CHAPTER 1

HISTORY OF THE LAW OF WAR

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I. INTRODUCTION.

A. OBJECTIVES:

1. Identify common historical themes which continue to support the validity of laws regulating warfare.

2. Identify the two "prongs" of legal regulation of warfare.

3. Trace the historical "cause and effect" evolution of laws related to the conduct of war.

4. Begin to analyze the legitimacy of injecting law into warfare.

B. WHAT IS WAR? "[i]t is universally recognized that war is *a contention, i.e., a violent struggle through the application of armed force."*

1. International Legal Definition: The Four Elements Test.

   a. A contention;

   b. Between at least two nation states;

c. Wherein armed force is employed;

d. With an intent to overwhelm.

2. War versus Armed Conflict. Historically, only conflict meeting the four elements test for "war" triggered law of war application. Accordingly, some nations asserted the law of war was not triggered by all instances of armed conflict. As a result, the applicability of the law of war depended upon the subjective national classification of a conflict.

   a. Post WW II response. Recognition of a state of war is no longer required to trigger the law of war. Instead, the law of war is applicable to any **international armed conflict:**

      (1) "Any difference arising between two States and leading to the intervention of armed forces is an armed conflict . . . [i]t makes no difference how long the conflict lasts, or how much slaughter takes place."

II. THE UNIFYING THEMES OF THE LAW OF WAR.

A. Law exists either to (1) prevent conduct, or (2) control conduct. These characteristics permeate the law of war, as exemplified by the two prongs. *Jus ad Bellum* serves to prevent conduct, while *Jus in Bello* serves to regulate or control conduct.

1. Validity. Although critics of regulating warfare cite historic examples of violations of evolving laws of war, history provides the greatest evidence of the validity of this body of law.

   a. History shows that in the vast majority of instances the law of war works. "Violated or ignored as they often are, enough of the rules are observed enough of the time so that mankind is very much better off with them than without them."

   b. History demonstrates that mankind has always sought to "diminish the corrosive effect of mortal combat on the participants," and has come to regard war not as a state of anarchy justifying infliction of unlimited suffering, but as an unfortunate reality which must be governed by some rule of law.

(1) This point is exemplified by Article 22 of the Hague Convention: "the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity."

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

B. The trend toward regulation grew over time in scope and recognition. When considering whether these rules have validity, the student and the teacher (judge advocates teaching soldiers) must consider the objectives of the law of War.

1. The purpose of the law of war is to (1) integrate humanity into war and (2) serve as a tactical combat multiplier.

2. The validity of the law of war is best explained in terms of both objectives. For instance, many cite the German massacre at Malmedy as providing American forces with the inspiration to break the German advance during World War II's Battle of the Bulge. Accordingly, observance of the law of war denies the enemy a rallying cry fight against difficult odds.

III. THE "PRONGS" OF REGULATION

A. Throughout history, the law focused on two primary issues related to war:

1. Under what circumstances was the use of military power legally and morally justified. This is referred to as *Jus ad Bellum* (or Legal Basis for the Use of Force by contemporary military lawyers).

2. What legal and moral restraints apply to the conduct of waging war. This prong is referred to as *Jus in Bello* (the Regulation of Hostilities or Hague/Geneva Law by contemporary military lawyers).

3. The concepts of *Jus ad Bellum* and *Jus in Bello* developed both unevenly and concurrently. For example, during the majority of the *Jus ad Bellum* period, most societies only dealt with rules concerning the legitimacy of using force. Once the conditions were present that justified war, there were often no limits on the methods used to wage war. At a certain point both theories began to evolve together.

B. THE TWO THEORIES.

1. *Jus ad Bellum:* Legitimate War. Law became an early player in the historical development of warfare. The earliest references to rules regarding war referred to the conditions which justified resort to war legally and morally.

   a. Greeks: began concept of *Jus ad Bellum*, wherein a city-state was justified in resorting to the use of force if a number of conditions existed (if the conditions existed the conflict was blessed by the gods and was just). In the absence of these conditions armed conflict was forbidden.

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

   c. The ancient Egyptians and Sumerians (2nd millennium B.C.) generated rules defining the circumstances under which war might be initiated.

   d. The ancient Hittites required a formal exchange of letters and demands before initiating war. In addition, no war could begin during planting season.

   e. Deuteronomy 20: "Before attacking an enemy city make an offer of peace."

2. *Jus in Bello:* Regulation of Conduct During War. The second body of law that began to develop dealt with rules that control conduct during the prosecution of a war to ensure that it is legal and moral.

a. Ancient China (4th century B.C.). Sun Tzu's *The Art of War* set out a number of rules that controlled what soldiers were permitted to do during war:

(1) Captives must be treated well and cared for; and

(2) Natives within captured cities must be spared and women and children respected.

