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IS THE LAW OF WAR REALLY LAW?
WAR AND LAW SINCE 1945


Reviewed by Alfred P. Rubin*

From January 1961 until April 1966 I worked in the office of the Assistant General Counsel (International Security Affairs) in the United States Department of Defense. One of my duties was to draft or approve legal documents reflecting the commitment of the United States to the rule of law in military matters. In that connection, and for many years after, I have referred to the laws of war as they have been codified (or not), and have been invited to participate in conferences and working groups grappling with unclarities in conventional and general international law and with proposals to modify the treaty-based law. Perhaps the most intriguing of the working groups was a “Panel on Humanitarian Problems and International Law” under the chairmanship of Professor Jacques Freymond, then vice president of the International Committee of the Red Cross (ICRC), organized by the American Society of International Law in 1969. The panel’s purpose was to consider a proposal of the ICRC, a Swiss organization (despite its name) headquartered in Geneva, to call a large meeting of states to consider revising the basic rules set out in four “humanitarian” conventions concluded in Geneva on August 12, 1949 (the 1949 Conventions), particularly the Prisoners of War (POWs) Convention and the Civilians Convention.¹ After several meetings and much discussion, it appeared to be the consensus of the

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panel that major improvements in the codified laws of war could not be expected at that time; in fact, there was some doubt as to the wisdom of convening the conference. That opinion was disregarded; indeed, we were told that it was considered inappropriate by whomever was supposed to be influenced by the panel’s discussions (who that was was never made clear to the panel). It was indicated that those who really made the decisions had already decided that the laws of war should be reviewed about every twenty years\(^2\) whether or not a significant improvement could be expected, and we were advised to produce papers that would help the process in substance. I wrote two such papers.\(^3\) As far as I could see, neither was useful to the participants in the ICRC’s conference which was in fact held in Geneva in four sessions beginning in 1974 and ending in 1977.

The product of those four sessions was drafts of two Protocols to the 1949 Conventions. The first (Protocol I) applies only to international armed conflicts — those conflicts covered by the general language of Article 2 common to the four Geneva Conventions:

\[\text{The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.}\]

The second (Protocol II) applies to armed conflicts not of an international character as that phrase is used in Article 3 common to the four Geneva Conventions:

\[\text{In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . .}\]

The United States has indicated that it finds Protocol II acceptable. But the executive branch of the United States government has not yet asked

\(^2\) The grand Hague codification of 1899 was updated and revised in 1907 and a third conference was expected to carry it even further. But the First World War changed the timetable. The provisions of 1907 dealing with prisoners of war and a convention concluded in Geneva in 1906 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field were made the subject of new conventions concluded in Geneva in 1929. Laws, supra note 1, at 63, 325, 339 (introductory notes on the 1899/1907 Rules and the 1929 Conventions).

the Senate to give the "advice and consent" that is necessary to authorize the President to ratify Protocol I. As of this writing, the United States has not ratified either Protocol.

During the nearly twenty years that these Protocols, the product of four years of sporadic negotiation, have languished as far as the United States is concerned, there have been many more conferences and learned articles published urging action by the United States and other laggards. While I have attended a few, I normally refuse to attend unless the organizers either pay the expenses of my participation (which ensures that they are prepared to hear what I might say), or give me a place on the platform to argue substance. I have refused to attend several conferences where I believe that I have been invited merely to swell an audience and ask what the enthusiasts seem to regard as impertinent questions from the floor. On the few occasions when I have attended such sessions, as at meetings of the American Society of International Law, the questions I ask, the same ones that were discussed in the panel of the American Society of International Law before the negotiations that ended in 1977, seem to confuse the advocates of the Protocols. They never answer in substance, nor do they mention, much less attempt to refute, my oft-repeated objections to their own arguments urging ratification by the United States. I will restate my objections at the end of this review.

Geoffrey Best, a former Professor of History at the Universities of Edinburgh and Sussex and currently a Senior Associate member of St. Anthony's College, Oxford, where he wrote this book, is a learned scholar in the laws of war and the techniques of negotiation and historical research. He has applied his considerable talents to analyzing the negotiating history of the 1977 Protocols. His conclusions confirm mine; therefore, I am delighted to recommend this book most highly. However, it is only fair to say that his argumentation follows a rather restricted British-oriented historical, and not a legal, trail, and while we both differ from our enthusiastic colleagues' conclusions, we also differ from each other on a number of points. Let me be specific.

Best begins with a very sketchy review of the evolution of political (not legal) thought concerning the relationship between a state, its military arm, and its non-military population. Perhaps because of his British orientation, he does not mention the national mythologies that make heroic the activities of the American "minute men" of 1775 or the French "levée en masse" of August 23, 1793. Thus, he appears to miss the events and codification efforts which first made clear that a funda-
mental error in relating words to facts was being committed by the most influential legal theorists.  

Best says that the definition of “combatant” crystallized in the international laws of war first emerged in 1899. It is true that the definition reached its current form in 1899, but that formulation descends from earlier ones and represents a triumph of the positive law negotiators of established governments seeking to criminalize the acts of their most effective military opponents. The essential technique of the purported “codifiers” after 1863 has been clearly to accept the fundamental division of the laws of war into the *jus ad bellum*, the “right to resort to war,” on the one hand, and the *jus in bello*, the “rights of soldiers and armies in war,” on the other, but then attempt to deprive those fighting in a bad cause of their *jus in bello* protections. The usual way to do this without appearing to violate fundamental principles has been to condemn the most effective guerrilla tactics while at the same time permitting similar tactics to be pursued by the forces of the defending authorities. There are obvious logical and moral inconsistencies created by inserting *jus ad bellum* considerations into the legal regime that is supposed to protect the victims (sick, wounded, shipwrecked, surrendered, persons otherwise *hors de combat*, and civilians) in order to deprive of their *jus in bello* combatant privileges those combatants whose *jus ad bellum* was regarded as unacceptable to the representatives of governments involved in drafting the purported codifications.

Best analyzes at some length how the more or less compartmentalized categories that lawyers and political scientists increasingly found convenient when discussing protected targets and “civilians” bore less and less relation to the complexities of economic and political organi-

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4. For an outline history of how the current “codifications” tried to take account of the heroic American and French “national independence” tactics and gradually relegated them to a position outside the mainstream of the positive laws of war, see Alfred P. Rubin, *Terrorism and the Laws of War*, 12 Denver J. Int’l L. & Pol’y 219, 220–25 (1983). For a much broader analysis of how changing European concepts of social, religious, and political organization changed the fundamental notions of humanitarianism as applied to organized violence by states, see Rubin, *Is War Still Legal?*, supra note 3.


