HISTORY OF THE LAW OF ARMED CONFLICT

I. OBJECTIVES

A. Understand the two principal "prongs" of legal regulation of warfare, *Jus ad Bellum* and *Jus in Bello*.

B. Understand the historical evolution of laws and events related to the conduct of war.

II. INTRODUCTION

A. "In times of war, the law falls silent."[1] This may have been the case in ancient times, but it is not so in modern times where the laws of war permeate armed conflict.

B. What is war? Although there is no universally accepted definition of war, one proposed definition contains the following four elements: (a) a contention; (b) between at least two nation-states; (c) wherein armed force is employed; (d) with an intent to overwhelm.

C. War v. Armed Conflict. Historically, the applicability of the law of armed conflict often depended upon a State subjectively classifying a conflict as a "war." Recognition of a state of war is no longer required to trigger the law of armed conflict. After the 1949 Geneva Conventions, the law of armed conflict is now triggered by the existence of "armed conflict" between States.

> "The substitution of [armed conflict] for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. . . . The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict . . . [i]t makes no difference how long the conflict lasts, or how much slaughter takes place."[2]

D. The Law of Armed Conflict. According to the upcoming FM 6-27, The law of armed conflict is the "that part of international law that regulates the conduct of armed

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[1] This Latin maxim ("*Silent enim leges inter arma*") is generally attributable to Cicero, the famous Roman philosopher and politician (106 – 43 BC). Justice Scalia wrote in his dissent in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it."

[2] COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1952).

hostilities. It is also called the law of armed conflict." The draft DoD Law of War Manual describes "law of war" as that part of international law that regulates the resor to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent states.[3] It "requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry."[4] The law of armed conflict is also referred to as the law of war (LOW) or international humanitarian law (IHL).[5]

E. The law of armed conflict developed into its present content over millennia. It is deeply rooted in history, and an understanding of this history is necessary to understand current law of armed conflict principles.

III. UNIFYING THEMES OF THE LAW OF ARMED CONFLICT

A. Law exists to either prevent conduct or control conduct. These characteristics permeate the law of armed conflict, as exemplified by its two major prongs. *Jus ad Bellum* serves to regulate the conduct of going to war, while *Jus in Bello* serves to regulate conduct within war.

B. Validity. Although critics of the regulation of warfare cite examples of violations of the law of armed conflict as proof of its ineffectiveness, a comprehensive view of history provides the greatest evidence of the overall validity of this body of law.

1. History shows that in most cases the law of armed conflict works. Despite the fact that the rules are often violated or ignored, it is clear that mankind is better off with than without them. Mankind has sought to limit the effect of conflict on combatants and noncombatants and has come to regard war not as a state of anarchy justifying infliction of unlimited suffering but as an unfortunate reality which must be governed by some rule of law. This point is illustrated in Article

[3] Note that these are *draft* definitions, and are subject to change. The old, and soon to be superseded FM 27-10, para. 1, labeled the law of armed conflict as the "customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States. Note that the FM 27-10 definition listed above cites to only "land warfare." Of course, it is a well-settled proposition in international law that the LOAC applies to all spheres of conflict, to include land, sea, air, space, and also cyberspace. *See* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, *International Law in Cyberspace: Remarks as Prepared for Delivery by Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012*, 54 HARV. INT'L L.J. ONLINE 1 (Dec. 2012)(footnoted version of original remarks, with citations to supporting sources).

[4] *Id*. at para. 3.

[5] The moniker describing this body of law has changed over time. Before the 1949 Geneva Conventions, it was known universally as the "Law of War." The 1949 Geneva Conventions advanced a change to the term "Law of Armed Conflict" to emphasize that the application of the law and prescriptions did not depend on either a formal declaration of war or recognition by the parties of a state of war. Of late, many other nations, scholars, and nongovernmental organizations outside the United States military refer to this body of law as "International Humanitarian Law" (IHL).

22 of the 1907 Hague Regulations: "the right of belligerents to adopt means of injuring the enemy is not unlimited."[6] This rule does not lose its binding force in a case of necessity.

2. Regulating the conduct of warfare is ironically essential to the preservation of a civilized world. General MacArthur exemplified this notion when he confirmed the death sentence for Japanese General Yamashita, writing: "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society."

C. The trend toward regulation grew over time in scope and recognition. When considering whether these rules have validity, the student and the teacher (Judge Advocates teaching soldiers) must consider the objectives of the law of armed conflict.

