THE JURIDICAL STATUS OF CIVILIAN RESISTANCE TO FOREIGN OCCUPATION UNDER THE LAW OF NATIONS AND CONTEMPORARY INTERNATIONAL LAW

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'There is no human means of subjugating by brute force a people who intend to preserve its patrie.' (fatherland) (Eugene Pelletan, 1862)[1]

"The merits and demerits of a patriotic resistance do no represent a simple question." (T.E. Holland, 1933) [2]

"Few problems connected with belligerent occupation have given rise to as much bitter, debate, acrimonious protests through diplomatic channels, and heated arguments among the leading publicists as has the problem of armed resistance to an occupant." (Von Glahn, 1957)[3]

INTRODUCTION

The recent invasion and occupation of Iraq has focused attention on a number of areas of the law of war. The law of war is made up of *jus ad bellum* and *jus in bello*. *Jus ad bellum* are the norms governing the right to go to war (or to use contemporary lexicon, the right to resort to "armed conflict"). *Jus in bello* is the body of rules which apply *during* armed conflict. This paper explores an area of *jus ad bellum* that has been the subject of significant controversy: the question of whether local inhabitants may wage war against a foreign occupation. Resolution of this issue necessarily involves recourse to *jus in bello,* including the norms of lawful belligerency (the requirements for combatant status) and the law of occupation (the body of international law which applies when territory is under the effective control of enemy forces.)

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1 Eugéne Pelletan *La Tragedie italienne* (Paris: Pagnerre, 1862) 13-14 cited in Nabulsi, above n 1, 245.

2 Holland T.E, *Lectures on International Law* Maxwell & Sweet London 1933 P 362

3 G. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, 1957 P 48.

The historical development of *jus ad bellum* and *jus in bello* had been influenced by 19th century traditions of war. Three such traditions were recently examined by Palestinian scholar Karma Nabulsi.[4] Nabulsi's analysis of the impact of these traditions upon the development of the laws of war and the norms of belligerency is a significant and unique contribution to legal scholarship. Extensive reference is made to Nabulsi's erudition in an attempt to resolve two lingering questions:

1 Was civilian participation in armed resistance to enemy occupation of the homeland a recognised norm of 19th century customary law?

2 If so, has this norm survived the codification of the laws of war?[5]

This article is divided into five parts. The first introduces the central issues to be explored in this paper. The second examines three 19th century traditions of war - the Martial, Grotian and Republican traditions. The impact of these traditions on the codification of the laws of war in assessed with specific reference to treaty provisions defining those entitled to participate in hostilities. Part III highlights 18th & 19th examples of civilian resistance to military aggression. It considers whether these practices were indicative of a customary right of civilians to engage in armed resistance to enemy occupation. Part IV asks whether such a right exists under contemporary international law. The final part questions the validity of Nabulsi's contention that civilian resistance to occupation was a recognised norm of 19th century customary law. It also flags both the merits and humanitarian consequences of recognition of such a norm.

I Part I: Civilian Participation in War

Civilian participation in war can be traced back to antiquity and has long been a matter of legal controversy. It was the subject of heated debate

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4 Nabulsi, above n 1.

5 The central treaties on the laws of war are the Convention (IV) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, opened for signature on 18 October 1907, Hague IV, (entered into force 26 January 1910). ('Hague Regulations 1907') (Also referred to in this paper as 'The Hague Regulations' or 'The Hague Law'), and the four Geneva Conventions of 1949. The most important of these conventions in the present context is Geneva Conventions (III) Relative to the Treatment of Prisoners of War, which opened for signature 12 August 1949 and entered into force 21 October 1950. ('Geneva Convention III') (Also referred to in this paper as 'Geneva Law')

6 The juridical status to be afforded to local inhabitants who engage in armed resistance was canvassed at diplomatic conferences in Brussels (1874) The Hague (1899) and Geneva (1949) and (1974-1977). W T Mallison and R A Jabri, 'The Juridical Characteristic of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity' (1974) 42(2) *The George*

at late 19th and early 20th century diplomatic conferences on the laws of war.[6] These conferences shaped the contemporary norms of belligerency and delineated the scope for legally protected armed resistance to enemy occupation.[7] This paper examines the juridical status of armed resistance by local inhabitants to occupying forces. It does so by reference to both 19th century customary law and the contemporary law of armed conflict.[8] The most important contribution to legal scholarship in this field of recent times is Karma Nabulsi's treatise *Traditions of War: Occupation, Resistance and the Law.*[9] Nabulsi examines the impact of 19th century military practices and traditions upon the codification of the law of war. This research provides rich insights into the development of the categories of lawful belligerency. It is by reference to these categories that the legal status of those who engage in armed resistance to occupation is determined. Nabulsi critiques a number of traditions of war and highlights their enduring influence upon the regulation of modern warfare. A central strand of Nabulsi's thesis is the failure of States to comprehensively resolve the distinction between combatant and non-combatants. This failure (which Nabulsi attributes to tensions between these traditions[10]) has had a direct impact on civilian involvement in war. This impact is illustrated by noting the reasons why the distinction between combatant and non-combatants was problematic:

1 widespread practices of *civilian* participation in war;

2 the reluctance of smaller States to limit lawful participation in war to soldiers belonging to national armies;

3 the threat civilian participation in war posed to armies of

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Washington Law Review 185; Richard R Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs' (1951) 28 *British Year Book of International Law* 323; Lauterpacht, *Oppenheim's International Law* Vol II (7th ed: 1952) 206; Graber, *The Development of the Law of Belligerent Occupation 1963-1914* (New York: Columbia University Press, 1949).

7 These issues were most extensively discussed at the Peace Conference held in Brussels in 1874, but also considered at the Hague Peace Conference of 1899. See generally: Graber, *The Development of the Law of Belligerent Occupation 1963-1914* (New York: Columbia University Press, 1949).

8 This writer's interest in this topic was triggered by the sustained resistance to the US-led occupation of Iraq (2003-2004). The juridical status of the various actors who engaged in such resistance goes beyond the scope of this paper. It is the subject of ongoing doctoral research by this writer.

