 174-175; Pierre-Marie Dupuy, "Les "Considérations Élémentaires d'Humanité" dans la jurisprudence de la Cour internationale de justice" in R.-J. Dupuy ed., *Mélanges en l'Honneur de Nicolas Valticos. Droit et justice* (Paris: Éditions A. Pedone, 1999); Judith Gardam, "The Contribution of the International Court of Justice to International Humanitarian Law" (2001) 14 *Leiden Journal of International Law* 349.

¹²⁷ Though the definition is a negative one. Article 50(1) of the First Protocol states that “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Article 43 deals with armed forces and the category of the combatant. The Third Geneva Convention deals with prisoners of war. In some ways the Additional Protocols do not solve the vexing question of the guerilla.

¹²⁸ Article 35 of the First Protocol includes the general provisions that “the right of the Parties to the conflict to choose methods or means of warfare is not unlimited” as well as the prohibition regarding the use of “weapons, projectiles and materials and methods of warfare of a nature of cause superfluous injury or unnecessary suffering.” The Second Protocol contains no such provision.

throughout the 1960s.¹²⁹ In particular, Jean Pictet, the *doyen* of the International Committee of the Red Cross had, echoing the nineteenth century protagonists of a *droit humain*, used the expression ‘humane law,’ or ‘human law’ to re-describe not only the laws of war but also a more general law of humanity, including the law of human rights.¹³⁰

Thus, though they constituted a key moment in the articulation of the substantive laws of war, the Protocols Additional to the Geneva Conventions also constituted a key moment in bringing to visibility the ground of the modern laws of war: humanity. As we have seen, prior to the Protocols Additional, the laws of war had been divided, albeit roughly, into two branches: Geneva law and Hague law. Hague law governed the means and methods of warfare whereas Geneva law, very closely associated with the International Committee of the Red Cross, dealt with the protection of victims of war. Though the distinction had never been watertight, it lost significance after the Protocols effectively combined the two branches into one ‘humanitarian law.’ Not only do the Protocols mark the merger of the Hague and Geneva strands of the law of war, they also mark the primacy of the Geneva strand. Indeed the very title of the Protocols points to the victims of war as their primary concern.¹³¹ Moreover, commentators note that the Protocols also capture the integration of human rights concerns into humanitarian law.¹³²

¹²⁹ See, e.g., Allan Rosas and Par Stenback, "The Frontiers of International Humanitarian Law" (1987) 24 *Journal of Peace Research* 219 at 220.

¹³⁰ Jean Pictet, *Development and Principles of International Humanitarian Law* (Geneva: Martinus Nijhoff, 1985) at 3: “Should we wish to bring them [humanitarian and human rights law] together under a common name, we might imagine the term ‘humane law’”. The French says “droit humain.”

¹³¹ The Commentary of the International Committee of the Red Cross to the Additional Protocols points to this merger of Hague and Geneva law: “The expression international humanitarian law applicable in armed conflict means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression ... is often abbreviated to international

Aside from the primacy of Geneva law and the emphasis on the humanitarian character of the laws of war, the Protocols accomplish or complete the disappearance of ‘civilization’ as a legal category. Though the Protocols take up the Martens clause, they do so without any reference to ‘civilization.’ The Martens clause appears in the preamble to the Second Protocol: “Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.” And, it appears again in the First Protocol – not in the preamble but, strikingly, as part of Article One (“General principles and scope of application”): “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”

The evacuation of civilization as a legal category from the laws of war no doubt reflects the wave of decolonization that followed the Second World War and that led to a great rise in United Nations membership. Like war, ‘civilization’ had become a ‘dirty word.’ According to a line of thinking to be found in Schmitt, the evacuation of the category of ‘civilization’ is a facet of the dissolution of the public law of Europe and its replacement by an abstract and ungrounded international law applying equally to all “states” in the world. The ‘uprootedness’ of

humanitarian law or humanitarian law.” International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* xxvii (1987).

¹³² Some commentators refer to this as the merger of Hague, Geneva, and New York. See, e.g., Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2001) at 19.

humanitarian law, as well as its possible ground in abstract sentiment, shows itself in a controversy surrounding the renaming of the laws of war. A commentator writes:

...there are historical errors and political dangers in a picture of “international humanitarian law” as coming out of Geneva, as a gospel that needs merely to be disseminated and applied in the rest of the world, or as a body of law that can progressively bring the use of force under control. Such perceptions of the law may have contributed to some of its disastrous failures in the 1980s and 1990s. The term “laws of war” is preferable to “international humanitarian law.” There is a need to place more emphasis on the idea that this body of law is intensely practical – that it represents, at least in part, a set of professional military standards and bargains among States; that its origins are as much military as diplomatic; and that its implementation can have consequences which are for the most part compatible with the interests of those applying it.¹³³

Though it might be an “error” of some sort to regard the laws of war as ‘humanitarian law’, this “error” reflects an important characteristic of our world and of the manner in which we inhabit it. Therefore, it behooves us, as we have attempted in this essay, to take seriously the history of this “error.”

¹³³ Adam Roberts, "Implementation of the Laws of War in Late-Twentieth Century Conflicts" in L. C. Green ed., *The Law of Armed Conflict: Into the Next Millennium* (Newport, Rhode Island: Naval War College, 1998) at 381.