1. The purposes of the law of armed conflict are to (1) integrate humanity into war, and (2) serve as a tactical combat multiplier.

2. The validity of the law of armed conflict is best explained in terms of both objectives. For instance, some cite the "Malmedy Massacre" as providing American forces with the inspiration to break the German advance during World War II's Battle of the Bulge in late 1944.[7] Accordingly, observance of the law of armed conflict denies the enemy a rallying cry against difficult odds.

D. Why respect the law of armed conflict?

1. May motivate the enemy to observe the same rules.

2. May motivate the enemy to surrender.

3. Guards against acts that violate basic tenets of civilization, protects against unnecessary suffering, and safeguards certain fundamental human rights.

4. Provides advance notice of the accepted limits of warfare.

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[6] Convention IV Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, art. 22, Oct. 18, 1907. .

[7] The Malmedy massacre was an event during the Battle of the Bulge in December 1944 where a German SS Commando unit under Jochaim Peiper, executed roughly 80 American POWS by firing squad, since they did not want to be slowed down by caring for prisoners while advancing to the Meuse river, their objective.

5. Reduces confusion and makes identification of violations more efficient.

6. Helps restore peace.

E. The law of armed conflict has two major prongs: *Jus ad Bellum* and *Jus in Bello*, and one less developed prong, *Jus post Bellum*.

1. ***Jus ad Bellum*** is the law dealing with conflict management and how parties (e.g., States) initiate armed conflict or are restrained from doing so (i.e., under what circumstances the use of military power is legally and morally justified).

2. ***Jus in Bello*** is the law governing the actions of parties to an armed conflict once it has started (i.e., what legal and moral restraints apply to the conduct of waging war).

3. Both *Jus ad Bellum* and *Jus in Bello* have developed over time, drawing most of their guiding principles from history. The concepts of *Jus ad Bellum* and *Jus in Bello* developed both unevenly and concurrently. For example, during the majority of the Just War period, most societies only dealt with rules concerning the legitimacy of using force. Once the conditions were present that justified war, there were often no limits on the methods used to wage war. Eventually, both prongs developed concurrently.

4. *Jus post Bellum* is the third, largely historically neglected prong of the Just War Tradition that focuses on the issues regulating the end of warfare and the return from war to peace (i.e., what a just peace should look like).

IV. ORIGINS OF JUS AD BELLUM AND JUS IN BELLO

A. *Jus ad Bellum*. Law became a factor early in the historical development of warfare. The earliest references to rules regarding war referred to the conditions that justified resort to war both legally and morally.

1. The ancient Egyptians and Sumerians (25th century B.C.) generated rules defining the circumstances under which war might be initiated.

2. The ancient Hittites (16th century BC) required a formal exchange of letters and demands before initiating war. In addition, no war could begin during the planting season.

3. A Greek city-state was justified in resorting to the use of force if a number of conditions existed. If those conditions existed, the conflict was blessed by the gods and was just; otherwise, armed conflict was forbidden.

4. The Romans formalized laws and procedures that made the use of force an act of last resort. Rome dispatched envoys to the States against whom they had grievances and attempted to resolve differences diplomatically. The Romans also are credited with developing the requirement for declaring war. Cicero wrote that war must be declared to be just.

B. *Jus in Bello*. This body of law deals with rules that control conduct during the prosecution of a war to ensure that it is legal and moral.

1. Ancient Babylon (7th century B.C.). The ancient Babylonians treated both captured soldiers and civilians with respect in accordance with well-established rules.

2. Ancient China (4th century B.C.). Sun Tzu's *The Art of War* set out a number of rules that controlled what soldiers were permitted to do during war, including the treatment and care of captives and respect for women and children in captured territory.

3. Ancient India (4th century B.C.). The Hindu civilization produced a body of rules codified in the *Book of Manu* that regulated land warfare in great detail.

4. Similarly, the Old Testament and Koran imposed some limits on how victors could treat the vanquished.

V. THE HISTORICAL PERIODS

A. JUST WAR PERIOD (335 B.C. – 1800 A.D.)

1. This period ranged from about 335 B.C.-1800 A.D. The law during this period was concerned principally with *Jus ad Bellum* considerations and developed initially as a means to refute Christian pacifists and provide for certain, defined grounds under which a resort to warfare was both morally and religiously permissible.