9 Nabulsi, above n 1.

10 'Failure to resolve the distinction between combatant and non combatants was thus not merely a problem of state representatives, lawyers and publicists. It was a reflection of the various problems of conducting war itself – in theory but also in practice, and particularly in its impact upon local state institutions occupying armies and civilians populations on the ground.': Nabulsi, above n 1, 78-79. The conferences of 1874, 1899 and 1949 were not the locus of the problem, but 'one could almost say, the epiphenomenal of it.': Nabulsi, above n 1, 79.

occupation; and

4 the refusal of expansionist military powers to explicitly recognise a right of civilian resistance to enemy occupation.

Military powers were motivated by point (3) to push for a definition of combatant that excluded civilians; even patriotic citizens who rise up to defend their homeland against belligerent occupation. Smaller States resisted this push and were determined to protect the interests of occupied peoples. They voiced concern at proposals to codify the qualifications of belligerency in a manner inconsistent with existing practices of civil resistance to occupation.[11] Whether such practices reflected a customary right of civilian resistance to occupation under the law of nations is a matter of controversy.[12] The Hague Regulations of 1899 and 1907 neither acknowledged nor abolished such a custom (if it existed). However what is clear from Articles 1 and 2 of The Hague Regulations, (which prescribe the qualifications of belligerency) is that civilian resistance to occupation is not recognised under Hague law as a form of lawful belligerency. This position can be attributed to the influence of three powerful traditions of war.

II PART II: THREE TRADITIONS OF WAR

Nabulsi contends that three 19th century traditions of war strongly influenced the process of codification of the law of war. They are Martialism, Republicanism and Grotianism.[13] These traditions and their role in the development of the norms of belligerency are now assessed.

A *Martialism*

Martialism was the political philosophy of 19th century occupying armies.[14] Its precepts were 'entirely favourable to the practices of occupation, and strongly hostile to all manifestations of resistance to its

11 Nabulsi highlights numerous instances of civilian resistance to occupation in the 18th and 19th century. Some are discussed below in 'Part III: 18th & 19th Civilian Resistance to Military Aggression as a Custom of War.'

12 This issue is canvassed in Part III. See also Richard R Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs' (1951) 28 *British Year Book of International Law* 323, 254. Baxter provides a useful survey of 19th century opinions on the scope for civilian resistance to occupation under the Law of Nations.

13 These ideological traditions are 'neglected strands in the history of international thought': Nabulsi, above n 1, 243.

14 Nabulsi, above n 1, 76.

15 Nabulsi, above n 1, 76.

16 Nabulsi, above n 1, 76. See also W S Holdsworth 'Martial Law Historically Considered' (1902) 18 *Law Quarterly Review* 117, 121, 132. Holdsworth notes that the Duke of Wellington described marshall law as follows: 'Marshall law is neither more nor less than the will of the general who commands the army. In fact Marshall Law means no law at all.' Holdworth asserts, at 137, that martial law can be either domestic or foreign. In the case of the former, it is outside the reach of the law of nations, in the

moral and political authority.'[15] It 'manifested itself most emphatically in the practices of conquest and foreign rule'[16]; an ideology which glorified war and conquest.[17] War was regarded as 'a natural force, which could not be codified and constrained,'[18] and 'the supreme instrument and the ultimate realization of all human endeavour.'[19] One of its most famous 19th century exponents was Germal Von Hartmann[20] of the German General Staff. Von Hartmann rejected codification of war.[21] In characterising his compatriot Bluntschi's[22] notion of 'civilised warfare' as 'hardly intelligible', Von Hartmann asserted that such a notion destroys 'the equilibrium of war.'[23] Nabulsi considers the martial tradition as the 'nosiest and most powerful voice' on the distinction between combatants and non-combatants, which 'easily drowned out the others at Brussels and The Hague and was still evident at Geneva.'[24] Martialism therefore represented the antithesis of respect for the customs of national resistance to aggression by civilians. Local inhabitants who resort to guerrilla or partisan warfare in an effort to repel occupying troops were therefore not recognised under the martial tradition as worthy of protection by the laws of war. Such a notion would have been irreconcilable with the martial focus on 'the values and sentiments of invading and conquering armies' and the validity of the subjugation of 'inferior peoples.'[25]

B *Republicanism*

Under the republican vision, occupation was an affront to both individual and collective freedom; 'a pervasive and invasive

latter, the commander of the invading army has supreme power subject to the law of nations and the orders of the sovereign government he serves.

17 Nabulsi, above n 1, 80.

18 Nabulsi, above n 1, 76.

19 Nabulsi, above n 1, 81.

20 J Von Hartmann wrote a number of essays under the collective title *Military Necessity and Humanity* (Bonn: Deutsche Rundschau, 1877-1878). See Nabulsi, above n 1, 81-82.

21 Clausewitz, author of the absolute war and fight to the finish theory (C Clausewitz, *On War* (London: Routledge & Regan Paul, 1962) espouses a similar view to the German martialist. See Nabulsi, above n 1, 94.

22 Bluntschi, a German jurist, was a close pen friend of Lieber, and was himself the author of a treatise on the law of warfare.

23 Von Hartmann, above n 20, xiii; C Andler, *Frightfulness in Theory and Practice* (London: T Fisher Unwin, 1913) 77 both cited by Nabulsi, above n 1, 94, footnote 46.

24 Nabulsi, above n 1, 80. The writer continues: 'the British, who had fought against those very principles' of martial values displayed by the 3rd Reich during World War II 'proved to be the main agents of martialism at the [1949] Conference' p 106. They took this approach to 'defend both the ideology of Empire' and 'the military policies of their colonial armies such as hostage-taking and the incineration of rebel villages': Nabulsi, above n 1, 106, fn 90. A connection that Nabulsi, above n 1, 106-107, notes has never been noticed in mainstream literature on the laws of war.