6. See Rubin, *Terrorism and the Laws of War*, supra note 4. The first modern codification of the laws of war, the *jus in bello*, was issued in 1863. This was the famous “Lieber Code” during the American Civil War of 1861–65. FRANCIS LIEBER, *U.S. WAR DEP’T, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (Government Printing Office 1898) (1863), *reprinted in Laws*, supra note 1, at 3. Since the Union had no doubt about its rectitude under the *jus ad bellum*, its application of the *jus in bello* to the Confederate soldiers was a major moral and legal signal that the *jus ad bellum* was to be considered irrelevant to the *jus in bello*. It is also noteworthy that the “war” was undeclared and viewed by the Union as entirely an internal matter of a legally undivided United States. Both these latter points will be discussed further below.
ization as the nineteenth century wore on. He notes with some anguish that it seemed to be routinely accepted that "[t]he Western cultural tradition . . . knew no principle more important than the distinction between the soldier and the civilian," pointing out that making oneself indistinguishable from the civilian population was "precisely what a guerrilla, unless hedged about with tight controls, would like to do; and, moreover, very much what the theory of revolutionary warfare required him to do."\(^7\) In light of the successful American Revolution and the successful French war against the European allies seeking to restore the ancien régime, as well as the national memories that surround those efforts with glory, I would question Best's assertion of a general "Western cultural tradition." But Best is certainly right about the codifiers' success in condemning guerrilla tactics. The 1899/1907 Hague formulations seem to reflect the values of those who would gain by stability. The rules they agreed on seem to favor their political and military position, just as revolutionary theorists try to establish rules that would result in the inevitable victory of their favored "independence" movement regardless of its historical or moral stature.

But it was not a theory of revolutionary warfare that raised the problem in 1949. It was the experience of the French, Danes and others in the anti-Nazi "resistance" during the Second World War. The resistance, at least in romantic memory, swam in the sea of civil resistance to an unspeakable occupation regime. It seems irrelevant that the occupation regime in general tried to abide by the codified laws of war; many aspects of its operation were dominated by its insane ideology. The horrors of the Nazi regime lent a certain aura of respectability to guerrilla warfare and made the job of the drafters of the 1949 Conventions an exercise in delicacy bordering on hypocrisy. Their conclusion seems strange. Instead of reviving memories of the "heroic" French and American revolutions, they seem to justify armed resistance movements by asserting the existence of a legal obligation in the occupying power to take such care of the civilian population that resistance seems almost absurd. They also seem to presume that "war" goes on in an eighteenth century pattern of set battles isolated from civilian targets (a pattern that in reality existed only rarely). Best wisely notes:

A civilian population so well cared for by a military occupier, the reader may reflect along with the Chinese delegate . . ., would be in clover. The clover would have been even lusher had not most of

\(^7\) Best, supra note 5, at 128–29.
[the pertinent articles of the 1949 Civilians Convention]... already
been trimmed into a nearer relation to likely reality by the repre-
sentatives of the occupying interest.8

This is not to say, nor does Best suggest, that there are better solutions
to the question of what should be the legal regime applicable to belliger-
et occupation. It is to say that at least major parts of the regime of the
1949 Conventions are the product of diplomatic maneuvering, not the
result of codifying the actual or predictable practice of states, or of any
deeper appreciation of either the realities or the moral principles that
permit decent people to participate in inflicting the miseries inevitably
visited on the helpless during a war.

In focusing on the negotiating history of various provisions of the
POWs and Civilians Conventions in the light of military realities, there
is evidence that at least parts of the 1949 Conventions were drafted in
unseemly haste. Perhaps only a lawyer who has had to work with them
feels it keenly, but one of my duties at the Department of Defense in the
early stages of the Vietnam conflict was to advise my superiors and
policy-making "clients" as to the legal regime appropriate to that messy
struggle. Was it an internal conflict, governed by the rules appropriate to
civil wars? Or was it, in the terms of Article 3 of all four Conventions,
an "armed conflict not of an international character?" Or was it an inter-
national armed conflict governed by Article 2 of the Conventions, bring-
ing the entire panoply of the laws of war into play? My conclusion was
that as a matter of the legal categories created by the 1949 Conventions,
there were several different conflicts taking place in a very confined
space and with different participants: a civil war of the authorities of
South Vietnam against indigenous Vietcong; an international conflict of
the same authorities against the Vietcong infiltrated from the North; an
"Article 3" internal conflict to the degree the United States confined its
activities to South Vietnam's acknowledged territory; an unclassifiable
conflict with regard to China and others advising the Vietcong, thus
intervening in the internal affairs of South Vietnam or in an undivided
Vietnam under the labels attached by some observers interested in main-
taining that the entire struggle was an internal struggle which the United
States should leave to those who lived there. And was not the United
States doing in South Vietnam exactly what China was doing in the
North? Did the *jus ad bellum* alter the *jus in bello*? But what was the
regime of law that applied between South Vietnam and North Vietnam?
If they were two states, as the United States insisted, then bombing

8. *Id.* at 121.
various targets in the North indicated that Article 2 must apply, in which case the authorities of South Vietnam would have had to change their treatment of captives unless two sets of "prisoners of war" with identical loyalties, motivations, and language, captured in the same battle, were to be differentiated. And if it were all an internal struggle, were third powers, like the United States and its SEATO allies on the one side, and China and the Soviet Union and their allies on the other, engaged in "unneutral service" by assisting their favorite contestants? Did the party to the conflict that felt disadvantaged by that service have a legal right to "reprisal?" Was "nation-building" and support of South Vietnam's social and political infrastructure "unneutral" when taking the form of economic assistance, thus freeing the fisc of South Vietnam to devote itself to greater military expenditures? The more I pondered these imponderables, the clearer it became that the categories enshrined in the 1949 Conventions, to which both North and South Vietnam purported to be parties each in its own name, had departed significantly from political, military, and probably legal reality.9