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

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

IV. THE HISTORICAL PERIODS.

A. THE JUST WAR PERIOD.

1. This period ranged from 335 B.C. to about 1800. The primary tenet of the period was determination of a "just cause" as a condition precedent to the use of military force.

2. Just Conduct Valued Over Regulation of Conduct. The law during this period focused upon the first prong of the law of war (*Jus ad Bellum*). If the reason for the use of force was considered to be just, whether the war was prosecuted fairly and with humanity was not a significant issue.

3. Early Beginnings: Just War Closely Connected to Self-Defense.

   a. Aristotle (335 B.C.) wrote that war should only be employed to (1) prevent men becoming enslaved, (2) to establish leadership which is in the interests of the led, or (3) to enable men to become masters of men who naturally deserved to be enslaved.

   b. Cicero refined Aristotle's model by stating that "the only excuse for going to war is that we may live in peace unharmed...."

4. The Era of Christian Influence: Divine Justification.

a. Early church leaders forbade Christians from employing force even in self-defense. This position became less and less tenable with the expansion of the Christian world.

b. Church scholars later reconciled the dictates of Christianity with the need to defend individuals and the state by adopting a *Jus ad Bellum* position under which recourse to war was just in certain circumstances (6th century AD).

5. Middle Ages. Saint Thomas Aquinas (12th century AD) (within his *Summa Theologica*) refined this "just war" theory when he established the three conditions under which a just war could be initiated:

   a. with the authority of the sovereign;

   b. with a just cause (to avenge a wrong or fight in self-defense); and

   c. so long as the fray is entered into with pure intentions (for the advancement of good over evil). The key element of such an intention was to achieve peace. This was the requisite "pure motive."

6. Juristic Model. Saint Thomas Aquinas' work signaled a transition of the Just War doctrine from a concept designed to explain why Christians could bear arms (apologetic) towards the beginning of a juristic model.

   a. The concept of "just war" was initially enunciated to solve the moral dilemma posed by the adversity between the Gospel and the reality of war. With the increase in the number of Christian nation-states, this concept evolved in light of an increasing concern with regulating war for more practical reasons.

   b. The concept of just war was being passed from the hands of the theologians to the lawyers. Several great European jurists emerged to document customary laws related to warfare. Hugo Grotius (1583-1645) produced the most systematic and comprehensive work, *On the Law of War and Peace*. His work is regarded as the starting point for the development of the modern law of war.

   c. While many of the principles enunciated in this work were consistent with church doctrine, Grotius boldly asserted an non-religious basis for this law. According to Grotius, the law of war was not based on divine law, but on recognition of the true natural state of relations

among nations. Thus, the law of war was based on natural and not divine law.

7. The End of the Just War Period. By the time the next period emerged, the Just War Doctrine had generated a widely recognized set of principles that represented the early customary law of war. The most fundamental of these principles were:

   a. A decision to wage war can be reached only by legitimate authority (those who rule a sovereign).

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

   c. The intention must be the advancement of good or the avoidance of evil.

   d. In war, other than in self-defense, there must be a reasonable prospect of victory.

   e. Every effort must be made to resolve differences by peaceful means, before resorting to force.

   f. The innocent shall be immune from attack.

   g. The amount of force used shall not be disproportionate to the legitimate objective.

   h. Emergence of a Chivalric Code. *Jus in Bello*. The chivalric rules of fair play and good treatment only applied if the war was just to begin with.

      (1) Victors were entitled to spoils of war, only if war was just.

      (2) Forces prosecuting an unjust war were not entitled to demand *jus in bello* during the course of the conflict.

      (3) Red Banner of Total War. Signaled a party's intent to wage absolute war (Joan of Arc announced to British "no quarter will be given").

B. THE WAR AS FACT PERIOD (1800-1918).

1. Generally. Arose based upon the rise of the nation state as a tool of foreign relations. Modern powers transformed war from a tool to achieve justice to a tool to pursue national policy objectives.

    a. Just War Notion Pushed Aside. Natural or moral law principles replaced by positivism which reflected the rights and privileges of the modern nation state. Law is based not on some philosophical speculation, but on rules emerging from the practice of states and international conventions.

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

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

    d. Things to Come. The War as Fact Period appeared as *a dark era for the rule of law*. Yet a number of significant developments signaled the beginning of the next period:

        (1) With war a recognized and legal reality in the intercourse of nations, the focus on mitigating the impact of war emerged.

            (a) Solferino (Henry Dunant's graphic depiction of the bloodiest battles of Franco-Prussian War). His work served as the impetus for the creation of the International Committee of the Red Cross and the negotiation of the First Geneva Convention in 1864.

            (b) Francis Lieber, INSTRUCTIONS TO ARMIES IN THE FIELD (1863). First modern restatement of the law of war issued in the form of General Order 100 to the Union Army during the American Civil War.

