

# The Genesis of the Civilian

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## Abstract

This paper argues that the concept of the civilian is a specific way of viewing non-combatants that can be traced to the First World War. Before the war, non-combatants were seen by the law and the prevailing culture as citizens. The citizen was potentially and probably aggressive, bound to the fate of his or her state and, therefore, granted only minimal protection by law. The war, however, brought technological changes and a propaganda effort that transformed these citizens into a civilian population. Civilians were essential to the war effort, which meant that they were a target. Yet, at the same time, they were feminized, described as vulnerable and deserving of protection. This cultural shift influenced the way in which the laws of war were understood, leading to the replacement of the traditional categories of law with a military/civilian distinction in the 1923 Hague Draft Rules of Aerial Warfare. In this way the concept of the civilian entered international law.

## Key words

civilian; First World War; international humanitarian law; legal history; 1923 Hague Rules of Aerial Warfare

Civilians today attract the protection of international law and the attention of the world. Among observers of conflict the plight of civilians is arguably the foremost concern. In more theoretical circles, the inviolability of the civilian has become so obvious and crucial that it has been described as the foundation of international order.<sup>1</sup>

Yet the very importance of the civilian provokes the questions, what is the source of this concern and what implications does it have for its subject? Some international lawyers presume that it is a timeless principle of international law.<sup>2</sup> Others see it as an achievement of the Lieber Code, the Hague Conventions, and/or the Geneva Conventions.<sup>3</sup> In this article, however, I argue that the idea of the civilian is a peculiar way of conceptualizing people that evolved during the First World War. When the war began non-combatants were perceived as citizens, who were either voluntarily passive or wilfully dangerous. But after the Germans invaded Belgium Allied propaganda erased the threatening aspect of the non-combatant population and redrew them as helpless victims. This characterization was reinforced as improvements to aircraft allowed for the bombardment of vulnerable population centres far from the front. Yet, at the same time as non-combatants seemed to be more and

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1. A.-M. Slaughter and W. Burke-White, 'An International Constitutional Moment', (2002) 43 *Harvard International Law Journal* 1, at 3.
2. L. C. Green, *The Contemporary Law of Armed Conflict* (2000), 229.
3. L. Doswald-Beck, 'The Civilian in the Crossfire', (1987) 24 *Journal of Peace Research* 251, at 252.

more defenceless, they also became more important. Governments and population alike acknowledged the vital role of non-combatants in the modern, industrialized war machine, while military strategists described them as a key military target. It was this paradoxical reconstruction of non-combatants as both weak and critically important, as both pitiful victims and primary targets, that constituted the new idea of the civilian population.

Once the civilian population was thus established as a target, some international lawyers began describing it as a group that deserved protection or even as a group that already was protected. The result of their concern was the 1923 Hague Draft Rules of Aerial Warfare (Rules). These Rules protected, for the first time in international law, the specific idea of the *civilian* as conceived during the war – as opposed to any other concept of a non-combatant. In doing so they abandoned the established distinctions and principles of international law and replaced them with the now familiar civilian/military distinction. As such, the Rules mark the point when the traditional structure of international law began to fade away and the contemporary system, centred on the civilian, began to emerge.<sup>4</sup>

## I. THE IDEA OF THE CITIZEN IN INTERNATIONAL LAW

The civilian has achieved such ascendancy in international law that it is hard to imagine a code of warfare or a world without civilians. Indeed, it is often written that the civilian has long existed as a protected subject of international law.<sup>5</sup> Yet both the term ‘civilian’ and the group it describes are relatively new. According to the *Oxford English Dictionary*, the word civilian, in the sense of a non-military person, only began to be used in the mid-nineteenth century. More importantly, the current conception of the civilian, defined in the 1977 Additional Protocol I as a homogeneous population characterized by not being part of the military and deserving protection on that ground,<sup>6</sup> can be contrasted with the range of past approaches, where people might be protected because of their membership of an occupational or social group or because of their substantive innocence.<sup>7</sup>

The novelty of the civilian and the existence of alternative ways of conceiving of non-combatants are demonstrated by the legal commentary and international conventions from the period leading up to the First World War. At this time the word