2. Early Beginnings: Just War Closely Connected to Self-Defense. Aristotle (335 B.C.) wrote that war should be employed only to (1) prevent men from becoming enslaved, (2) establish leadership which is in the interests of the led, or (3) enable men to become masters of men who naturally deserved to be enslaved. Cicero refined Aristotle's model by stating that "the only excuse for going to war is that we may live in peace unharmed...."

3. Era of Christian Influence: Divine Justification. Early church leaders forbade Christians from employing force even in self-defense. This position became

less and less tenable with the expansion of the Christian world. Church scholars later reconciled the dictates of Christianity with the need to defend the Holy Roman Empire from the approaching vandals by adopting a *Jus ad Bellum* position under which recourse to war was just in certain circumstances (5th century A.D.).

4. Middle Ages. In his *Summa Theologica*, Saint Thomas Aquinas (12th century A.D.) refined the Just War theory by establishing the three conditions under which a Just War could be initiated: (a) with the authority of the sovereign; (b) with a just cause (to avenge a wrong or fight in self-defense); and (c) so long as the fray is entered into with pure intentions (for the advancement of good over evil). The key element of such an intention was to achieve peace. This was the requisite "pure motive."

5. Juristic Model.

   a. Saint Thomas Aquinas' work signaled a transition of Just War doctrine from a concept designed to explain why Christians could bear arms (apologetic) toward the beginning of a juristic model. The concept of Just War initially sought to solve the moral dilemma posed by the tension between the Gospel and the reality of war. With the increase in the number of Christian nation-states, this concept fostered an increasing concern with regulating war for more practical reasons.

   b. The concept of Just War was being passed from the hands of the theologians to the lawyers. Several great European jurists emerged to document customary laws related to warfare. Hugo Grotius (1583-1645) produced the most systematic and comprehensive work, *On the Law of War and Peace* (published in 1625). His work is regarded as the starting point for the development of the modern law of armed conflict. While many of the principles enunciated in his work were consistent with previous church doctrine, Grotius boldly asserted a non-religious basis for this law. According to Grotius, the law of war was based not on divine law, but on recognition of the true natural state of relations among States. This concept was reinforced through the Peace of Westphalia in 1648 - a series of treaties resulting from the first modern diplomatic congress, based on the concept of sovereign states.

6. *Jus ad Bellum* Principles. By the time the next period emerged, Just War doctrine had generated a widely-recognized set of principles that represented the early customary law of armed conflict. The most fundamental Just War *Jus Ad Bellum* principles are:

   a. Proper Authority. A decision to wage war can be reached only by legitimate authority (those who rule, i.e., the sovereign).

b. Just Cause. A decision to resort to war must be based upon either a need to right an actual wrong or to punish wrongs, be in self-defense, or be to recover wrongfully seized property.

c. Right Intention. The State must intend to fight the war only for the sake of the Just Cause. It cannot employ the cloak of a Just Cause to advance other intentions.

d. Probability of Success. Except in the case of self-defense, there must be a reasonable prospect of victory.

e. Last Resort. A State may resort to war only if it has exhausted all plausible, peaceful alternatives to resolving the conflict in question.

f. Macro Proportionality. A State must, prior to initiating a war, weigh the expected universal good to accrue from prosecuting the war against the expected universal evils that will result. Only if the benefits seem reasonably proportional to the costs may the war action proceed.

7. *Jus in Bello* Principles. *Jus in Bello* received less attention during the Just War Period. Two principles, however, do exist according to the Just War tradition.

a. Micro Proportionality. States are to weigh the expected universal goods/benefits against the expected universal evils/costs, in terms of each significant military tactic and maneuver employed within the war. Only if the goods/benefits of the proposed action seem reasonably proportional to the evils/costs, may a State's armed forces employ it.

b. Discrimination. One must make a distinction between combatants and non-combatants. Non-combatants may not be directly targeted and must have their rights respected.

C. WAR AS FACT PERIOD (1800-1918)

1. This period saw the rise of the State as the principal actor in foreign relations. The concept of *raison d'état* developed as a justification for taking whatever actions were necessary to preserve the State's well-being. States transformed war from a tool to achieve justice into a tool for the legitimate pursuit of national policy objectives.