25 Nabulsi, above n 1, 127.

26 Nabulsi, above n 1, 240.

phenomenon from which no retrenchment was possible.'[26] Philosophers and publicists of the 'defensive republican tradition' sought to identify a normative framework for citizen participation in (war), and 'championed the rights of citizens in captured and occupied territories.'[27] They did so by drawing upon customs and traditions of civilian participation in resistance struggles. Their tradition 'reflected a quest for independence and political autonomy' leading to a doctrine of patriotism and just war combined with justice in war.[28] Nabulsi notes that the republican position was founded on the principle of 'just war.' It viewed the separation of *jus ad bellum* ('the rules governing the actual conduct of armed conflict')[29] from *jus in bello* ('the rules governing the resort to armed conflict')[30] as artificial, because 'considerations of morality applied with equal force to both the origins and the conduct of the war.'[31] This approach was championed by Rousseau, who embraced 19th century ideas of just war and citizen participation in war. Just wars of self defence could not succeed without the active participation of the population, as 'the republic was inseparable from its citizens.'[32]

Nabulsi's perspective on Rousseau is unique. It stands in contrast to the orthodox use of Rousseau's writings to promote the separation of civilians and combatants. The orthodox view is derived from a famous passage in *Social Contract*:

> War is then not a relationship between one man and another, but a relationship between one State and another, in which individuals are only enemies accidentally, not as men, not even as citizens, but as soldiers.[33]

Nabulsi contends that it was never Rousseau's intent 'to limit the rights of belligerency to soldiers; rather, his two main purposes were to deny the very legitimacy of soldiers of conquest, and to protect citizens participating in the defence of their country from reprisals.'[34] In chapter 3 of *Social Contract* (entitled 'the Right of the Strongest'),[35] Rousseau asserts that 'The right of conquest has no other foundation than the law

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27 Nabulsi, above n 1, 241.
28 Nabulsi, above n 1, 77.
29 Adams and Guelff, *Documents on the Laws of War* (3rd ed, Oxford: Oxford University Press) 1.
30 Adams and Guelff, above n 29, 1.
31 Nabulsi, above n 1, 242.
32 Nabulsi, above n 1, 204.
33 OC iii 356 cited in Nabulsi, above n 1, 184.
34 Nabulsi, above n 1, 240, affirms Rousseau's contention that war 'was not between individuals, but most often between occupying armies and peoples.'
35 Nabulsi, above n 1, 190.
36 OC iii 356, 7; Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston, trans) (New York: Penguin Putnam Inc, 1968) 57.

of the strongest[36]… regular troops are only good for two purposes, to attack and conquer neighbours, or to shackle and enslave Citizens.'[37] This perspective on Rousseau supports Nabulsi's contention, that 'defensive republicanism' promoted citizen involvement in patriotic campaigns to resist military aggression and defend liberty. Indeed the defence of a nation could only come through patriotic virtue:[38]

> The central concern of defensive republics was the need to involve the entire populace in resistance through their political identification with *la patrie*.[39]

Nabulsi summarizes the republican view on civilian involvement in armed resistance as follows:

> if conquest ends liberty, and liberty is a basic value them one needs to stand ready as a community to repel enslaving conquerors no less then tyrants. Just as this makes participation in civil government an aspect of the *virtu* needed to stop tyranny, so participation in a civic militia becomes part of the *virtu* required to stop conquest.[40]

Under this tradition, active citizen resistance to occupation and tyranny was held up as being 'among the worthiest of human endeavours':[41]

> Rousseau's practical advice[42] on resisting foreign rule and occupation, coupled with Pasquale Paoli and Tadeusz Kosciuszko's epic acts, inspired and legitimized a vibrant, creative, and authentic body of writing on partisan and insurrectionary warfare across Europe in the nineteenth and twentieth centuries. This literature and the numerous organized uprisings it codified were systematically buried by mainstream writers and publicists on the laws of war.[43]

While mainstream writers on the law of war may have neglected this tradition, its influence was not entirely excluded from the process of codification of the laws of war. The influence of defensive war republicanism is highlighted by the work of French republican

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37 Jean-Jacques Rousseau, *Considérations* OC iii 1014 cited in Nabulsi, above n 1, 191.

38 Nabulsi, above n 1, 202.

39 Nabulsi, above n 1, 236.

40 Nabulsi, above n 1, 239-240, traces the republican tradition of war to 18th century figures such as Rousseau, Pasquale Paoli and Tadeusz Kosciuszko. The tradition involved 'relentless unmasking of corrupt political structures [which] provided the impetus for many republican blueprints for change; … and … calls for active citizen resistance to occupation and tyranny.'

41 Nabulsi, above n 1, 240.

42 'the state should not remain without defenders; but its true defenders are its members. Each citizen ought to be a soldier by duty, none by profession.'; Jean-Jacques Rousseau, *Considérations* OC iii 1014 cited in Nabulsi, above n 1, 191.

43 Nabulsi, above n 1, 240, also makes an important observation about the use of language such as 'innocent civilians' to classify the category of passive civilians under occupation. This use of language 'had a moral rather than a merely descriptive connotation.' "Innocent" if passive implied, of course, "guilty" if politically or military active.': Nabulsi, above n 1, 168-169. This suggests an implicit, if not explicit,

intellectual Jules Barni, an architect of the large peace conferences of the 1860s. Barni argued for a type of patriotism where 'each citizen has two outfits, one for his profession and the other for military life,'[44] and asserted that 'it is the intrinsic right of all human beings to resist by force those who wish to oppress them.'[45]

C *The Grotian Tradition*

The Grotian tradition of war represents a middle position between the martial and republican traditions.[46] It articulates the rights of States, and therefore reflected a need to serve both invaded and invading parties. Its central ambition was to 'limit the rights of belligerency to a particular class of participant (the soldier), and to exclude all others from the right to become acutely involved in political violence in times of war.'[47] In the context of civil and political resistance to occupation, 'Grotian lawyers consistently argued no such customary practice had occurred.'[48] Unsurprisingly, Grotian jurists also opposed the codification of a right of civilian resistance:

> The Grotian tradition's objective in the mid to late nineteenth century was the opposite of the martial, namely to codify war; but in doing so it achieved a similar end, which was to favour conquering armies.[49]

Nabulsi contends that in the Grotius mind, the rights of States and armies were above those of ordinary members of society.[50] This sowed the seeds for a distinction to be drawn 'between the rights of States and armies and the subordinate position of civilians - expressed in the legal dichotomy between lawful and unlawful combatants'.[51] Grotius 'defined liberty as a subsidiary right to sovereign authority'[52] and even 'preached submission to all forms of alien rule.'[53] 'Liberty must be sacrificed to peace,' with peace being defined by reference to civil order, and slavery preferable to a liberty without civil order.[54] Grotius's approach to the question of obedience to sovereign power relied heavily on the principle that rebellion or resistance to tyrannical rule was illegal.'[55] Inherent in Grotian thought and writing is subservience to the dominant

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attempt to undermine the legitimacy of civilian resistance to aggression.