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4. Today we would say that the protection of the civilian belongs to international humanitarian law rather than to international law generally. In the period I am discussing, however, the distinction was not made in this way and the term ‘international humanitarian law’ was not used. Therefore I shall refer throughout this article to ‘international law’ to avoid confusion and anachronisms.
  5. Green, *supra* note 2, at 229; E. Jaworski, “Military Necessity” and “Civilian Immunity”: Where is the Balance?, (2003) 2 *Chinese Journal of International Law* 175, at 175.
  6. Art. 50, 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. A. Roberts and R. Guelff, *Documents on the Laws of War* (1989), 415.
  7. For example, the eleventh-century ‘Peace of God’ protected clerics, merchants, and the poor on the grounds of their specific role in society. This association of certain roles with protection is further expounded by Bonet, an influential commentator of the fourteenth century, in his careful analysis of the reasons why various groups should be spared. G. W. Coopland, *The Tree of Battles of Honoré Bonet: An English Version with Introduction by G. W. Coopland* (1949), 184–8. See also M. H. Keen, *The Laws of War in the Late Middle Ages* (1965), 189.

civilian was used sporadically to designate non-military persons, but without the associated connotations of protected or victimized non-combatants. For example, it was common to write of ‘civilian spies’<sup>8</sup> or ‘civilian belligerents’ – terms that now sound odd, if not oxymoronic. At the same time ‘non-combatant’ was generally used to describe members of the military who did not fight.<sup>9</sup> ‘Non-combatant’<sup>10</sup> or ‘civilian’ might also be used to describe the general, non-military population, but when discussing those who warranted protection it was more common to use a term such as ‘private citizen’,<sup>11</sup> ‘private individual’,<sup>12</sup> or ‘private subject’.<sup>13</sup> This nomenclature indicates the difference in the category and the type of protection it attracted.

The term ‘private citizen’ encompassed a particular concept of the non-combatant. Jurists writing before the First World War recognized the historical particularity of this concept and were proud of it. It was an achievement of their civilization. Gone were the days when the entire population was liable to be killed, robbed, or exiled.<sup>14</sup> They attribute the more enlightened conduct of their age to Rousseau, who, in 1801, had argued that war was a relation between states, not between men. Men were not involved simply because they were citizens, but only when they were soldiers.<sup>15</sup>

Yet, while praising Rousseau’s ideals, these jurists hasten to add that he was wrong in practice.<sup>16</sup> Citizens of an enemy state *are* enemies too.<sup>17</sup> But if they are not combatants then they are *passive* enemies.<sup>18</sup> This means that it is not usually necessary to injure them in the prosecution of the war. And, as the fundamental principle of war is that everything should be done that is necessary to win but that nothing should be done that is not necessary,<sup>19</sup> such passive enemies should not be deliberately injured. If, however, placing pressure on the general population can bring the war to a speedy conclusion then it will be allowed as a necessity of war.<sup>20</sup>

To take Rousseau’s comments any further than this point, these writers emphasized, would be foolish and, as the history of modern wars showed, unrealistic.<sup>21</sup> Enemy subjects, even passive enemies, are exposed to the strictures and dangers of war. During the war, in the ‘theatre of operations’, they could expect little relief. Their property could be destroyed and, if they were besieged, they could be killed by bombardment or starvation.<sup>22</sup> There was no obligation to allow ‘useless mouths’ to leave a besieged town.<sup>23</sup> A coastal town that refused supplies to an enemy ship

8. L. Oppenheim, *International Law: A Treatise* (1906), 162.

9. *Ibid.*, at 115.

10. W. E. Hall, *A Treatise on International Law* (1895).

11. C. Phillipson, *International Law and the Great War* (1915).

12. H. Wheaton, ‘Elements of International Law’, in J. B. Atlay (ed.), *Elements of International Law* (1904), 480.

13. Oppenheim, *supra* note 8, at 59.

14. Phillipson, *supra* note 11, at 115.

15. *Ibid.*, at 116. Oppenheim, *supra* note 8, at 60.

16. Oppenheim, *supra* note 8, at 60. Oppenheim states that English and American writers never accepted this doctrine. A. P. Higgins, *War and the Private Citizen* (1912), 12. J. Westlake, *International Law* (1910–13), 40.

