

Of Guns and Grotius

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INTRODUCTION

What is law's responsibility when a new technology transforms the conduct and consequences of war? Does law have responsibility for war at all? If so, then it would seem important to understand the wellsprings of the law that asserts responsibility for war. This was especially vital to European legal theorists during the emergence of explosive weapons warfare.

War, for all its horror, remained essentially unchanged for a very long time up through the Middle Ages. Arguably, the last true breakthrough in warfare had been the invention of the bow. Before that, weapons were for pounding or piercing within the length of the human arm. By harnessing the power of a bent shaft and taut string, the bow transformed warfare. But that was at least twenty thousand years ago.¹ In the meantime, countless empires killed countless people with myriad capabilities for pounding and piercing each other. Yes, there were innovations: the catapult was one of the biggest, but it was, in terms of design and use, just a very big bow.²

If Sargon, Ramses, Alexander, Caesar, and a crowd of other ancient tyrants were magically transported centuries into the future to witness Swiss rebels fighting against their Habsburg overlords in the Battle of Laupen (1339), they would have readily understood the battle waging before them. Alexander would have recognized the 19-foot iron-tipped pikes that the Swiss wielded – they were a virtual copy of the *sarissa* that was standard issue to his Macedonian troops.³ Caesar would have appreciated how troops lined up in tactical formations resembling a Hellenistic phalanx. Certainly there had been progress. The

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1. The bow was likely humanity's first machine, endowing a crucial advantage over other animals' killing weapons; humans could now kill prey from a distance. Cave paintings reveal that humans have used bows against each other for the past 20,000 years. ROBERT L. O'CONNELL, *OF ARMS AND MEN* 269 (1989) [hereinafter O'CONNELL]. See James B. Harrod, *The Bow: A Techno-Mythic Hermeneutic – Ancient Greek and the Mesolithic*, 49 J. AMER. ACAD. OF RELIGION 425 (1981); Joseph Schneider, *On the Beginnings of Warfare*, 31 SOC. FORCES 68 (1952). See generally WILLIAM FOWLER, *ANCIENT WEAPONS: THE STORY OF WEAPONRY AND WARFARE THROUGH THE AGES* (2000); ALFRED S. BRADFORD, *WITH ARROW, SWORD, AND SPEAR: A HISTORY OF WARFARE IN THE ANCIENT WORLD* (2001).

2. See generally MICHAEL WOODS, *ANCIENT WARFARE: FROM CLUBS TO CATAPULTS* (2000).

3. O'CONNELL, *supra* note 1, at 102 (citing CHARLES W. OMAN, *THE ART OF WAR IN THE MIDDLE AGES: A.D. 375-1515* (1885)).

tyrants would have been impressed that improved metallurgy had enabled far sturdier yet lighter and more flexible armor that adorned even the Habsburg steeds. They would have likely ignored the seldom used tubes, called *gonnes*, that propelled shot with very impressive penetrating force – it took forever to load just the right amount of black powder and pellet, and aiming the tube was difficult especially if you wanted to avoid getting your head blown off. These tyrants had surely seen fads on the battlefield. *Plus ça change, plus c'est la même chose.*

How different their impression would have been just over a century later when the impregnable walls of Constantinople, having stood for a thousand years, crumbled in two months in the face of Turkish big *gonnes*. Suddenly, fortresses could be destroyed from a distance. The entire operation of warfare, which had stayed essentially constant for thousands of years, would in a few decades be transformed. The terrible tyrants of the past would be awestruck at the force that Charles VIII of France led into Italy 1494. Large by medieval standards and constantly escalating thereafter, the force was organized into various capacities for gunfire, assault, and artillery, with a supply train to carry all the necessary equipment – altogether a stunning manifestation of military execution. In battle, combatants were far from each other, using some explosive weapons that could crumble walls and other weapons that killed whole groups of men at a distance. Another accomplishment that these terrible generals might have admired would have been the massive industrial capacity that had produced all these weapons.

A telling difference between this new warfare and its historical antecedents would have been the escalating death toll. It was only the beginning. War's most lethal and most destructive centuries, by far, comprise the explosive weapons era – dated here as the five centuries between the Fall of Constantinople/end of the Hundred Years' War (1453-1454) and the detonation of nuclear weapons that ended World War II (1945). Certainly in Europe and likely worldwide (in part due to European colonialism), more people died from organized violence during the explosive weapons era than in any period in human history. "The transition from mechanical- to chemical-powered warfare was one of the major watersheds in man's history."⁴

Thus my initial question: in the face of such profound changes in warfare, what should law have been responsible for? It is useful to discuss this question from the perspective of the people who had the fortune to live during the emergence of explosive weapons warfare, the intellect to write down their ideas about the legality of war, and the fame to inform us centuries later.

In Part I, I set forth the bases for asserting that explosive weapons transformed war and thereby everything that war bore upon. In Part II, I assess the

4. *Id.* at 106.

foundations of the international law of war early in the explosive weapons era as expounded by Hugo Grotius and other scholars. In Part III, I describe the peace advocacy of Emeric Crucé and others for a European confederation to govern warfare, and I discuss the bases of an international law of peace in the era of explosive weapons warfare.

This article ends on a rueful note: Grotius and his disciples failed to appreciate how explosive weapons were transforming war and thereby failed to constrain the era's violence. Crucé's alternative was more far-sighted about the direction of international law but was not given sufficient credence until the explosive weapons' transformation of war was much more deeply entrenched and perhaps impossible to avert. In retrospect, opportunities may have been lost to steer human events away from warfare, which, if true, would be regrettable.

I. EMERGENCE OF EXPLOSIVE WEAPONS WARFARE

From the beginning, explosives technology was based on recipes. Chemists from at least as early as Sung Dynasty China (circa mid-11th century) knew that a black powder of charcoal, sulfur, and saltpeter would generate explosive force when lit.⁵ Its first uses were mostly for celebratory fireworks. In the 13th century, amid open trade between the Orient, Christendom, and Islam, Chinese traders transferred the magical black powder to European and Arabic cultures.⁶ Most likely, neither sellers nor buyers considered it very important. Fireworks, then as now, are not the stuff of military revolutions.

When gunpowder was weaponized, when its explosive force was directed to shoot a projectile with penetrative force beyond anything previously imaginable, it warped warfare's offense/defense relationship. Men-at-arms died in their plate armor and fortress walls crumbled. Compared to all earlier weapons, gunpowder's explosive force was virtually unstoppable and indiscriminate. By staggeringly increasing the quantity of force, it diminished the importance of other military variables such as personal defense, strength in the melee, even bravery.⁷ Gaining military advantage became first and foremost a matter of quantity: more force was highly correlated to victory.

Gunpowder was markedly easy to commodify: sulfur and charcoal are ubiquitous; saltpeter is the natural product of organic wastes. (As a lethal byproduct of biological processes, it might today spark a debate about its legality under

5. See KENNETH W. CHASE, *FIREARMS: A GLOBAL HISTORY TO 1700*, at 30-32 (2003) [hereinafter CHASE].

6. See Wang Ling, *On the Invention and Use of Gunpowder and Firearms in China*, 37 *ISIS* 160, 161 (1947) ("The book of Marcus Graecus, *Liber ignum*, in which saltpetre, sulphur and charcoal are mentioned (together for the first time) was formerly said to have been published in the year A.D. 846, but according to George Jacob, it is a publication of the year 1250.").

7. See DAVID ELTIS, *THE MILITARY REVOLUTION IN SIXTEENTH-CENTURY EUROPE* 11-15 (1995) [hereinafter ELTIS] (refuting earlier historians' de-emphasis of gunpowder's penetrating force as a decisive reason for changing warfare).

international law prohibiting biological weapons.) The recipe was well-known. In the late 1200s, Roger Bacon deduced that gunpowder's force increased with saltpeter concentrations over 65%.⁸ Early on, supply was limited as Europe lacked Asia's geological deposits of saltpeter, and importing saltpeter entailed exorbitant cost. But by the 1380s, saltpeter plantations began appearing throughout Europe to meet the increasing demand for explosive weapons. Saltpeter prices dropped by half or more between the 1380s and the 1420s.⁹ By the mid-15th century, gunpowder was a common commodity throughout Europe. The drop in price for gunpowder (and firearms) was associated with explosive weapons' full integration into European warfare.¹⁰

The technical capacity to direct explosive force – guns – similarly evolved from random discoveries to precise specifications (recipes) to mass production responsive to the military advantage of “more force is key to victory.” Explosive weapons did not suddenly revolutionize warfare.¹¹ In the 20th century, nuclear weapons' appearance can be accurately dated to August, 1945. Not so with explosive weapons. It took generations from explosive weapons' first appearance in the mid-14th century to their transformative impact in the early 17th century. Yet, what was noteworthy about explosive weapons' revolution of warfare was how deeply its roots were planted. “The period of experimentation for firearms was the 15th century; by about the middle of the 16th century, guns had achieved a kind of ‘closure’ or ‘synthesis’ of designs and practices that persisted for nearly 300 years.”¹²

This Part highlights five principal impacts of explosive weapons' emergence in war and through war to governance – all with an eye to assessing how international law in its incipiency might have regarded that emergence: (A) explosive weapons recalibration of battle; (B) proliferation of explosive weapons warfare; (C) ascent of scientific military command; (D) “mercantilization” of explosive weapons; and (E) explosive weapons escalation of death and destruction.

8. See WILLIAM ROMAINE NEWBOLD & ROLAND GRUBB KENT, *THE CIPHER OF ROGER BACON* 140-43 (1928) (describing Bacon's recommendation of a gunpowder mixture containing 66 percent saltpeter).

9. See BERT S. HALL, *WEAPONS AND WARFARE IN RENAISSANCE EUROPE: GUNPOWDER, TECHNOLOGY AND TACTICS* 58 (1997) [hereinafter HALL (1997)].

10. See Bert S. Hall, *European Gunpowder 1250-1600: From Oriental Curiosity to Critical War Material*, Presentation at the Society for the History of Medieval Technology and Science (June 8, 2002) [hereinafter Hall (2002)] (“As costs went down, supplies increased, despite soaring demand. Whereas fourteenth-century documents speak of purchases in the hundreds of pounds weight, fifteenth-century accounts mention tens of thousands of pounds bought, sold, or in storage.”).

11. One contemporary myth was that a German monk, necromancer, and alchemist, Berthold Schwarz, invented guns with the devil's help. See JACK KELLY, *GUNPOWDER: ALCHEMY, BOMBARDS, AND PYROTECHNICS: THE HISTORY OF THE EXPLOSIVE THAT CHANGED THE WORLD* 23-24 (2004) [hereinafter KELLY].

12. HALL (1997), *supra* note 9, at 156.

A. Explosive Weapons' Recalibration of Battle

Throughout the late medieval period, fortress sieges represented a huge share of total military resources.¹³ The reason was elementary: fortresses gave defenders robust military advantages unless the attacker could starve the besieged into submission. Attackers could succeed, of course, but there was a reason why siege warfare had not changed much throughout history. For all the militarism of the ages, a fortress offered real security.¹⁴ Medieval aggressors were rarely strong enough to overcome the most powerful defenses and could seldom sustain their feudal armies long enough for a prolonged siege. By no means was the era safe; for one thing, many people did not live in fortresses. But for those fortunate to do so, a fortress was a reasonably effective security strategy.

Explosive weapons (cannon) were used for destroying fortresses dating to the siege of Cividale in Friuli (1331).¹⁵ A well-placed cannon ball could do some real damage but not without challenges. Cannon had to be fabricated at special workshops and transported to the siege site – a monstrously burdensome and expensive undertaking for weapons that weighed thousands of pounds and required dozens of horses to haul them around.¹⁶ When a cannon arrived at the enemy fortress, it might not work. If too much powder was used, the gun barrel could be excessively strained, potentially rendering the entire weapon useless. Even if it all worked, a cannon could fire perhaps one shot per day. In 1437, a French cannoneer who managed to fire three rounds from a single large gun in one day was forced to undertake a penitential pilgrimage to Rome because such a feat could only have been achieved with the devil's aid.¹⁷

Explosive weapons' initial improvements concentrated on improved boring techniques which enabled reliable production of larger and longer barrels that increased cannons' destructive power. Around 1450, substitution of spherical metal shot for stone projectiles produced far higher velocities and impact energy than had previously been attainable.¹⁸ In the span of only four decades from the Turkish destruction of Constantinople's walls (1453) through Charles VIII's march through the Italian peninsula with forty mobile, cast-bronze cannon on two-wheeled carriages, the belief disintegrated that fortresses endowed defenders with substantial military advantages. It was an explosion in the conception of warfare just as it was in fact. The most solid medieval masonry crumbled before crude cannon firing stone balls. Charles marched from one fortress to

13. See generally Jack S. Levy, *The Offensive/Defensive Balance of Military Technology: A Theoretical and Historical Analysis*, 28 INT'L STUD. Q. 219, 230-31 (1984) [hereinafter Levy].

14. See DUNCAN B. CAMPBELL, *BESIEGED: SIEGE WARFARE IN THE ANCIENT WORLD 7-14* (2006).

15. See generally Clifford J. Rogers, *The Military Revolutions of the Hundred Years' War*, 57 J. MIL. HIST. 241, 258 (1993).

16. Marlborough required 16,000 horses to move his siege train of 80 cannon and 20 mortars across the Belgian countryside to attack the French at Lille. CHASE, *supra* note 5, at 70.

17. HALL (1997), *supra* note 9, at 86. See also JEFF KINARD, *ARTILLERY: AN ILLUSTRATED HISTORY OF ITS IMPACT* 37 (2007); KELLY, *supra* note 11, at 60.

18. David Kirkpatrick, *Revolutions in Military Technology, and Their Consequences*, 146 ROYAL UNITED SERVICES INST. J. 67, 69 (2001).

another, moving through them, as Machiavelli described, with “chalk in hand.”¹⁹ Soon his advance down the peninsula took on the visage of a procession; he reached Naples in weeks. In 1498, the Venetian Senate decided to hastily acquire firearms because “the wars of the present time are influenced more by the force of bombards and artillery than by men at arms.”²⁰

Holy Roman Emperor Charles V elevated uniformity of specifications to a fundamental norm of military planning. Field artillery had demonstrated their value in the French-Swiss Battle of Marignano (1515), but the profusion of types of artillery pieces made ammunition supply impossible. Balls that might fit only one cannon would lie useless if that cannon jammed or got hit. Emperor Charles ordered standardization of all imperial artillery into seven types, increasing both their production and battlefield substitutability.²¹ Standardization of charges followed necessarily. Manuals were published dealing with practical gunnery and the theory of ballistics.

Better cannon demanded better walls. Thus, structural engineering became pitted against explosives technology. New walls proved effective at withstanding previously unimaginable levels of pounding. Advanced construction design enabled defenders to create interlocking fields of fire for defeating an attacker’s capacity for shooting cannon shot against and into the fortress. It became crucially important to calculate angles and fields of fire precisely so as to eliminate the blind spots that, in medieval fortresses, had often enabled an attacker to find protection from defending fire under the defenses themselves. “New fortifications were built with broad, low walls from which triangular bastions extended to permit defending artillery to sweep all approaches to the fort . . . [T]he new theory of fortifications was to provide a low but massive screen as a basis for a murderous counter fire that would stop an assault before it began.”²²

Siege methodology was refined and systematized to keep pace with the evolving methods of fortification. Attackers resorted to digging trenches toward a vulnerable point in the defenses. When these trenches were within artillery battering range of the fortress, protected platforms were built for artillery to sustain a rate of fire against defensive positions. This was dangerous work; within 300-400 yards, the attackers were within a sharpshooter’s range.²³ Moreover, the sheer magnitude of the effort was daunting:

19. TREVOR NEVITT DUPUY, *THE EVOLUTION OF WEAPONS AND WARFARE* 107 (1984) [hereinafter DUPUY].

20. GEOFFREY PARKER, *THE MILITARY REVOLUTION: MILITARY INNOVATION AND THE RISE OF THE WEST 1500-1800*, at 9-10 (2d ed. 1996) [hereinafter PARKER]. Similarly, “[t]he conquest of Granada was largely a process of reducing towns and castles.” J.R. HALE, *WAR AND SOCIETY IN RENAISSANCE EUROPE 1450- 1620*, at 48 (1985) [hereinafter HALE].

21. DUPUY, *supra* note 19, at 102; *see also* ELTIS, *supra* note 7, at 28.

22. DUPUY, *supra* note 19, at 107.

23. *See generally* ELTIS, *supra* note 7, at 85-87.

A battery would need a minimum of 5,000-6,000 rounds to cause a suitable breach, or between 12-15 days' work for four guns. This will involve hand-carrying about 120,000-144,000 pounds of shot and 60,000-72,000 pounds of gunpowder through the trenches to the gunners in the forward positions . . . [T]he amount of sheer effort that went into making a siege seems to have increased considerably with the maturing of gunpowder weapons.²⁴

By the late 16th century, fortress security had become a proficient discipline. However, better walls did not come cheap. Defense planners had to make choices about the value of the defense offered by walls, measured against the likelihood of attack (highly uncertain), in comparison to the value of offense offered by equipped troops who could meet an adversary on the open plain. Following the sacking of Rome (1527), city fathers considered building a belt of eighteen powerful bastions but decided that it was unaffordable (1542).²⁵ Of course, those calculations would vary enormously from one community to another.

Altogether, explosive weapons led to longer sieges, extending warfare's active year beyond the old rhythms of summer fighting followed by disbandment for winter. "Men froze to the death in the siege-lines outside Metz in 1552."²⁶ The risks associated with open-field battle, rare in the medieval era (as battlefield victory meant little without capture of a fortress²⁷), now had to be recalibrated. By the early 16th century, rising urban populations meant that fortress defense was an insufficient security strategy. When attacked, if lacking battlefield capacity, one's fortress would soon be viewed as a prison not a defense. Both sides had to plan for the possibility of offering battle.²⁸ "By the early 16th century, commanders were prepared to engage in the types of set-piece battle that had been largely avoided in earlier periods."²⁹ Battlefield encounters became bigger and more prevalent.

The risks and opportunities of battlefield strength and fortress security established a dialectic quality that shaped warfare in the 1500s. Pivotaly, explosive weapons crystallized the distinctions between siege and land warfare. Military leaders for eons had appreciated the differences between besieging a fortress and fighting a foe. But now it was imperative to have the appropriate explosive weapons for an upcoming engagement against an adversary who posed unique military challenges, whether by siege or in the field. And with bifurcation of warfare came bifurcation of explosive weapons: sieges required artillery and firearms to defend artillery; open-field battle required interdependence of more

24. HALL (1997), *supra* note 9, at 155.

25. Simon Pepper, *Planning versus fortification: Sangallo's project for the defence of Rome*, 2 ARCHITECTURAL REV. 33 (1976).

26. HALE, *supra* note 20, at 46.

27. See generally JEFF KINARD, ARTILLERY: AN ILLUSTRATED HISTORY OF ITS IMPACT 37 (2007).

28. See JEREMY BLACK, EUROPEAN WARS 1494-1660 (2002).

29. HALL (1997), *supra* note 9, at 164.

diverse sets of weapons – pikes, muskets, cavalry, light artillery – but heavy artillery most useful for sieges was too cumbersome to be useful.

Thus, explosive weapons inverted the offense/defense parameters of siege warfare by stripping medieval walls of their defensive utility, thereby endowing attackers with newfound advantages. Defenders re-asserted fortress strength, but new wall construction could be a very expensive choice. For all combatants, open-field and siege warfare diverged. Offensive (and thus defensive) considerations had to be weighed according to the specific explosive weapons useful for each combat engagement which in turn put a premium on advance planning and systematized weapons production. Altogether, “campaigns were slower to achieve definite results, and wars tended to become a series of long sieges and to last years, often with indecisive results.”³⁰

B. The Proliferation of Explosive Weapons Warfare

The development of plate armor in the late Middle Ages rendered men-at-arms safe from all but the most unlucky arrow strikes from either longbow or crossbow, which were lethal mostly against unarmored targets. Early firearms were similarly of limited value; they were inaccurate, short of range, slow to fire, heavy, and awkward.³¹ Firearms first demonstrated their value at the Battle of Beverhoutsveld (1382). Six thousand Flemish rebels led by Philip Van Artevelde defeated Count Louis of Male’s superior force of 40,000. The rebels used “ribaudiax” – wheelbarrows loaded with firearms that could be moved around the field of battle. Explosive weapons’ twin challenges – the need for concentrated fire and for mobility – were productively solved in tandem. Although Van Artevelde’s success was short-lived,³² firearms had shown their military value.

Throughout the 15th century, firearms (muskets and arquebusiers) ascended to battlefield supremacy; by the 1470s, all the leading European armies deployed them in large numbers.³³ Broad swordsmen essentially vanished by century’s end, soon followed by the halberd and crossbow, and infantry essentially supplanted cavalry as the principal component of armies in battle.³⁴ This not

30. THE MEDIEVAL MILITARY REVOLUTION: STATE, SOCIETY AND MILITARY CHANGE IN MEDIEVAL AND EARLY MODERN EUROPE 2 (Andrew Ayton & J.L. Price, eds., St. Martin’s 1995) [hereinafter Ayton & Price].