44 Barni, above n 1, 116 cited in Nabulsi, above n 1, 237.
45 Barni, above n 1, 116 cited in Nabulsi, above n 1, 237.
46 Nabulsi, above n 1, 241.
47 Nabulsi, above n 1, 77.
48 Nabulsi, above n 1, 79.
49 Nabulsi, above n 1, 76.
50 Nabulsi, above n 1, 157-158.
51 Nabulsi, above n 1, 158.
52 Nabulsi, above n 1, 151.
53 Nabulsi, above n 1, 131.
54 Nabulsi, above n 1, 151.

constellation of power in his time.[56]

Nabulsi asserts that 'the Grotian position was the ambition to limit the rights of belligerency to a particular class of participant (the soldier) and to exclude all others from the right to become actively involved in it.'[57] The qualifications of belligerency encoded in the laws of war between 1874 and 1949 reflect such Grotian ideology.[58] 'In the Grotian scheme of things, states were the exclusive subjects of international law. This system of rules was therefore designed to protect and maintain their interests.'[59] These rules could only be made to work if States and civilians were recognised to operate in different spheres:

> Wars were waged by soldiers, on the orders of their political and military commanders, while civilian populations remained entirely outside its framework.[60]

Nabulsi offers up Lieber, Bluntschli and de Martens as modern founders of the law of war,[61] and exponents of Grotian thought who shaped the law of war with a focus on the Hobbesian desire for preservation of order.[62] Bluntschli[63] and Martens argued that 'regularising armies was the best means of preserving order.'[64] Through their work came the 'Grotian emphasis on denying all right of belligerency to civilians, even in situations of self defence.'[65] Nabulsi points to the fondness of these three for citing Roman practices as examples of precedent.[66] This was ostensibly done to confirm their acceptance of the notion that order may be imposed by the conqueror as of right. Martens' opposition to republican notions of popular sovereignty and mass participation in civic life are reflected in his criticism of the *levee en masse*, and his view that citizen involvement in the defence of their country was a threat to

55 Nabulsi, above n 1, 152.
56 Nabulsi, above n 1, 141.
57 Nabulsi, above n 1, 158.
58 Nabulsi, above n 1, 175.
59 Nabulsi, above n 1, 176.
60 Nabulsi, above n 1, 176.
61 Nabulsi, above n 1, 167.
62 Nabulsi, above n 1, 163.
63 Bluntschli took the failed Brussels project under his wing at the Institute and pushed through the creation of the Manual on the Laws of war of 1880 which was repudiated by British and German military officials: Nabulsi, above n 1, 162.
64 Nabulsi, above n 1, 163. The notion of order was a central belief of Grotius. States were viewed as the primary locus of legitimacy and law: Nabulsi, above n 1, 163. This approach is reflected in Martens' notion of the hegemony of the great Powers as the only means of preserving international peace: Nabulsi, above n 1, 164. As well as notions that it would be impossible to expect the Turks or the Chinese to observe the laws and customs of war: F Martens, *La paix et la guerre* (Paris: A Rousseau, 1901) 47 cited in Nabulsi, above n 1, 164. Prussian militarists shared similar notions of superiority: Nabulsi, above n 1, 164-165.
65 Nabulsi, above n 1, 167.
66 Nabulsi, above n 1, 168.
67 Nabulsi, above n 1, 173.
68 Nabulsi, above n 1, 176: 'All rights of belligerency were denied to civilians because

order and an endangerment to civilization.[67] Martens defended his position by asserting that removal of civilians was in their best interests, as war would be less destructive if they were excluded from it.[68] 'Citizens struggling to defend their communities, properties and ways of living did not belong to [the Grotian] world'[69] of 'order over liberty'[70] and 'slavery over freedom'.[71] Indeed citizen involvement in war threatened the very existence of this world prompting 'the invocation of notions of perversity and jeopardy whenever attempts were made to broaden the range of permitted belligerents'.[72] On Nabulsi's analysis, those asserting the right of civilian participation in armed struggles against occupying powers find little comfort in the Grotian tradition of war. Attention now turns to 19th century civilian resistance to occupation, and reactions to such resistance by invading and occupying powers.

III PART III: 18TH & 19TH CIVILIAN RESISTANCE TO MILITARY AGGRESSION AS A CUSTOM OF WAR

Does 19th century State practice reflect the existence of a right of civilian resistance to occupation? Nabulsi suggests that this question is to be answered in the affirmative claiming that 'the social history of occupation … reveals the existence of a custom of resistance among civilian population'.[73] In order to establish as an 'incontrovertible fact the existence of a powerful custom of civilian resistance to occupation and foreign rule'[74] – as Nabulsi asserts – it is necessary to examine 19th state practice. What follows is by no means an exhaustive analysis of 18th and 19th century patterns of resistance to foreign occupation. To the contrary, only a few instances are discussed below. However these examples serve to demonstrate both the phenomena of civilian participation in armed resistance to foreign occupation and the response of occupying powers. An assessment is then made of whether a customary norm of civilian resistance to occupation existed under the 19th century law of nations.

A *Corsican Resistance*

In 1755 the islanders of Corsica rose up in armed revolt against Genoese

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the arming of the citizenry was part of a system of values which was entirely alien to the Grotian understanding of the world'.