Worse still, the categories of the 1949 Conventions left a gap. For Article 3 common to all four conventions to apply, the armed conflict not of an international character must occur "in the territory of one of the High Contracting Parties." What about incidents on the high seas, like the Gulf of Tonkin incident? But Article 2 common to all four conventions relates only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." But suppose no High Contracting Party "recognizes" a state of war? Or one High Contracting Party considers the struggle international and another considers the struggle internal and itself the victim of foreign intervention in its internal affairs? In the real world, such disagreements about legal categories frequently exist, and each state or party considers itself to have the power, by "autointerpretation," to adopt whatever model of the legal order it finds to be in its political or legal interest. Those who disagree will simply disagree and there may be quarrels about it, but international law does not demand that all parties agree on legal categories. Ultimately, historians will disagree, as they have over whether the American Civil War of 1861–65 was a "war" or was an exercise of treasonous behavior in which the Union applied the laws of war in order to ease the return to peace, limit the excuses for atrocities, and maintain morale among its own forces and their support-

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9. See id. at 363, where Best makes a similar point.
Best quotes the pertinent language of common Article 2, but does not note the confusion of thought it reflects. He does note many other technical arguments, such as the use of the phrase "armed conflict" to replace the usual reference to "war" and the failure of that substitution to "avert the evasive casuistries" that had marked the British and American refusal to attach the word "war" to the military struggle between China and Japan beginning in 1937.

In some ways, Best's immersion in the British and ICRC documents leading to the conclusion of the Geneva Conventions of 1949 and the Protocols of 1977 have also immersed him in the quite wrong, but not obviously so, "conventional wisdom" of the negotiators. For example, he refers quite correctly to "war crimes," violations of the laws and customs of war for which soldiers and civilians have been tried and, in some cases, hanged, as "crimes against the law of nations" justifying trial or handing over to another party concerned for trial. But he mislabels the "handing over" as "extradition"; "extradition" has its own problems and the phrase "hand over" was deliberately chosen to avoid them. Also, the use of the phrase "grave breaches" in the 1949 Conventions as a substitute for the more traditional "war crimes" involved a great sacrifice of principle by the humanitarian negotiators which Best seems not to notice. "Grave breaches" are defined in general terms in

10. See Williams v. Bruffy, 96 U.S. 176 (1877), for the Supreme Court's conclusion that although the civil war was not legally a "war," and the Constitution remained in effect throughout the undivided "union," the laws of war were applied by the Union forces as a matter of grace for various stated purposes.

11. Best, supra note 5, at 142.

12. Some eminent publicists have blamed the confusing language, "not recognized by one of them," on an error in translating from the French, "aucune Partie." But the French text of the 1949 Conventions does not use that phrase. To the argument that the French text is a back-translation from the mistranslated English, the obvious response is that to compile confusion on confusion does not lead to understanding or clarity. In any case, the parties to the 1949 Conventions who accept its current text in either official language are bound by that language, not by a hidden intention of incompetent translators.

13. Best, supra note 5, at 143.

14. This sort of casuistry undercut the Nuremberg charge regarding "aggressive war" as it was related to the Kellogg-Briand Pact of 1928, Aug. 27, 1928, 46 Stat. 2343, 94 U.N.T.S. 57, which deliberately forbade "recourse to war" but not recourse to arms. Of course, legal limitations on initiating military action relate to the jus ad bellum, and are thus outside the direct scope of Best's analysis. For the background and interpretation of the Kellogg-Briand Pact, see Robert H. Ferrell, Peace in Their Time (1952).

15. See, e.g., the Trial of Captain William Wirz, in 1 The Law of War 783 (Leon Friedman, ed. 1972). This trial concerned the case of the Swiss medical doctor who took a commission from the Confederate side during the American Civil "War" and was hanged in 1865 by a Union military commission under what were conceived at the time to be the laws of war for his failure to discharge his responsibilities as commandant of the notorious Andersonville Prisoner of War camp.

16. Best, supra note 5, at 161.
the four Geneva Conventions and two Protocols, leaving it to individual states to translate the general language (like "murder") into the language of statutory crime. The failure of the Conventions to define the essential elements of the listed "grave breaches," and the failure of states to translate the generalities of the Conventions' language into terms appropriate to the criminal law, leaves "grave breaches" to be handled by military commissions or courts martial as if breaches of military discipline (which can hardly apply when it is an enemy soldier or a civilian who is accused of the breach), or revives "common law crimes," which judges define as the cases arise.

Legally, the "grave breaches" provisions cannot enhance humanitarian law, at least not in the United States. In the United States, "common law crimes" in the regular judicial system (i.e., disregarding the administrative tribunals that act as "courts" when military law is involved) dropped out of consideration by 1816 except for "piracy." And even with regard to "piracy" there is more than a little doubt whether the supposed "common law" definition makes legal sense or is sufficient today to form a useful criminal charge. Nor does Best seem to notice that the word "concerned" was included in the "hand over" part of the "grave breaches" provisions to avoid the notion that "universal jurisdiction," the principle whereby a state's legal order can apply its notion of law to a foreigner outside the territory of the state, carries with it universal jurisdiction to adjudicate. At least to American jurists, and with some anomalous exceptions, there must still be some element of national involvement in the criminal act, perhaps as victim, to support the "trial" that the Conventions and Protocols envisage. Indeed, there is so much more in the way of technical comment that can be addressed not only to Best's analysis, but also to the tendentious analyses of various experts now accepted as if definitive and cited as such by Best, that it is perhaps wise to stop here.


18. See Historical and Revision Notes, 18 U.S.C.A. Ch. 81 (1984) ("In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by the way of modification and expansion"). The matter is discussed in Alfred P. Rubin, Revising the Law of Piracy, 21 CAL. W. INT'L L.J. 129 (1990). For a more thorough analysis of the background of the United States statute and the failure of international efforts at codification, see ALFRED P. RUBIN, THE LAW OF PIRACY 127-154, 305-346 (1988).