31. Edward III of England took firearms to the Battle of Crecy (1346) although their impact seems to have been incidental. ANDREW AYTON & PHILLIP PRESTON, THE BATTLE OF CRÉCY 1346, at 154-55 (2005). See also ELTIS, *supra* note 7, at 101.

32. Van Artevelde and his forces were defeated two years later at the Battle of Roosebeke (1382). See HALL (1997), *supra* note 9, at 51-55.

33. DENNIS SHOWALTER & WILLIAM J. ASTORE, SOLDIERS’ LIVES THROUGH HISTORY: THE EARLY MODERN WORLD 52 (2007).

34. Charles VIII’s still took heavy cavalry for the invasion of Italy in 1494 because it was strongly believed that “without cavalry, a 15th century army was unlikely to achieve a decisive victory on the field of battle.” Ayton & Price, *supra* note 30, at 2.

only inflated the size of armies but democratized them as wage-earning yeomen replaced landed knights.

The key to battle success was to have enough firearms to lay a continuous concentration of fire that, regardless of inaccuracy, could simply kill more of the enemy than vice versa. A large musket volley fired into massed infantry had to be devastating. Concentrated fire could be achieved only by arming large numbers of foot soldiers, each wielding small firearms. As the biggest armies typically won, sovereigns were compelled to muster the largest forces they could support.

This fact – the growth of armies – was a lodestone of the military, political, and social impact of explosive weapons.³⁵ William of Normandy led a miniscule force of 7,000 to meet Harold at Hastings.³⁶ Few medieval English field armies exceeded 10,000 men; Edward I led probably the largest English army – nearly 3,000 heavy cavalry and over 25,700 infantry. Philip IV of France likely never had more than 30,000 men under arms; Philip VI fielded 28,000 men at arms and 16,700 foot soldiers. “[T]he largest European armies probably topped off at a few tens of thousands men strong; most of the armed conflicts of the 14th century were conducted by armies half this size.”³⁷

The emergence of explosive weapons changed the situation markedly. Consider Spain. Ferdinand and Isabella of Spain expelled the Moors with 60,000 men (1492); their grandson Charles V commanded about 100,000 troops against the Turks in Hungary (1532) and about 150,000 troops when he sieged Metz (1552).³⁸ By early in the 1600s, Spain’s army numbered 300,000, increasing to nearly 500,000 by 1692.³⁹ During the same period, Sweden’s forces reached about 180,000, up from about 15,000; French forces more than doubled to 200,000; English forces tripled from their levels under Elizabeth I; Dutch forces more than doubled. By the 1630s, the armed forces maintained by the leading European states each totaled upwards of 150,000.⁴⁰ For most European states, increased force levels escalated thereafter. This much was certain – more was better.

These armies had to have weapons that conformed to specifications. Weapons had to be capable of interchanging ammunition and parts effectively; mecha-

35. See John A. Lynn, *The Pattern of Army Growth, 1445-1945*, in *TOOLS OF WAR: INSTRUMENTS, IDEAS, AND INSTITUTIONS OF WARFARE, 1445-1871*, at 1-20 (John A. Lynn, ed., Chicago Univ. Press 1990) (“From the debut of firearms to the detonation of atomic weapons in 1945 no military development in Western Europe rivaled in importance the growth of armies. It shaped history.”). The growth of armies underlay virtually all the other political and administrative changes that followed from the “military revolution” and that makes the thesis important for the broader history of European state-formation and nation-building. HALL (1997), *supra* note 9, at 201-36.

36. PAUL HILLIAM, *WILLIAM THE CONQUEROR: FIRST NORMAN KING OF ENGLAND* 48 (2005).

37. Ayton & Price, *supra* note 30, at 11-15.

38. PARKER, *supra* note 20, at 24.

39. MATTHEW SMITH ANDERSON, *WAR AND SOCIETY IN EUROPE OF THE OLD REGIME 1618-1789*, at 17 (1988).

40. PARKER, *supra* note 20, at 24.

nisms, bore, powder, and shot had to satisfy increasingly precise measurements. Indeed, the whole concept of explosive weapons warfare based on strategic use of lots of weapons meant that mechanical uniformity was directly correlated to military success. In turn, “the need to routinize production of large volumes of functionally interdependent and precise weapons compelled the evolution of weapons artisanship into industry that faced strong incentives for continued improvements of weapons design.”⁴¹

From 1500, technical improvement of explosive weapons accelerated.⁴² The triggerless gun held under the arm was replaced by the shoulder-fired arquebus and the slightly shorter caliver. The heavier musket, supported on a rest stuck into the ground, gained acceptance about 1540. By the early 1600s, the musket was reduced to a meter in length and about eleven pounds; its rate of fire more than doubled to one round per minute. Thus, emerging techniques for mass producing firearms helped fuel their growing military uses.

Two other developments proliferated war in significant, albeit different, directions: the pistol and new naval warfare.

1. Pistols

The appearance of the wheel-lock cavalry pistol (1515-1534) had significant impact. Key to its development were: the invention of the wheel-lock matchless firing mechanism, caliber standardization to accommodate a uniform bullet size,⁴³ and development of crumb powder which solved many problems of measuring and loading small firearms.⁴⁴ By the 1540s, pistol-armed cavalry were plentiful on the battlefield. A rider could load and wind his pistols in advance and shoot them repeatedly at any moment without need for flame. Although wildly inaccurate at a distance, he could shoot his pistol only a few meters from the target and from any direction. In short order, pistols posed an existential threat to traditional, lance-bearing heavy cavalry, which essentially collapsed by the late 1500s.⁴⁵

Small arms also became the weapons of the burg. Towns built on trade were gravely interested in defending their mercantile success and readily took advantage of the technical skills propounded by the gun trade in the 16th century: fine

41. “When many different purchasers entered the market, and many different artisan shops produced arms and armor for the public, any change in design that cheapened the product or improved its performance could be counted on to attract prompt attention and propagate itself rapidly. Whenever anything new really worked, it spread from court to court, shop to shop, and camp to camp with extraordinary rapidity.” WILLIAM H. MCNEILL, *THE PURSUIT OF POWER: TECHNOLOGY, ARMED FORCE, AND SOCIETY SINCE A.D. 1000*, at 80 (1982) [hereinafter MCNEILL].

42. The same ingenuity expressed itself in a search for stupefying or poisonous gases, and in the sphere of siege craft, inflatable boats, prefabricated pontoons, elevatable fire platforms, and earth-shifting machinery. HALE, *supra* note 20, at 57.

43. See James P. Ward, *Prices of Weapons and Munitions in Early Sixteenth Century Holland during the Guelder's War*, 33 J. EUR. ECON. HIST. 585 (2004) [hereinafter Ward].

44. See ROBERT KREBS, *Groundbreaking Scientific Experiments, Inventions and Discoveries of the Middle Ages and the Renaissance* 280 (2004).

45. ELTIS, *supra* note 7, at 64.

and base metalworking, precision handiwork, and familiarity with pyrotechnical materials including gunpowder.⁴⁶ Pedro Navarro described the strategic value of taking advantage of those resources: “A city can expect to have more guns than an army can carry with it; whenever you can present more guns to the enemy than he can range against you, it is impossible for him to defeat you.”⁴⁷

2. Naval Warfare

Independent of the explosive weapons revolution was a revolution in naval technology that itself had transformative consequences. Together with explosive weapons, these technologies added a whole dimension of warfare that, in turn, became crucial to European expansion, trade, and power relations. Fighting at sea in the late medieval period had entailed close-in maneuvering, some arrow fire, grappling, boarding, and combat. Many battles occurred in narrow waters where navigational constraints rendered fighting on decks a variant to land combat. Early cannon on ships only modified these tactics – ships would try to get within range and fire one broadside hoping to inflict some random damage so that sailors could attempt boarding actions. As late as the Battle of Lepanto (1571), naval fleets sustained this tradition.⁴⁸

The defeat of the Spanish Armada (1588) transformed European military history. It proved the value of conjoining naval technology with the manifold capacities of explosive weapons at the procurement stages of war planning. Henry VIII, fearing a mainland invasion, strengthened the Royal Navy by building “full-rigged” ships that could sail faster and carry heavier guns.⁴⁹ Moreover, he initiated the casting of iron cannon, cheaper than bronze. Under Elizabeth I, the Royal Navy was standardized to fire in fixed calibers which allowed for greater quantities of fewer types of ammunition to be fired more rapidly, enabling coordinated broadside volleys from more elusive ships. For the next two centuries, navies with superior gun technology tended to score largely one-sided victories against inferior forces.

By the late 1600s, the shift from boarding and hand-to-hand fighting to artillery duels at a distance, together with the growth in ship size and improved management of explosive weapons aboard them,⁵⁰ impelled the need for permanent navies using specially designed warships. In turn, the need to control a great number of ships stretched across miles of sea spurred development of communications systems for instructions that directed a commonly understood

46. Ward, *supra* note 43, at 619.

47. J.R. HALE, *RENAISSANCE WAR STUDIES* 12 (1983).

48. See generally JACK BEECHING, *THE GALLEYS AT LEPANTO* (1982); see also N.A.M. RODGER, *THE SAFEGUARD OF THE SEA: A NAVAL HISTORY OF BRITAIN 660-1649*, at 263 (1997).

49. See Geoffrey Parker, *The “Dreadnought” Revolution of Tudor England*, 82 *MARINER’S MIRROR* 269, 269-300 (1996).

50. See DUPUY, *supra* note 19, at 123. An important development in the early part of the 17th century was a way to harness a gun’s recoil which increased the rate of fire of each ship and, for all practical purposes, potentially multiplied firepower by a factor of about five.

military strategy.⁵¹ Ultimately, the revolution in naval warfare “opened the way to the exercise of European hegemony over most of the world’s oceans for much of the modern era. At the centre of this revolution lay the adoption of the gun, which the West used at sea with ruthless skill to control or destroy all its maritime rivals.”⁵²

C. *The Ascent of Professional Military Command*

The image of the medieval warrior king – Shakespeare’s Henry V atop his steed amidst the chaos of Agincourt (1435) exhorting his troops once more into the breach – would ill-fit Henry’s 17th century successors. For one thing, explosive weapons could be remarkably non-discriminatory, felling nobility, even royalty, as randomly as the lowliest vagabond.⁵³ But the compulsion to remain out of harm’s way was not mere self-preservation. Indeed, when called upon, senior officers manifested a remarkable willingness to die.⁵⁴ It was the strategic complexity of warfare that drove commanders away from battle. Decisions spelling success required expertise and a coherent information flow; a commander’s contribution in strategic direction vastly outweighed his value as a fighting man.

The commander was now a professional military planner. In the medieval period, armies were raised by reaching through the feudal structure, drawing lord and commoner away from civilian pursuits on the basis of their respective fealty. Except for a king’s retinue, most would serve in campaigns that were only a few months a year and, but for crusaders, would not involve much traveling. But with explosive weapons, a commander’s work was never done. Even in peacetime, weapons had to be procured which depended upon the anticipated type of war, its mission and major strategic objectives, its duration and number of troops, the crown’s resources, and the requirements of territorial defense.

The nub of warfare was the calculus of explosive weapons. Amid battle, “[w]hether assaulting a breach or storming a trench where the enemy was offering battle in the open country, the commander faced the same problem: How was he to dislodge entrenched arquebusiers and musketeers supported by cannon without losing an unacceptable fraction of his assaulting force?”⁵⁵ While no degree of planning could wholly eliminate the fortunes of battle, an unprepared combatant of even Henry’s courage and cunning would likely fare

51. *See id.* at 124.

52. PARKER, *supra* note 20, at 83.

53. *See* David Kirkpatrick, *Revolutions in Military Technology, and Their Consequences*, 146 ROYAL UNITED SERVICES INST. J. 67, 69 (2001) (illustrating firearms as balancing the relative weaponry of choice on the battlefield: “[n]ow the humblest yokel equipped with a musket could slay an armored knight at a distance, and the latter’s courage, chivalry, good breeding, physical strength, and skill at arms were all nugatory”).

54. *See, e.g.,* HALE, *supra* note 20, at 30 (providing an extensive list of kings, dukes, emperors, and other high potentates who waged war in person).

55. ELTIS, *supra* note 7, at 17.

poorly. Explosive weapons rewarded diligent preparation for impending military challenges.

It was but a short step to realize a need for permanent military establishments more formal than a cluster of princely guards and reliable tenants-in-chief. Raising a whole army from scratch and dismissing it at a fighting season's end made it difficult to raise short-service troops of adequate quality. A permanent force that could be quickly activated had substantial advantages.

The challenge of arming ever-escalating armies with explosive weapons was that multiple variables, including range and pace of fire, had to be addressed in tandem to optimize the weapons' efficacy. Of course, the distance that one could hurl a spear or shoot an arrow had always been important, but explosive weapons covered distance nearly instantly, rendering critical the question *at what distance*. Range was a function of both explosive force and accuracy; typically, the greater one factor, the lesser the other. Similarly, the faster the weapon could be shot, the better. As with range of fire, even medieval tacticians understood the importance of repeat pace, but explosive weapons meant that any innovation, if mass produced and trained, carried a significant advantage. When equipping hundreds of thousands of troops to fight for the crown, these considerations amidst countless others magnified the sheer complexity of making military decisions. In all, procurement and combat coalesced into sequential segments of the same continuum which flowed to and through each other according to circumstances.

The ideal European commander of the 16th century had to be conversant with and adaptive to the new tactical elements of the battlefield as well as the architecture of fortification, all of which required considerable mathematical capacity. Accordingly, military activity aspired to be scientific:

War needs to be as precise a science as possible. If a battalion, when it comes under fire, has a clear and exact procedure to follow, one in which all its constituent parts have been thoroughly trained, then it will gain time for the commander to make his decisions, and it will give confidence to the men in their actions. The fact that Machiavelli in the sixteenth century and most military writers down to the eighteenth century reckoned warfare could be reduced to a science is not therefore simply a reflection of the age of reason. It also denotes the dominance of tactics in military thought . . . [S]cience provided the framework or the grammar of war, and the art the genius of inspired command.⁵⁶

At least as important to the emerging science of military command was methodological training of troops. With changes in weaponry, highly trained and experienced troops fared much better than amateurs; untrained troops were a liability. Typically, the advantage in battle lay with those who "employed

56. HEW STRACHAN, *EUROPEAN ARMIES AND THE CONDUCT OF WAR* 4-5 (George Allen & Unwin 1983).

soldiers who were better adapted to the rigors of combat; those who stayed in formation instead of breaking, those who could fire more rounds per minute and cause more carnage to the enemy.”⁵⁷ Thus, the outcome of battle was directly linked to the importance of a core of battle-hardened men training recruits to adapt to advanced methods of warfare.⁵⁸

Arquebusiers, musketeers, and pistol-armed cavalrymen required considerable training to operate their firearms effectively, and combat techniques were difficult to execute quickly if untrained.⁵⁹ Long lines of shooters had to learn how to pivot in case of a flank attack. Each man had to turn left or right to preserve the fighting front – a laborious and time-consuming maneuver that could be done only by well-drilled units. Training men how to use their weapons thus soon became a facet of training them to execute synchronized movements *en masse* in complex tactical formations. Drills also regimented obedience to the chain of command.

A new military hierarchy emerged to steer the new technical aspects of war. The Spanish General Gonzalo Fernandez de Cordoba was an early proponent of tactical organization of firearms to substantially enhance their value.⁶⁰ Maurice of Nassau improved on those ideas by reducing the depth of infantry formation and making it more flexible and more effective through discipline and drill.⁶¹ His breakthrough was linear deployment of long, thin ranks of troops that maximized the effect of their fire and minimized the density of targets for cannon shot.⁶² Moreover, the new strategy reduced the deadweight of soldiers who never reached the enemy, such as rear-rank arquebusiers who rarely got a clear view for a shot. Unit strength was reduced even as man-for-man effectiveness was doubled, and units could act independently while in coordination with other units.

All these improved command structures depended on overcoming the communications barriers existing between sections of an army during battle.⁶³ By the end of the 16th century, standardization of terminology was imperative. Numer-

57. Harald Kleinschmidt, *Using the Gun: Manual Drill and the Proliferation of Portable Firearms*, 63 J. MIL. HIST. 601, 607-608 (1999) (arguing that the expanded use of manual drill in the era of early firearms – breaking down complicated processes (marching, firing, reloading) to component commands – was necessary to warfare of the day. Mercenaries were often the only populations who came “loaded” with these skills. Skilled mercenaries of the time were hence important for battle in and of themselves and also as examples to levy troops).

58. See ELTIS, *supra* note 7, at 51.

59. See Geoffrey Parker, *The Limits to Revolutions in Military Affairs: Maurice of Nassau, the Battle of Nieuwport (1600), and the Legacy*, 71 J. MIL. HIST. 331, 361-62 (2007). Drill manuals of the era described the intricate maneuver, fire, and reloading processes that would need to be instilled into matchlock gunners in order for the unit to work effectively on the battlefield.

60. See DUPUY, *supra* note 19, at 112. Key to General Cordoba’s reforms was organizing pikes and firearms into a single unit.

61. *Id.* at 132.

62. HALE, *supra* note 20, at 59.

63. See Michael Hagos, *Military Technology, political organization and international political philosophy from 1618 to WWI*, 5 (2006), available at <http://www.lovefreedomorquestionwhoyouare.com/>

ous published tracts, almost entirely written by experienced soldiers, specified commands for controlling troops in the field covering many aspects of warfare: weapons, tactics, company drill, battle formations, siege craft and defense, and the ideal characteristics of officers and men.⁶⁴ A transnational market for new technologies and tactics spread throughout much of Europe via printed texts as well as word of mouth, espionage, and commercial intelligence.⁶⁵ War became referred to as an “art,” and rulers set up training “schools” of warfare where young, highborn men came to learn everything from military planning to gunnery.⁶⁶ Indeed, “[t]he art of war is now such that men be fain to learn it anew at every two years’ end.”⁶⁷

Gustav Adolphus of Sweden is credited with synthesizing the full array of explosive weapons tactics, turning a small army lacking equipment into a well-honed war machine.⁶⁸ To mobilize an army of nearly 200,000 from his small nation, he initiated a conscription system that was both cheaper than mercenaries and patriotically motivated. He replaced heavy artillery with smaller and more maneuverable three-pound cannon grouped in batteries that coordinated with infantry movement, and he reduced the length and weight of the matchlock musket making it easier to handle and load.⁶⁹ Adolphus adopted shallow infantry formations, typically six ranks or less with gaps between formations filled with cavalry reinforced by cannon. Through constant drill and practice, Swedish reloading speeds and rotation accelerated up to three times faster than his rivals. He restored the efficacy of cavalry by ending caracole – the practice of discharging pistols by ranks similar to infantry fire – freeing riders to fire as targets appeared. The cavalry’s medieval elite status was ended; cavalry, infantry, and artillery were extensively cross-trained, improving not only coordination but also esprit de corps.⁷⁰

Adolphus also promulgated his *Articles of Military Lawwes* that established the rudiments of a judicial process to ascertain guilt and assess punishment for violations of the law of war. Notably, Adolphus’s *Articles* introduced the

wp-content/uploads/2011/09/Military-technology-political-organization-and-international-political-philosophy-from-1618-to-WWI1.pdf [hereinafter Hagos].

64. See ELTIS, *supra* note 7, at 63 (referring to Sir John Smythe’s *Instructions, Observations and Orders Mylitarie* (1594) and William Wade’s efforts to standardize battle vocabulary).

65. See Hagos, *supra* note 63, at 7-8 (“[T]he most essential features of military technologies, most notably, improved information networks and organizations, more sophisticated weapons system, more efficient drill systems, more strict command structures, more effective control over standing armies, improved systems of taxation and more effective intelligence services to support the standing armies and the elite interests they protect, etc., enabled political organization during the Thirty Years War to become more stable and secure.”).

66. See JEREMY BLACK, *EUROPEAN WARFARE, 1494-1660*, at 137 (2002).

67. HALE, *supra* note 20, at 57.

68. See generally T.A. DODGE, *GUSTAVUS ADOLPHUS: A HISTORY OF THE ART OF WAR FROM ITS REVIVAL AFTER THE MIDDLE AGES TO THE END OF THE SPANISH SUCCESSION WAR* (Boston and New York, Houghton, Mifflin and Company 1895). Adolphus’ success earned him the moniker of “the father of modern warfare,” a model for Clausewitz, Napoleon, and Patton.

69. See DUPUY, *supra* note 19, at 130.

70. See ELTIS, *supra* note 7, at 21-23.

concept of command responsibility for violations of proper conduct. Following the Swedish plundering of Brandenburg in 1631, which endangered the system of retrieving war contributions from occupied territories, he prohibited “marauding and plundering” by Swedish soldiers.

D. The “Mercantilization” of Explosive Weapons Warfare

Explosive weapons production became a business; the one unalterable rule of this business was *more business*. It had not always been that way. Swordsmithing, armor production, and other crafts associated with earlier weapons were low-volume, widely dispersed technologies typically employed on behalf of a single sovereign for whom exceptional quality did not strictly correlate to military success. From weapons producers’ perspectives, entry costs in equipment and expertise were not exceptionally high; productive capacity could be more or less responsive to immediate demand. The sheer fact that there was something of an upper limit on how many weapons could be made limited the size of armies and how often they could fight.