69 Nabulsi, above n 1, 176.

70 Nabulsi, above n 1, 176.

71 Nabulsi, above n 1, 176.

72 Nabulsi, above n 1, 176.

73 Nabulsi, above n 1, 79.

74 Nabulsi, above n 1, 243.

rule. This revolt was viewed by many republicans as heroic resistance to foreign occupation.[75] Pasquale Paoli, who led this struggle, believed in the need to preserve the independence of Corsica from foreign powers by military self reliance. Citizens' armies were deployed against the Genoese soldiers 'both for reasons of republican virtue and, more practically, for the successful defence of the island.'[76] Paoli favoured limiting defence to a civil militia but was overruled by the National *Consulte* who preferred to utilize as many soldiers as possible.[77]

B *Resistance to Napoleon*

In 1812 Napoleon invaded Russia. Napoleonic troops were met by a wave of patriot resistance among the Russian peasantry who 'waged an all-out war on the French-occupied territory.'[78] This has been describes as one of the fiercest examples of resistance to occupation.[79] According to one French soldier 'They kept harassing the army, impeding its advance. Virtually every peasant became a partisan'.[80] Like many military leaders of this era, Napoleon instructed his troops to shoot such partisans as *francs tireurs.*

C *European Insurrections*

Traditions of resistance were not limited to revolt against foreign occupation. A strong republican insurrectionary tradition was to emerge. On March 24, 1794, Tadeusz Kosciuszko[81] – himself influenced by Rousseau – led an Act of Insurrection in Cracow, Poland. Although unsuccessful, this struggle reinforced Kosciuszko's impassioned views on the right of the occupied to resist tyranny and armed oppression,[82] and influenced republican thinkers and insurrectionary fighters in Europe.[83] By the 19th century, exiles escaping persecution from their empire's police and military forces (in nations such as Poland and Italy) organised republican insurrections. The ideology of insurrectionism

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75 The creation of a democratic republic on the island was a celebrated event of the late 1750s. Nabulsi, above n 1, 212.

76 Nabulsi, above n 1, 212.

77 Nabulsi, above n 1, 213

78 *Peasant War* (2002) The Voice of Russia <http://www.vor.ru/Events/1812_19.html> at 4 May 2005.

79 Nabulsi, above n 1, 41. Of the 600,000 French troops that invaded and occupied Russia, fewer than 30,000 returned to their homeland: *Ruling Empire*, Country Studies <http://www.country-studies.com/russia/ruling-the-empire.html> at 4 May 2005.

80 *Peasant War* (2002) The Voice of Russia <http://www.vor.ru/Events/1812_19.html> at 4 May 2005.

81 Having returned to Poland after seven years in the American struggle for independence and having set up West Point Academy, Kosciuszko wrote the seminal handbook on insurrectionary and partisan warfare *Can the Poles Fight their way to Freedom?* (1800) cited in Nabulsi, above n 1, 215.

82 Nabulsi, above n 1, 132.

and partisan war was seen as a method of developing democratic republics.[84] Secret Polish, Italian, Spanish and Greek revolutionary movements mounted insurrections during this century. Popular uprisings and partisan warfare were widely regarded as legitimate methods of achieving republican goals.[85] In 'Young Italy', Mazzini espoused the philosophy thus:

> Insurrection - by means of guerrilla bands - is the true method of warfare for all nations desirous of emancipating themselves from a foreign yoke.[86]

Stolzman believed that partisan war was the means to achieve republican goals:

> Guerrilla warfare causes minds to adapt themselves to independence and to an active and heroic life - it makes nations great.[87]

Some writers went so far as to place the partisan fighter above the regular soldier. Like Rousseau, Harro Harring thought professional soldiers the worst type of criminal: 'the word soldier is an infamous one, by its very etymology "sold" which indicates payment and a bought creature.'[88] Harring described himself as a 'trooper citizen' and an exile in the fifth company of the 'Polish republic.'[89]

This brief overview of Nabulsi's research on 18th and 19th traditions of resistance and insurrection offers a glimpse of the writer's significant contribution to legal scholarship. However what is absent from Nabulsi's expose of traditions of war is evidence of a general recognition among states of the legitimacy of civilian resistance to occupation.

D *The Requirements for the Existence of a Customary Norm Under International Law*

Proof of the existence of a customary norm is demonstrated by reference to two criteria: state practice and *opinio juris*. State

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83 Nabulsi, above n 1, 216.

84 Nabulsi, above n 1, 229.

85 Nabulsi, above n 1, 235.

86 Nabulsi, above n 1, 235, fn 200.

87 K Stolzman, *Partisan Warfare: The Warfare Most Appropriate to Insurgent Nations* (A Ansusiewicz, ed) (Warsaw: Wydawn, Ministerstwa Obrony Narodowej, 1959) 20 cited in Nabulsi, above n 1, 235.

88 P Harro Harring, *Mémoires sur la Jeune Italie* i (Paris: Librairie M Dérivaux, 1834) 7 cited in Nabulsi, above n 1, 235. Harro Harring defined rebel as follows: 'What is a rebel? A Man whose heart revolts against injustice and lies, the prerogatives of birth, and against favour by grace of God. A Man whose heart burns for justice and truth, for virtue and for liberty, who is ready to sacrifice, for humanity, his goods, his blood, and his life. A man who takes up arms to defend the honour of his *patrie*, and who prefers death to slavery: There! That is what a rebel is!': P Harro Harring, *Mémoires sur la Jeune Italie* iii 2 cited in Nabulsi, above n 1, 232.

89 Harro Harring, i, above n 88, 7-8 cited in Nabulsi, above n 1, 235.

practice must point to the existence of the custom asserted. That is, the practice 'must have been generally adopted in the practice of States'.[90] *Opinio juris* is the 'belief (by States) in the obligatory nature of a practice.'[91] Brownlie notes that 'the Court (ICJ) is willing to assume the existence of an *opinio juris* on the basis of a general practice, or a consensus in the literature, or the previous determinations of the Court or other international tribunals.'[92]

E *The Status of Civilian Resistance Under the Law of Nations*

As has been noted in 'Part III: 18th & 19th Civilian Resistance to Military Aggression as a Custom of War', Nabulsi's analysis of 19th century warfare indicates that civilian resistance to foreign occupation was not infrequent. However that writer's review of the historical record does not demonstrate that civilian resistance was recognised as a permissible mode of warfare by military powers; at least not while they engaged in military occupation. Their brutal treatment of civilians who attacked occupying troops suggests that military powers did not recognise a customary right of civilians to take up arms in occupied territory. Peasants who resisted occupation were shot as *francs tireurs.* One of the earliest instruments on the law of war reflects this approach. In 1863 Lieber defined war rebels as 'persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same'.[93]

> If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.[94]

Such harsh treatment of civilian resistors, (who were often executed for doing no more than defending their homeland from a foreign aggressor), motivated diplomats from 'lowland' European nations such as Netherlands and Belgium to fight for the protection of local inhabitants who engaged in patriotic resistance. During the diplomatic conferences at Brussells (1874) and The Hague (1899) such smaller nations asserted that those brave enough to defend their homeland should not be

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90 *Anglo-Norwegian Fisheries Case* [1951] ICJ Rep 116 cited in Martin Dixon, *Textbook on International Law* (5th ed, Oxford: Oxford University Press, 2005) 30.