(c) International Revulsion of General Sherman's "War is Hell" Total War. Sherman was very concerned with the morality of war. His observation that "war is Hell" demonstrates the emergence and reintroduction of morality. However, as his March to the Sea demonstrated, Sherman only thought the right to resort to war should be regulated. Once war had begun, he felt it had no natural or legal limits. In other words, he only recognized the first prong (*Jus ad Bellum*) of the law of war.

(d) First Geneva Convention (1864).

2. Foundation for Treaty Period Laid. Based on the "positivist" view, the best way to reduce the uncertainty attendant with conflict was to codify rules regulating this area.

   a. Intellectual focus began shift toward minimizing resort to war and/or mitigating the consequences of war.

   b. **EXAMPLE:** National leaders began to join the academics in the push to control the impact of war (Czar Nicholas and Theodore Roosevelt pushed for the two Hague Conferences that produced the Hague Conventions and Regulations).

C. *JUS CONTRA BELLUM* PERIOD.

1. Generally. World War I represented a significant challenge to the validity of the "war as fact" theory.

   a. In spite of the moral outrage directed towards the aggressors of that war, legal scholars unanimously rejected any assertion that initiation of the war constituted a breach of international law.

   b. World leaders struggled to give meaning to a war of unprecedented carnage and destruction. The "war to end all wars" sentiment manifested itself in a shift in intellectual direction leading to the conclusion that aggressive use of force must be outlawed.

2. *Jus ad Bellum* Changes Shape. Immediately before this period began, the Hague Conferences (1899-1907) produced the Hague Conventions, which represented the last multilateral law that recognized war as a legitimate device of national policy. While Hague law concentrates on

war avoidance and limitation of suffering during war, this period saw a shift toward an absolute renunciation of aggressive war.

a. League of Nations. First time in history that nations agreed upon an obligation under the law <u>not</u> to resort to war to resolve disputes or to secure national policy goals (Preamble). The League was set up as a component to the Treaty of Versailles, largely because President Wilson felt that the procedural mechanisms put in place by the Covenant of the League of Nations would force delay upon nations bent on war. During these periods of delay, peaceful means of conflict management could be brought to bear.

b. Eighth Assembly of League of Nations: banned aggressive war (questionable legal effect of resolution). However, the League did not attempt to enforce this duty (except as to Japan's invasion of Manchuria in 1931).

c. Kellogg-Briand Pact (1928). Officially referred to as the Treaty for the Renunciation of War, it banned aggressive war. This is the point in time generally thought of as the "quantum leap." **For the first time, aggressive war is clearly and categorically banned.**

(1) In contradistinction from the post WW I period, this treaty established an international legal basis for the post WW II prosecution of those responsible for waging aggressive war.

d. Current Status of Pact. This treaty remains in force today. Virtually all commentators agree that the provisions of the treaty banning aggressive war have ripened into customary international law.

3. Use of force in self-defense remained unregulated. No law has ever purported to deny a sovereign the right to defend itself. Some commentators stated that the use of force in the defense is not war. Thus, war (i.e., aggressive or offensive use of force) has been banned altogether.

D. POST WORLD WAR II PERIOD.

1. Generally. The Procedural requirements of the Hague Conventions did not prevent World War I, just as the procedural requirements of the League of Nations and the Kellogg-Briand Pact did not prevent World War II. World powers recognized the need for a world body with greater

power to prevent war, and international law that provided more specific protections for the victims of war.

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

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

    b. World focused on ex post facto problem during prosecution of war crimes. The universal nature of law of war prohibitions, and the recognition that they were at the core of international legal values (*jus cogens*), resulted in the legitimate application of those laws to those tried with violations.

E. The United Nations Charter. Continues shift to outright ban on war. Extended ban to not only war, but through Article 2(4), also "the **threat** or use of force."

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

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

F. Geneva Conventions (1949).

1. Generally.

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

b. Four Conventions. A comprehensive effort to protect the victims of war.

c. Birth of the Civilian's Convention. A post war recognition of the need specifically to address this class.

2. The four conventions are considered customary international law. This means even if a particular nation has not ratified the treaties, that nation is still bound by the principles within each of the four treaties because they are merely a reflection of customary law by which all nations states are already bound.

3. Concerned with national and not international forces? In practice, forces operating under U.N. control comply with the Conventions.

4. Clear shift towards a true humanitarian motivation: "the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles respected for their own sake . . ."

5. The 1977 Protocols.

   a. Generally. These two treaties were negotiated to supplement the four Geneva Conventions. The United States has not yet ratified either treaty.

   b. Protocol I. Effort to supplement rules governing international armed conflicts.

   c. Protocol II. Effort to extend protections of conventions to internal armed conflicts.

V. WHY REGULATE WARFARE?

1. Motivates the enemy to observe the same rules.

2. Motivates the enemy to surrender.

3. Guards against acts that violate basic tenets of civilization.

   a. Protects against unnecessary suffering.

b. Safeguards certain fundamental human rights.

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

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

6. Helps restore peace.

VI. CONCLUSION.

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