None of this should suggest that ancient tyrants and their medieval heirs did not take seriously the need for numerous and effective weapons. Indeed, successful commanders took their need for armament so seriously that they controlled supply within their domain. Weapons production was very subsidiary to national or ethnic allegiance. Neither Caesar nor Charlemagne would have taken it in stride that the supplier of his weapons was also supplying an adversary; suppliers were a part of his military, and to trade with the enemy was treason. Weapons’ producers shared either the spoils of victory or the consequences of defeat. Whatever the outcome, weapons producers’ loyalties were rarely either ambiguous or transient.

In the explosive weapons era, producing vast quantities of weapons that operated according to precise technical specifications required hefty capital investment. Yet once that high capital investment was made, the marginal costs of increased production fell rapidly by volume. With declining prices, obtaining more weapons became easier, and building supply capacity for precisely produced weapons became an ever higher priority. From a prospective belligerent’s perspective, it made enormous sense to identify the most proficient producers of explosive weapons (regardless of nationality), underwrite their capital costs, and maximize production.⁷¹ And because there were huge incentives for any technological advantage, there was mutually embellishing synergy between explosive weapons production and advances in precision ballistics, metallurgy, and machine tool technology.⁷²

71. See CHASE, *supra* note 5, at 26 (“Each small incremental improvement made the weapons much more effective against infantry formations, castle walls, or ships. This was enough incentive to drive innovation.”).

72. See MCNEILL, *supra* note 41, at 80 (“The system maintained strong incentives for continued improvements of weapons design. When many different purchasers entered the market, and many

The only potential jam in the system would have been the prospect of a cessation of war since explosive weapons might have uselessly taken up space unless destroyed by other weapons. That did not happen. By increasing the supply of explosive weapons, demand for them soared. Unsurprisingly, military expenditures in the early explosive weapons era sharply increased.⁷³ Virtually every European state initiated a chronic arms race. From the late 15th century onward, the military budget of every government increased as a percentage of capital expenditure.⁷⁴ If early modern states were assessed “by what they spent their money on, then they were primarily organizations for the preparation or prosecution of war.”⁷⁵ The increased cost of explosive weapons compelled every prince “to squeeze the maximum of resources out of what were still essentially low-productivity economies.”⁷⁶ Civilians paid higher taxes, and with higher taxes on commodities “they paid more for what they wore, ate and drank.”⁷⁷

Purchased weapons were optimally effective only if integrated into the crown’s broader military objectives, which heightened military leaders’ reliance on weapons producers for advice.⁷⁸ An unprecedented manifestation of this dependence was that weapons production matured as “private sector activity”; independent sources of supply, often located in neutral territory, could competitively bargain with military authorities and even sell to competing clients.⁷⁹

different artisan shops produced arms and armor for the public, any change in design that cheapened the product or improved its performance could be counted on to attract prompt attention and propagate itself rapidly.”); *see also id.* at 98.

73. *See* THE MILITARY ORGANIZATION OF A RENAISSANCE STATE: VENICE C. 1400-1617, at 3 (M.E. Mallett & J.R. Hale, eds., Cambridge Univ. Press 1984) (“By the 1480’s, half the income of the French crown was committed to the new permanent military needs, and the same was probably true of most western European states with the exception of England.”).

74. *See* HALE, *supra* note 20, at 232-34. For example, from 1547 to 1598, the Spanish military expenditure more than quadrupled. *See* Daniel Sok, *An Assessment of the Military Revolution*, 3 EMORY ENDEAVORS J. 31, 34 (2010) [hereinafter Sok].

75. Ayton & Price, *supra* note 30, at 4-5 (“France in the last years of Louis XIV’s reign was spending 75 per cent of its income on war, and in England in the 1650s about 90 per cent of government expenditure went to the upkeep of the army and navy . . . States went bankrupt . . . through the cost of war, and the fiscal strain of long-term involvement in warfare was perhaps the single most important threat to political stability.”).

76. *Id.* at 3.

77. HALE, *supra* note 20, at 47.

78. *See* O’CONNELL, *supra* note 1, at 112 (“[I]t was expected that those who cast the cannon would also serve them in battle . . .” Because of this separation, “artillerists” would serve in the armies of princes like Gustavus Adolphus “not as subordinate arms,” but as kinds of artists whose discipline was to be respected from a distance, and, even more importantly, as “craftsmen and independent contractors working for a profit.”); *see also* Leandro De Magalhães & Francesco Giovannoni, *War Financing and the Transition from Absolutism to Rule by Parliament* (Mar. 2012), http://jagiellonia.econ.columbia.edu/colloquia/political/papers/l_demagalhaes.pdf.

79. *See* MCNEILL, *supra* note 41, at 113 (McNeill explains how early gun makers needed a free market. For example Liège was a neutral town and “important armament center.” Occupying armies that tried to monopolize the town’s gun trade found that only by pulling their armies out and allowing market forces to normalize could “rulers get what they wanted in the quantities to which they had become accustomed.” The Liège gun makers would, at times, supply both sides of Spanish and Dutch

This idea of weapons production as unattached and non-loyal created a new dynamic in the concept of war. Soon the European weapons industry wrapped itself into the emerging ideas of mercantilism; the symbiosis of emerging mercantile philosophy and the emerging explosive weapons served all combatants. Every sovereign could see the benefits of strict adherence to a set of legal principles designed to promote private enterprise.

By the 17th century, the state and the weapons industry were distinguishable sectors in joint ventures that strengthened bonds among military and industrial leaders, among diverse types of technologies, and among financial and logistical planners. A differentiated and precisely integrated industry for supplying explosive weapons, operating pursuant to the dynamics of private enterprise, was a reality not seriously questioned.⁸⁰ As in any commercial relationship, there was no expectation of monogamy.

Governments subsidized development of military-specific industries. Major agricultural and commercial sectors were organized to support the armed forces whether directly or through tax revenues, which led to maturation of the financial structure of governments, a key aspect of the explosive weapons revolution. All this created a standing demand for logistics and finances, helping create the modern European state.⁸¹ Thus, the advent of explosive weapons has been linked to the strengthening of state power at the expense of local autonomy and to the growth of bureaucracies. “In other words, absolutism was the standard answer to the problem of how to pay for war in this period.”⁸²

Most important was the impact all this had on the mercantilization of combat itself. Sovereigns faced a problem of insufficient supply of troops: too few soldiers were willing to fight for religious or political reasons to make up armies of sufficient size to fight wars.⁸³ Foreign mercenaries were an obvious solution to these problems⁸⁴ and were especially useful in putting down rebellions and internal disputes.⁸⁵ Soon, organized violence came to be exercised mainly by

conflicts. “Even the mightiest rulers had to pay what was asked, or do without.”); *see also* Paul Seaver, *Armies, Nations and Liberty*, 1 *PEACE REV.* 8 (1989).

80. *See* O’CONNELL, *supra* note 1, at 141-47; *see also* E. Landesteiner, *The Long Sixteenth Century, circa. 1450-1650*, Paper, 12th Int’l Congress held at Madrid (Aug. 24-28, 1998), <http://www.ianblanchard.com/CEU/paper3.pdf>.

81. *See* Sok, *supra* note 74, at 31, 34.

82. Ayton & Price, *supra* note 30, at 5.

83. *See* Quentin Outram, *The Demographic Impact of Early Modern Warfare*, 26 *Soc. Sci. Hist.* 245, 256 (2002) [hereinafter Outram].

84. *See* R. DOUCET, *LES INSTITUTIONS DE LA FRANCE AU XVII^E SIÈCLE* 632 (1948). Another advantage of mercenaries is that, as warriors by trade, they tended to be better informed of new military techniques and technology.

85. According to V.G. Kiernan:

European governments thus relied very largely on foreign mercenaries. One of the employments for which they were particularly well suited was the *suppression of rebellious subjects*, and in the sixteenth century, that age of endemic revolution, they were often called upon for this purpose . . . [F]irearms, which were improved into practical weapons during the crisis of feudalism, were essential to the rise of the modern state, not only because cannon could batter

professional troops commanded by captains who negotiated contracts.⁸⁶

Wealthy trading cities could increasingly pay for their own security by buying the military services of armed strangers. Best of all, cities could choose just what kind of force they wished to have for a particular campaign season, filling in weaknesses and responding to new conditions. Necessarily, security forces needed to be bought wisely; the city fathers had to understand why one supplier should be preferred over another. It was in the interest of both sides – mercenary and client – to commercialize their interaction by stabilization and standardization of personnel as well as equipment.⁸⁷

Such was the need for mercenaries that the chief grievance was that there were never enough of them. This fueled protection rackets whereby populations seeking security had to pay for security from threats posed by the organization offering security.⁸⁸ Artificial communities of hardened soldiers emerged whose solidarity was driven by pecuniary incentives and reliant on plunder and ransom to supplement their income.⁸⁹ Altogether the emerging synthesis between the explosive weapons industry and the commercialization of military service (mercenaries) stoked demand for war; “[e]asy and open access to arms was therefore a *sine qua non* of mercenary war.”⁹⁰

E. The Escalation of Explosive Weapons’ Toll

For the soldier, explosive weapons changed “the equipment he wore and carried; the formations which affected his morale and practice in combat; the nature of his wounds, for they broke bones and led to the loss of limbs by

feudal strongholds, but even more because firearms could deal with peasant revolts more effectively than any earlier equipment. And *such arms were more safely entrusted to foreign than to native troops.*

V.G. Kiernan, *Foreign Mercenaries and Absolute Monarchy*, 11 *PAST & PRESENT* 66, 74 (1957) [hereinafter Kiernan].

86. *See id.* at 77 (“Every officer, collecting recruits for a government and making what he could out of their pay, was an entrepreneur, a businessman great or small.”); *see also* MATTHEW SMITH ANDERSON, *WAR AND SOCIETY IN EUROPE OF THE OLD REGIME 1618-1789*, at 48-50 (Sutton Publishing Ltd. 1988) (“Private-enterprise warfare was carried to its highest pitch in the 1620s and 1630s by a series of commanders who raised on their own account not merely regiments but entire and sometimes very large armies All these military entrepreneurs were the centers of complex webs of credit and financial dealings The great entrepreneur who raised an army hoped for bigger profits and to become ruler of a principality.”).

87. *See generally* McNEILL, *supra* note 41, at 69-70, 73, 74.

88. *Id.* at 132, 133; *see also* Hagos, *supra* note 63, at 6 (“This is the essence of organized crime, the nation-state system qualifying in no uncertain terms, since it is the foremost violator of human rights, while ostensibly being committed to the protection of human rights, albeit mostly only in a rhetorical or nominal sense.”).

89. *See* Outram, *supra* note 83, at 255. The key feature that distinguishes early modern warfare from later practices was the existence of large numbers of men willing to accept military service under foreign powers, apparently in return for low and uncertain wages from states and “military enterprisers” teetering on the edge of bankruptcy. These low and risky returns were acceptable only because they were supplemented by opportunities for plunder and booty.

90. McNEILL, *supra* note 41, at 79.

gangrene; and more conjecturally, his chances of being killed.”⁹¹ Indeed, his chances of being killed escalated rapidly.⁹² “From the beginning, the dramatically higher level of violence was directly attributable to the introduction of firearms on a large scale.”⁹³

In the two centuries from the Fall of Constantinople (1454) to the end of the Thirty Years War (1659), there were at least thirty clusters of wars, many containing multiple wars. Some of them are historically notable for their duration.⁹⁴ The French Religious Wars included eight distinctive wars; the Italian Wars included four wars; the Ottoman-Hungarian Wars included three wars. Warfare was nearly a perpetual condition during this period. In the 16th century there were less than ten years of complete peace. From the mid-15th century to the mid-16th century, there was a major war or battle in Europe more than three out of every four years; in only twenty-two years does the historical record suggest momentary respite.⁹⁵

For the century 1561-1659, there were no years that witnessed twelve months without a major battle or war.⁹⁶ “The years between 1500 and 1700 were the most warlike in terms of the proportion of years of war under way (95%), the frequency of war (nearly one every three years), and the average yearly duration, extent, and magnitude.”⁹⁷ These were not cold wars. At least fifty battles were fought that accounted for more than 5,000 casualties each. During the 16th century, Spain and France were scarcely at peace. During the 17th century, the Ottoman Empire, the Austrian Habsburgs, and Sweden were at war for two years in every three, Spain for three years in every four, and Poland and Russia for four years in every five.⁹⁸ And it continued: in the 18th century, there

91. HALE, *supra* note 20, at 46.

92. See GEOFFREY PARKER, *THE ARMY OF FLANDERS AND THE SPANISH ROAD 1567-1659: THE LOGISTICS OF SPANISH VICTORY AND DEFEAT IN THE LOW COUNTRIES' WARS* 209 (Cambridge Univ. Press 1972) (estimating that wastage rates of early modern, i.e., 16th and 17th century, armies fluctuated between 2% and 7% monthly); see also Mahinder Kingra, *The Trace Italienne and the Military Revolution During the Eighty Years' War*, 57 J. MIL. HIST. 431, 445 (1993).

93. O'CONNELL, *supra* note 1, at 114.

94. See PARKER, *supra* note 20, at 43 (“[T]he Italian wars lasted from 1494 to 1559; the French Religious Wars dragged on from 1562-1598 and then broke out again in 1621-1629; the ‘Eighty Years’ War’ in the Netherlands, which involved continuous hostilities between 1572 and 1607 and against between 1621 and 1647; the ‘long war’ in Hungary in 1593-1606. And thereafter: the Thirty Years’ War lasted from 1618 to 1648; the ‘other thirty years’ war’ between France and Spain dragged on between 1629 and 1659.”).

95. See HALE, *supra* note 20, at 21 (“There was probably no single year throughout the period [1453-1620] in which there was neither war nor occurrences that looked and felt remarkably like it.”).

96. PARKER, *supra* note 20, at 1. For more background information, see Peter Brecke, *Violent Conflicts 1400 A.D. to the Present in Different Regions of the World* (2001), <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=54A757979D90BB40A397DB4A5EC74CAD?doi=10.1.1.15.9141&rep=rep1&type=pdf>.

97. PARKER, *supra* note 20, at 1; see also Magalhaes & Giovannoni, *Draft, War Financing and the Transition from Absolutism to Rule by Parliament* (2012), http://jagiellonia.econ.columbia.edu/colloquia/political/papers/L_demagalhaes.pdf.

98. JACK S. LEVY, *WAR IN THE MODERN GREAT POWER SYSTEM: 1495-1975*, at 139-41 (1983). See also HALE, *supra* note 20, at 21; see generally QUINCY WRIGHT, *A STUDY OF WAR* (2d ed. 1965).

were only sixteen years of complete peace.⁹⁹

Casualty rates were extreme by historical standards. For Queen Elizabeth's Lisbon and Brittany expeditions of 1589, 15,000 men went out; only 600 returned from the former, and fifty percent returned from the latter. Spanish losses from death or capture (officers only) at the battle of Nieuwpoort in 1600 were reckoned at about one half.¹⁰⁰ According to Professor Parker, "probably one out of every four or five soldiers who enlisted in early modern Europe died each year on active service."¹⁰¹ This does not include the number of casualties attributable to disease, privation, or other ancillary consequences of intense violence.

Fueling (and drawing from) the death toll was an ethos of violence. Charles the Bold reportedly

laughed off the slaughter of a third of his men at Murten (1476). Charles V, upon learning of the tremendous losses of "poor soldiers" (not men of birth), reportedly said "it makes no matter if they die," comparing them to caterpillars and grasshoppers which eat the buds of the earth . . . This was a world which took cruelty and early deaths from natural causes (at a median age in the mid-twenties) for granted, and offered the possibility of escape into an occupation that measured the chances of death from the trajectory of bullets and offered a moral void.¹⁰²

The causes for high casualty rates had to do with the technology of explosive weapons, which compelled perhaps the most suicidal type of warfare ever so widely practiced. To inflict the greatest damage on the enemy, fire had to be coordinated. Moreover, musket fire was accurate only at close ranges; the probability of hitting a target fell off drastically with distance. Thus, both sides had to close in on one another. In the countermarch, successive ranks of musketeers each fired a volley and then retired between the files to reload, all in the face of enemy fire. Success depended on entire tactical units performing the motions necessary for repetitive volley-fire swiftly and in unison. To reload their weapons for the next shot, the battalion had to perform a complex sequence of operations in a fixed order. Because of their physical design, muskets had to be recharged from the muzzle such that troops must be standing as they advanced in order to reload. "Under the best of circumstances the whole process took approximately 20-30 seconds, a time that could well become fatally lengthened by inexperience, panic, or confusion."¹⁰³

99. JONATHAN BROWN & JOHN H. ELLIOTT, *A PALACE FOR A KING: THE BUEN RETIRO AND THE COURT OF PHILIP IV* 255 (1980). For additional details, see GEORGE NORMAN CLARK, *THE SEVENTEENTH CENTURY* 98 (2d ed. 1945).

100. BROWN & ELLIOTT, *supra* note 99, at 255.

101. PARKER, *supra* note 20, at 53.

102. HALE, *supra* note 20, at 84.

103. HALL (1997), *supra* note 9, at 149.

A raw recruit could be taught to aim a gun in weeks if he did not already know, but the demands of the countermarch could be learned only with practice. Troops had to be trained to fire, load, and maneuver all together. Only after lengthy exposure to repeated training drills could men be expected to maintain their concentration on a series of minute mechanical tasks in the face of possible death or mutilation. Training de-emphasized personal skills and strengths while accentuating the power of cohesion and obedience. In a military strategy where numbers were always critical, the effect of training was to turn boys into manpower.

Death, of course, did not change then or since, but there was something different in the invisibility and sheer indefensibility of death from explosive weapons.¹⁰⁴ It is difficult to understand the willingness of troops to walk upright into waves of bullets. Medieval warfighting emphasized traditional warrior virtues of physical prowess and courage. But in the explosive weapons era, killing was reduced to a fairly abstract function, and the ethos of battle fell from something at least rhetorically chivalric into indiscriminate slaughter. Wounds from musket fire were virtually always incapacitating; a single well-aimed cannonball could mow down a file of infantry. Necessarily, “armies grew and casualties mounted, and with them came the climate of callousness.”¹⁰⁵

Whatever individuality a soldier might offer was simply irrelevant. Professor Hall explains:

[t]o outsiders unaccustomed to the demands of the European battle rituals, the whole process seemed curiously abstracted and the soldiers’ indifference to suffering was almost unfathomable. Black Hawk, a chief of the Sauk People, once remarked that “instead of stealing up on each other, and taking every advantage to kill the enemy and save their own people (which with us is considered good policy in a war chief), they march out in open daylight and fight, regardless of the number of warriors they may lose! After the battle is over, they retire to feast, and drink wine, as if nothing had happened.”¹⁰⁶

This process of dehumanization contributed to the very high death toll of losers. “In twenty battles between 1495 and 1600, the defeated lost 38% of their men (killed or captured, not counting wounded).”¹⁰⁷ This was due in great part to widespread annihilation of prisoners. Earlier modes of warfare that esteemed personal courage might evoke mercy for one’s enemy; if surrender was offered, killing would be tantamount to murder. But in the explosive weapons era, a vanquished prisoner was an adversary asset best eliminated:

104. “[T]here is something constricted, something deeply inhuman in the ‘fire discipline’ that their weapons imposed on these men.” *Id.* at 151.

105. O’CONNELL, *supra* note 1, at 109.

106. HALL (1997), *supra* note 9, at 149-50.

107. *Id.* at 217. See generally ARCHER JONES, *THE ART OF WAR IN THE WESTERN WORLD* 204 (1987).

Combatants find themselves on the cusp of two conflicting moralities when one side offers its surrender. In one moment it is licit to kill any member of the opposing force; in the next, the act or surrender is supposed to be recognized and accepted, entitling the vanquished to be treated as prisoners. Killing disarmed men at this point is tantamount to murder, which is why self-disarming is such a potent token of submission. At Ceresole, the imperialists sought to minimize the dangers inherent in this moment by offering their surrender to the French men-at-arms The surrendering imperialists were seeking to remain alive by offering themselves as prisoners in which status they would acquire both a symbolic and an economic value [Their captors] seemed to sense . . . that those new soldiers would simply exterminate them if given the opportunity. “More than half the surrendering imperialists were slain, because we dispatched as many of those people as we could get our hands on.”¹⁰⁸

Prolonged sieges and accelerating battles among larger, rapacious armies were an unremitting molestation of civilian life.¹⁰⁹ Legally, civilians could seek recompense from the army’s commissary service for whatever soldiers took, but these claims lost to the assertion of military necessity. Far worse for civilians was a deliberate policy of scorched earth “in 1483 in Castile; in 1536 in Provence; in 1544 in Scotland; in the Netherlands in 1572; in 1593 in Ireland.”¹¹⁰ If rural life was terrorized, urban life was catastrophic. “Nicholas Froumenteau, in 1581, recorded the destruction by fire of 252 villages, the death of 765,200 civilians (out of a population which had by then reached about 16 million), 12,300 rapes. From 1500 to 1529, the population of Pavia fell from 16,000 to 7,000. [T]here were ‘children kreyeng abowt the streates for bred, and yet dying for hungre.’”¹¹¹ In the Thirty Years War, when the population of Europe was around 100 million, the population of Germany plunged from 21 million in 1618 to around 13.5 million in 1648.