Best is generally very careful of his citations, and there are nuggets of great interest. For example, Best finds in the internal British analysis a possible reason for one relatively minor slip by which the four Conventions' parallel "grave breaches" articles all refer to "great suffering or serious injury to body or health" of property as well as of persons. A British participant referred to an influential member of the drafting committee "wanting his lunch and not allowing the drafting committee enough time." 20

One great battle in 1949 apparently centered on the reluctance of the colonial powers (United Kingdom, France, The Netherlands) to accept any international purview over their attempts to suppress the "national self-determination" struggles of the peoples of their far-flung empires. It resulted in the fundamental division of the regime of war into "international" and "non-international" categories noted above. 21

It was pointed out above how this fundamental division created problems of legal categorization that plagued the United States during the Vietnam conflict. It has not been mentioned, nor does Best mention, how absurd the division really is as a matter of law. That it is absurd is obvious when it is remembered, as noted above, that the basic rules of the modern jus in bello are derived more or less directly from the Lieber Code issued during the American Civil War of 1861-65. But that "war" was categorized by the Confederacy as a war of national independence, and by the Union as not a "war" at all, but as an internal constitutional struggle. The rules of war derived from the Lieber Code do not relate to the jus ad bellum or make it easy for the rebels to win. They do not inhibit the defending government from considering "enemy" combatants as traitors or rebels, nor do they inhibit labelling them war criminals if they do not abide by the laws and customs of war. Since mere membership in the "rebel" forces would be analogous to membership in an "enemy" army, that membership alone justifies imprisonment without trial for the duration of active hostilities; that is, for as long as the captive considers that he or she has the authority to act as an enemy soldier engaged in combat. And if they do get involved in war crimes, they can be charged, tried, and punished as war criminals by a military commission or court martial without some of the safeguards that human rights advocates would regard as essential for the application of ordinary criminal justice, like the right to confront witnesses in some cases. Indeed, in agreeing to common Article 3, the article that in fact legally

20. Best, supra note 5, at 165 n.84.
21. Id. at 172–79.
requires states parties to the 1949 Conventions to apply some principles of restraint in their internal conflicts, the colonial powers appear to have lost their major struggle.

It thus seems clear that the division between international armed conflicts and armed conflicts not of an international character has no legal, military, or political basis. And since the language of common Article 3 differs from the elaboration of provisions that apply to international armed conflicts under common Article 2, the distinction creates major headaches for honorable soldiers and lawyers. The objections can be refuted by some interpretations of the final text itself, but the two unnecessary and incomplete categories remain. The violation of Occam’s Razor, the fundamental rule of philosophy, science, and law, that basic categories should not be posited unless necessary, is obvious and has unfortunate consequences.

Best treads more lightly than I would when discussing the contributions the Nuremberg indictment has made to the development of international humanitarian law. He points out that “crimes against the peace” were “carefully defined” to include various atrocities “in execution of or in connection with any crime within the jurisdiction of the Tribunal,” and that crimes against humanity were qualified by the condition that they had been “carried on in execution of or in connection with any crime against peace or any war crime.” He suggests that this language keeps the “door open with potential regard to committers of crimes against humanity in other countries [than Germany] and on subsequent occasions.” But he then notes with obvious irony that the USSR had insisted that the indictments be drawn so as to exclude any of its own then recent actions, such as the invasion of eastern Poland and the ingestion of the Baltic states, “which the uninformed and unfriendly might misunderstand.” Now, how “crimes against the peace” can be applicable in other places and in later times, but not applicable to the Molotov half of the Molotov-Ribbentrop deal, or the Soviet treatment of Germans taken prisoner during the War, escapes me. The example of France using its own interpretation of the “crimes against humanity” definition to bring the likes of Klaus Barbie to belated justice seem

22. “Essentia non sunt multiplicanda praeter necessitatem.” Also called the rule of parsimony. See Parsimony, Law of, in 20 ENCYCLOPÆDIA BRITANNICA 868 (11th ed. 1911); see also Occam, William of, in 19 ENCYCLOPÆDIA BRITANNICA 965–66 (11th ed. 1911). The word “essentia” is a reference to the neo-Platonic notion of “essences” which I have called “basic categories” in the text.

23. The laws of war are called “international humanitarian law” by the ICRC and many other experts. Best abbreviates it IHL throughout his book. This review follows that example.

24. BEST, supra note 5, at 180–82.
inappropriate; the crimes against humanity for which Barbie and some others were tried (by national tribunals of the states in whose territory their atrocities were committed) were all directly covered by the Nuremberg charge. They were crimes committed by Germans or their wartime friends acting in German interest during the Second World War itself.

One notable consequence of Nuremberg pointed out by Best is the erosion of the distinction between the "Hague Rules" of 1899/1907, which related to the military conduct of hostilities, and the "Geneva Rules" (1929/1949/1977), which are supposed to relate to the protection of the victims of hostilities. Indeed, as Best points out, the distinctions are to a considerable degree artificial. But as far as concerns the authority of the ICRC and its people to act, the distinctions remain vital. A lesser functionary of the ICRC, some twenty-eight year old Swiss advocate for humanitarianism, can ask embarrassing questions of a POW camp commandant and write an influential report. Yet, the same functionary would have difficulty asking a field commander if the object of his attack were sufficiently significant militarily to justify the collateral damage likely to occur to undifferentiated civilian installations. And if he or she asked the questions, it is likely that the opportunity to ask more of the same would not recur. That is not a reasonable way to enhance respect for the rule of law; the observance of Hague Rules cannot in principle be achieved by the same means available to encourage observance of the Geneva Rules. There must be some doubt as to the rationality of a purported codification that lumps together the rules derived from the positive agreement of statesmen and military officers, the rules derived from "natural law" as a source of "humanitarian" concern for the helpless victims, and the other sort of "natural law" that derives from predictable patterns of behavior based on interest (like the "laws" of economics or sociology, making the "polis" the "natural" organization of all people). It seems obvious that the enforcement procedures for each of these bodies of "law" must be attuned to the sources of the rules and the "natural" enforcement mechanisms of each if enforcement is to be effective. Unfortunately, Best accepts the conventional wisdom that brushes aside the distinctions. He does not grapple with the underlying problem.

Best does repeat, as if undisputed, some common notions that might well be wrong. He notes, for example, that "like the international law which evolved pari passu with it, nationalism is one of the European

25. Id. at 183.
political inventions which (for better or worse) became a world possession.\textsuperscript{26} I am not sure that he is right about either “international law” in its current form or about “nationalism” in the sense of ethnic solidarity that he seems to have in mind. Indeed, I am quite sure that he is wrong about both, although he reflects a common European misconception.

Also, although it is unreasonable to expect both wide and deep thought on all topics from any writer, and I have no doubt that Best knows and understands more about most things than I, it is disturbing to read his summary of “terrorism” in this context without any reference to the work of the International Law Association on the topic.\textsuperscript{27} He attributes to all “terrorists” a:

summary rejection of the civilized norms for conflict resolution: within States and in peaceful times, the norms of representative government and the rule of law; in unpeaceful times and when States or other organized parties are in armed conflict with one another, the norms of IHL.\textsuperscript{28}

If a guerrilla outfit’s members follow the rules of IHL, do they cease to be “terrorists?” Moreover, since the Hague and Geneva Rules, and the subsystems of interest, sociology, and positive agreement on which they are based, apply whenever force is used for a political end, the distinction between “peaceful times” and “unpeaceful times” seems an obscure reference to when the laws of war apply. But by Best’s own analysis, those rules apply in times of technical “peace” as well as in times of declared or recognized “war.”

Rather than analyze the concept of “terrorism” more fully in this piece, I would simply express doubt as to whether the adjective “criminal” is helpful before an attempt is made to identify the body of law applicable to the situation, whether it be the municipal criminal law of the state in which the “terrorist” activity occurs, or “international law” in its “law of war” phase. I suspect that many in Northern Ireland would reject the notion that the criminal law of the majority, a representative

\textsuperscript{26} Id. at 215.

\textsuperscript{27} INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-FIRST CONFERENCE 6–8 (1985) (Resolution No. 7). Unfortunately, the report of the working session at pages 323–24 was so badly garbled by the Association’s secretariat that a replacement page 323 had to be issued. The text of the resolution itself contains a typographical error (“or” for “of” in article 2(b)). But a correct text and fuller analysis is in Committee on International Terrorism, International Law Association Paris Conference (1984): Committee Report, 7 TERRORISM: AN INT’L J. 199 (1984). The bulk of that issue is devoted to various learned analyses of the work of the International Law Association on the topic and is well worth perusing. The members of the Committee clearly disagreed about many important points.

\textsuperscript{28} BEST, supra note 5, at 221.
government that does not seem to safeguard the fundamental interests ("rights?") of many of its people, reflects a "rule of law" that can make criminal to any impartial observer the behavior of military representatives of that minority. This is not to say that those military representatives may not behave in ways that deserve "criminal" sanction in the eyes of many, but the commission of "war crimes" or "grave breaches" under the rules of the 1949 Conventions are not restricted to them, and it seems as unbalanced to submit them to British or American legal labels as it would be to submit British soldiers to Irish or American judgment regarding the legality of their acts in connection with the struggle in Northern Ireland. And if "international law" contains rules that govern armed politics that governments like to call "terrorism," then various possibilities for accommodation are opened which Best's labelling system seems to deny.

Another example of the confusion wrought by the lumping together of Hague and Geneva Rules lies in Best's condemnation of "humanitarian aid" that actually helps only one side in a political struggle.\(^29\) He seems to conclude that humanitarian aid cannot truly exist. But his examples deal not with "nation-building" assistance that raised unresolved legal problems for the United States in Vietnam, as noted above, but only with abuses of humanitarian aid. On the other hand, his deeper point is certainly well-taken. If an "outsider" relieves a political movement of the necessity of maintaining an economic and political order to provide for its supporters, then material assistance is in fact being given to that political movement, even though the positive \textit{jus in bello} might forbid starvation as a weapon and the offer of food is made to both sides equally in a two-sided struggle. The tension between humanitarianism and political reality is often stretched to its limit and reality has a way of winning while the humanitarian rules are quickly reduced to argumentative propositions that must seem to an outsider to smack of either saintliness, stupidity, or hypocrisy.

On a still deeper level, I find myself in a rather peculiar disagreement with Best. He asserts, as if conclusive, that "the law of war, wherever it began at all, began mainly as a matter of religion and ethics, and only became also a matter of law as part of the processes of social development and political sophistication."\(^30\) Leaving aside the question

\(^29\) \textit{Id.} at 240-41.

\(^30\) \textit{Id.} at 289. Best seems to compound religion and ethics as two aspects of the same thing. But they are not the same, either in history or in theory. In Europe, the distinctions became significant with the decline of the organized institutions of the Roman Catholic Church before the rising power asserted at law by the holders of "secular" authority (actually authority derived from Germanic tribal or other non-Catholic "religious" laws). For an
of how unsophisticated in political matters our ancestors were, the implication that all "law" is positive law, the decree of a human law-giver, embodies a perfectly rational definition of "law" but it is a definition that leads to some serious misunderstandings of IHL. For example, it has long been argued that there is no wholly satisfactory way that a "rebel" organization can be bound by the rules of international law codified by treaty and accepted by the very government against which it is fighting for control of a state. But that dilemma exists only for positivist theorists. The remedies of more subtle systems of law will still operate. Those who commit atrocities against surrendered enemies, for example, will have trouble convincing their enemies to surrender regardless of whether the POWs Convention is considered binding in positive law. Those who violate their agreements will have trouble negotiating agreements that would save them time, money, and risk. In sum, the sociological and amoral "natural law" remedies encourage the observance of rules by non-state actors even if the positive documents cannot be held to bind them.

Moral-virtue or religious theorists tend to find binding on all participants those rules that each theorist discovers by introspection or analysis of divine writ by their favorite analysts. Thus, if so inclined, they can easily condemn as illegal (terrorist?) those groups that fight for authority in disregard of the niceties of "representative government." The result of morality-based jurisprudence is to confuse the jus ad bellum with the jus in bello again; to make "criminal" in their version of international law the behavior of entirely honorable fighters engaged in a struggle for which they and their supporters are prepared to die. If that is the result, then it is no wonder that IHL as currently conceived and partially codified seems to embody rules that are neither international, humanitarian, nor "law" in any generally acceptable sense.

By the end of the book, Best seems to have realized the solution to this self-imposed dilemma. "The history of the law of war began in the temple and the church. Restraint in the conduct of hostilities has always been most effective when grounded in region and ethics . . . ." But the implication that an elaboration of the positive law might not be the best, and is certainly not the only, means to try to ameliorate the evils of organized violence seems to be ignored for most of the intervening pages.

For example, Best condemns Iraq's argument that it would have been legally acceptable to use poison gas to defend Iraqi territory during the
Gulf War of 1992 by condemning also the arguments of "Britain's pro-gas defense planners" of 1940, when a Nazi invasion of the home islands seemed imminent.\(^3\) I should like to agree, but it seems to me that the blanket condemnation of the use of poison gas might well reflect a mistranslation of moral imperatives into the positive law. When defense of a homeland is involved, the moral evil of using poison gas must be measured against the moral evil of victory by the invading forces, in this case, the immeasurable evil of the Nazis. It might well be that defeat by the Nazis is a lesser evil than using poison gas strictly in defense, in what is unquestionably the defender's own territory, and against an attacker who can withdraw. The Iraqi case is much more difficult to make, since the war aims of the United Nations forces led by the United States in 1992 were clearly less than the total defeat of the Iraqi political order, despite some overheated rhetoric from parts of the United States. But moral argumentation involves weighing values, and the positive law's absolute ban on the use of poison gas in all circumstances might, in real situations, seem too much to many otherwise rational people.