2. Just War Notion Pushed Aside. Positivism, reflecting the rights and privileges of the modern State, replaced natural or moral law principles. This body of thought held that law is based not on some philosophical speculation, but on

rules emerging from the practice of States and international conventions. Basic Tenet of Positivism: since each State is sovereign, and therefore entitled to wage war, there is no international legal mandate, based on morality or nature, to regulate resort to war (*realpolitik* replaces justice as the reason to go to war). War is, based upon whatever reason, a legal and recognized right of statehood. In short, if use of military force would help a State achieve its policy objectives, then force may be used.

3. Clausewitz. This period was dominated by the *realpolitik* of Clausewitz. He characterized war as a continuation of a national policy that is directed at some desired end. Thus, a State steps from diplomacy to war, not always based upon a need to correct an injustice, but as a logical and required progression to achieve some policy end.

4. Foundation for Upcoming "Treaty Period." Based on the positivist view, the best way to reduce the uncertainty associated with conflict was to codify rules regulating this area. Intellectual focus began shifting towards minimizing resort to war and/or mitigating the consequences of war. National leaders began to join academics in the push to control the impact of war (e.g., Czar Nicholas and Theodore Roosevelt pushed for the two Hague Conferences that produced the Hague Conventions and Regulations).

5. During the War as Fact period, the focus began to change from *Jus ad Bellum* to *Jus in Bello*. With war a recognized and legal reality in the relations between States, a focus on mitigating the impact of war emerged.

6. Jean Henri Dunant's *A Memory of Solferino* (1862). A graphic depiction of one of the bloodiest battles of the Austro-Sardinian War, it served as the impetus for the creation of the International Committee of the Red Cross and the negotiation of the 1864 Geneva Convention.

7. Francis Lieber's *Instructions for the Government of Armies of the United States in the Field* (1863). First modern restatement of the law of armed conflict, issued in the form of General Order 100 to the Union Army during the American Civil War.

8. Major General William Tecumseh Sherman's Total War. Early in his career, Sherman was concerned with the morality of war and keeping warfare away from noncombatants. His 1864 "March to the Sea" during the American Civil War and observation that "War is Hell" demonstrated a change in thinking in *Jus ad Bellum* conduct, once he began to view the population of the South as the enemy. For him, the desire to bring the war to a quick end justified increasing the short-term suffering by the people in the South. Sherman noted, "the more awful you can make war the sooner it will be over."

9. Near the end of this period, the major states held the Hague Conferences (1899-1907) that produced the Hague Conventions. While some Hague law focuses on war avoidance, the majority of the law dealt with limitation of suffering during war.

D. JUS CONTRA BELLUM PERIOD (1918-1949)

1. World War I represented a significant challenge to the validity of the "war as fact" theory. Despite the moral outrage directed toward the aggressors of World War I, legal scholars unanimously rejected any assertion that initiation of the war constituted a breach of international law. Nevertheless, world leaders struggled to give meaning to a war of unprecedented carnage and destruction. The "war to end all wars" sentiment manifested itself in a *Jus ad Bellum* shift in intellectual direction, leading to the conclusion that the law should be used to prevent the aggressive use of force.

    a. League of Nations. First time in history that States agreed upon an obligation under the law not to resort to war to resolve disputes or to secure national policy goals. The Covenant of the League of Nations was designed to impose upon States certain procedural mechanisms prior to initiating war. President Wilson, the primary architect, believed during these periods of delay, peaceful means of conflict management could be brought to bear. The League, operating without the United States or the Soviet Union, ultimately proved to be ineffective at preventing war.

    b. Kellogg-Briand Pact (1928). Officially referred to as the General Treaty for the Renunciation of War, it banned aggressive war. This is the event generally thought of as the "quantum leap": for the first time in history, aggressive war is clearly and categorically banned. In contradistinction to the post-World War I period, this treaty established an international legal basis for the post-World War II prosecution of those responsible for waging aggressive war. The Kellogg-Briand Pact remains in force today. Virtually all commentators agree that the provisions of the treaty banning aggressive war have ripened into customary international law.

2. Use of force in self-defense remained unregulated. No law has ever purported to deny a sovereign the right to defend itself.

E. POST-WORLD WAR II PERIOD (1949-)

1. The procedural requirements of the Hague Conventions did not prevent World War I, just as the procedural requirements of the League of Nations and the Kellogg-Briand Pact did not prevent World War II. World powers recognized

the need for a world body with greater power to prevent war and for international law that provided more specific protections for the victims of war.