Indeed, warfare of this period was overrun by virtually every conceivable type of predatory excess: “the brutal sacking of civilian population centers and the attendant abuse of women and children; the refusal of quarter and the ritual slaughter of prisoners.”¹¹² The constant economic pressure to perpetually sustain large armies of mercenaries and the very disorder created by war enabled armed bands to inflict whatever damage they enjoyed, “destroying all before them and all too frequently accomplishing nothing of particular political value.”

108. HALL (1997), *supra* note 9, at 189-90.

109. “Guicciardini noted in the 1530s the changed impact of war on civilians who, especially after 1509, ‘saw nothing but scenes of infinite slaughter, plunder and destruction of multitudes of towns and cities, attended with the licentiousness of soldiers no less destructive to friends than foes.’” HALE, *supra* note 20, at 179.

110. “Burning as a threat to extort food or money was [so] common that, at least in Germany, a certificate was issued to house owners who had paid ‘fire tax’ to protect their homes, and they were safe as long as they could display it and soldiers were not too desperate to ignore.” *Id.* at 184-85.

111. *Id.* at 180.

112. O’CONNELL, *supra* note 1, at 124.

In addition to plunder and the slaughter of adult males, ritual rape of women and girls increasingly became routine. Spanish troops took to drinking the blood of their victims.¹¹³

Of course, warfare's contagion was not limited to Europe. "The principal export of pre-industrial Europe to the rest of the world was violence, and the *fidalgos*, the *conquistadores*, the *vrijburghers* and the *nabobs* were in effect warrior nomads who differed little from the Mongols or the Mughals."¹¹⁴ Explosive weapons had a decisive impact on non-Europeans not only for their penetrating force but for their seemingly magical quality that compelled submission. European massacres of local populations in the Americas and elsewhere, too numerous to mention, were not only made technically possible by explosive weapons; these weapons fed and were sustained by all-consuming warfare first throughout Europe, then beyond, consuming human life worldwide. "For the first time, death dealing would achieve the level of ecological blight."¹¹⁵

II. EMERGENCE OF THE INTERNATIONAL LAW OF WAR

Hugo Grotius (1583-1645) was so appalled by his era's violence that he wrote his great work, *De jure belli ac pacis* (*On the Laws of War and Peace*, 1625), to try to reduce warfare:

[t]hroughout the Christian world, I observed a lack of restraint in relation to war, such as even barbarous nations should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if . . . frenzy had openly been let loose for the committing of all crimes.¹¹⁶

Grotius' book, echoing the writing of Alberto Gentili (1552-1608)¹¹⁷ and embellished by Emerich de Vattel (1714-1767),¹¹⁸ has received centuries of acclaim for having propounded the foundations of the international law of war.¹¹⁹ These men wrote at a pivotal historical moment when there had been

113. *Id.*

114. PARKER, *supra* note 20, at 115 (referencing FREDERIC C. LANE, *VENICE AND HISTORY: THE COLLECTED PAPERS OF FREDERIC C. LANE* 23-24 (1966)); see also Nils Steensgard, *Violence and the Rise of Capitalism: Frederic Lane's Theory of Protection and Tribute*, 2 *REVIEW* V 247 (1981).

115. O'CONNELL, *supra* note 1, at 115.

116. Hugo Grotius, *De Jure Belli ac Pacis*, Prolegomena, ¶ 28 (Carnegie ed. 1925) [hereinafter Grotius].

117. ALBERICO GENTILI, *DE JURE BELLI (ON THE LAW OF WAR)* 58-61 (John C. Rolfe trans., Clarendon Press ed. 1933) (1598) [hereinafter GENTILI].

118. EMERICH DE VATTEL, *THE LAW OF NATIONS* (Charles G. Fenwick ed. & trans., William S. Hein & Co. 1995) (1758) [hereinafter VATTEL].

119. Hugo Grotius's stature as the father of international law is well-acknowledged. See WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 212 (Michael Byers, trans., 2000) [hereinafter GREWE]. See also Bederman:

enough time to digest the impacts of explosive weapons on warfare yet when the governance response to those impacts was at a crossroads. It was a moment, perhaps, when international law could have made a difference.

For centuries, the international law of war as propounded by these preeminent scholars went substantially unchallenged. Warfare got worse, but juridical examination of warfare receded from western international legal discourse until the rise of international humanitarian law in the 19th century. It could fairly be argued that not until the United Nations Charter, adopted at the onset of the nuclear weapons era, was the Grotius–Gentili–Vattel architecture of the *international law of war* meaningfully reconceived.

In this Part II, I consider why the international law of war did not effectively stem the flood of violence wrought by explosive weapons. Part II's three sections address respectively: (A) The Law of War's Intellectual Inheritance; (B) The Law of War and Sovereign Primacy; and (C) Just War and Warfare. In Part III, I will consider whether there might have been more productive perspectives to have advocated.

A. *The Law of War's Intellectual Inheritance*

Before Grotius and Gentili, three lines of thought about war emerged from noted scholars. Machiavelli's (1469-1527) endorsement of war as a princely prerogative for *raison d'état* (although he never used the phrase) was history's most prominent assertion of a philosophy often labeled, appropriately, Machiavellianism. Erasmus (1466?-1536), by sharp contrast, was among history's most respected moral proponent of the virtues of peace. Vitoria (1483-1546) was pivotal in reworking "just war" theory, earlier propounded by scholastic theologians, within the emerging discipline of international law. All shared a central focus on the responsibilities of sovereigns but differed radically on the content of those responsibilities. That these scholars were contemporaries writing dur-

Adam Smith, in lectures delivered in 1762, said that "Grotius seems to have been the first who attempted to give the world anything like a regular system of natural jurisprudence, and his treatise On the Laws of War and Peace, with all of its imperfections, is perhaps at this day the most complete work on the subject."

David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli ac Pacis*, 10 EMORY INT'L. L. REV. 1, 2 (1996). Andrew White extolled Grotius's work, saying: "Of all works not claiming divine inspiration, that book has proved the greatest blessing to humanity. More than any other it has prevented unmerited suffering, misery and sorrow; more than any other it has promoted the blessings of peace and diminished the horrors of war. See Andrew D. White, *Debt Due to Hugo Grotius*, 61 ADVOC. PEACE 186 (1899). And consider this more recently bestowed praise: "*De jure belli ac pacis* commended itself to the conscience of the age Grotius showed that the totality of international relations could be systematically subject to law. By striking an integral combination of natural, human, and divine laws, Grotius extended the vision of the great jurist-theologians who preceded him. Like Suarez and Vitoria, Grotius contemplated the universe as subject to the reign of jurisprudence." Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 A.J.I.L. 477, 482 (1982).

ing the early decades of the explosive weapons era might be mere coincidence. Apparently, Erasmus and Vitoria knew each other;¹²⁰ there appears little evidence that either knew Machiavelli.

1. Machiavellianism

In truth, Machiavellianism is millennia older than its appellation. It's how it's always been. Perhaps the idea's most famous recounting was the slaughter of Melos, a Spartan ally, during the Peloponnesian War. Melos refused the Athenians' demand of surrender hoping errantly that Sparta would come to its rescue. In the ensuing negotiations, the Athenians made clear that appeals to mercy would not save the Melians from their fate. As the weaker party, they could only accept the demands of the stronger and be content that they were not more extreme: "[R]ight, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must."¹²¹ In the end, the Athenians attacked, killed every male, and sold the women and children into slavery. Today, of course, the Athenian generals would face prosecution for crimes against humanity.

Machiavelli asserted that a prince's fortune depended on his power to impose his will. "Machiavelli took the freedom of the State to its ultimate consequences by stating that the power of the prince was sufficiently legitimated by its own effectiveness and was in the last analysis independent of any de facto or higher moral authority."¹²² Thus, every means for achieving certain political objectives was permissible.¹²³ *The Prince* outlined methods that included conquering by force or fraud, destroying cities, executing anyone who could do harm, moving inhabitants to another place, establishing colonies, and extending the state's territory and power at the expense of rivals. The question of morality, in the sense of norms restraining states in their mutual relations, either did not arise or

120. Ramón Hernández, *The Internalization of Francisco de Vitoria and Domingo de Soto*, 15 FORDHAM INT'L L. J. 1031, 1035 (1991) [hereinafter Hernández].

121. Thucydides, *The Melian Dialogue*, in HISTORY OF THE PELOPONNESIAN WAR Bk. V, sec. 89. Thucydides cited Euphemius to similar effect: nothing is unjust which is expedient; for those whom fortune favors makes right, the administration of a state cannot be carried on without injustice, and war is irreconcilable with all law.

122. Lesaffer further explains that with this proposition, the law of nations and treaties between those nations was in jeopardy. "[T]his implied that a prince, when the national interest demanded it, was not bound by a given word With this provocation, the Florentine articulated a challenge which the European powers faced around the middle of the sixteenth century." Randall Lesaffer, *The Grotian Tradition Revisited: Change and Continuity in the History of International Law*, 73 BRIT. Y.B. INT'L L. 103, 121-22 (2002) [hereinafter Lesaffer].

123. Dogan notes that this is a "utilitarian" perspective on politics, since the result is the object and whatever means best effect that result are proper. To that end, the "prince must be capable of being both good and evil and of behaving like both 'fox and lion.'" Nejat Doğan, *Machiavellism, Kantian Deontology, and the Melian Dialogue: A Reflection on Morality and the Use of Force*, 44 J. FAC. LANGUAGE HISTORY-GEOGRAPHY 65, 68-69 (2004).

was subordinated to the sovereign's pursuit of power.¹²⁴ Moral values did not direct policy; a wise prince should exploit morality.

Machiavellianism comes into today's lexicon as "realism" but is better described as "fatalism"¹²⁵ – war is part of the human condition because humans are inherently acquisitive and combative, and it will always be this way; with regard to power, the only virtue is success. All creatures, human beings and animals, are impelled by nature to pursue ends advantageous for themselves. Man is essentially an opportunist, unaffected by abstract principles of right and wrong. Thus, the causes of war are inherent in man's nature: self-interest, self-defense, and sometimes aggression.

Machiavellianism did not so much expound this view as took it for granted. Indeed, whether called fatalism or another name, one of its most notable attributes is that its proponents have considered it so obvious as to rarely need defense.¹²⁶ Ancestors more learned than ourselves understood it and taught it to us.¹²⁷ God must have made us this way, for how could something so universal and manifest be other than heavenly mandated.¹²⁸ Advocacy of anything otherwise was entirely ignorable. Only the foolish might need to be reminded of it.

Machiavellianism offered instant justification for all of the era's warfare with all the human cost. Violence had no special character – violence was just a tool that could be effectively used for power.¹²⁹ Frederick the Great would later call Machiavelli the enemy of mankind, characterizing Machiavellianism as: "[P]rinces are slaves to their resources, the interest of the state is their law, and this law is inviolable."¹³⁰ With respect, there was nothing about Machiavellianism (at least with regard to war) that had anything to do with law. Machiavelli

124. Korab-Karpowicz states that before Machiavelli, this moral (or amoral) "stream of thinking had never prevailed over the dominant political tradition of Western thought." The popularity of Machiavelli's arguments stem from his willingness to justify evil acts as a "legitimate means of achieving political ends . . . [this] persuaded so many thinkers and political practitioners after him." W.J. Korab-Karpowicz, *In Defense of International Order: Grotius' Critique of Machiavellism*, 60 *REV. METAPHYSICS* 55, 56 (2006) [hereinafter Korab-Karpowicz].

125. See FREDERICK G. WHELAN, *HUME AND MACHIAVELLI: POLITICAL REALISM AND LIBERAL THOUGHT* 58 (Lexington Books 2004); see generally FRIEDRICH MEINECKE, *MACHIAVELLISM: THE DOCTRINE OF RAISON D'ÉTAT AND ITS PLACE IN MODERN HISTORY* (Transaction Pub. 1998) [hereinafter MEINECKE].

126. Offered by Jordan and Krehbiel: "The principle of nationality is of such force that it is fruitless to try to stop its victory." DAVID STARR JORDAN & EDWARD BENJAMIN KREHBIEL, *PEACE PROJECTS OF THE PAST* 80 (1912).

127. See William S. Anderson, *Livy and Machiavelli*, 53 *CLASSICAL J.* 232 (1958). Machiavelli took guidance from early Roman history, as did Livy earlier on. Machiavelli, though, did not read history for moral guidance so much as he did for examples of effective methods of rule. Livy would read these same tactics as impermissible methods of waging war. For example, see Anderson's discussion of Livy and Machiavelli on the early Roman king Tullus. *Id.* at 233-34.

128. According to Korab-Karpowicz, theorists of *raison d'état* interpreted the "good of the state" as the "highest moral value"; ethics and moral issues were "subject to politics." Korab-Karpowicz, *supra* note 124, at 55-57.

129. "Violence must be inflicted once for all," Machiavelli argued. "[P]eople will then forget what it tastes like and so be less resentful." NICCOLO MACHIAVELLI, *THE PRINCE* 66 (Bonadella trans. and ed., 2005) (1513).

130. MEINECKE, *supra* note 125, at 36.

rejected the idea that universally valid natural law, discoverable by “right reason,” determined what was right or just. Laws were merely things that human beings created for expediency.

Law was based only on calculation of the advantage of citizens who – living singly and powerless to protect themselves – therefore socialized for their mutual protection. But powerful states that could protect themselves need acknowledge no higher law but their own strength. In international politics, nothing was unjust which was advantageous for the prince.¹³¹ To consider the advantage of others to the detriment of one’s own interests would be supreme folly.¹³² Theories of just war that had evolved for ten centuries from Augustine could be jettisoned as could the chivalric tradition that had infused medieval warfare. The notion of law did not apply to relations among sovereigns.

2. Erasmus

Erasmus was repulsed at the bloodshed surrounding him and preached for peace. “Discord and strife are forever and everywhere rampant. We wage endless war, man against man, prince against prince, father against son . . . [I]n war an army of all the evils of tragedy moves like a sea in flood; so deadly that it sweeps like a plague through the world.”¹³³ In his “Plea of Reason, Religion, and Humanity against War” he wrote, “There is nothing more unnaturally wicked, more productive of misery, more extensively destructive, more obstinate in mischief, more unworthy of Man.”¹³⁴ War is “a disease of man’s wit.”¹³⁵

Albeit not the first to object to war, Erasmus highlighted the significance of state command by asking, “[A]re those civic duties requiring to do violence unto other men at the command of the state compatible with certain crucial injunctions which seem to counsel meekness as the precondition for salvation?” His answer: if we “take peace away, the whole society of Christian life perishes.”¹³⁶ “What is war, indeed, but murder shared by many, and brigandage, all the more immoral from being wider spread?”¹³⁷

131. NICCOLO MACHIAVELLI, DISCOURSES ON THE FIRST TEN BOOKS OF LIVY (Book I, chs. 3, 9).

132. This view of international conduct became the main theme of an entire genre of 16th century Italian political writings, the most notable contribution to which was Giovanni Botero’s work *Ragione di Stato*. See Korab-Karpowicz, *supra* note 124, at 60.

133. Erasmus began writing on war’s folly in a letter to his former patron, the Abbot of St. Bertin (1514). See JOHAN HUIZINGA, ERASMUS AND THE AGE OF REFORMATION 51 (F. Hopman trans., 1924) (1952) [hereinafter HUIZINGA].

134. Desiderius Erasmus, *Antipolemus: Or, the Plea of Reason, Religion, and Humanity, Against War*, in THE BOOK OF PEACE: A COLLECTION OF ESSAYS 77 (George C. Beckwith ed., 1845).

135. Desiderius Erasmus, *The Complaint of Peace*, in THE COMPLAINT OF PEACE BY ERASMUS 45 (W.J. Hirten ed., 1946, trans. 1521).

136. See José A. Fernández, *Erasmus on the Just War*, 34 J. HIST. IDEAS 209 (1973) [hereinafter Fernández].

137. Desiderius Erasmus, *Dulce Bellum Inexpertis*, in INTERNATIONAL RELATIONS IN POLITICAL THOUGHT: TEXTS FROM THE ANCIENT GREEKS TO THE FIRST WORLD WAR 224 (Chris Brown, Terry Nardin & Nicholas Rengger eds., 2002) (1515).

Erasmus called on sovereigns to stop war, arguing that the “really Christian prince will first weigh the great difference between man who is an animal born for peace and good will, and beasts and monsters who are born to predatory war.”¹³⁸

The ruler who insists upon defending his rights by war must ask himself: Shall I, one person, be the cause of so many calamities? Shall I alone be charged with such an outpouring of human blood; with causing so many widows; with filling so many homes with lamentation and mourning; with robbing so many old men of their sons; with impoverishing so many who do not deserve such a fate; and with utter destruction of morals, law, and practical religion?¹³⁹

Thus, “[a] good prince should never go to war at all unless, after trying every other means, he cannot possibly avoid it” and he must obtain the consent of his subjects before declaring war.¹⁴⁰

A just war may perchance exist but is not likely.¹⁴¹ In Erasmus’ view, the just war is nothing but a myth; its doctrinal assumptions, as harsh evidence demonstrated, were invalidated by the reality of man’s behavior. It is the innocent – those who have least interest in conflict, who are involved in war against their will – who suffer the scourge of war’s worst effects. “Evildoers, criminals, murderers are never punished in war; indeed, far, far from it, for they are the ones who, under the name of soldiers, work havoc upon the human race.”¹⁴²

And what is a just war? A real or imagined slight, an insignificant article omitted from some overlong treaty, a miscarried wedding, a ‘merry scoff freely spoken,’ the thirst for power, a private grudge, the desire for revenge . . . for these and similar trifles humanity is visited with the scourge of war . . . More serious and frequent is the tyrannical ambition of some princes whose passions, bridled in peace by vigorous laws and strong counselors, find freedom and fulfillment in discord.¹⁴³

138. Erasmus may have called on princes to give up war knowing this would be futile. “He sometimes used just war theory not with the idea that rulers would *cease* to fight unjust wars but with the idea that using just war appeals to counsel such rulers might lead them to fight fewer unjust wars.” JOHN HOWARD YODER, *CHRISTIAN ATTITUDES TO WAR, PEACE, AND REVOLUTION* 201 (Theodore J. Koontz & Andy Alexis-Baker eds., 2009).

139. DESIDERIUS ERASMUS, *THE EDUCATION OF A CHRISTIAN PRINCE* 253-54 (W.T.H. Jackson ed., Lester K. Born trans., 1968) (1516).

140. *Id.* at 249.

141. To offer no resistance against the ambitions of infidels is “delivering Christendom and Christianity into the hands of their bestial enemies and to abandon in helplessness our brothers who groan in servitude.” Fernández, *supra* note 136, at 219 (citing Erasmus, *Utilissima consultation de bello Turcis inferendo* in *Opera Omnia* V, 353D).

142. Desiderius Erasmus, *De vidua christiana*, in *ERASMUS ON WOMEN* (Jennifer Tolbert Roberts trans., 1996).

143. ERASMUS, *Scarabeus aquilam quaerit*, in *THE ADAGES OF ERASMUS* 58 (Margaret Phillips trans., 1964) (1517).

“[A]n unjust peace is far preferable to a just war.”¹⁴⁴

Yet Erasmus commended war against the Turks as a valid last resort in defense of Christendom and of unjustly oppressed innocents.¹⁴⁵ To not resist their ambition was tantamount to “delivering Christendom and Christianity into the hands of their bestial enemies and to abandon in helplessness our brothers who groan in servitude,” noting “[t]here are those who judge that the right to wage war is absolutely prohibited to Christians; to my understanding this opinion is too absurd to deserve refutation.”¹⁴⁶ In accord with Thomas More¹⁴⁷ and other preeminent social theorists of his time, Erasmus’s advocacy of peace was not simplistic pacifism.¹⁴⁸

Erasmus saw war as an extreme example of discord that also included private criminality. Man, a social and political being, has established communities to repel the violence of wild beasts and robbers. States were formed with authority vested in the prince to ensure people’s well-being, to control discord, and to punish wrongdoers. The magistrate, empowered by the laws to administer justice, guarantees the reign of concord within the commonwealth, obviating the need for individuals to seek private justice. As magistrates were vested with the power to bridle the wicked, princes must be endowed with the right to wage war. To take the sword away from princes would mean “depriving the magistrates of the right to punish delinquents,” dooming the safety of the state.¹⁴⁹ Ultimately, society’s welfare must be paramount, and the presence of the state thereby demanded the presence of war. Yet, war must be conducted so as to shed as little blood as possible, spare the innocent, and be short-lived.

Machiavelli rejected this type of moralizing approach. “[I]t appears to me more proper to go to the real truth of the matter than to its imagination; and many have imagined republics and principalities which have never been seen or known to exist in reality.”¹⁵⁰ Erasmus rejected Machiavelli’s moral indifference to the implications of warfare. Neither demonstrated an appreciation of how a state could cope with the magnitude of emerging warfare.¹⁵¹ Ultimately, Erasmus had far less impact on the behavior of princes than did Machiavelli,

144. J.W. Mackail, *Introduction to DESIDERIUS ERASMUS, AGAINST WAR*, at xxx (Lewis Einstein ed., 1907) (1515).

145. Fernández, *supra* note 136, at 219.

146. *Id.* (citing Erasmus, *Utilissima consultation de bello Turcis inferendo* in *Opera Omnia V*, 354A).