91 Dixon, above n 90, 32.

92 Ian Brownlie, *Principles of Public International Law* (6th ed, Oxford: Oxford University Press, 2003) 8 (footnotes adopted).

93 *The Lieber Code of* 1863, art 85 ('Lieber Code').

94 Lieber Code, art 85. Lieber's approach mirrors the position adopted by the Prussian

amenable to punishment as *francs tireurs* but instead afforded legal protection. If the law of war was to be codified, a right of civilian resistance to occupation should be included in the instrument. They strongly objected to attempts by military powers at the Brussels Conference of 1874 to codify the laws and customs of war without reference to these modes of resistance.[95]

Despite such valiant efforts, a right of civilians to engage in armed resistance to enemy occupation was not (and has never been) expressly recognised under international treaties on the law of war. Instead such persons were afforded 'the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'[96] This provision does not confer protection from punishment for taking part in hostilities.[97] The failure of States to confer a treaty right of civilians to engage in armed resistance to occupation confirms this writer's view of:

1 An absence of state practice among 19th century military powers favouring the existence of a right of civilians to engage in armed resistance to foreign occupation.

2 A distinct lack of o*pinio juris* among these powers that civilians captured whilst engaging in armed resistance should be treated in the same manner as regular soldiers from the armed forces of an adversary.

As neither of the requirements for a customary norm[98] was met, it is this writer's view that there was no right under 19th century customary law of civilians to engage in armed resistance to enemy forces in occupied

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army throughout the 19th century; it treated partisans operating in occupied territory as *francs tireurs*.

95 Baxter notes that 'Those States that rely on large bodies organized military forces demand that prisoners of war status be reserved for those belonging to such forces, Smaller States that rely on citizen armies, guerilla warfare, and resistance activities seek to have prisoner of war status extended to as many people as possible.' Richard R Baxter, 'Modernizing the Law of War' 78 *Military Law Review* 165, 174.

96 Preamble to Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, opened for signature on 29 July 1899. ('Hague Regulations 1899') and Hague Regulations 1907 'In the interpretation of Belgium, … the clause remitted to customary law the major bone of contention, namely the question of which persons not belonging to the armed forces of the occupied country might be regarded as lawful combatants in occupied territory.' Antonio Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? European Journal of International Law <http://www.ejil.org/journal/Vol11/No1/ab13.html> at 4 September 2004, 197.

97 See discussion under the heading 'Additional Protocol I' in 'Part IV: Does Contemporary International Law Recognise a Right of Civilian Participation in Armed Resistance to Foreign Occupation?'.

territory. Nabulsi's appraisal 18th and 19th century republican perspectives on civilian resistance to enemy occupation, while impressive, fails to authoritatively demonstrate that a *right* of civilian participation in armed resistance to occupation existed under the law of nations. Indeed Nabulsi's survey of 19th century practice indicates that military powers *did not* recognise the existence of a right of civilian participation in war. If one had existed, these powers clearly did not feel themselves bound by such a norm. Civilian resistance to occupation was often brutally crushed by occupying armies through reprisals and the collective punishment of communities from which partisan and guerrilla fighters were drawn. The existence such a right would have run counter to the Martial and Grotian traditions of war that Nabulsi notes were so influential in the latter 19th century. State practice before and after the Peace conferences held at Brussels (1874) and The Hague (1899 and 1907), suggest that Martial and Grotian ideology prevailed. The triumph of these traditions of war over defensive republicanism is demonstrated by the failure of lowland states to have such a right explicitly recognised under the Hague Regulations (1899 and 1907).

IV Part IV: Does Contemporary International Law Recognise a Right of Civilian Participation in Armed Resistance to Foreign Occupation?

The final issue to be address in this article is whether a right of civilian participation in armed resistance to occupation exists under contemporary international law. This requires an analysis of customary and treaty law. Relevant treaty law includes provisions pertaining to combatant status and eligibility for POW status under Hague and Geneva law. These instruments have (at least in part) entered into customary law.[99]

A *The Hague Law*

98 See discussion of the requirements for a customary norm in 'Part III: 18th & 19th Civilian Resistance to Military Aggression as a Custom of War' above.

99 'In view of the large number of parties that have states parties to the 1949 Geneva Conventions the status which the Conventions have acquired in the international community, the Conventions (at least in part) are widely regarded as customary international law. A report of the UN Secretary General to the Security Council in May 1993 concerning the establishment of the ICTY affirmed that the law embodied in the four 1949 Geneva Conventions had become part of customary international law.': Adams and Guelff, above n 29, 196. In the context of the Hague Law, Adams and Guelff note that 'to the extent that aspects of the Conventions are considered customary law those aspects are binding on all states. The International Military Tribunal at Nuremberg Tribunal in 1946, and a report of the UN Secretary General in May 1993 to the Security Council on the International Criminal Tribunal for the

The treaties signed at The Hague Peace Conferences of 1899 and 1907 were the first international instruments on the law of land warfare to be widely ratified by States. While codifying the qualifications of belligerency, the Hague law was silent on the issue of civilian resistance to occupation. While neither expressly prohibited nor affirmed under this law, such conduct remained punishable by an occupying army. Civilians who engaged in armed resistance to occupation lacked immunity from prosecution and could be punished for taking part in hostilities. The main categories of belligerency under Hague law are now discussed.

1 *Regular Armed Forces*

Members of 'armies … militia and volunteer corps',[100] were entitled to be treated as POWs under Hague law.[101] Patriotic citizens, partisans and guerrillas not belonging to 'the armed forces of the belligerent parties'[102] were not recognised as combatants[103] and denied the protections of POW status on capture.