2. Post-World War II War Crimes Trials (Nuremberg, Tokyo, and Manila Tribunals). The trials of those who violated international law during World War II demonstrated that another quantum leap had occurred since World War I.

   a. Reinforced tenets of *Jus ad Bellum* and *Jus in Bello* ushered in the era of "universality," establishing the principle that all States are bound by the law of armed conflict, based on the theory that law of armed conflict conventions largely reflect customary international law.

   b. International law focused on an *ex post facto* problem during prosecution of war crimes. The universal nature of law of armed conflict prohibitions, and the recognition that they were at the core of international legal values, resulted in the legitimate application of those laws to those tried for violations.

3. United Nations Charter. Continues the shift to outright ban on war. Required Members, through Article 2(4), to refrain "from the threat or use of force" against other States.

   a. Early Charter Period. Immediately after the negotiation of the Charter in 1945, many States and commentators assumed that the absolute language in the Charter's provisions permitted the use of force only if a State had already suffered an armed attack.

   b. Contemporary Period. Most States now agree that a State's ability to defend itself is much more expansive than the provisions of the Charter seem to permit based upon a literal reading. This view is based on the conclusion that the inherent right of self-defense under customary international law was supplemented, not displaced, by the Charter. This remains a controversial issue.

4. Geneva Conventions (1949). The four Conventions improved upon the earlier conventions of 1864, 1906, and 1929[8] as the product of a comprehensive effort to protect the victims of war.

[8] The Geneva Convention of 1864 had 10 articles, and provided implicit protections for wounded and sick soldiers in the field who were out of combat, and the prohibition against attacking neutral personnel—medical and chaplains—who were assisting them. The 1906 Geneva Convention had 33 articles and gave explicit protections to the wounded and sick in the field and added what became GC II by addressing the care and protection of wounded and sick at sea. The 1929 Convention added the Prisoner of War protections that were updated in GC III of 1949. The 1949 Convention also added GC IV concerning the protection of civilians in time of war or occupation.

a. "War" vs. "Armed Conflict." Article 2 common to all four Geneva Conventions ended this debate. Article 2 asserts that the law of armed conflict applies in any instance of international armed conflict.

b. Birth of a New Convention on Civilians (GC IV). A post-war recognition of the need to specifically address this class of individuals.

c. The four Conventions are considered customary international law. This means that, even if a particular State has not ratified the treaties, each State is still bound by the principles within each of the four treaties because they are merely a reflection of customary law that binds all States. As a practical matter, the customary international law status matters little because every State currently is a party to the Conventions.

d. The Conventions are directed at State conduct, not the conduct of international forces. In practice, national forces operating under U.N. control comply with the Conventions as a national obligation.

e. Clear shift toward a true humanitarian motivation: "the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles respected for their own sake, and a series of unconditional engagement on the part of each of the Contracting Parties *vis-a-vis* the others."[9]

5. The 1977 Additional Protocols. These two treaties were negotiated to supplement the 1949 Geneva Conventions. Protocol I supplements rules governing international armed conflicts, and Protocol II extends the protections of the Conventions as they relate to internal armed conflicts.

E. THE NEXT PERIOD?

1. The 1949 Geneva Conventions, drafted in the aftermath of World War II, were primarily designed to deal with state vs. state, or international armed conflicts. Given that the majority of recent conflicts have not been state vs. state, but instead have been non-international armed conflicts, one could argue that we are entering a new historical period.

2. Many would argue there is a current lack of clarity in international law on issues such as detention, civilians taking a direct part in hostilities (DPH) cyber operations, automated weapon systems, and targeting in non-international

[9] GC I COMMENTARY, *supra* note 2, at 28.

armed conflicts. This is leading many to question whether the existing law of armed conflict is adequate, and whether (and how) these gaps need to be filled.

VI. CONCLUSION

"Wars happen. It is not *necessary* that war will continue to be viewed as an instrument of national policy, but it is likely to be the case for a very long time. Those who believe in the progress and perfectibility of human nature may continue to hope that at some future point reason will prevail and all international disputes will be resolved by nonviolent means . . . . Unless and until that occurs, our best thinkers must continue to pursue the moral issues related to war. Those who romanticize war do not do mankind a service; those who ignore it abdicate responsibility for the future of mankind, a responsibility we all share even if we do not choose to do so."[10]

[10] Malham M. Wakin, *Introduction to War and Morality, in* WAR, MORALITY, AND THE MILITARY PROFESSION 224 (Malham M. Wakin ed., 2nd rev. ed. 1986).