147. According to More, in Utopia, war is institutionalized. *See generally* THOMAS MORE, *UTOPIA* (1516) (More’s concept of war in Utopia is treated primarily in the chapter titled “Of Their Military Discipline”).

148. *See* Carl J. Friedrich, *Erasmus and Kant: On War and Peace*, 133 *WORLD AFF.* 1, 7-8 (1970).

149. Fernández, *supra* note 136, at 221 (citing Erasmus, *Utilissima consultation de bello Turcis inferendo* in *Opera Omnia V*, 353D).

150. NICCOLO MACHIAVELLI, *THE PRINCE* 60 (Luigi Ricci trans., 1903) (1513).

151. *See generally* Friedrich, *supra* note 148 (analyzing the shortcomings of Erasmus and Machiavelli in understanding the changing nature of warfare in Europe).

proving that moral aspirations were meaningless to powerful people possessing weapons if those people were unwilling to pay attention.¹⁵²

3. Vitoria

Vitoria's theory of just war¹⁵³ was offered in reaction to the Spanish conquest of the Americas. Upon hearing accounts of atrocities of the Peruvian conquest, Vitoria wrote "my blood freezes in my veins when I imagine them."¹⁵⁴ Spain's colonization, in his view, must be limited to protection and advancement until such time as the natives could develop self-governance that respected the fundamental rights of man. Vitoria asserted that it was imperative "to invoke the supreme argument of the natural unity of all peoples in order to definitively dissolve armed conflicts, and to study the possibility of international accord on the basis of a society of nations bound together by common principles and laws."¹⁵⁵

All races shared a natural right of friendship. Vitoria drew the foundations of a society of nations from the inescapable and inalienable unity among all peoples. Thus, the natural community of nations was preordained initially in the divine world order and aimed at the higher common well-being of humankind. Political authority was rooted in human nature: man needed authority to develop his material and spiritual resources to the fullest extent possible. Accordingly, the community of nations could bind its members through legal rules based on natural law. These rules' binding force derived from the morality of a just coexistence of nations, not the will of sovereigns or contractual consensus. "For Vitoria the legal bindingness of *ius gentium* necessarily presupposes an integrated character of the global commonwealth that leads him to, as it were, ascribe legal personality to the global community as a whole."¹⁵⁶

Consent of most states either by custom or treaty was the second source of law, below natural law in the hierarchy of the legal order. "If there were a

152. Huizinga comments:

It may be doubted whether Erasmus exercised much real influence on his contemporaries by means of his diatribes against princes. One would fain believe that his ardent love of peace and bitter arraignment of the madness of war had some effect. They have undoubtedly spread pacific sentiments in the broad circles of intellectuals who read Erasmus, but unfortunately the history of the sixteenth century shows little evidence that such sentiments bore fruit in actual practice.

HUIZINGA, *supra* note 133, at 154.

153. For a discussion of Vitoria's views on *just war* in connection with the larger community of Spanish jurists of the 16th century, see GREWE, *supra* note 119, at 204-07.

154. Vitoria's thoughts on the colonization of the New World and Europe's attending obligations can be found in his 1532 treatise *De indis*. See generally Antony Anghie, *Francisco De Vitoria and the Colonial Origins of International Law*, 5 SOC. LEGAL STUD. 321 (1996); Hernández, *supra* note 120, at 1039.

155. Hernández, *supra* note 120, at 1041-42.

156. Andreas Wagner, *Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth*, 31 OXFORD J. LEGAL STUD. 565, 565 (2011). By contrast, Gentili posited that sovereign states in their plurality are the pinnacle of the legal order(s). *Id.*

human law, which would without reasonable cause hinder the observance of natural or divine law, this law would be inhuman (*inhumanum*) and unreasonable and therefore without binding force.”¹⁵⁷ In time, when government by isolated and divided nations no longer would suffice to ensure the security of human nature, some form of universal government will be perceived as the most advantageous and appropriate solution. “[T]he human race had the right to choose a single ruler in the beginning, before the division of peoples and nations. It can still do so now, as this power, as a natural right, does not disappear.”¹⁵⁸

Vitoria called upon sovereigns to join together to design the bodies and arrangements that would ensure the security and progress necessary to prevent the more powerful from infringing the inalienable rights of the weakest, least favored, and least developed, and that would favor their improvement and perfection. To deny such improvement and perfection would be to violate nature itself. Vitoria’s new legitimizing construction was based on *titulus naturalis societatis et communicationis*.¹⁵⁹ He urged free communication among peoples, freedom of the seas, and free commerce, trade, and interaction among civil societies.

Under careful limits and conditions, war could be justified in defense of rights, but only if it was provoked by, and proportionate to, a grave injury. “[I]n exercising the right of war moderation must be employed according to the nature and quality of the injury suffered.”¹⁶⁰ Three rules applied: (1) before war, nations must pursue all available peaceful means to resolve the dispute; (2) during the war, nations must act without hatred and with a view to minimizing harm and casualties; and (3) after the war, nations must be moderate and judicious in victory.¹⁶¹ Notably, Vitoria asserted that if “one’s nation is engaged in an unjust war, it is incumbent on the individual to refuse to fight.”¹⁶²

Vitoria’s most important contribution was to re-craft the concept of just treatment of belligerents in war. For a millennium, scholastic theologians had asserted that sovereigns, responsible for the community’s security, may legally use force to defend the innocent, restrain evil, and repel threats.¹⁶³ Every armed

157. GREWE, *supra* note 119, at 190. Notably Suarez took exception with this, holding that there is no natural society which was directed at the common good. On the contrary, states had a natural right to refuse to interact with other states, in order to isolate themselves. Establishment of a society based on transaction and communication depended entirely on the positive free will of its members.

158. Hernández, *supra* note 120, at 1043-44 (quoting FRANCISCO DE VITORIA, *DE POTESTATE CIVILI* 14 (T. Urdáñez ed., 1960)).

159. GREWE, *supra* note 119, at 204.

160. Hernández, *supra* note 120, at 1047.

161. JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS* 208 (Lawbook Exchange rpt. ed. 2013) (2000).

162. Alexander Moseley, *Francisco de Vitoria and Just War*, ALEXANDER MOSELEY’S PHILOSOPHY OF WAR PAGES (2004), <http://www.alexander-moseley.me.uk/Articles/just%20war%20theory/philosophers/Vitoria.htm> [hereinafter Moseley].

163. Scholastic theologians asserted that the sovereign’s prerogative for using force was limited to securing redress and compensation for the offender’s crimes. Orderic Vitalis (1075-1142) wrote:

conflict was a case of crime and punishment, and just war was analogous to just infliction of punishment against a criminal. Mercy and proportionality were extolled, but the important question was which combatant's cause was right. Necessarily, both sides could not be justified in going to war. One side had to be right; the other wrong. God can only be on one side of a war. "The Will of God was not, in theological terms, divisible."¹⁶⁴

Vitoria understood that if only one side was right, the unjustly warring belligerent would be denied the benefits of restraints upon the conduct of warfare, particularly in relation to the taking of prisoners. The brutalities of medieval warfare were in part attributable to this reasoning.¹⁶⁵ He therefore affirmed that both sides in warfare must be subject to the same restraints on their conduct.¹⁶⁶ "This was the non-discriminating concept of war."¹⁶⁷

Nevertheless, Vitoria accepted war's horrors. In war, any action "should be permitted to defend the public good and to seize reparations for damage," provided such acts fit within proportionality concerns.¹⁶⁸ "It is lawful to kill indiscriminately all those who fight against us, which surely, by virtue of their actual threatening activity defines them as combatants."¹⁶⁹ Soldiers were legitimate targets except for those who did not pose (or no longer posed) a threat. Killing non-soldiers was excused if their deaths were not the intended goal. When conquering a city, killing all adult males (regardless of combatant status) was morally acceptable; "if the innocents could not be distinguished from the guilty," it was likely that the intended targets were combatants.

The principle of mercy "cannot be extended to civilians who are merely potential [or future] threats," such as children who may grow up one day to be soldiers. Yet, "it does not seem to me permissible to kill a large number of innocent people by indiscriminate bombardment in order to defeat a small

"[W]rong must be done to put an end to a worse thing. The same action can be and should be both just and prudent. It is one thing to ask whether our cause is just, but another to ask whether what we do about it is wise or prudent." ORDERIC VITALIS, *THE ECCLESIASTICAL HISTORY OF ORDERIC VITALIS* 96-97 (Marjorie Chibnall trans., Oxford U. 1975) (quoting Orderic). Aquinas (1225-1274) wrote that public authorities may lawfully kill someone who has become "dangerous and infectious to the community." Thomas Aquinas, *Question 64 – Of Murder*, *SUMMA THEOLOGICA PART II-II*, art. 2 (Fathers of the English Dominican Province trans., 1917). Indeed, "it is praiseworthy and advantageous that he be killed in order to safeguard the common good." *Id.* A just war must be waged not out of enmity but out of the purpose of correcting evil and bringing the enemy to the path of righteousness. *Id.*

164. G.I.A.D. Draper, *Grotius' Place in the Development of Legal Ideas About War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 177, 186 (Bull, Kingsbury and Roberts, eds., Clarendon Press 1992) [hereinafter Draper].

165. *Id.* at 186. See generally Daniel M. Green, *Canon Law, Dynasticism, and the Origins of International Law*, Paper for the Sixth Pan-European Conference on International Relations (2007), http://www.eisa-net.org/be-bruga/eisa/files/events/turin/Green-sgir_torino_2007_green.pdf.

166. Moseley describes Vitoria as being in the "Thomist just war tradition," where "peace should be the purpose of war." Moseley, *supra* note 162.

167. GREWE, *supra* note 119.

168. Moseley, *supra* note 162.

169. *Id.*

number of enemy combatants.”¹⁷⁰ War costs may justly be demanded from enemies; punitive measures taken to guarantee no further transgressions, and entrance into an enemy’s territory to plunder and take civilians as prisoners (not for its own sake, but to target the enemy’s capability to wage war, presumably by targeting food producers, craftsmen, etc.) were allowed. Acts of revenge were permissible, but after the war concluded revenge was no longer necessary.¹⁷¹

B. *The Law of War and the Primacy of Sovereignty*

For a hundred years, Machiavellianism stood intellectually supreme,¹⁷² with predictably horrific consequences. Writing at the onset of 17th century amidst incessant bloodletting, Grotius sought to propound legal constraints on the interstate use of force and thereby guide sovereigns to peacefully cooperate and resolve disputes. Grotius rejected as a denial of natural law the Machiavellian view that man merely seeks his own naked greed, that power is justice, that war is outside law’s authority to judge, and that in the case of a king nothing is unjust which is expedient.¹⁷³ Grotius conceded that self-preservation – the most basic and common law of nature – has sustained the core justification for recourse to war. Yet, “among the traits characteristic of man is an impelling desire for society, that is, for the social life . . . peaceful, and organized according to the measure of his intelligence.”¹⁷⁴

Natural law derives from humans’ social nature and promulgates a set of rules for protecting social order against acts that destroy peace. Grotius asserted that natural law had universal validity, was applicable to all rational beings, and could not be changed by any authority whether divine or human. Natural law was a mandatory force that even sovereigns must obey because the source of their sovereignty was law. In this view, to assert that sovereigns’ interests should override international norms was to disregard the importance of international norms to the realization of sovereign interests and thereby posit a false dichotomy between particular sovereigns’ interests and the interests of the whole international community.

This principle – that sovereigns were subject to natural law – has been a highly regarded contribution to the understanding of how law should regulate war. Erasmus had based the sovereign obligation to pursue peace on religious principles. By positing that sovereigns were obligated under natural law to

170. *Id.*

171. See Robert E. Williams, Jr. & Dan Caldwell, *Jus Post Bellum: Just War Theory and the Principles of Just Peace*, 7 INT’L STUD. PERSP. 309, 316-18 (2006).

172. “The spirit which most thoroughly permeated the whole world, whether in war or peace, when Grotius wrote, was the spirit of Machiavelli – unmoral; immoral. It had been dominant for more than a hundred years.” T.J. McCormack, *The Hugo Grotius Celebration at Delft*, 1901 THE OPEN COURT 181, 186 (containing a speech by Andrew D. White on the influence of Grotius).

173. Grotius, *supra* note 116, Prolegomena, ¶ 3, at 39.

174. *Id.* at ¶ 6.

control war, Grotius endowed this obligation with strength it had not heretofore possessed. This advance from law based on religious morality to law based on sovereign legal responsibility has been asserted as a chief reason for Grotius's historical significance.¹⁷⁵

At this early threshold in logic, a pivotal intellectual choice arose that was among the most important to the emergence of the international law of war: *Does the universality of natural law suggest, at least in theory, an authority superior to that of states? Is there some higher "international" order, or is the law of nations exclusively the sum of its supremely sovereign parts – states? If the whole is something greater, should that "whole" impel some concept of international governance?* At issue here was not sovereignty in the internal sense – the authority of the sovereign over the citizenry – but was rather about whether the sovereign was answerable, at least with regard to war, to any "super-sovereign" operating on at least a multinational if not international plane.

Gentili had asserted that there could be no super-sovereign above nation-states, and Grotius implicitly agreed.¹⁷⁶ Cicero was cited for the Stoic belief in a "society of mankind rather than of States,"¹⁷⁷ but there was no ascent from the universality of natural law to some universal governance, whether for peace or any other aspiration.¹⁷⁸ International law was an abstract set of principles, binding but not institutionalized.¹⁷⁹ This principle of sovereign primacy became "the fundamental ordering principle of the states system, placing the state at the

175. See Josef L. Kunz, *Natural Law Thinking in the Modern Sciences of International Law*, 55 A.J.I.L. 951, 951-52 (1961). Also, according to Stephen C. Neff, "The source of this new body of law lay in the conscious will of the states themselves . . . Its binding power came not from the command of God or the nature of things but rather from the 'mutual consent' of the states, and its function was the down-to-earth one of promoting the advantage of the great society of states." STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 98 (2005) [hereinafter NEFF].

176. "The law of nations, designated by Gentili as *ius gentium* . . . is that law which all nations or the greater part of them . . . agree upon. It is the law of the society or community of states . . . Grotius adopts substantially the conception of Gentili, when he says the law of nations (*ius gentium*) is that law . . . from the will of all nations or of many." Coleman Phillips, *Introduction to DE JURE BELLI LIBRI TRES* 9a, 22a-23a (John C. Rolfe ed. & trans., Oxford 1933) (1612).

177. Ford characterized Grotius's "animating vision . . . as being rooted . . . in the moral reasoning of a Stoic philosophy," and traced the lineage of this thought to Lipsius and the ascendancy of Renaissance Stoicism. See Christopher A. Ford, *Preaching Propriety to Princes: Grotius, Lipsius, and Neo-Stoic International Law*, 28 CASE W. RES. L. REV. 313, 343-45 (1996) [hereinafter Ford].

178. See generally 7 JOHN DUNN & IAN HARRIS, *GREAT POLITICAL THINKERS: GROTIUS* (1997); JEROME B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* 71-72 (1998).

179. There has been debate on how Grotius would have viewed modern international peacekeeping institutions. Many scholars see Grotius as "an early pioneer" in laying the groundwork for international peacekeeping institutions. See CHARLES S. EDWARDS, *HUGO GROTIUS: THE MIRACLE OF HOLLAND* 165 (1981) (commenting that "Grotius might tend toward approval of some kind of international machinery with some coercive authority for controlling resort to war"); see also A.H. Tabibi, *Commentary on INTERNATIONAL LAW AND THE GROTIAN HERITAGE* 109, 127 (T.M.C. Asser Instituut ed., 1985) (invoking Grotian theory to argue that "the 'auctoritas' to use violence thus now only accrues to mankind as a whole, as organized in the United Nations"). In fact, however, Grotius did not advocate them himself. See Ford, *supra* note 177, at 313.

centre of the unambiguous locus of authority,”¹⁸⁰ although it has been asserted that the imprimatur of sovereign primacy to national rulers was merely the acknowledgement of historical fact.¹⁸¹

This negation of a supranational authority was, in a sense, inconsistent with the understanding of the law of nations as a set of rules founded on natural law that governs the conduct of all peoples everywhere. Yet, reconciliation of the doctrine of sovereign primacy with natural law was enabled by the assertion that no sovereign was free to act unlawfully. Sovereigns must obey the law of nations because their authority derives from that law, not because there might be a superior earthly institution that might hold sovereigns answerable for their misdeeds. A sovereign who disobeyed the law of nations separated itself from international society and hence undermined the foundation of its own security.¹⁸²

Instead of any supervening compliance system, in the society of nations there were common interests – “a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy.”¹⁸³ Each state was simultaneously a distinct commonwealth consisting of its own members and a member of the universal human race that always preserves a certain unity. No state was so powerful that it could disregard the potential benefits of international cooperation pursuant to legal rules. At some time, it would need the help of others outside itself, whether to trade or to ward off hostile forces. Mutual assistance and association were perpetually required, and law was necessary to guide and regulate such intercourse.

Absent any superior authority, the rules that flowed from natural law must be enforced by other sovereign powers. Indeed, Grotius’ purpose in propounding the “law of nations” was to provide criteria for judging a sovereign’s actions in the light of ethics and reason. And on that core premise – sovereigns are and must be the sole judges of the legality of their actions – grew a host of problems that infiltrated the international law of war and logically led to a stoking of the era’s warfare. If free to determine the “interests of international society,” sovereigns would be “all the more at liberty of defending their own interests, if necessary by force”¹⁸⁴; thus, “[a] neutral authority no longer being available for judging the claims made by sovereign princes, the just war doctrine was

180. See A. Claire Cutler, *Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy*, 27 REV. INT’L STUD. 133, 135 (2001).

181. See generally Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT’L HIST. REV. 569, 569-91 (1999).

182. See Quincy Wright, *The Outlawry of War and the Law of War*, 47 A.J.I.L. 365, 365-76 (1953).

183. Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 A.J.I.L. 477, 479 (1982) (citation omitted). Murphy observes that even though sovereign states may constitute “perfect communities” themselves, their constituent members are members of this universal human class, and thus the society is viewed in “relation to the human race.” No state is ever “so self-sufficient” that it does not require assistance or association from other states. This applies not only to practical needs of the state, but to “moral necessity or need” as well. *Id.*

184. Lesaffer, *supra* note 122, at 127-28.

watered down and the freedom of the sovereigns to resort to war became almost unlimited.”¹⁸⁵ As such, it has fairly been said that the international law of war was built in a manner which did not actually constrain the supremacy of force in the international society, instead providing “statesmen with an ideological cover.”¹⁸⁶

To be fair, as of the early 1600s, there was no effective supranational authority strong enough to pass judgment on the justificatory claims put forward by any belligerents or to impose the law. For sovereigns, the just war doctrine had become an empty box; only moral or political considerations could exercise a restraining influence. “The lack of real substance in the doctrine of the *bellum iustum* was matched by the total absence of the concept of just peace in treaty practice.”¹⁸⁷ Even for centuries thereafter, internationalization of any legal topic, especially one as important as war and peace, proved exceedingly difficult, baffling some of history’s greatest intellects.¹⁸⁸ Yet, there were some writers with very different ideas about sovereignty that vied with international law for adherence, as will be discussed in Part III.

C. *Just War and Warfare*

Machiavellianism had posited that war was a sovereign prerogative to be used as an instrument of policy, albeit one to be used shrewdly. War needed no special cause other than to secure or augment power. Indeed, war could be an important symbol of power and thus justify itself absent any extrinsic value. Grotius disagreed; sovereigns had no absolute right to engage in war. Yet Grotius did *not* view the use of force as contrary to natural law. “Right reason and the nature of society . . . do not prohibit all force, but only that use of force which is in conflict with society.”¹⁸⁹

War should be undertaken only to enforce law.¹⁹⁰ War may be necessary to remedy a violation of rights. If the cause was just, war had essentially the same function and structure as a lawsuit. Thus, judicial resolution of disputes and war could be viewed as on the same continuum: judicial resolution for disputes within a single jurisdiction, resolution by war for disputes between sover-

185. *Id.* at 128.

186. Georg Schwarzenberger, *Jus Pacis Ac Belli? Prologomena to a Sociology of International Law*, 37 A.J.I.L. 460, 465 (1943) [hereinafter Schwarzenberger].

187. Lesaffer, *supra* note 122, at 116.

188. See Pierre Hassner, *Beyond the three traditions: the philosophy of war and peace in historical perspective*, 70 INT’L AFF. 737, 740-47 (1994).

189. Grotius, *supra* note 116, bk. II, ch. I, § 1, at 169.

190. War was *public* if both adversaries had sovereign authority; *private* if neither had authority; or *mixed* if one side had authority. Grotius, *supra* note 116, bk. I, ch. III, § 1, at 91; Vattel, *supra* note 118, bk. III, ch. I, § 2, at 235. This formulation of war as a *condition* was “contrary to the medieval doctrine,” which viewed war as “individual coercive acts or operations” that existed within a perpetual state of “peace.” NEFF, *supra* note 175, at 102.

eigns.¹⁹¹ In Grotius' words, "It is evident that the sources from which wars arise are as numerous as those from which lawsuits spring; for where judicial settlement fails, war begins. Actions, furthermore, lie either for wrongs not yet committed, or for wrongs already done."¹⁹²

This assertion of a warfare-as-lawsuit analogy derived from the concept of sovereign primacy. Any entity must be entitled to seek redress of legal wrongs. Private persons could seek judicial relief, but in an international order comprised only of legally equal sovereigns for whom no system for remedying violations of rights was available, sovereigns were permitted to seek vindication and enforce claims for redress through war. Absent any international authority, each sovereign must judge each other and, if a breach occurred, take action against the violator. Methodologically, determining the legal rightfulness of war was comparable to determining the legal rightfulness of any other claim.

Consistent with this logic, the law of war applied only internationally, not to internal rebellion. Not being war and invariably undertaken without any type of formality, rebellion was not legitimated by international law, and the concept of just war could not be used to justify it.¹⁹³ By so fortifying the separation of internal from external governance, international law could assert that in external matters – war between sovereigns – international law applied to all participants. Only war, distinct from other varieties of violence, was a subject of international law.¹⁹⁴

The assertion of the war-as-lawsuit analogy also helped to clarify the distinction between war's two legal issues: First, under what conditions was resort to war legal (*jus ad bellum*)? And second, in the condition of war, what rules govern legal behavior (*jus in bello*)? Indeed, the war-as-lawsuit analogy reflected the basic legal distinction in any dispute between substance (what are the rules of legal behavior?) and procedure (what rules must litigants obey in pursuing their legal claims?). In a lawsuit, of course, substance and procedure have their distinctive yet overlapping domains. Analogously, distinctive consideration of *jus ad bellum* and *jus in bello* clarified legal analysis. This distinction (which organizes the remainder of this section) sustains the international law of war to this day.

Nevertheless, the war-as-lawsuit analogy ignored the horrendous fact that thousands and thousands of young men were dying incessantly on battlefields all over Europe. Whatever might be said about the woes of lawsuits, not even the most rancorous have comparable consequences. Grounding the assertion that war was a type of dispute resolution mechanism into the very foundation of

191. Lawsuits and wars were both "searches for truth." According to Gentili, war was means to elicit truth between two "disputants." GENTILI, *supra* note 117, at 48-50.

192. Grotius, *supra* note 116, bk. II, ch. I, § 2, at 171.

193. GENTILI, *supra* note 117, at 136-41; *see also* Vattel, *supra* note 118, bk. III, ch. XVIII, § 287, at 336.

194. *See generally* Lesaffer, *supra* note 122, at 121-28.

the law of war effectively stripped away war's reality in favor of pedantic abstraction.

And the war-as-lawsuit analogy magnified the dangers of the doctrine of sovereign primacy. Might and right were equated. It was, in effect, a reversion to the concept of trial by might elevated to entire nations: the litigating nation with better combat skills won. Now the damage was not limited to chivalric litigants but engulfed entire armies as well as non-combatants.

Most significant in light of the horrible bloodshed of the 16th and 17th centuries were the issues excluded from the war-as-lawsuit analogy. International law sidestepped the need to curtail war by addressing war's political, economic, and social causes. War was seen not as a horrible tragedy that must be prevented but as a legal mechanism with an important role in the international order. Peaceful means of settling disputes were not legally obligated. Thus, international law did not impel changes in the international order that might have corralled war. Over time, international legal experts afforded states the right to resort to war for the national policy of the moment. This right, lodged within the citadel of sovereign primacy, enabled virtually all state claims to be asserted by resort to war.¹⁹⁵

Ultimately, the international law of war served the interests of explosive weapons, cementing the need for more and better weapons and helping to ensure war's perpetual acceptance as a condition of human existence. The remainder of this section is intended to defend this assertion.

1. Legal War – Just Cause

Expounders of the international law of war believed that man is a rational and social being who, aware of the damages of war for unjust causes, would only wage war for just causes. Because unjust wars were by definition illegal, comprehensively cataloguing the just causes of war and precisely distinguishing them from unjust causes would serve to constrain war.¹⁹⁶

This should have meant that the legality of resort to war to vindicate wrongs must be based on a severely short list of justificatory wrongs. In an anarchic international environment where sovereigns judged each other and themselves, where the finding of justification for war had such horrible implications, and where the causes and inducements of war were not otherwise addressed, it would have made sense to have a high bar on the wrongs that could be asserted to justify war. Expounders of the law of war, however, accepted as precedent

195. See Gunther Rothenberg, *The Age of Napoleon*, in *The LAWS OF WAR* 86-87 (Howard et al. eds., Yale 1994) (describing warfare of the period as “escalating towards unrestrained violence, with international law and custom reduced to mere self-imposed limitations.”).

196. “To indicate specifically and exhaustively the substantive rights capable of functioning as just causes not only indicates the specific standards for determining what is just for and in war, but also constitutes the basic scheme for achieving Grotius’s fundamental aim of minimizing the outbreak of war itself.” ONUMA YASUAKI, *A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS* 77-80 (1993) [hereinafter ONUMA].

that ancient wars were legal if ancient sources so deemed them. War was justifiable, accordingly, for national defense and for recovery of debts and infliction of punishment.¹⁹⁷

Immanuel Kant later observed that international law simply substituted what *was* for what *should be*.¹⁹⁸ In this sense, the law of war was not aspirational: it derived from the natural (and therefore unchanging) condition of man and offered, as evidence of legal war, Greek and Roman examples for contemporary emulation. Instead of narrowing the gates to war, uncritically citing the ancient past expanded the legal justifications for war beyond the scope allowable by medieval theologians, to say nothing of Erasmus and Vitoria; only Machiavelli justified war more broadly.

a. National Defense. Recognition of a right to self-defense is traceable to virtually every writer on war since Augustine.¹⁹⁹ Expounders of the international law of war contributed the idea that a state's right to undertake defensive war was broader and conceptually distinct from an individual's right of self-defense. A man living in an ordered society with governance and security institutions devoted to his protection could legally use lethal force only to fend off immediate and life-threatening violence. Individuals had no right to attack on the mere possibility of being attacked. Sovereigns, however, faced an international environment lacking both any security apparatus and any meaningful processes for seeking legal redress; they therefore were entitled to initiate war against violence threatened from a distance or a "wrong action commenced but not yet

197. "Authorities generally assign to wars three justifiable causes: defense, recovery of property, and punishment." Grotius, *supra* note 116, bk. II, ch. I, § 2, at 171. Professor Neff recognized a temporal sequence in these causes of war: defense is to avoid a harm in the imminent future; recovery of property is to rectify a harm currently suffered; and punishment is to redress a harm already sustained. See NEFF, *supra* note 175, at 240-41. War was not justified, however, for territorial acquisition, ambition, religious zeal, nor pursuit of profit. See Grotius, *supra* note 116, bk. II, ch. XXII, at 546-56; Vattel, *supra* note 118, bk. III, ch. III, §§ 33-36, at 245-46 (on the unjust causes for war, generally); Gentili, *supra* note 117, at 38-57 (on unjust wars for religion and expansion).

198. Kant stated "there is no instance of a state ever having been moved to desist from its purpose by arguments supported by the testimonies of such notable men [Grotius, Vattel and Wolff]." KANT, *Perpetual Peace*, in KANT'S POLITICAL WRITINGS 103 (Reiss ed. and Nisbet trans., Cambridge Univ. Press 1991) (1795). Archibugi notes Kant's objections to Vattel's and Grotius's formulations of international law. States would "take pains not to abide by the precepts envisaged in the manuals of the law of nations." Because of this, "... the idea of just war is in fact meaningless in the absence of a legitimate supranational authority, since each party would be obliged to judge about the legitimacy of its own actions." Daniele Archibugi, *Immanuel Kant, Cosmopolitan Law, and Peace*, 1 EUR. J. INT'L REL. 429, 435 (1995).

199. Regarding the efforts of pre-Grotius philosophers to identify the right of self-defense, see David B. Kopel, *The Human Right of Self Defense*, 22 BYU J. PUB. L. 43, 58-75 (2007) (discussing philosophers who likely influenced Grotius on self-defense, including da Legnano, de Bonet, de Pisan, Vitoria, Belli, Suarez, and Gentili) [hereinafter Kopel]. See also NEFF, *supra* note 175, at 128 (principles applicable to wars of self-defense were discussed as early as Aquinas in his *On Law, Morality, and Politics*).

carried through.”²⁰⁰ Yet, cautioned Grotius, “the possibility of being attacked confers the right to attack is abhorrent to every principle of equity.”²⁰¹ Thus, if a neighboring power built up arms or fortified its territory, the concerned sovereign must be legally allowed to build up its own forces on a precautionary basis.²⁰²

Moreover, unlike individuals who might use only such force as necessary to fend off an attack in strict proportion to the attack’s gravity, a sovereign’s right to defensive war allowed it to inflict whatever degree of force was necessary to remove the threat altogether, including taking steps to ensure against its recurrence.²⁰³ The allowable level of force to eradicate the threat necessarily included killing anyone who served under the offender.²⁰⁴

The problem, left unaddressed, was how to limit the proclivity of sovereigns to abuse the concept of defensive war in the name of aggression. Absent was law that might inform consideration about what to do in the face of ignorant, dishonest, or pathological leaders despite the overwhelming historical evidence that evil men often rose to power who forced even good leaders to abandon adherence to legal constraints on warfare. Effectively, legalizing the use of total force whenever necessary for national defense reflected and entrenched the concept of sovereign primacy, authorizing tyrants to rationalize resort to unlimited war.²⁰⁵ “As a result, this preventive feature meant that defensive wars, notwithstanding the label, were essentially offensive in nature, thoroughly in keeping with just wars generally.”²⁰⁶

b. Recovery of Debts and Punishment. The law of war’s expansion of justifiable war beyond defense for the purpose of obtaining what was owed and to punish wrongdoers represented a sharp break from the traditions of Western discourse. If a sovereign claimed territory that rightfully belonged to another sovereign, or if a prior wrong had gone uncompensated, then the injured sovereign had a right of recourse to war.²⁰⁷

200. Grotius, *supra* note 116, bk. II, ch. I, § 16, at 184. “[I]n private war, self-defense is generally the only consideration; but public powers have not only the right of self-defense but also the right to exact punishment.” *Id.* As Neff explains, “[S]elf-defense in the narrow sense arose in situations of ‘true and absolute necessity’, whereas defensive war was allowed on the broader basis of expediency.” NEFF, *supra* note 175, at 127 (quoting GENTILI, *supra* note 117, at 58).

201. Grotius, *supra* note 116, bk. II, ch. I, § 17, at 184.

202. *Id.* at bk. II, ch. XXII, § 5, at 549.

203. NEFF, *supra* note 175, at 127.

204. Thus, participants in defensive wars could exercise greater force than would be permitted for reprisals: the latter were compensatory; force was allowable only to the extent sufficient to recover damages for the original injury and could not involve killing persons not responsible for that injury. GENTILI, *supra* note 117, at 58-60; *see also* VATTEL, *supra* note 118, bk. III, ch. VIII, § 140, at 280.

205. *See* Kopel, *supra* note 199, at 67-68, 71-72, 74.

206. NEFF, *supra* note 175, at 127.

207. The debt may be: (1) based on agreement; (2) due from a wrongful act; or (3) based on either the law of nature or the law of nations. Grotius, *supra* note 116, bk. II, ch. I, § 2, at 171. *See also* GENTILI, *supra* note 117, at 79-82, 99-104 (on prior debts and retaking one’s lost homelands as cause for war).

This was the inversion of the war-as-lawsuit analogy: if war could be a justifiable way for a sovereign to rectify a wrong, then wrongs that justified individuals seeking redress in lawsuits would also justify a sovereign seeking redress in war. To be sure, the wronged sovereign must exhaust all peaceful remedies for an inflicted injury – “necessity alone warrants the use of force.”²⁰⁸ Yet this admonition to attempt peaceful resolution of disputes was not a legal obligation.

This gaping welcome to war was further widened to include as justifiable wrongs not only the acts of another sovereign but also the wrongful acts committed by another sovereign’s subjects that the other sovereign did not rectify.²⁰⁹ Thus, war was justified where a sovereign failed to punish or correct the aggressions and debts of its subjects. As history proved, unrectified injury from another sovereign’s subjects readily became justification for enormous bloodshed.

Even more disturbing was the transmutation of the concept of proportionality in the context of just war theory. As thoroughly analyzed by just war theorists from Augustine through Erasmus, proportionality limited the right to undertake war, even for war having just cause. As war entailed horrible loss, the cause for war must not only be just, it must be proportional to war’s horrible consequences. The gains of warfare had to outweigh the misery inflicted on the innocent not only by the war itself but by the chaos and criminals who prey upon humanity.²¹⁰ In this view, proportionality was linked to the reality of war and asked whether resort to war was worth the human cost.

For the expounders of the international law of war, by contrast, it was the measure of the wrongdoer’s culpability that justified resort to war.²¹¹ Proportionality was a subsidiary consideration of just cause: the magnitude of the offense should be weighed against the cost to the state of violently compelling redress. What debt to be recovered or wrong to be avenged would justify the deaths of thousands if not hundreds of thousands of young men was a question left entirely unexplored. The sheer human misery of war was not a salient factor in this calculation.²¹²

208. Vattel, *supra* note 118, bk. III, ch. III, § 37, at 246; Gentili, *supra* note 117, at 27-30 (Mankind, the only animal given the gift of discourse, must exhaust peaceful methods to resolve disputes before resorting to the “bestial” method of war).

209. With regard to the requirements for wars to punish, see Vattel, *supra* note 118, bk. III, ch. III, §§ 28, 41, at 244, 247.

210. Fernández, *supra* note 136, at 214.

211. The allowable level of force to be used against a wrongdoer was *not*, therefore, the quantity of damage done to victims by the wrongdoer. Neff, *supra* note 175, at 97.

212. Gardam argues that concepts of proportionality and *jus in bello* were largely unargued by early medieval Christian philosophers; just war theory of the time concerned itself with just cause. Judith Gardam, *Proportionality and Force in International Law*, 87 A.J.I.L. 391, 395 (1993). See also Paul Ramsey, *War and the Christian Conscience* 34-36 (1961) (on Aquinas’s views on proportionality and mercy to non-combatants); see generally James Turner Johnson, *Just War Tradition and the Restraint of War* 26-80 (1981) (arguing the secular *jus in bello* doctrine of the mid- to late medieval period “derived from the chivalric code”).

Here was the basis for Kant's contempt for international law's "sorry comforters," whose works were "dutifully quoted in justification of military aggression."²¹³ Gustavus Adolphus (discussed in Part I) famously carried Grotius's book in his saddlebag throughout his campaigns²¹⁴ and justified his conquests on Grotius's book, which "implied that the Swedes could do as they pleased provided they treated conquered peoples humanely."²¹⁵ Thus, the law of war emerged as a well-learned application of a balm to whatever pangs of conscience commanders might have felt over the mounting death toll of their exploits – an apology for aggression and violence.²¹⁶

According to Professor Schwarzenberger:

There is little substance in the time-honored assertion that the naturalists have subjected war to law, and that rather cynical disregard of these norms by State practice merely amounts to regrettable violations of clearly defined standards. It very much looks like special pleading to retort that sovereigns paid their respect at least in form to these rules when they attempted to justify their wars of interest in terms of the doctrine of the *bellum justum*. In effect, this did not mean that war was subordinated to natural law, but that natural law was made subservient to the reason of state. In an international society in which the rulers of States are only responsible to their own conscience, an elastic theory with as many loopholes as the doctrine of the *bellum justum* was bound to degenerate into a mere ideology serving the interests which it was supposed to control.²¹⁷

2. Legally Fought War – *Jus in bello*

Following the logic of lawsuits, yet analytically richer than the abstract and formalistic justification of *jus ad bellum*, was the international law of war's elaboration of battle's proper conduct. In order to restrict war's horrors to what was only necessary to accomplish its just cause, *jus in bello* stipulated rules governing how war could begin, what actions it could entail, how non-participants should be treated, how participants should treat each other, and how it might be resolved.

Declaration was crucial, providing an opportunity to resolve the dispute

213. ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 295 (Cambridge Univ. Press 2004). Kant believed the principles that Grotius and Vattel laid down "cannot have the slightest legal force, since states are not subject to a common external constraint." Immanuel Kant, *Perpetual Peace*, in *THE CIVIL SOCIETY READER* 33 (Virginia Hodgkinson & Michael Foley eds., Tufts U. 2003).

214. Richard Tuck, *Introduction to DE JURE* 31 (Richard Tuck ed., Liberty Fund 2005) (1625).

215. Antony Anghie, *The Grotius Lecture: ASIL 2010: International Law in a Time of Change: Should International Law Lead or Follow?*, 26 *AM. U. INT'L L. REV.* 1315 (citing PETER H. WILSON, *THE THIRTY YEARS WAR: EUROPE'S TRAGEDY* 463 (2009)).

216. Tuck, *supra* note 214, at 7.

217. Schwarzenberger, *supra* note 186, at 462.

before a resort to arms if restitution or redress were provided.²¹⁸ Once war was formally declared, belligerents had a right to do against the enemy whatever was necessary to attain the war's end.²¹⁹ "[V]iolence and frightfulness are particularly suited to wars . . . [K]illing is called a right of war."²²⁰ This right applied not only against the enemy's soldiers in arms but to all its subjects and anyone within its jurisdiction. "We have a right to deprive our enemy of his possessions, of everything which may augment his strength and enable him to make war . . . Thus, we waste a country, and destroy the provisions and forage, that the enemy may not find a subsistence there."²²¹ Moreover, the enemy's violation of the rules of war allowed denying them quarter.²²²

An attack could be lawful even though the lives of many innocent persons were endangered. "[T]he slaughter even of infants and of women is made with impunity, and this is included in the law of war."²²³ "On almost every page of historical writings you may find accounts of the destruction of whole cities, or the levelling of walls to the ground, the destruction of fields, and conflagrations."²²⁴ Yet the right to kill enemies must be tempered with moderation and charity.²²⁵ "It is the bidding of mercy, if not of justice, that, . . . no action should be attempted whereby innocent persons may be threatened with destruction."²²⁶ Women, children, the old, sick, and feeble, and clergy were not to be targeted

218. "Livy criticizes the conduct of Menippus . . . because he had slain certain Roman citizens when war had not yet been declared, and when no hostilities had been engaged in . . . [E]ven in the case the law of nature does not require that such a demand be made, still it is honourable and praiseworthy to make it, in order that, for instance, we may avoid giving offence or that the wrong may be atoned for by repentance and compensation." Grotius, *supra* note 116, bk. III, ch. III, § 6, at 634; *see also* Vattel, *supra* note 118, bk. III, ch. IV, § 56, at 255.

219. "Whatever we do beyond that, is reprobated by the law of nature, is faulty, and condemnable at the tribunal of conscience. What is just and perfectly innocent in war, in one particular occasion, is not always so in other occasions. Right goes hand in hand with necessity and the exigency of the case, but never exceeds them." Vattel, *supra* note 118, bk. III, ch. 8, § 137.

220. Grotius, *supra* note 116, bk. III, ch. I, § 6, at 605; ch. 4, § 5, at 644.

221. Vattel, *supra* note 118, bk. III, ch. IX, § 166, at 292.

222. "There is . . . one case in which we may refuse to spare the life of an enemy who surrenders, or to allow any capitulation to a town reduced to the last extremity. It is, when that enemy has been guilty of some enormous breach of the law of nations, and particularly when he has violated the laws of war. This refusal of quarter is no natural consequence of the war, but a punishment for his crime – a punishment that the injured party has a right to inflict. *But, in order that it be justly inflicted, it must fall on the guilty.*" Inflicting this level of punishment is an "endeavour, by this rigorous proceeding, to force them to respect the laws of humanity." *Id.*, bk. III, ch. VIII, § 141, at 280.

223. "[I]n the Psalms it is said that he will be happy who dashes the infants of the Babylonians against a rock . . . Thucydides relates, upon capturing Mycalessus the Thracians slew both women and children. Arrian records the same of the Macedonians when they had taken Thebes . . . Tacitus records that Germanicus Caesar laid waste the villages of the Marsi, a people of Germany, with fire and sword, and adds: 'Neither sex nor age found mercy.' Titus even exposed Jewish children and women to be slaughtered by wild beasts in a public spectacle." Grotius, *supra* note 116, bk. III, ch. IV, § 9, at 648.

224. Grotius, *supra* note 116, bk. III, ch. V, § 1, at 658.

225. "Cicero's point of view is better . . . 'There is in fact a limit to vengeance and punishment.'" Grotius, *supra* note 116, bk. III, ch. XI, § 1, at 722; *see also* Vattel, *supra* note 118, bk. III, ch. VIII, §§ 139-41, at 280.

226. Grotius, *supra* note 116, bk. III, ch. XI, § 8, at 737.

unless they took up arms in opposition. Similarly, moderation against the vanquished was proper: the populace should not be held responsible for the crimes or debts that their sovereign incurred in the war if they were merely doing their duty.²²⁷ Yet defeat in war was legitimate grounds for enslavement, and those who, from a legitimate cause, have come into personal or political slavery ought to be satisfied with their status.²²⁸ Thus, the international law of war linked advocacy of slavery to sovereigns' right to engage in warfare.