2 *The Levee en Masse*

Hague law also recognised a limited right of belligerency to all citizens of an invaded nation, including non military personnel. A distinction was drawn under the laws of war between armed resistance to an invading army, and an occupying force. The right of civilians to rise up *en masse* and defend their homeland against an attack by a foreign invader was protected under Article 2. The category of *levee en masse*[104] afforded combatant immunity to those civilians who rose up to

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Former Yugoslavia, expressly recognised 1907 Hague Convention IV as declaratory of customary law': Adams and Guelff, above n 29, 68.

100 Hague Regulations 1907, art 1, states:

'The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army".'

101 Hague Regulations 1907, art 3, states: 'The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.'

102 Hague Regulations 1907, art 3.

103 For the position of partisans and guerrillas in 19th century law of war see Bart (ed), *Halleck's International Law* (1878) 7: 'Partisans and guerrilla troops are bands of men, self organised and self controlled, who carry on war against the public enemy, without being under the direct authority of the State. If authorised and employed by the State they become a portion of its troops, and the State is as much responsible for their acts, as for the acts of other parts of its army. They are no longer partisans or guerilleros, in the proper sense of those terms, for they are no longer self controlled,

resist an enemy *invasion*:

> The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.[105]

This category did not however extend to acts of armed resistance by civilians against an occupying army. That is, the right of civilians to participate in hostilities as combatants ended where the invasion force had secured effective control over the territory.[106] This limitation left patriotic citizens who engaged in armed resistance against occupying forces open to harsh punishment upon capture.[107]

B *Geneva Law*

1 *Geneva Convention III (1949)*

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but carry on hostilities under the direction and authority of the State.'

104 Hague Regulations 1907, art 2 and Geneva Convention III art 4(6).

105 Hague Regulations 1907, art 2.

106 See, Gerhard Von Glahn, *Law Among Nations: An Introduction to Public International Law* (3rd ed, McMillan Publishing Co: 1976) 668 who observes that 'an armed uprising *within* occupied territory is forbidden.'

107 'Individuals partaking in such a rising were always classified as war rebels and were subject to the death penalty.': Gerhard on Glahn, above n 107, 668.

108 The full list of combatants to whom POW status is to afforded under the Geneva Convention III are listed in Article 4:

'A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time

(a) Organised Resistance Movements

After World War II, the categories of belligerents recognised under Hague law were expanded (under Geneva Convention III) to include members of 'organised resistance movements.'[108] This is by no means an all encompassing category. Indeed one scholar regards it as 'almost entirely symbolic',[109] as members of an organised resistance movements are still required to meet the requirements that all irregulars must satisfy: they must be members of an organised force, the force must belong to a party to the conflict, and the force must be under responsible command members must carry arms openly and wear a fixed distinctive sign and conduct their operations in accordance with the laws of war.[110] Even so, it is significant that Geneva law formally recognises that members of organised resistance movements (and all combatants for that matter) have a right to engage in military operations against an occupying army inside occupied territory.

Not all partisan or guerilla resistance forces would constitute (or form part of) an 'organised resistance movement.' Patriotic citizens who take part in armed resistance to occupying forces as individuals or members of small armed groups *not* belonging to the armed forces of a 'party to the conflict' would not qualify as members of an 'organised resistance movement.'[111] Such isolated bands of fighters are therefore not recognised as combatants.[112] On capture, they may be treated by occupying troops as common criminals and punished accordingly.[113] This reflects the strictures of Geneva law; those who take part in hostilities during an international armed conflict will only enjoy immunity from punishment (upon capture) if two conditions are met. They must (i) qualify as combatants, and (ii) have complied with the laws of armed conflict.

(b) The Levee en Masse

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to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.'

109 C Greenwood 'The law of War' in M Evans (ed), *International Humanitarian Law* (Oxford: Oxford University Press, 2003) 795.

110 Geneva Convention III, art 4A(2).

111 An individual will belong to the armed forces of a party to the conflict if that person is member of the regular army, an organised resistance movement, a militia or volunteer corps forming part of such forces: Geneva Law, art 4A(2).

112 Geneva Convention III, art 4A(2) and Additional Protocol I, art 43.

113 'The position of private individuals is made known to them through proclamations which the commander-in chief of an army occupying the territory usually publishes…Owing to their position it is inevitable that he should consider and mark as criminals such of them as commit hostile acts, although they may be inspired by patriotic motives, and may be highly praised for their acts by their compatriots.':

The right of local inhabitants to engage in a levee *en masse* was confirmed under Geneva Law. The Geneva provision is identical in scope to Hague Law outlined above. [114]

2 *Additional Protocol I*[115]

Eligibility for combatant status under 1949 Geneva law has been slightly modified by Additional Protocol I (1977). This modification only takes effect where this optional protocol applies to the respective parties to the conflict. Article 43(1) defines 'armed forces of a Party to a conflict', and by implication prescribes the definition of 'combatant':

> The *armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party*. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict. (emphasis added)

As is the case under 1949 Geneva law, civilian are precluded under Additional Protocol I from engaging in armed resistance unless they belong to a unit of the armed forces of a party to the conflict. Civilians who engage in self-authorised guerilla attacks against an occupying army outside the Geneva paradigm invite punishment. In case of espionage, sabotage and intentionally causing death this punishment may include the death penalty.[116] If they belong to a militia or volunteer force that forms part of the armed forces of a party to the conflict they are no longer civilians but instead combatants - even if they only occasional engage in military operations. (Geneva law does not recognise 'part-time soldiers', or 'civilians by day combatants by night.')

While the Protocol relaxes the norms of belligerency in relation to guerrilla fighters,[117] the requirements of Article 43 must still be met. In other words, those who engage in guerrilla and partisan resistance

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Lauterpacht, above n 6, 206. See also: Baxter, above n 6.

114 Geneva Convention III, art 4(6).

115 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)* (adopted on 8 June 1977) (entered into force 7 December 1979) ('Additional Protocol I').

116 *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, art 68 (entered into force 21 October 1950) ('Geneva Convention IV'): 'where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.'