The usual counter-argument is that to relax the absolute ban on the use of poison gas in war is to invite further exceptions and interpretations that would destroy the ban absolutely. I am not convinced that lawyers should be in the business of trying to overstate their conclusions in order to keep a degree of control over the political leadership that has been put in place by history and perhaps even by democratic processes.

Indeed, Best seems to reach the same conclusion when considering the moral and legal arguments that pose chemical and biological (but not necessarily "poisonous" or "gaseous") weapons against nuclear weapons.\(^3\) His argument is technically persuasive to a positivist jurist, resting on the language of the pertinent conventions and the impermissibility under positive law of inspecting suspected stockpiles without the permission of the state in whose territory the inspection is to proceed. But the real inhibition on the use of biological weapons at least, and possibly chemical weapons and poison gas as well, is not moral. It is in the more complex world of sociology and comity; the proper apprehension that constituents and allies will drop away if they know of a state's readiness to use weapons that are believed to be cruel or unnecessary. If that feeling is not there, then it is hard to see how the positive law can be effective. The threat of "reprisal," "mutual assured destruction," or, as in the case of the Israeli destruction of Iraq's Osirak nuclear

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\(^{32}\) Id. at 308.

\(^{33}\) Id. at 309.
reactor, a preemptive strike arguably in self-defense,\textsuperscript{34} might in some cases be more effective to inhibit the use of unspeakable weaponry than positive law arrangements for inspections that can be refused, evaded, or ignored. This is not to denigrate the role of positive law and provisions for inspection of suspected stockpiles of designated materials. It is to indicate that the system is more complex than might appear at first glance, and that the positive law is not the only means, and is frequently not the most efficient or reliable means, by which moral and sociological values can be enhanced.

Best seems to come to a similar conclusion, although he does not directly discuss the alternative enforcement or enhancement tools that the international legal order places in the hands of political leaders. Best writes, "there is no necessary relation between the permanent importance of things and the space they occupy in . . . instruments" of the positive IHL.\textsuperscript{35}

To my mind, the most important part of Best's book is his discussion of the 1977 Additional Protocols to the 1949 Conventions. His critique is devastating, or should be, to advocates of ratification. For example, he points out that the underlying assumption of the negotiators was that guerrillas were either involved primarily in internal conflicts only, or if the conflict were international (and thus subject to Protocol I) that the guerrillas would have the better \textit{jus ad bellum} than those fighting against them. Therefore, in provisions protecting "civilians" from some of the hardships of military occupation, advantages were given to "guerrillas" who swam in the sea of civilians. But the \textit{jus in bello} should treat all parties and all combatants in an armed conflict equally.\textsuperscript{36} Therefore, for the combatants on the side of repression to masquerade as civilians should also be permissible,\textsuperscript{37} and they, like guerrillas on the other side, should be treated as prisoners of war if captured carrying their arms openly.

\textsuperscript{34} The great precedent for a preemptive strike is the classic "Caroline correspondence" of 1841. \textit{See} JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217 (1906). Article 51 of the United Nations Charter, apparently restricting the "inherent right of self-defense" in the positive law of the Charter to cases in which an armed attack has first occurred, must be read in context; it presumes the Security Council will act to maintain international peace and security if there is a "threat to the peace," and the state threatened would have no occasion to resort to preemptive force if the Security Council acts as it was supposed to. For a short discussion of the point and its practical significance, see Alfred P. Rubin, \textit{Looking Out from the Inside}, 19 FLETCHER F. WORLD AFF., Winter-Spring 1995, at 171, 171-73 (1995) (book review).

\textsuperscript{35} \textit{Id.} at 337-41.

\textsuperscript{36} \textit{Id.} at 340 n.100.
But Protocol I does not do that. To make up for the excessive protection of civilians from the exigencies of war, the Protocol carries on the false precedent of the framers of the 1949 Conventions. It tries to saddle insurgents with rules they cannot observe. It "holds the line for the protection of civilians when armed conflicts rage around them. It prohibits most of the civilian-oppressing forms of behaviour which seem inseparable from much guerrilla and insurgency existence" thus seeming to require insurgents to conform to rules that are fundamentally inconsistent with their theories of revolution.\textsuperscript{38} It is doubtful that insurgents will observe the rules of Protocol I. By strict positivist logic they cannot be bound to obey those rules anyhow, any more than revolutionaries could be held bound to agreements among established governments that revolution be considered illegal as a matter of international law. And it is doubtful that established governments protecting themselves from revolutionary violence would consider themselves bound by those rules either; certainly, they would not regard themselves as bound if observing those rules hindered their military or political efforts to win the armed struggle or help their favorite revolutionaries win their revolution.

There is an interesting corollary to this line of thought, not followed by Best, but inspired by his analysis. It is that if an armed conflict begins internally within a single party to the 1949 Conventions alone, or the Conventions and one or both of their Protocols, the normal political progression would be to have the party deny that the conflict has reached the pitch, duration, degree of organization, or other natural law criteria bringing Article 3 and Protocol II into play. When other states must categorize the conflict, for example, if a third state is giving military assistance to the defending government and finds itself embarrassed politically by that support, Article 3 must come into consideration. Under traditional criteria however, by the time that pitch is reached, the general rules of war should come into play. If there is no significant distinction between the rules applicable as a result of the commitments contained in Article 3 and those applicable as a result of the commitments contained in the elaboration of rules applicable in Article 2 for international armed conflicts, then most of the elaboration is unnecessary and the entire distinction is more confusing than helpful. One of the recommendations to come out of the panel of the American Society of International Law that considered these matters, as noted above, was to abolish the distinction between Article 3 and Article 2 conflicts or, at least, to eliminate the gap created by their peculiar wording and make

\textsuperscript{38.} Id. at 341.
all conflicts not covered by one of the articles covered by the other. That was not done. Indeed, the Protocols dig the distinctions deeper into the positive law.

I was delighted to see that Best places the blame for the weaknesses and fiction of the Additional Protocols of 1977 on the politicized atmosphere of the time. It is the same argument others and I had posed more or less successfully at the final panel meetings of the American Society of International Law, but which were ignored by those who made the decision to go ahead with the attempt to "update" the 1949 Conventions at that time.

Another odd elision occurs in the discussion of repatriation of prisoners of war after the cessation of active hostilities, as required by the POWs Convention. Best's discussion of the first application of the key provision, Article 118 of the Convention, during the Korean conflict of 1950–53 makes no mention at all of the unsupervised release by South Korea of about 25,000 North Korean prisoners of war. In 1971, when India refused to repatriate a huge number of Pakistani POWs in Indian hands after the Bangladesh war of independence, the precedent had been set, and India considered its political interest in retaining the POWs more compelling than its legal interest in repatriating them as the positive law required. The issue was confused still further by the insistence that those Pakistanis who were credibly accused of "war crimes" during the struggle be brought to trial as the Civilians Convention required, at least with regard to those atrocities called "grave breaches." No Pakistanis were ever brought to trial.

Best's apparent dismay over this demonstration of the weakness of the positive law is bolstered by his example of an Israeli refusal to hand over about 200 of several thousand PLO prisoners in Israeli hands as

39. Id. at 344.
40. Id. at 352–54.
41. Lindesay Parott, Korean Anti-Red P.O.W.S. Freed by Rhee in Defiance of the U.N., N.Y. TIMES, June 18, 1953, at A1. HOWARD S. LEVIE, 59 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 417–29 (1978) discusses the excruciating negotiation over "forced repatriation" and the compromises ultimately struck, but does not mention the particular incident; nor does CHRISTIANE S. DELESSERT, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES 157–66 (1977), reprinted in 5 SCHWEIZER STUDIEN ZUM INTERNATIONAL RECHT (1977). I was in Japan at that time, serving with the Navy, and remember very well the shock, confusion, and dismay experienced at the Headquarters of the Commander of U.S. Naval Forces, Far East. The dismay was occasioned by the apprehension that the Chinese or North Koreans would "release" captured Americans to China or some other inhospitable country in disregard of the provisions of the 1949 Convention on which we relied for some stability in that miserable time.
42. BEST, supra note 5, at 357.
part of an exchange transaction negotiated in 1983. But this example seems misplaced. The fault seems less in the refusal of Israel to consider the POWs Convention to be the operative positive document than in all parties' misperceptions of the legal context. Many commentators, including representatives of the ICRC, argued that the law governing the Israeli occupation of the West Bank and Gaza was the law of the Civilians Convention. But none of them seemed to consider that the "grave breaches" provision of that Convention applied to anti-Israeli activists. But if that Convention applied to Israel, it must also have applied to the populace of the area, and accusations of "grave breach" might well have justified the Israeli refusal to release the 200 accused perpetrators of "terrorist" atrocities. Israel never raised the argument, apparently because it was in Israel's political interest to continue to call all enemies "terrorists" regardless of the terms of the 1949 Conventions. But if the terms under which anti-Israeli activists were "grave breaches" did not apply, it is very difficult to understand why Best and others believe that the terms restricting Israeli activities did apply. And the threshold of application is the same for both the POWs and Civilians Conventions. It is apparent that there is a deep divide between the positive commitments of many parties to the 1949 Conventions and their behavior in practice. It is very hard to see how multiplying positive commitments will improve the compliance record.

Best's final chapter, "Application, Implementation, and Enforcement," focuses on this issue. In my view, he is not only right, but he understates the jurisprudential problems brought about by shallow thought in a blind codification effort. He notes, for example, that there is a tension between the conventional law and customary law; that to the degree that "enforcement" is embodied in the positive law, presumably including the provisions of the 1949 Geneva Conventions and their 1977 Protocols calling for pursuit and trial of persons accused of "grave breaches" designated (but not adequately defined) in those positive documents, the regime applicable to a villain whose state has not yet ratified the pertinent Protocol must rest on general international law. But his or her companion in villainy might be a member of the armed forces of a state which is a party to the pertinent Protocol. Do two different regimes apply to a single incident? Can it be asserted that the Protocol's regime has become part of general international law when it might be that one of the reasons why the accused's state has not ratified the Protocol is because that state disagrees that the provision is or should be

43. Id. at 359.
Is the Law of War Really Law?

considered binding on it or its people? Nor is it helpful to mount a high moral horse and assert that the interpretation of the law and its rules that provide the greatest protection to the victims of armed conflict is the rule of general international law.

Grotius avoided this very problem in ways that seem to have been forgotten by the enthusiasts for IHL codifications. The Grotian solution was to identify a myriad of "orders," including the positive law, the customary rules of chivalry among combatants, divine law derived from holy scripture and biblical precedent, rules derived from concepts of morality and "justice" which might be shared or not (but which certainly affect the behavior of soldiers and statesmen), and many other "orders." Thus, to a Grotian scholar, there might be gaps in the positive law, but there is no need to fill them with more positive law. The other legal orders continue to operate, and in many cases operate more immediately and more effectively to influence behavior than the prescriptive, enforcement, and adjudicatory mechanisms of the positive law.

From this point of view, the long-standing quarrel over whether an unrecognized insurgent group is bound by the positive law agreed internationally by the government it is seeking to replace ceases to have meaning. Of course the positive law does not apply in such a case. The state might or might not be bound by the agreement, but it would be an intervention in the internal affairs of that state for any third party to hold a rebel group — that confines its activities to the state in which it hopes to gain authority — bound by any international agreement, an agreement which might even attempt to make rebellion itself, or its most effective tactics, illegal. For those who believe that non-intervention in internal affairs is a fundamental rule of the international legal order, a treaty cannot change the rule. In modern terminology, it would for them be a rule of *jus cogens* and, as such, not subject to change by treaty.

But being released from the provisions of the positive law inhibiting atrocities in wartime (or in unpeaceful time) does not release a rebel or any other group or individual from the many other bonds which tie him,

44. HUGO GROTIUS, ON THE RIGHTS OF WAR AND PEACE (EP 1926) (1625). One learned author has identified at least eighteen different such orders. Onuma Yasuki, Conclusion: Law Dancing to the Accompaniment of Love and Calculation, in A NORMATIVE APPROACH TO WAR: PEACE, WAR AND JUSTICE IN HUGO GROTIUS 333, 342-43 (Onuma Yasuaki, ed. 1993) (chart of "legal" orders used by Grotius).

her, or them to civilization. To cut those bonds is to alienate allies, dismay constituents, and provoke the enforcement measures of the sociological or moral orders, including embargoes, opprobrium, refusals to discuss problems, and rigid insistence on prepayments and guarantees of behavior in cases in which others need merely pledge a word. In sum, life in that state of each against all posited by the rebel or, indeed, by the "realist" government, becomes solitary, poor, nasty, and brutish, even if not short. And if the expected sociological and moral results do not flow because allies and constituents are prepared to accept the "realist" behavior as justifiable in the circumstances, then so will the positive enforcement mechanisms also fail, as they have failed in so many cases in which the moral and sociological tools have not even been tried. Perhaps it is for reasons like these that Best recommends "truth-telling," transparency, or exposure by multinational human rights organizations and the excellently trained and sensitive officials of the ICRC as the most promising techniques to encourage observance of IHL. I agree entirely.

On the other hand, his analysis of the weaknesses of the enforcement techniques of the positive legal order (reprisal, retaliation, retribution, and revenge) seems to exaggerate unfortunate overstatements of Bert Röling. Moreover, Best's notion that enforcement of IHL requires a guarantee that its violators "will be brought to trial and, if convicted, appropriately punished" seems again to urge adoption of the unrealistic favorite enforcement techniques of those who would like lawyers or benign guardians to rule the world. Since it appears to rest on the designation of "grave breaches" of the Civilians Convention — a designation that itself includes undefined terms, confuses Hague Rules (that forbid "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly") with

46. Best, supra note 5, at 383.
47. Id. at 391–92. Röling and Best seem to have been unduly influenced by Kelsen's identifying only "reprisals and war" as the sanctions which by positivist theory were regarded as necessary to define "international law" as a "legal" order. See Hans Kelsen, Pure Theory of Law 320–22 (Max Knight trans., 2d ed., University of California Press 1967) (1934).
48. Id. at 393.
49. Civilians Convention, supra note 1, art. 147 (purporting to define "grave breaches"). Persons who commit such "grave breaches" are to be sought after by all the High Contracting Parties and tried by the one catching him or her, or handed over for trial to another High Contracting Party "concerned, provided such High Contracting Party has made out a prima facie case." Id. art. 146. Nothing is said about which body of law is to be used to define which wanton acts of destruction are carried out "unlawfully." Is there a body of law that can make "lawful" an act of wanton destruction not justified by military necessity? Nor is there any guidance regarding the Party, neutral in the conflict, that apprehends a person alleged to have committed a "grave breach" but against whom nobody submits a "prima facie case."
Geneva Rules that protect the victims (what if the property destroyed is property only of the government against which the struggle is being waged? and who is to question a tactical commander’s view of what is militarily necessary, and bring him or her to trial for taking too broad a view?), and refers to such destruction being carried out “unlawfully” without defining the legal order against whose rules the lawfulness of the destruction is to be measured — it is a weak ending to an otherwise penetrating chapter.

Finally, it might be useful to restate my own objections to the 1977 Protocols. Those objections echo in legal terms much of what appears above and are entirely consistent with the objections posed by Best in more moderate language than I can muster.

First, the division between internal and international armed conflicts is not only artificial, it makes no sense if the aim of IHL is to ameliorate the evils of military action. As noted above, the division between Articles 2 and 3 common to the four Geneva Conventions, used since 1977 to separate Protocol I from Protocol II, failed to achieve the purpose of freeing colonial powers from the restraints of positive law when they attempted to use force. And those colonial powers have never been free of the restraints of other normative orders in their political actions. The division in law between international and non-international conflicts is also inconsistent with the evolution of politics and conscience when it is remembered that the current purported codifications derive from the Lieber Code, an American internal document issued and made effective during an internal struggle. The problem is too deep to be ameliorated by any reservations to the Protocols.

Second, if the positive law is to be elaborated, it must distinguish between the so-called Hague Rules relevant to the conduct of hostilities and the Geneva Rules relevant to the protection of the victims of hostilities. That some overlap is inevitable is clear, but the enforcement techniques differ so obviously and so markedly that nothing but confusion is wrought by the mingling of the two. It would be more effective and easier to separate them as far as possible with an eye to implementation and enforcement than to combine them as if there were no significant distinctions. Again, the problem is too deep to be ameliorated by any reservations to the Protocols.

50. Those objections have been stated several times in print. The most recent has been in the Correspondence section of the American Journal of International Law. See Correspondence, 89 AM. J. INT’L L. 363 (1995) (response to, Meron on U.S. ratification of 1977 Protocol I to the 1949 Geneva Conventions).
Third, the biases of Protocol I in favor of some guerrillas, and the special authority given to them in some circumstances,51 inserts *jus ad bellum* criteria into the *jus in bello* which defeats the Geneva and Hague Rules' whole purpose of protecting victims and controlling the tactics of military forces without regard for which side wins and which side loses the battle. The *jus ad bellum* is a legitimate concern of moralists, sociologists, jurists, and many others, but a pure heart in the breast of a fanatic on any side of any armed conflict is not a valid reason to excuse his or her atrocities if some framework of civil discourse is to be maintained in a system that has no objective judge of virtue. It does not help the cause of justice or peace to insist that each actor in the horizontal legal order subordinate his or her judgment to that of the collectivity, when the collectivity has not established its capacity to judge wisely. Yet again, the underlying problem is too deep to be ameliorated by any reservations to the Protocols.

In this last regard, I am reminded of the anecdote incident to the British electoral reforms of the 1830s. The rallying cry of those arguing for a wider franchise was "*Vox populi vox dei*" [the voice of the people is the voice of God]. The response was, "Yes, it cried out 'Crucify Him, crucify Him!'" In my opinion, the voice of individual conscience and the voice of the community are all we have to go on with regard to judgments of justice, and they are both notoriously unreliable. Therefore, justice must be sought by different means than individual assertion or the consensus of human law-makers, the positive law. Judging by the evidence he marshals in this book, I think that Geoffrey Best would agree. My only real criticism is that he is too kind and underrates the confusions inherent in the current codifications and their effects in the real world.

51. For example, Article 96(3) of Protocol I gives to the authority representing a people engaged in an armed conflict "against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" the legal power by unilateral declaration to bring the Conventions and the Protocol into effect with regard to all parties to the conflict. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3, 46, *reprinted in* 16 I.L.M. 1391, 1429 (1977). No equivalent legal power is given to the authority representing a people engaged in a mere revolution no matter what the humanitarian interest might be in protecting its victims.