Strict rules applied to the treatment of allies and neutrals. Vattel instructed that anyone who furnishes one side with supplies and the means of prolonged resistance so as to obstruct prosecution of a just war will be guilty of an aggression and injury toward the other side which may then take remedial action.²²⁹ States had a right to preserve their neutrality but must show "a strict impartiality towards the belligerent powers."²³⁰ Neutral nations had a right to continue customary trade with belligerents but must treat both states comparably. Contraband could be seized without compensation; traffickers forfeit their sovereign's protection. Neutral vessels could be searched for contraband during wartime, as this was a valid exercise of the right to deny materiel to the enemy.²³¹

Perhaps international law's greatest contribution to ameliorating war's horrors was the specification of rules for treating prisoners and other captives. Vattel asserted that prisoners of war could be executed only for some new attempt to assist the enemy, not just because of the difficulty of feeding, clothing, or sheltering them. Surrendering soldiers could be confined or fettered to prevent them from retaking up arms or until till their ransom was paid, but they could not be sold or enslaved. "In every circumstance, when I cannot innocently take away my prisoner's life, I have no right to make him a slave."²³² The right of postliminium guaranteed that, upon peace, prisoners had a universally recognized claim to liberty. Whatever the reasons for detaining them during the war, no such motive persisted for refusing their release.

227. "Even where justice does not demand the remission of punishment, this is nevertheless often in conformity with goodness, with moderation, with highmindedness." Grotius, *supra* note 116, bk. III, ch. XI, § 7, at 731.

228. Grotius, *supra* note 116, bk. III, ch. XIV, § 6, at 765.

229. "It is lawful and commendable to succour and assist, by all possible means, a nation engaged in a just war; and it is even a duty incumbent on every nation, to give such assistance, when she can give it without injury to herself. But no assistance whatever is to be afforded to him who is engaged an unjust war To support the cause of justice when we are able, is always commendable: but, in assisting the unjust, we partake of his crime, and become, like him, guilty of injustice." Vattel, *supra* note 118, bk. III, ch. VI6, § 83, at 262.

230. *Id.*, bk. III., ch. VII, § 104, at 268. "No act on the part of a nation, which fell within the exercise of her rights, and was done solely with a view to her own good, without partiality, without a design of favoring one power to the prejudice of another would violate neutrality." *Id.*, bk. III., ch. VII, § 110, at 270.

231. *Id.* at bk. III, ch. VII, §§ 111-12, at 270-71.

232. *Id.* at bk. III, ch. 8, § 152, at 286.

Despite the impressive detail of *jus in bello*, in summation it may be offered that “there was neither means nor logic in Grotius’s theory to enable law in the strict sense to restrict wars.”²³³ Humane war was certainly preferable to inhumane war, but it was a sorry substitute for peace. As summarized by a leading 19th century jurist: “International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation.”²³⁴

The international law of war offered only the hope that “[w]ar was to be ameliorated; its horrors were to be reduced; but there was to be no end of it.”²³⁵

III. THE INTERNATIONAL LAW OF PEACE

The thesis of Part III is that development of an international law of *peace* would have been better than the international law of *war* expounded by Grotius, Gentili and Vattel. The cause of peace is one of humanity’s greatest aspirations.²³⁶ “It is the function of human law to restrain violence.”²³⁷

It is curious that among the hundreds of pages written by legal scholars on the international law of war during the early centuries of explosive weapons warfare, so few words were devoted to peace. The definition of war was an important topic, but not the definition of peace. The purpose of international law in this domain, it was explicitly asserted, was to identify a sovereign’s responsibilities with regard to war, but apparently sovereigns had no responsibility with regard to peace. War, it was widely agreed, was an institution that law should regulate, but peace was ethereal without form or substance. There was an element of willful blindness in this perspective that diminished law’s primary imperative to reduce violence.

My two purposes, discussed respectively in this part’s sections, are to (A) present a viable contemporary alternative vision that unfortunately was omitted from the international law of war, and (B) posit the foundations of the international law of peace for the era of explosive weapons warfare. In the conclusion, I will offer some comments on why all this might be important now.

233. ONUMA, *supra* note 196, at 97.

234. Draper, *supra* note 164 (quoting W.E. Hall).

235. John MacDonell, *The Influence of Grotius*, in 5 TRANSACTIONS OF THE GROTIUS SOCIETY xvii, xix (London, Sweet and Maxwell 1920).

236. Myres S. McDougal, *Law and Peace*, 18 DENV. J. INT’L L. & POL’Y 1 (1989) (“The establishment and maintenance of a comprehensive peace, through law rather than by arbitrary violence and coercion, is today commonly regarded as one of humankind’s most urgent and difficult problems.”).

237. Attributed to a decretist scholar by James A. Brundage, *Holy War and the Medieval Lawyers*, in THE HOLY WAR 144 (Thomas Patrick Murphy ed., 1976); *see generally* Spencer R. Weart, *Remarks on the Ancient Evidence for Democratic Peace*, 38 J. PEACE RES. 609 (2001) [hereinafter Weart].

A. *Early Seeds of Peace Advocacy*

Emeric Crucé published *Le Nouveau Cyneé ou Discourse d'Etat (The New Cyneas, or a Discourse on the State)* in 1623, two years before publication of Grotius's *de Jure Belli*.²³⁸ Crucé extolled a vision of how the nations of Europe should govern themselves so as to advance peace,²³⁹ initiating a line of thought that can be tracked to the Duc de Sully and the Abbe de Saint-Pierre and William Penn.²⁴⁰ These early writers helped establish an intellectual foundation for William Ladd²⁴¹ and Immanuel Kant,²⁴² eventually forming the modern foundation of international peace and security in the United Nations and dozens of international and regional organizations.²⁴³

Perhaps Grotius and Crucé were acquainted when they both lived in Paris; Grotius explicitly referred to the assertions of "certain French writers."²⁴⁴ Despite living at the same time, for some time in the same city, and being among a small number of intellectuals who thought about the escalation of war in their time, Crucé's work both drew on very different sources and inspired separate lineages from Grotius. In any event, international law emerged from the 17th century onward as descriptive on the basis of precedent; international relations emerged at virtually the same moment as aspirational on the basis of moral philosophy and ethics. It is curious why international *law* was conceived as distinct from international *relations*.²⁴⁵ Whatever their differences might signify in hindsight, there is no evidence that these early 17th century writers thought themselves barred from each other's domain.

238. ÉMERIC CRUCÉ, *LE NOUVEAU CYNÉE* (Balch ed. & trans., 1909) (1623) [hereinafter CRUCÉ].

239. See generally Edward Krehbiel, *Peace Projects of the Past*, in SYLLABUS OF LECTURES ON INTERNATIONAL CONCILIATION 81 (David Starr Jordan & Edward Benjamin Krehbiel eds., World Peace Foundation 1912) (identifying Crucé as one of the first of many proposing international peace structures). See also Andrew Carnegie, *Peace to Come at Last—A Peace League of Nations*, 67 *ADVOC. PEACE* 247, 250 (1905) [hereinafter Carnegie].

240. See David Jayne Hill, *World Organization*, 55 *PROC. AM. PHIL. SOC'Y* 322, 324 (1916); see also Stefan T. Possony, *Peace Enforcement*, 55 *YALE L. J.* 910 (1946) [hereinafter Possony].

241. See WILLIAM LADD, *AN ESSAY ON A THE CONGRESS OF NATIONS—FOR THE ADJUSTMENT OF INTERNATIONAL DISPUTES WITHOUT RESORT TO ARMS* (Boston, Whipple and Damrell 1840).

242. See generally Daniele Archibugi, *Immanuel Kant, Cosmopolitan Law and Peace*, 1 *EUR. J. INT'L REL.* 429 (1995); Kenneth N. Waltz, *Kant, Liberalism and War*, 56 *AM. POL. SCI. REV.* 331 (1962).

243. See generally Robert H. Ferrell, *Peace Movements*, *ENCYCLOPEDIA OF THE NEW AMERICAN NATION* (1957), <http://www.americanforeignrelations.com/O-W/Peace-Movements.html>.

244. Ford, *supra* note 177, at 361 (citing Grotius, *supra* note 116, Prolegomena, ¶ 54, at 29). "It is suggested that Grotius may have seen . . . *Le Nouveau Cynée* . . ." JAMES BROWN SCOTT, 2 *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907: A SERIES OF LECTURES DELIVERED BEFORE THE JOHNS HOPKINS UNIVERSITY IN THE YEAR 1908*, at 741 (Nabu Press 2011). See also Willem Maas, *Grotius on Citizenship and Political Community*, Presented at the Canadian Political Science Conference (Quebec, 29 Jul., 2009) (revised version published in Willem Maas, *Grotius on Citizenship and Political Community*, 20 *GROTIANA* 163, 163-78 (1999)); see also Daniele Archibugi, *Principles of Cosmopolitan Democracy*, in *RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* 199 (Archibugi, Held & Köhler, eds., Stanford Univ. 1998) (discussing Grotius and Crucé as contemporaries).

245. See generally Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *A.J.I.L.* 205 (1993).

More important, albeit more futile to ponder, is whether Crucé and his successors' ideas for peace might have been more profoundly incorporated into European governance if leading international law theorists, including Grotius, had accorded them more respect. And if so, might the succeeding horrible centuries of war been ameliorated? No one can know. What might be fair to suggest is that, with regard to matters of war and peace, we now live in an imperfect Crucéan world of international organizations enabling an array of nonviolent dispute resolution mechanisms, and we take for granted much of the basic tenets of his thought. Modern international law owes an ever increasing debt to Crucé while the expounders of the international law of war seem ever more anachronistic.

1. The Nature of War – The Meaning of “Peace”

A line of peace advocacy emerged from Erasmus and his contemporaries which asserted that the international customs and traditions of the era must be ordered by law for peaceful existence.²⁴⁶ While Erasmus had laid out the moral objection to war, he had not sought to comment on how to achieve peace. This became the principal challenge of later peace advocates. Grotius faced the same challenge, but that was where the overlap splinters.

Among Erasmus's first generation of readers, Sebastian Franck (1499-1543) notably asserted that war contradicted Christ's teaching: “a devilish, inhuman thing, an abhorrent plague . . . an open door for all vices and sins and destruction of land, soul, body and honor.”²⁴⁷ War did not achieve peace but brought about damages in excess of any conceivable gain. Franck characterized all wars as crimes.²⁴⁸ He may have been the first known writer to characterize warfare as criminal. From this seed comes the Statute of Rome's criminalization of aggression.²⁴⁹ This was a very different seed than international law's characterization of war as a legitimate mechanism of seeking redress or exacting punishment; from these different seeds emerge abundant and critical divergences of thought.

Crucé, another disciple of Erasmus, shared Franck's condemnation of war. He believed that it was for the advantage of humanity that the different races and nations should not seek to injure and destroy one another by war but rather to exchange their products.²⁵⁰ War was useless, including wars fought in the name of religion.²⁵¹ He denounced “people who regard the sowing of dissen-

246. Ferrell, *supra* note 243.

247. Istvan Kende, *The History of Peace: Concept and Organizations from the Late Middle Ages to the 1870s*, 26 J. PEACE RES. 233 (1989) [hereinafter Kende], citing SEBASTIAN FRANCK, SEBASTIAN FRANCK VON DONAUWÖRTH: KRIEGSBÜCHLEIN DES FRIEDENS (Aupperle 1929) (1539).

248. *Id.* at 233.

249. Rome Statute of the International Criminal Court Statute of Rome art. 5, para. 1, July 1, 2012, A/CONF.183/9.

250. Thomas Willing Balch, *The Proposed International Tribunal of Arbitration of 1623*, 46 PROC. AM. PHIL. SOC'Y 302, 304 (1907) [hereinafter Balch].

251. Annemarië van Heerikhuizen, *How God Disappeared from Europe: Visions of a United Europe from Erasmus to Kant*, 13 EUR. LEGACY 401 (2008) [hereinafter Heerikhuizen].

sion among neighbors as political wisdom . . . [H]uman society is one body, the organs of which are in such sympathy with each other that the sickness of one affects the other.”²⁵² He believed that “tolerance should be the guiding principle in the relations” between those of differing religious creeds²⁵³: “Let us lay down arms and put an end to eternal enmities. We have stirred up enough storms. It is time to restore calm and serenity to this big ocean, pouring into it the oil of perfect reconciliation.”²⁵⁴ “War has had its day and should be abolished forever.”²⁵⁵

Crucé approached the task of defining what conduct should be prohibited by distinguishing organized collective violence from “localized or selective violence, crime, inter-personal rivalry, etc.” Despite obvious similarities, war was not merely a variant of homicide or even marauding. War “implies violence that crosses established boundaries – it is about a large and readily identifiable violence of us versus them that constitutes a breach of the peace. It is not about sporadic or hooligan outbursts or civil unrest, although there is a margin at which such chaotic violence may approach a breach of the peace.”²⁵⁶ War was both more legitimate than other forms of violence in the sense that it was a product of legitimate state authority but also more consequential in that the toll of death and destruction far exceeded anything associated with common crime. Distinguishing war from other variants of violence, even homicidal violence, was a crucial intellectual step, enabling Crucé to discuss restrictions of war without having to resolve issues about the state’s authority to use force against criminals or rebels. For Crucé, the problem of war was, in important respects, *sui generis*.

In Crucé’s view, just war theory had by the 16th century eviscerated any limits to self-justifiable resort to war, widely opening war’s floodgates. Crucé identified and rejected five traditionally asserted justifications of war: difference of race or nationality, difference of religion, desire for profit, the attraction that war has for those who see in it a kind of sport, and the desire for reparation of a wrong that has been done. His rejection of this last “just cause” – reparations of wrongs – was his most obvious break with Grotius. Crucé, by contrast, limited the problem of war to the question of self-defense. To pursue that question, he had to first address the topic of sovereignty.

2. Sovereignty and War

Crucé asserted that there are inherent connections of sociability among humans that are the basis of our aspiration to develop law for nonviolent resolution of disputes. As there are only minimal differences between people in

252. CRUCÉ, *supra* note 238, at 9.

253. ELIZABETH V. SOULEYMAN, *THE VISION OF WORLD PEACE IN SEVENTEENTH- AND EIGHTEENTH-CENTURY FRANCE* 12 (G.P. Putnam’s Sons, 1941) [hereinafter SOULEYMAN].

254. CRUCÉ, *supra* note 238, at 135.

255. SOULEYMAN, *supra* note 253, at 15.

256. *Id.* at 20.

various states, and as all men are endowed with reason, then a concept of shared citizenship should follow in the sense of all people being protected by and obedient to the same law.²⁵⁷ “From this come[] the seeds for contemplating a universal peace, growing from a moral and just natural law, understood by world citizens who are determined to conduct their lives by those principles.”²⁵⁸

However, people have never lived as one humankind, always vesting critical authority over decisions about how to use violence to a territorially delimited sovereign source of power. That was the heart of the problem. For Crucé (and virtually every subsequent European peace advocate), sovereigns were responsible for war.²⁵⁹ This assertion of a nascent idea of state responsibility for warfare was diametrically in contrast to Grotius for whom unsupervised state sovereignty was key to organizing the law of war. For Crucé, war was an international wrong that must be expunged; at its heart were the problems associated with the emerging institution of *l'état* which must be solved to advance peace. Sovereigns' *a priori* primacy was therefore denied, at least with regard to war.

Yet, the system of nation-states that emerged during the 16th and 17th centuries had to grapple with the challenge of how to centralize power so as to curtail intra-state lawlessness. By necessary implication, these nationally centralized sources of power – sovereigns – also reflected outward; their interaction was the subject of international law, which should define the legal exercise of sovereign authority in a manner that advanced the pursuit of peace. As discussed in Part II, the international law of war implicitly viewed each sovereign as the primary authority on any question regarding its engagement in war. It was not that there were no rules but that each subject of the rules was the judge of its own compliance, and no other enforcement could be envisaged lest it intrude on sovereignty.

Crucé and his successors adopted a very different approach, introducing a critical distinction to separate the state's sovereignty over its territory and subjects (internal sovereignty) from the state's sovereign authority vis-à-vis the international community (external sovereignty).²⁶⁰ The latter scope of sovereignty, at least with regard to war, could be curtailed by a higher multilateral authority, even while respecting the sovereign's virtually unlimited power over its own subjects. This idea – that sovereignty had two dimensions and that the

257. “As the Roman Emperor-philosopher Marcus Aurelius argued, ‘Wherever a man live, he live as a citizen of the World-City.’ The early Stoics claimed that the exercise of reason necessary for comprehending the law of nature would bring such thinkers to a condition of mutual concord, transcending any divisions between their states.” Deter Heater, *Cosmopolis, the way to peace?*, 9 PEACE REV. 315 (1997) [hereinafter Heater].

258. *Id.* at 316.

259. Balch, *supra* note 250, at 302.

260. See Daniel Philpott, *Sovereignty: An Introduction and Brief History*, 48 J. INT'L AFF. 353 (1995). But see Jens Bartelson, *On the Indivisibility of Sovereignty*, 2 REPUBLICS OF LETTERS 2 (2011), <http://rofl.stanford.edu/node/91>.

sovereign's exclusive power over national governance did not extend to a right to war – was a crucial breakthrough.

While modern international legal experts might disagree with affording sovereigns absolute power within their domain, in the 17th century, Crucé's distinction meant that peace could be discussed without threatening sovereigns with any concession of their domestic authority nor any intrusion into national independence. As one scholar noted, “[i]ts historical value lies in its conception of a federal partnership among Sovereign States, in its provision of machinery whereby different national influences could function in harmony.”²⁶¹ Thus, an intermediate position was struck between the doctrine of sovereign primacy avowed by Gentili and Grotius and proposals for international government whether European or broader. Instead of any type of super-state, there could be a confederation in which sovereignty was both absolute internally and dutiful externally. This principle of confederation has been the keynote of every peace plan since.²⁶²

3. Peace as a Proactive Responsibility

Crucé asserted that sovereigns' greatest ambition should be to preserve peace. Peace was the essential condition for the advancement of civilization, not merely a useful condition for the exercise of sovereign power. Yet Crucé was unsatisfied by a negative concept of peace as merely the absence of warfare. Its pursuit must grapple with the causes of disputes and encourage policies that ameliorate the chronic accelerants of conflict. International peace cannot be realized without assuring the improvement of life and realization of social justice, freedom, and development.²⁶³ Crucé proposed a broad set of proactive steps that should be taken to end warfare. He advocated reform and universalization of education, compulsory for everyone up to age eighteen.²⁶⁴ Provision should be made for the poor; the arts should be supported; individuals should have career choice; aliens should have protected rights; there should be unified units of measurement and fixed interests rates, and statistical surveys and regular census.²⁶⁵

Instead of warring, the army should be engaged in defense, protecting free relations and capturing pirates and robbers. Crucé developed a vast plan of transportation reforms to enable people to interact more readily, including construction of roads, bridges and canals, and he emphasized the need to unite

261. Joseph E. Keller, *Henry IV and World Peace*, 31 MINN. L. REV. 390, 392 (1946) [hereinafter Keller].

262. See Carnegie, *supra* note 239, at 20.

263. Kende, *supra* note 247, at 235-36.

264. *Id.* at 237.

265. *Id.* A century later, the Abbé de Saint-Pierre proposed a graduated income tax, paved roads, and colleges for women. GRACE ROOSEVELT, *A BRIEF HISTORY OF THE QUEST FOR PEACE 2* (Global Policy Forum 2009).

the seas.²⁶⁶ He strongly advocated free trade and asserted that the merchant was far more useful to human society than the soldier. “There is no occupation to compare in utility with that of the merchant who legitimately increases his resources by the expenditure of his labor and often at the peril of his life, without injuring anyone: in which he is more worthy of praise than the soldier whose advancement depends upon the spoil and destruction of another.” And he offered as an aspiration: “[i]t may be possible that we may obtain a universal peace, of which the best result is the establishment of commerce: and on that account the monarchs must see to it that their subjects can traffic without fear.”²⁶⁷

4. International Dispute Resolution

Crucé and his successors viewed war as a problem that required governance. Peace was not the absence of disputes; it was the capacity to resolve disputes nonviolently.²⁶⁸ As the imperative for peace was universal, governance to achieve it should be vested in some type of super-national mechanism that determines rights and obligations of sovereigns and holds accountable any sovereign who contravenes limits on the use of force. Thus, striving for peace was about developing criteria to judge who might be right and wrong in a particular dispute and about authorizing institutions that have deeply respected legitimacy to apply that criteria.

The idea of an international confederation that limited the powers of sovereigns dated at least to George Podebrady, King of Bohemia (1420-1471), who advocated a European league comprising an assembly and a tribunal and staff; each nation would have an equal vote.²⁶⁹ No longer could an individual state declare war as only the confederation would have that right. He suggested a treaty which authorized sanctions against an aggressor; a victim of aggression would be assisted by all members of the confederation. Every aggressor was to be punished as a “violator of general peace.”²⁷⁰

Crucé recommended establishment of an international Congress of Ambassadors with authority to resolve disputes.²⁷¹ He set forth an international arbitration system.²⁷² An ambassador could plead his sovereign’s grievances which would be judged without prejudice, and failure to abide by the judgment would mean the sovereign’s disapprobation. By inclusively engaging many sovereigns

266. Kende, *supra* note 247, at 237.

267. CRUCÉ, *supra* note 238, at 60-62.

268. See Emanuel Adler, *Condition(s) of Peace*, 24 REV. INT’L STUDIES 165, 167-68 (1998).

269. JOHAN GALTUNG, *THEORIES OF PEACE—A SYNTHETIC APPROACH TO PEACE THINKING* 9 (1967).

270. See Possony, *supra* note 240, at 916 (asserting that the treaties that comprised the Peace of Westphalia provided that any person who broke the public peace would be punished). See generally Leo Gross, *The Peace of Westphalia 1648-1948*, 42 A.J.I.L. 20 (1948).

271. CRUCÉ, *supra* note 238, at 102-106. The Congress (sitting in the neutral city of Venice) included the Pope, the Emperor of the Turks, the Habsburgs, the Kings of France and Spain, and all other sovereigns of the known world including Persia, China, Ethiopia, and the Indies.

272. Heerikhuizen, *supra* note 251, at 404-405.

including from outside Europe, Crucé's plan was based on the capacity for the vast majority of sovereigns to find suitable means to compel war-inclined recalcitrants to accept peace.²⁷³

The Duc de Sully, writing on behalf of King Henry IV of France,²⁷⁴ revamped Crucé's concept of international oversight, basing the confederation's survival on the principle of equilibrium. His was an early iteration of a "balance of power" concept that was to be a staple of European diplomacy for the next three centuries. He proposed that Europe would be re-divided into fifteen states that were nearly equal in territory and power – six hereditary monarchies, five elective monarchies and four sovereign republics. Henry IV would undertake and supervise the process himself.²⁷⁵ These states would comprise a "Christian Republic."²⁷⁶ Disputes arising over the readjustments of the European nations were to be arbitrated by the Kings of France, England, Lombardy, and the Republic of Venice.²⁷⁷

Once established, authority to resolve conflicts among states would be vested in the General Council²⁷⁸ comprising four representatives from each major and two from each minor power, altogether about seventy members.²⁷⁹ Council members would seek re-election every three years. There was to be a system of minor councils with the right of appeal to the Great General Council whose decisions would be final and irrevocable. There would also be a common defense system because armed actions were necessary against "infidel princes" – those who "refused to conform to any of the Christian doctrines of religion."²⁸⁰ Moreover, an international army and navy would be deployed to prevent any flouting of a Council decision. Peace and free trade would spread through the continent, and all Europeans could expect profits and advantages by not spending immense sums of money required by military activities. In the near-term, the plan's success depended on a capable king, a man like Henry IV.²⁸¹ Henry, however, was assassinated in 1610.

William Penn proposed in 1693 to establish an interstate parliament that would safeguard peace and an international tribunal to settle disputes.²⁸² Accord-

273. James L. Tryon, *Proposals for an International Court*, 23 YALE L.J. 415, 416 (1914).

274. See generally Keller, *supra* note 261, at 392.

275. ROOSEVELT, *supra* note 265, at 2.

276. Heerikhuizen, *supra* note 251, at 406. Sully's proposal involved a forcible dissolution of the Catholic Austrian (Habsburg) Empire which would have to give up its possessions in Italy, the Low Countries, and in Germany; as compensation, it could build up an empire overseas. He observed: "the larger the extent of kingdoms, the more they are subject to great revolutions and misfortunes."

277. Tryon, *supra* note 273, at 415.

278. The General Council was to be modeled on the ancient Amphictyons of Greece. See David Jayne Hill, *World Organization*, 55 PROC. AM. PHIL. SOC'Y 322 (1916). But see generally Weart, *supra* note 237, at 609.

279. Keller, *supra* note 261, at 392.

280. Heerikhuizen, *supra* note 251, at 406.

281. *Id.* at 406-07.

282. William Penn, *Essay towards the Present and Future Peace of Europe, by the Establishment of an European Dyet, Parliament or Estates*, 58 ADVOC. PEACE 259 (1896).

ing to this proposal, “[r]efusal to refer by one party or refusal to respect the decision subjected the offender to the exercise of force by the others.”²⁸³ And in the early 18th century, the Abbé de Saint-Pierre adapted these ideas to an emerging recognition of a Europe beset by external threats. He advocated that European sovereigns should organize themselves into a permanent league and agree to settle their differences by peaceful negotiations rather than by war, thereby securing their power and gaining mutual protection against invasions and uprisings from within. He propounded a system for judging sovereigns enforced by an army maintained by contributions from each member state.

B. An International Legal Foundation for Peace

At the root of peace advocacy since Crucé were ideas that diverged significantly from the ideas of the expounders of the international law of war, despite some common intentions and overlapping rhetorical homage to the concept of natural law. Peace advocacy was premised on the belief that war epitomized everything contrary to law and that peace was imperative to fulfillment of human potential.

In this view, international law’s primary objective should be not reiteration of earlier eras’ practices but incisive contribution of doctrines and mechanisms that might corral and eventually abolish war. It is useful to consider this objective in connection with two topics: (1) accountability of sovereigns (which was discussed by contemporary peace advocates); and (2) weapons control (which was not).

1. Accountability of Sovereigns

At the heart of the difference between the international law of peace and the expounded law of war was the question of whether to hold sovereigns accountable for their uses of force and, if so, how. According to the international law of war, sovereign states must have autonomy from any external law. As sovereigns were the only entities having international legal personality, any international legal authority that could supersede that autonomy would jeopardize the state’s authority over its legal order. Without a supervening authority, any proposal to control sovereign behavior, either to stop the sovereign from doing something or to hold it accountable thereafter, was tantamount to abandoning the authority of claims of right embedded in law. Such proposals were mere preferences that may be appropriate subjects for policy debate but not for international legal rules.²⁸⁴

This was (and is) little more than a cynical canard. No serious proponents of European peace from Crucé through Kant championed unitary world govern-

283. Possony, *supra* note 240, at 916 (quoting JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 120 (1929)).

284. See Bruce P. Frohnen, *A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective*, 20 *TRANSNAT’L L. & CONTEMP. PROBS.* 599 (2012).

ment nor authority to intrude in a nation's domestic affairs. A legal assertion of the international community's right to intervene in a state's internal affairs, even to prevent intra-state crimes against humanity, did not gain widespread adherence until the late 20th century.²⁸⁵ Critically, however, early peace advocates deemed that sovereigns ruling mutually conflicting states bore the principal responsibility for millions of human deaths and thrived in a culture that extolled war; they manifestly could not be trusted to achieve peace. It was sovereigns that planned huge campaigns of aggression. It was sovereigns that built the academies that trained sophisticated battle tactics but scarcely considered why war should be fought. In this view, war was not a mechanism of law enforcement (as expounded by the international law of war) but the clearest expression of global lawlessness. That it was rampant was evidence not of its "naturalness" but of international laws' incapacity to control it so long as that law was based on sovereign primacy. Accordingly, the doctrine of sovereign primacy was highly dangerous to peace.

The pursuit of peace demanded that sovereigns be denied an inherent right to engage in war. This did not mean pacifism – that suggestion was yet another cynical canard rejected by every thinker on the subject since Augustine. As long as evil exists in the world, there must be capacity to resist and if necessary overcome that evil, and law must not condemn all use of force. Even Erasmus agreed that Jesus' words about turning the other cheek should not be interpreted as advocacy of pacifism in the face of grave offense to oneself or to other innocents. Prohibition of war, therefore, should not be heard as an argument for pacifism but as a limitation on the use of force only to national defense against violence and only as last resort – precisely the modern wisdom inherent in the United Nations Charter.

This view did not dismiss the complexities and ambiguities inherent in the concept of defense that are actively wrestled with to this day. Yet, from the perspective of Crucé and his successors, limiting the legal use of war to national defense was an important stride forward. By prohibiting sovereigns from using force except in response to threatened or actual violence and by positing that sovereigns were at the heart of the problem of war, early peace advocates laid three keystones of all legal efforts to control war: a legal line separates extra- from intra-territorial use of military force; extra-territorial uses of force must be subject to rigorous analysis of the threat that might justify the use of force outside a state's domain; and a sovereign who used violence that was not in national defense acted in a manner that must be legally condemned.

The Grotian distinction between individual self-defense and states' right to use force in national defense was potentially relevant in this context. Key, whether in connection with individuals or sovereigns, was the imperative of last resort. Thus, as Grotius instructed, individuals living in states governed by the

285. See generally Louis René Beres, *Examining the Logic of World Federal Government*, 4 *PUBLIUS* 75 (1974).

rule of law had options for self-protection that must be resorted to before using force; only in instances where the immediacy and severity of a threat precluded resort to those options could use of force to repel an attack be justified. However, Grotius's acceptance of a state's right to use defensive force in the anarchic international context was, at most, only half right. This view omitted imposition of proactive obligations on sovereigns, as participants in the international community, to create and buttress alternative dispute resolution mechanisms that obviate (or at least reduce) the need to use force.

Peace advocacy recognized that sovereigns must protect a vast and more long-range set of interests than individuals which, in some contexts, broadened their legal exercise of national defense (as Grotius had argued). An individual's right to exercise self-defense existed wholly in the circumstances of the moment; the individual bore no responsibility to actively engage in strengthening the legal system that protected him. But a state's right to use defensive force could not be viewed on such an *ad hoc* basis – states carried legal responsibilities for advancing peace that individuals did not. At minimum therefore, if dispute resolution mechanisms were available, disregard of them by a state using force necessarily undercut any claim of its legitimacy.

These conjoined ideas – that international law must deny sovereigns the unsupervised authority to undertake war and that national defense was the only justification for the use of force – led necessarily to the dilemma that plagues efforts to control war to this day: how to enforce compliance. The Grotian answer was enforcement through war conducted by the wronged party (and perhaps its allies). The answer offered by the Crucé, Duc de Sully, and many intellectuals thereafter was based on a confederation of many states for resolving disputes and whose combined military prowess might deter and, if necessary, repel any one state's aggressive tendencies. But centuries before there was a United Nations, the notion of international dispute resolution along with a limited right to national defense foundered on the international law of war's disavowal of supranational supervision of warfare and to its expansion of "legal" war to include conflicts having little specific relevance to self-defense.

Instead and far more beneficially, international legal scholars could have made important contributions to the pursuit of peace. A legal analysis of the governance structures of ancient leagues of city-states could have revealed insights about which mechanisms proved useful and which mechanisms failed to ameliorate discord. A legal analysis of where a community's successful exercise of force to defend itself had been appreciated could have revealed insights about the limits of the right of self-defense and demonstrated that wanton abuse of this right had recurring characteristics worthy of condemnation. A legal analysis of nonviolent remedies available to wronged parties through redress under law might have informed a discussion of how a collectivity of states might nonviolently apply sanctions to sovereigns who behave aggressively.

These and many other questions, unfortunately, did not receive serious

inquiry by legal scholars until centuries later, but there was nothing in their consideration that was inherently beyond the scope of 17th century thought. Their neglect was neither inevitable nor forced; it was chosen.

2. Controlling Explosive Weapons

I thus return to my initial question: in the face of the emergence of explosive weapons that so profoundly changed warfare, what should law have been responsible for? No one can say whether any legal prescription, no matter how incisive, could have broken the chain of inherited habit that imperiled so many lives.²⁸⁶ Yet, it seems worth speculating what might have evolved if legal scholars had more effectively contributed to the cause of advancing peace in the face of emerging explosive weapons warfare. Such an analysis would have been grounded in a denial of any inherent right of sovereigns to engage in war, in a legal obligation on sovereigns to submit a claimed right to use force in national defense to judgment by a super-sovereign authority, and in a legal prohibition against the trans-boundary use of force except in national defense and as a last resort.

The historical reality was that even if that foundation had been espoused, the tsunami of violence that was shaped and driven by explosive weapons compelled a spiral of decisions and responses that could only increase the production and use of explosive weapons and, necessarily, human death. This is not to suggest that weapons were the exclusive cause of war, whether in the 16th and 17th centuries or any other time. A narrow view of technological determinism²⁸⁷ is undercut by the sheer variety of roots of human conflict. When explosive weapons emerged, there were shattering religious schisms, exploitation of the Americas, the advance of printing and other technologies unrelated to weaponry, urbanization, global trade, and numerous other “causes” that gravely contributed to the era’s violence. Certainly, very evil men took advantage of chaos to horrible effect; the impact of their sheer malevolence must not be disregarded.

Thus, to point a sole finger at explosive weapons as the cause of all the era’s warfare and suggest that, then or now, peace would flow simply from a world without weapons would ignore the many reasons that have caused people to go to war from the earliest moments of human history. Yet, the opposite is also true. To disregard how explosive weapons changed not only the conduct of warfare but the interaction of forces that propelled war as an international institution would be to turn a blind eye to a truly transformative phenomenon.

286. “[I]t is not the theories of war that have limited the horrors of combat, but factors far more compelling, be they social, economic or political.” HEW STRACHAN, *EUROPEAN ARMIES AND THE CONDUCT OF WAR 4* (George Allen & Unwin 1983).

287. See generally George Raudzens, *War-Winning Weapons: The Measurement of Technological Determinism in Military History*, 54 *J. MIL. HIST.* 403 (1990); see also Fernando Echeverría Rey, *Weapons, Technological Determinism, and Ancient Warfare*, in *NEW PERSPECTIVES ON ANCIENT WARFARE* 21 (Garret G. Fagan & Matthew Trundel eds., 2010).

The emergence of explosive weapons propelled expansion of warfare in virtually every conceivable dimension. Geographically, war in the medieval era centered in confined areas (fortresses), but with explosive weapons, war expanded to huge confrontations on the open plain, to the sacking and destruction of cities, even to the oceans and over them throughout the world. War also expanded quantitatively: more wars entailed more battles lasting longer and engaging ever larger forces. The actual combat of warfare also expanded as the scale of battles spread and combatants wielded greater varieties of weapons often far from each other, replacing direct physical confrontation with anonymous delivery of invisible and unavoidable shot. Thus, as war expanded, fighting became something more of an abstraction even as it became vastly more lethal.

The emergence of explosive weapons and the consequent expansion of warfare rendered military success a quantifiable objective; more men wielding more weapons was highly correlated to victory. With an emphasis on quantity of force came a need for more force differentiation and improved coordination among these forces that was a function, in turn, of longer and more precise training, which necessarily highlighted the importance of centralized strategic planning. Explosive weapons readily became mass commodities as did the troops who wielded them, which put a high premium on longer and more professional experience. In this commercialized environment, mercenaries flourished even to the point that many soldiers-for-profit fought for only their own aggrandizement, effectively delinking combat from any larger purpose other than its own reward.

The emergence of explosive weapons compelled a concentration and rationalization of an industrial infrastructure for production and delivery of ever more technically precise weapons, turning war into something that had to be well-planned, not only in terms of battlefield strategy, but as a matter of social organization. Indeed, rarely could even the best battlefield tactics make up for a lack of preparedness in terms of vast numbers of well-trained troops and well-made weapons with sufficient ammunition and carrying capacity. Not to be prepared meant being overrun; once prepared, all that preparation compelled continuous rationalization. Industrial capacity for producing weapons had to engage constantly improving techniques, demanding perpetual production from a technologically sophisticated weapons-making private sector. Emerging mercantilist values provided a ready justification for escalating weapons production which in turn provided a ready justification for mercantilism. War became an extension of industrial production and trade, but by other means.

In one sense, explosive weapons democratized warfare by requiring engagement of huge numbers of men and subjecting nearly everyone regardless of social status to a high likelihood of death. In another sense, however, explosive weapons autocratized war in that individual strength, courage and other martial values receded in importance, while the need for disciplined command authority rose in importance. Most important, all this production and deployment of

larger military forces had to be used lest it be wasted. From the perspective of military planners, the “cost” of war was sunk into purchasing of weapons and training of troops; that cost could be recouped only through conquest and exploitation of victims.

Ultimately, explosive weapons enormously expanded warfare’s impact: larger and more expensive armies serving longer tours and engaged in more battles that violently caused vastly more casualties and more destruction. The ambit of human choice was so effectively narrowed as to cause leaders to compel millions of boys to walk upright into waves of bullets and to cause those boys to obey. In ecological terms, the invasive species of explosive weapons had so overtaken its habitat as to organize virtually every aspect of its environment to its propagation.

In hindsight, it is difficult to understand how intellectuals committed to ameliorating war could have been so oblivious to the cataclysmic impact of emerging explosive weapons. Even in the early 17th century, international law could have established principles for assessing the behavior of sovereigns in connection with war so as to enable more consistent application of the criteria of national defense in last resort.

Thus, if the basis of international law with regard to war was that aggressive war was prohibited and that only national defense in last resort could legitimately justify the external use of force, then preparations of war, including the amassing of mammoth weapons stockpiles and the training of troops in their effective use would be evidence of an aggressive, and hence illegal, purpose. In a legal context where sovereigns were held accountable for war, evidence of preparations for war should have been considered counter-indicative of defensive intentions and thereby established a presumption of legal responsibility.

In this alternative legal context, even the most rudimentary mechanisms for controlling the size and disposition of national arsenals could have produced metrics for distinguishing reasonable preparations for national defense from aggressive preparations for hostility. Indeed, the reality of European war at least from the mid-16th to the mid-20th century was that most states were so dedicated to the pursuit of war that it would have been impossible to portray their preparations as benignly intentioned. Perhaps a few nations’ military preparations might arguably have been for defense; most were far from any gray area.

Thus, in a legal context where a super-national institution would have judged the legitimacy of sovereign resort to force in the cause of national defense, the vast contracts for supply of explosive weapons, the establishment of command structures for taking tactical advantage of those explosive weapons, the creation and elevation of training schools to produce the best commanders and troops for them to command, and the careful elaboration of military campaigns far from one’s national territory would have built a strong case of illegality.

An insightful international legal analysis could have contributed to the cause of peace by questioning the legitimacy of weapons producers who sold to all sides of conflict and profited accordingly. Instead of propounding a doctrine of

neutrality that enabled weapons suppliers to operate outside one or another sovereign's domain, international law could have mandated that, as weapons were needed only for national defense purposes, suppliers should serve only their own nation – ironically, the way it had been before the explosive weapons era.

International law could have also considered sovereign proactive responsibilities for resolving disputes peaceably, for instructing commanders on how to pursue effective diplomacy, and for building a military culture that esteemed peaceful dispute resolution over combat. Certainly, a total absence of any efforts in these directions could have buttressed a conclusion that the undertaking of war was illegal.

At minimum, therefore, international law could have laid a foundation for the idea that, as per the wisdom of Sebastian Frank, aggressive war was (and is) a crime and that unjustified production and use of explosive weapons was material evidence of its commission.

CONCLUSION

My intent is not to praise or tarnish early 17th century legal scholarship but to assess international law's utility in stanching war. War has been among humanity's greatest challenges. It is imperative, therefore, to scour international law to ensure its optimum fitness for contributing to the cause of peace. In truth, no one can know if the extraordinary level of violence of the explosive weapons era might have been any more or less had Grotius or anyone else written a very different treatise on war and peace. Perhaps the unprecedented levels of war of the explosive weapons era would have been exactly the same regardless of what international law had to say about it. But that possibility must not dismiss international law's accountability for what happened on at least an intellectual level. International law would be a sorry contribution to humanity if its proponents denied it bore any relation to the course of human events, especially on matters so serious as war and peace.

The entire international law of war was born from a contest of ideas that was transformatively sharpened during the 16th and early 17th centuries. At stake was the huge assault on social order caused by the explosive weapons revolution. The prevailing philosophy accepted, even glorified, what explosive weapons had wrought. Expounders of the international law of war, seeking to shape the substance and process of international governance over war, made crucial intellectual choices. It is important to ask whether, had they thought about explosive weapons more insightfully, their ultimate goal of less war might have transpired.

Critically, the course of international law was diverted from the course of international peace. International law went off in a direction that was independent of and aside from the eradication of explosive weapons warfare. What international law did not do was to penetrate the dynamics that led sovereigns to engage in war and disincentivize the continuous reinforcement of warfare as a

legitimate social activity. By inadequately appreciating the impact of explosive weapons on military strategy and preparedness, and by overlooking any linkage between explosive weapons and state responsibility for aggression, the international law of war failed to stem that era's bloodshed. Instead of contributing to the cause of peace, it is difficult to deny the conclusion that international law afforded a ready rationale for the righteousness of war and may have helped foster war's centuries of escalation.

It may be offered that the primacy of the United Nations Security Council on matters of international peace and security and the prohibition against aggression testify to how much modern international law has corrected course. 'Tis a consummation devoutly to be wished. Yet attentive ears can still hear arguments that sovereigns have an inherent right to develop and deploy weapons for their defense and that the international community lacks legal right to judge the legitimacy of those weapons. These arguments are unfailingly adduced as grounded in the mandates of international law. Simply put, whatever remnants of that view remain should be decisively disavowed. The potentiality that, as regarding war, the intellectual integrity of legal principles might actually correlate to lives not lost is no less pivotal now than four centuries ago.