117 Additional Protocol I, art 44.

118 'Captured unprivileged members of resistance movements cannot be sentenced on

against occupying forces only enjoy immunity from punishment upon capture if they belong to the armed forces of a party to the conflict.

Interestingly, like The Hague law, Geneva law does not expressly prohibits civilian resistance to enemy occupation.[118] Armed resistance to foreign occupation (by patriotic citizens who do not form part of their nation's armed forces) is therefore not a violation of international law, yet it is punishable by the occupier under the law of occupation. Consequently, civilians who choose armed resistance over submission do so at their peril, and may be lawfully punished by the occupier upon capture and conviction.[119] However such punishment must reflect the fact that inhabitants of the occupied territory owe no duty of allegiance to a foreign occupier.[120]

Finally, armed resistance to occupation by patriotic citizens falls within the category of 'cases not included in the [Hague] Regulations.'[121] Occupying powers must afford such persons 'the protection and the rule of the principles of the law of nations, as they result from the usages

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the basis of any rule of the laws of war, because there are no such rules which prohibit resistance.' Dr. W.J. Ford, *De Volkenrechtelijke Positie Van Verzetclieden* (The position of Members of resistance Movements under International Law) With extensive English Summary 1955 N.V. Noord-Holandsche Uitgevers Maatschappij Amsterdam p320. Mallison and Jabri, writing in 1974, noted 'the existing lawfulness of unprivileged but protected guerrillas. There should be realistic recognition that …civilians will take up arms in defence of elementary human rights… Situations of belligerent occupation involving civilian resort to armed resistance will probably arise in the future as they have in the past.': Mallison and Jabri, above n 6, 220.

119 Geneva Convention IV, art 64-68.

120 Geneva Convention IV, art 68(3) 'The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.'

121 Preamble to Hague Regulations 1899 and 1907. Reiterated Additional Protocol I, art 1(2).

122 The draft text of the preamble, although often attributed to Russian delegate Fedor Martens, appears to have been the work of Belgian diplomat Baron Lambermont. It was presented in a truncated form at The Hague Peace Conference by Martens: Nabulsi, above n 1, 161. The Preamble to the Hague Regulations 1899 is usually referred to as the 'Martens Clause'. For a critique of 'the Martens Clause' see Cassese, above n 96. Cassese states: 'In the interpretation of Belgium, … the clause remitted to customary law the major bone of contention, namely the question of which persons not belonging to the armed forces of the occupied country might be regarded as lawful combatants in occupied territory.' Cassese, above n 96, 197

123 For an assessment of the treatment afforded to persons taking part in fighting without having combatant status (in a number of armed conflicts that arose after the promulgation of the Hague Regulations 1899) see W J Ford 'Resistance Movements and International Law II' (1967) *International Review of the Red Cross* 579. In 1902, the German General Staff published a manual *Kreigsbrauch im Landkriege*. While recognising that 'the population of a certain territory cannot be denied the natural right to resist the enemy en masse', this right was exercisable only against invading forces and not within occupied territory. This position is confirmed in the manual by the prohibition on guerrilla warfare, with the 'Freischarler' (guerrilla) being

established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'[122] During World War I & II this eloquent phrase offered little protection to local inhabitants and partisan forces that fought armies of occupation. Neither did it offer protection to the local population from collective punishment and summary reprisals.[123]

V PART V: CONCLUSION

This article has examined the juridical status of civilian resistance to enemy occupation under the 19th century law of war and the contemporary law of armed conflict. It has highlighted a much neglected aspect of the law of war; whether citizens have ever enjoyed the right to engage in armed resistance to enemy occupation. Nabulsi's claim that such a norm existed under 19th century custom has been questioned. If such a norm did exist, it was never codified under treaties signed at either The Hague or Geneva. It would in any event be at odds with important developments in the law of armed conflict. Civilian armed resistance runs counter to fundamental principles of contemporary international humanitarian law including the requirement that 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants'.[124]

Nabulsi has identified 'a wealth of memoir literature and archive documents'[125] that point to many instances of civil and political resistance to occupation in the 19th century. However this is not of itself sufficient to establish the existence of a customary rule. Through their harsh treatment of civilian resistance to occupation, 19th century military powers demonstrated their emphatic rejection of any right of local inhabitants to rise up against an occupying army. Nabulsi offers no compelling evidence of State practice or *opinio juris* favouring the existence of a binding norm of this nature.

Neither does the contemporary law of armed conflict recognise such a norm. Arguments raised at Brussels, The Hague and Geneva (by European nations that were victims of crimes of aggression and illegal occupation by expansionist military powers in the 19th and 20th centuries) have consistently failed to convince the majority of States of the merits of codifying a right of civilian resistance to belligerent occupation. Few would countenance a return to an era of total war; a

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punishable by death: Ford, n 123 523. This line of reasoning was used to condemn partisan resistance to German forces in World War I & II: Ford, n 123 580-584.

124 Additional Protocol I, art 48: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.' (The so called 'principle of distinction')

time when international law failed to regulate the means and methods of warfare. It is unlikely that States would countenance the dilution of the 'principle of distinction.'[126] This would require a fundamental overhaul of international humanitarian law, a body of law which is built upon the principle of minimizing the suffering of victims of war; civilians in particular. The 1949 Geneva Conventions are the most widely ratified of all multi-lateral treaties[127] and may therefore be regarded as binding on all States under customary law. It would be a monumental challenge to assert the existence of a norm that runs counter these treaties.

These factors point to the absence of *opinio juris* among States favouring the existence of a customary right of civilian armed resistance to enemy occupation. Civilians who take up arms (without belonging to the armed forces of a party to the conflict) do not enjoy combatant immunity and may be punished upon capture by the occupier.[128] Such punishment may include the death penalty. Patriotic motivations and a desire to overthrown an illegal occupation are irrelevant. These are the grim consequences of the norms of belligerency that emerged from diplomatic conferences held in Brussels and The Hague over a century ago. What has evolved since is a body of humanitarian law which seeks to reduce the impact of war upon civilians; by excluding them from the battlefield. Those who violate this fundamental norm do so at their peril.

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125 Nabulsi, above n 1, 79.

126 See note 124.

127 192 States are party to the 1949 Geneva Conventions. Source: International Committee of Red Cross data base: