

Main Principles of International Humanitarian Law:

A Module of

**International Humanitarian Law
Fall 2011
Faculty of Law, University of Oslo**

Thursday, 5 September 2011

Prepared by

Nobuo Hayashi

Researcher, Peace Research Institute Oslo

ON WAR

(excerpts)

Carl von Clausewitz, 1832
(edit. trans. by Michael Howard and Peter Paret)

Book One, Chapter One: What is War?

...

2. Definition

I shall not begin by expounding a pedantic, literary definition of war, but go straight to the heart of the matter, to the duel. War is nothing but a duel on a larger scale. Countless duels go to make up war, but a picture of it as a whole can be formed by imagining a pair of wrestlers. Each tries through physical force to compel the other to do his will; his *immediate* aim is to *throw* his opponent in order to make him incapable of further resistance.

War is thus an act of force to compel our enemy to do our will.

Force, to counter opposing force, equips itself with the inventions of art and science. Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force – that is, physical force, for moral force has no existence save as expressed in the state and the law – is thus the *means* of war; to impose our will on the enemy is its *object*. To secure that object we must render the enemy powerless; and that, in theory, is the true aim of warfare. That aim takes the place of the object, discarding it as something actually part of war itself.

3. The Maximum Use of Force

Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is fallacy that must be exposed; war is such a dangerous business that the mistakes which come from kindness are the very worst. The maximum use of force is in no way incompatible with the simultaneous use of the intellect. If one side uses forces without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand. That side will force the other to follow suit; each will drive its opponent toward extremes, and the only limiting factors are the counterpoises inherent in war.

This is how the matter must be seen. It would be futile – even wrong – to try and shut one's eyes to what war really is from sheer distress at its brutality.

If wars between civilized nations are far less cruel and destructive than wars between savages, the reason lies in the social conditions of the states themselves and in their relationships to one another. These are the forces that give rise to war; the same forces circumscribe and moderate it. They themselves however are not part of war; they already exist before fighting starts. To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.

...

If, then, civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct.

...

The thesis, then, must be repeated: war is an act of force, and there is no logical limit to the application of that force. Each side, therefore, compels its opponent to follow suit; a reciprocal action is started which must lead, in theory, to extremes. This is the *first case of interaction and the first 'extreme'* we meet with.

4. The Aim Is To Disarm the Enemy

I have already said that the aim of warfare is to disarm the enemy and it is time to show that, at least in theory, this is bound to be so. If the enemy is to be coerced you must put him in a situation that is even more unpleasant than the sacrifice you call on him to make. The hardships of that situation must not of course be merely transient – at least not in appearance. Otherwise the enemy would not give in but would wait for things to improve. Any change that might be brought about by continuing hostilities must then, at least in theory, be of a kind to bring the enemy still greater disadvantages. The worst of all conditions in which a belligerent can find himself is to be utterly defenseless. Consequently, if you are to force the enemy, by making war on him, to do your bidding, you must either make him literally defenseless or at least put him in a position that makes this danger probable. It follows, then, that to overcome the enemy, or disarm him – call it what you will – must always be the aim of warfare.

War, however, is not the action of a living force upon a lifeless mass (total non-resistance would be no war at all) but always the collision of two living forces. The ultimate aim of waging war, as formulated before, must be taken as applying to both sides. Once again, there is interaction. So long as I have not overthrown my opponent I am bound to fear he may overthrow me. Thus I am not in control; he dictates to me as much as I dictate to him. This is the *second case of interaction and it leads to the second 'extreme.'*

5. The Maximum Exertion of Strength

If you want to overcome your enemy you must match your effort against his power of resistance, which can be expressed as the product of two inseparable factors, viz. *the total means at his disposal* and *the strength of his will*. The extent of the means at his disposal is a matter – through not exclusively – of figures, and should be measurable. But the strength of his will is much less easy to determine and can only be gauged approximately by the strength of the motive animating it. Assuming you arrive in this way at a reasonably accurate estimate of the enemy's power of resistance, you can adjust your own efforts accordingly; that is, you can either increase them until they surpass the enemy's or, if this is beyond your means, you can make your efforts as great as possible. But the enemy will do the same; competition will again result and, in pure theory, it must again force you both to extremes. This is *the third case of interaction and the third 'extreme.'*

6. Modifications in Practice

Thus in the field of abstract thought the inquiring mind can never rest until it reaches the extreme, for here it is dealing with an extreme: a clash of forces freely operating and obedient to no law but their own. From a pure concept of war you might try to deduce absolute terms for the objective you should aim at and for the means of achieving it; but if you did so the continuous interaction would land you in extremes that represented nothing but a play of the imagination issuing from an almost invisible sequence of logical subtleties. If we were to think purely in absolute terms, we could avoid every difficulty by a stroke of the pen and proclaim with inflexible logic that, since the extreme must always be the goal, the greatest effort must always be exerted. Any such pronouncement would be an abstraction and would leave the real world quite unaffected.

...

But move from the abstract to the real world, and the whole thing looks quite different. In the abstract world, optimism was all-powerful and forced us to assume that both parties to the conflict not only sought perfection but attained it. Would this ever be the case in practice? Yes, it would if: (a) war were a wholly isolated act, occurring suddenly and not produced by previous events in the political world; (b) it consisted of a single decisive act or a set of simultaneous ones; (c) the decision achieved was complete and perfect in itself, uninfluenced by any previous estimate of the political situation it would bring about.

...

10. The Probabilities of Real Life Replace the Extreme and the Absolute Required by Theory

Warfare thus eludes the strict theoretical requirement that extremes of force be applied. Once the extreme is no longer feared or aimed at, it becomes a matter of judgment what degree of effort should be made; and this can only be based on the phenomena of the real world and the *laws of probability*. Once the antagonists have ceased to be mere figments of a

theory and become actual states and governments, when war is no longer a theoretical affair but a series of actions obeying its own peculiar laws, reality supplies the data from which we can deduce the unknown that lies ahead.

From the enemy's character, from his institutions, the state of his affairs and his general situation, each side, using the *laws of probability*, forms an estimate of its opponent's likely course and acts accordingly.

11. The Political Object Now Comes to the Fore Again

A subject which we last considered in Section 2 now forces itself on us again, namely the *political object of the war*. Hitherto it had been rather overshadowed by the law of extremes, the will to overcome the enemy and make him powerless. But as this law begins to lose its force and as this determination wanes, the political aim will reassert itself. If it is all a calculation of probabilities based on given individuals and conditions, the *political object*, which was the *original motive*, must become an essential factor in the equation. The smaller the penalty you demand from your opponent, the less you can expect him to try and deny it to you; the smaller the effort he makes, the less you need make yourself. Moreover, the more modest your own political aim, the less importance you attach to it and the less reluctantly you will abandon it if you must. *This is another reason why your effort will be modified.*

...

Generally speaking, a military objective that matches the political object in scale will, if the latter is reduced, be reduced in proportion; this will be all the more so as the political object increases its predominance. Thus it follows that without any consistency wars can have all degrees of importance and intensity, ranging from a war of extermination down to simple armed observation. ...

17. The Superiority of Defense over Attack Often Destroys the Effect of Polarity, and This Explains the Suspension of Military Action

... if the side favoured by present conditions is not sufficiently strong to do without the added advantages of the defense, it will have to accept the prospect of acting under unfavourable conditions in the future. To fight a defensive battle under these less favourable conditions may still be better than to attack immediately or to make peace. I am convinced that the superiority of the defensive (if rightly understood) is very great, far greater than appears at first sight. It is this which explains without any inconsistency most periods of inaction that occur in war. The weaker the motive for action, the more will they be overlaid and neutralized by this disparity between attack and defense, and the more frequently will action be suspended – as indeed experience shows.

18. A Second Cause Is Imperfect Knowledge of the Situation

There is still another factor that can bring military action to a standstill: imperfect knowledge of the situation. The only situation a commander can know fully is his own; his opponent's he can know only from unreliable intelligence. His evaluation, therefore, may be mistaken and can lead him to suppose that the initiative lies with the enemy when in fact it remains with him. Of course such faulty appreciation is as likely to lead to ill-timed action as to ill-timed inaction, and is no more conducive to slowing down operations than it is to speeding them up. Nevertheless, it must rank among the natural causes which, *without entailing inconsistency, can bring military activity to a halt*. Men are always more inclined to pitch their estimate of the enemy's strength too high than too low, such is human nature. Bearing this in mind, one must admit that partial ignorance of the situation is, generally speaking, a major factor in delaying the progress of military action and in moderating the principle that underlies it.

The possibility of inaction has a further moderating effect on the progress of the war by diluting it, so to speak, in time by delaying danger, and by increasing the means of restoring a balance between the two sides. ...

20. Therefore Only the Element of Chance is Needed To Make War a Gamble, and That Element is Never Absent

It is now quite clear how greatly the objective nature of war makes it a matter of assessing probabilities. Only one more element is needed to make war a gamble – chance: the very last thing that war lacks. No other human activity is so continuously or universally bound up with chance. And through the element of chance, guesswork and luck come to play a great part in war.

21. Not Only Its Objective But Also Its Subjective Nature Makes War a Gamble

If we now consider briefly the *subjective nature* of war – the means by which war has to be fought – it will look more than ever like a gamble. The element in which war exists is danger. The highest of all moral qualities in time of danger is certainly *courage*. Now courage is perfectly compatible with prudent calculation but the two differ nonetheless, and pertain to different psychological forces. Daring, on the other hand, boldness, rashness, trusting in luck are only variations of courage, and all these traits of character seek their proper element – chance.

In short, absolute, so-called mathematical, factors never find a firm basis in military calculations. From the very start there is an interplay of possibilities, probabilities, good luck and bad that weaves its way throughout the length and breadth of the tapestry. In the whole range of human activities, war most closely resembles a game of cards.

...

23. But War Is Nonetheless a Serious Means to a Serious End: A More Precise Definition of War

...

When whole communities go to war – whole peoples, and especially *civilized* peoples – the reason always lies in some political situation, and the occasion is always due to some political object. War, therefore, is an act of policy. Were it a complete, untrammelled, absolute manifestation of violence (as the pure concept would require), war would of its own independent will usurp the place of policy the moment policy had brought it into being; it would then drive policy out of office and rule by the laws of its own nature, very much like a mine that can explode only in the manner or direction predetermined by the setting. This, in fact, is the view that has been taken of the matter whenever some discord between policy and the conduct of war has stimulated theoretical distinctions of this kind. But in reality things are different, and this view is thoroughly mistaken. In reality war, as has been shown, is not like that. Its violence is not of the kind that explodes in a single discharge, but is the effect of forces that do not always develop in exactly the same manner or to the same degree. At times they will expand sufficiently to overcome the resistance of inertia or friction; at others they are too weak to have any effect. War is pulsation of violence, variable in strength and therefore variable in the speed with which it explodes and discharges is energy. War moves on its goal with varying speeds; but it always lasts long enough to be changed in one way or another – long enough, in other words, to remain subject to the action of a superior intelligence. If we keep in mind that war springs from some political purpose, it is natural that the prime cause of its existence will remain the supreme consideration in conducting it. That, however, does not imply that the political aim is a tyrant. It must adapt itself to its chosen means, a process which can radically change it; yet the political aim remains the first consideration. Policy, then, will permeate all military operations, and, in so far as their violent nature will admit, it will have a continuous influence on them.

24. War Is Merely the Continuation of Policy by Other Means

We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. What remains peculiar to war is simply the peculiar nature of its means. War in general, and the commander in any specific instance, is entitled to require that the trend and designs of policy shall not be inconsistent with these means. That, of course, is no small demand; but however much it may affect political aims in a given case, it will never do more than modify them. The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.

25. The Diverse Nature of War

The more powerful and inspiring the motives for war, the more they affect the belligerent nations and the fiercer the tensions that precede the outbreak, the closer will war approach its abstract concept, the more important will be the destruction of the enemy, the more closely will the military aims and the political objects of war coincide, and the more military and less political will war appear to be. On the other hand, the less intense the motives, the less will the military element's natural tendency to violence coincide with political directives. As a result, war will be driven further from its natural course, the political object will be more and more at variance with the aim of ideal war, and the conflict will

seem increasingly *political* in character.

At this point, to prevent the reader from going astray, it must be observed that the phrase, the *natural tendency* of war, is used in its philosophical, strictly *logical* sense alone and does not refer to the tendencies of the forces that are actually engaged in fighting – including, for instance, the morale and emotions of the combatants. At times, it is true, these might be so aroused that the political factor would be hard put to control them. Yet such a conflict will not occur very often, for if the motivations are so powerful there must be a policy of proportionate magnitude. On the other hand, if policy is directed only toward minor objectives, the emotions of the masses will be little stirred and they will have to be stimulated rather than held back.

...

27. The Effects of This Point of View on the Understanding of Military History and the Foundations of Theory

First, therefore, it is clear that war should never be thought of as *something autonomous* but always as an *instrument of policy*; otherwise the entire history of war would contradict us. Only this approach will enable us to penetrate the problem intelligently. *Second*, this way of looking at it will show us how wars must vary with the nature of their motives and of the situations which give rise to them.

The first, the supreme, the most far-reaching act of judgment that the statesman and commander have to make is to establish by that test the kind of war on which they are embarking; neither mistaking it for, nor trying to turn it into, something that is alien to its nature. This is the first of all strategic questions and the most comprehensive. ...

28. The Consequences for Theory

War is more than a true chameleon that slightly adapts its characteristics to the given case. As a total phenomenon its dominant tendencies always make a war a paradoxical trinity – composed of primordial violence, hatred and enmity, which are to be regarded as a blind natural force; of the play of chance and probability within which the creative spirit is free to roam; and of its element of subordination, as an instrument of policy, which makes it subject to reason alone.

The first of these aspects mainly concerns the people; the second the commander and his army; the third the government. The passions that area to be kindled in war must already be inherent in the people; the scope which the play of courage and talent will enjoy in the realm of probability and chance depends on the particular character of the commander and the army; but the political aims are the business of government alone.

...

DECLARATION RENOUNCING THE USE, IN TIME OF WAR, OF EXPLOSIVE PROJECTILES UNDER 400 GRAMMES WEIGHT

St. Petersburg, 29 November/11 December 1868

On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St. Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

They will invite all the States which have not taken part in the deliberations of the International Military Commission assembled at St. Petersburg by sending Delegates thereto, to accede to the present engagement.

This engagement is compulsory only upon the Contracting or Acceding Parties thereto in case of war between two or more of themselves; it is not applicable to non-Contracting Parties, or Parties who shall not have acceded to it.

It will also cease to be compulsory from the moment when, in a war between Contracting or Acceding Parties, a non-Contracting Party or a non-Acceding Party shall join one of the belligerents.

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

Done at St. Petersburg, 29 November (11 December) 1868.

**CONVENTION (II) WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND AND ITS ANNEX:
REGULATIONS CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND**

(excerpts)

The Hague, 29 July 1899

Considering that, while seeking means to preserve peace and prevent armed conflicts among nations, it is likewise necessary to have regard to cases where an appeal to arms may be caused by events which their solicitude could not avert;

Animated by the desire to serve, even in this extreme hypothesis, the interests of humanity and the ever increasing requirements of civilization;

Thinking it important, with this object, to revise the laws and general customs of war, either with the view of defining them more precisely or of laying down certain limits for the purpose of modifying their severity as far as possible;

Inspired by these views which are enjoined at the present day, as they were twenty-five years ago at the time of the Brussels Conference in 1874, by a wise and generous foresight;

Have, in this spirit, adopted a great number of provisions, the object of which is to define and govern the usages of war on land;

In view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war so far as military necessities permit, are destined to serve as general rules of conduct for belligerents in their relations with each other and with populations;

It has not, however, been possible to agree forthwith on provisions embracing all the circumstances which occur in practice;

On the other hand, it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders;

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;

They declare that it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood;

The High Contracting Parties, desiring to conclude a Convention to this effect, have appointed as their Plenipotentiaries, to wit:

...

Who, after communication of their full powers, found in good and due form, have agreed on the following ...