17. G. G. Wilson and G. F. Tucker, *International Law, by G. G. Wilson and G. F. Tucker* (1910), 241.

18. J. H. Morgan, *The German War Book: Being ‘The Usages of War on Land’ Issued by the Great General Staff of the German Army* (1915), 51.

19. Wheaton, *supra* note 12, at 479–80; Morgan, *supra* note 18; and Westlake, *supra* note 16, at 36.

20. Phillipson, *supra* note 11, at 19.

21. *Ibid.*, at 12.

22. W. E. Hall, *supra* note 10, at 575.

23. Phillipson, *supra* note 11, at 44–5.

could be bombarded and destroyed.<sup>24</sup> Whole regions could be devastated if it was necessary for military success.<sup>25</sup>

Once an area was occupied, private individuals were subject to requisitions and required to pay contributions. They had to provide lodging and food for the occupier if required. The occupying force could coerce them into carrying out orders, including providing assistance in military works.<sup>26</sup> Finally, the non-combatant population could be subjected to reprisals or taken hostage.<sup>27</sup> For example, it was frequently recalled that during the Franco-Prussian War, the Germans put hostages on trains that were likely to be wrecked by irregular combatants.<sup>28</sup> The legality of this manoeuvre, the Germans insisted, was synonymous with its success.<sup>29</sup>

Thus as much as these jurists were proud of the conceptual separation of the private citizen and the state military, it was an idea that everyone was careful not to take too far. Indeed, they often seem to mention the concept in order to limit it. But the notable feature of both the broad, idealistic statement and the narrow, whittled-down precepts is that they perceive the protected subject primarily as a citizen or subject, albeit a private one. As such, they are unavoidably a part of their state and cannot expect much respite from its fortunes.

Furthermore, even the residue of protection that remained for the 'private individual' was assured only if he or she remained private and peaceful.<sup>30</sup> The probability that citizens would not remain so was one of the principal concerns of jurists and governments at the time – certainly a much greater concern than the suffering of private citizens. It was feared that citizens were likely to take up arms individually or as part of a *levée en masse*. When this happened it was believed to lead to particularly brutal, uncivilized warfare.<sup>31</sup> The 'irregular' or 'civilian' combatants who took part were liable to be executed, while the rest of population could be subjected to reprisals.<sup>32</sup> This being the case it was the usual practice for an invader to announce, as a promise and a warning, that he would make war only against the soldiers *as long as* the rest of the population remained neutral.<sup>33</sup>

These principles of warfare were confirmed by the positive law that was codified before the First World War: the Lieber Code and the Hague Conventions. The 1863 Lieber Code, written to govern the conduct of Union troops in the American Civil War, is usually considered to be the first document in the modern codification movement. It was certainly considered to be a pivotal document by contemporaries, and today admiration for the Lieber Code has increased even more. Now it is

24. Ibid., at 37.

25. Wheaton, *supra* note 12, at 487.

26. Oppenheim, *supra* note 8, at 120–1.

27. Ibid., at 175–6.

28. Ibid., at 176.

29. Morgan, *supra* note 18, at 120.

30. Higgins, *supra* note 16, at 43.

31. Morgan, *supra* note 18, at 61.

32. H. Wheaton, *Elements of International Law* (1916), 475. In the Franco-Prussian War the Germans instituted a policy of executing all soldiers who could not show a government authorization to fight. Although this was considered a little excessive, the principle was accepted.

33. Phillipson, *supra* note 11, at 38.

described as the prototype of modern international humanitarian law<sup>34</sup> and is invoked as proof of the longevity of the principles of distinction and proportionality that protect civilians.<sup>35</sup>

Although admiration for the Lieber Code may be shared by lawyers past and present, this modern interpretation of the Lieber Code was not shared by earlier writers. This is not surprising, since the Lieber Code neither protects nor even mentions civilians. Instead it talks about citizens and talks about them in such a way that past international lawyers used the Lieber Code to support their refutation of Rousseau's statement that individuals could not be enemies.<sup>36</sup> For the citizen of the Lieber Code is a part of their state and, as such, an enemy.<sup>37</sup> Since they *are* enemies, citizens do not have to be protected; citizens must bear the hardships of their country as well as sharing in its successes. Thus, while it is desirable to spare their lives and property if it is possible and simple to do so,<sup>38</sup> it is legitimate to inflict suffering, such as starvation, upon citizens if it will lead to a speedier conclusion of the war.<sup>39</sup>

The 1907 Hague Convention does little to change this paradigm. Like the Lieber Code, the Hague Convention is seen today as a crucial step in the development of modern international law and another example of the provenance of civilian protection.<sup>40</sup> At the time, however, its status was more dubious, given the limited number of ratifications.<sup>41</sup> Yet whatever the strength of the treaty may have been, the fact remains that it gives little thought and less protection to non-combatants. The one clear provision of protection is found in Article 25, which states: 'The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited.'<sup>42</sup>

Besides this article, the only other relevant guidance offered by the convention is contained in Article 26, which requires that the attacking force warn the besieged city of an impending bombardment if possible, and Article 27, which encourages the attackers to avoid damaging buildings dedicated to religion, art, science, or charitable purposes; historic monuments; hospitals; and places where the sick and wounded are collected.<sup>43</sup> The word 'civilian' is only used once, in Article 29, where it is stated that soldiers and civilians, carrying out a mission openly, are not considered spies.<sup>44</sup>

Although the modern imagination has converted these meagre articles into a shining example of the protection of civilians, they should more accurately be seen as a codification of the traditional approach to the citizenry. Article 25, in particular, entrenches the citizen's exposure to danger, despite its appearance as a protective

34. H. McCoubrey and N. D. White, *International Law and Armed Conflict* (1992), 217.

35. Doswald-Beck, *supra* note 3, at 252.

36. Higgins, *supra* note 16, at 14.

37. Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Art. 21.

38. *Ibid.*, Art. 19.

39. *Ibid.*, Arts. 17 and 18.

40. McCoubrey and White, *supra* note 34, at 231; Green, *supra* note 2, at 229.

41. J. W. Garner, 'Proposed Rules for the Regulation of Aerial Warfare', (1924) 18 AJIL 56, at 56; A. S. Hershey, 'The International Law of Aerial Space', (1912) 6 AJIL 381, at 384.

42. Roberts and Guelff, *supra* note 6, at 53.

43. *Ibid.*

44. *Ibid.*

clause. The crucial aspect of this article is the codification of the traditional distinction between fortified and open towns. This means that non-combatants in fortified towns, as customary practice held, could expect no immunity from warfare. On the contrary, it was generally agreed that one of the most efficient ways to take a besieged town was to inflict suffering on the non-combatant population, whether by bombardment or starvation.<sup>45</sup> If non-combatant citizens in open towns were exempted from this pressure it was not because of their intrinsic status as non-combatants, but simply because no violence was needed to take an open town.

The 1907 Hague Convention not only reiterated this traditional stance, it actually extended it. Contemporaries noted that the Hague Convention had replaced the older distinction between fortified and unfortified towns with the terms ‘defended’ and ‘undefended’ towns.<sup>46</sup> As they pointed out, it was much harder to determine what constituted a defended town than a fortified town.<sup>47</sup> Could the category, they wondered, include towns with a few soldiers or military stock?<sup>48</sup> They were unable to resolve the exact parameters of the category, but they were sure that the new term exposed many more towns to legitimate bombardment.

Article 26 does little to ameliorate this situation. Despite its call for a warning to precede bombardment, which might seem to provide the opportunity for inhabitants to leave a city or seek shelter before a bombardment, the convention places no obligation on the surrounding forces to allow the ‘useless mouths’ to leave.<sup>49</sup> Moreover, it was agreed that the provision did not apply in the case of a surprise assault or bombardment, or when it was otherwise in conflict with military efficiency.<sup>50</sup>

Thus the Second Hague Peace Conference provided little succour for non-combatants during warfare. For the delegates the more immediate and controversial issue was the status of civilian belligerents. All the delegates believed that citizens were likely to take up arms, although they differed in their response to the possibility. Germany, which was still traumatized by the experience of fighting the *francs-tireurs* (free-shooters) of the 1870–1 Franco-Prussian War, was the most vigorously opposed to irregular combatants. According to Germany, fighting outside the state military was savage, inhumane, and unfair. At the conference General von Gundell of Germany said, ‘[It] is time to remember that soldiers also are men, and have a right to be treated with humanity. Soldiers who, exhausted by fatigue after a long march or a battle, come to rest in a village have a right to be sure that the peaceful inhabitants shall not change suddenly into furious enemies.’<sup>51</sup>

Switzerland, Britain, and Belgium agreed that citizens were likely to resist invasion or occupation, but felt that it should not be so rigorously prohibited.<sup>52</sup> M. Beernaert of Belgium said,

45. L. Oppenheim, *International Law: A Treatise*, ed. A. D. McNair, vol. 2 (1926), 285.

46. J. M. Spaight, ‘Air Bombardment’, (1923–4) 4 *British Yearbook of International Law*, 21, at 21.

47. M. W. Roysse, *Aerial Bombardment and the International Regulation of Warfare* (1928), 157.

48. E. Colby, ‘Aerial Law and War Targets’, (1925) 19 *AJIL*, 702–15.

49. Westlake, *supra* note 16, at 89.

50. Wheaton, *supra* note 32, at 508.

51. W. I. Hull, *The Two Hague Peace Conferences* (1908), 221–2.

52. *Ibid.*, at 211–20.

By attempting to restrict war to states alone, their citizens being left in some sort as simple spectators, shall we not run the risk of reducing the elements of resistance, by enervating the powerful strength of patriotism? Is not the citizen's first duty the defence of his country, and is it not to the accomplishment of this duty that we all owe the finest pages of our national history? To say to citizens that they must not mingle in struggles on which depends the fate of their country, – is that not to encourage that evil indifference which is, perhaps, one of the worst ills from which our time is suffering?<sup>53</sup>

Belgium's fears for the treatment of irregular fighters were eventually allayed by the broad, idealistic terms of the Martens clause, but, in practice, Germany and the other Great Powers had their way in this debate.<sup>54</sup> The result was Article 1, which required belligerents to fulfil certain conditions in order to be considered legitimate, and Article 2, which allowed citizens to rise in a spontaneous *levée en masse* in response to an invasion.<sup>55</sup> This right did not extend to citizens who were already occupied by an invader. If they opposed the enemy they could still be punished with all the rigour of criminal or martial law.

Thus, when the First World War began, the laws of war contained no concept of a civilian population distinguished from the military and deserving of protection on that ground alone. Rather, custom, conventional law, and legal commentary concurred in their perception of non-combatants as enemy citizens who might hold themselves aloof from the conflict or who might be drawn in, whether voluntarily or by force of circumstance. If they did remain passive and outside the conflict then there would be no need to harm them, but if they were caught in the 'theatre of operations' then there was no need to protect them. Finally, if they chose to fight outside the military they could be treated ruthlessly – for it was these treacherous, civilian belligerents who were seen as the greatest threat to the laws of war and civilized warfare.

## 2. THE FIRST WORLD WAR AND THE IDEA OF THE CIVILIAN

In 1914, when the First World War began, these laws and the corresponding view of non-combatants were firmly in place. During the course of the war, however, they were sufficiently challenged to allow for the entry of the civilian into the legal lexicon in 1923. There were two processes in particular that were responsible for bringing about this change: the propaganda battle concerning the German invasion of Belgium and the development of aerial warfare. These processes had the paradoxical effect of making the non-combatant population appear more vulnerable but also more of a target – features that were to become an intrinsic part of the idea of the civilian.

53. *Ibid.*, at 216.

54. A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', (2000) 11 EJIL 187, at 197–8. Cassese shows that the Martens clause was primarily introduced as a diplomatic sop to reassure the Belgian delegation on this issue.

55. 1907 Hague Convention IV, Roberts and Guelff, *supra* note 6, at 48.



## 2.1. The invasion of Belgium

The German invasion of Belgium was attended by a series of incidents in which non-combatants were killed and villages and towns destroyed. According to Horne and Kramer, 5,521 civilians were killed in the invasion of Belgium in 129 major incidents and 383 minor incidents.<sup>56</sup> Among the most notorious were the destruction of Louvain, Aerschot, and Dinant. In time these events became the subject of a propaganda battle that charted the changing image of non-combatants.

The Germans argued that when they entered Belgium they became the victims of an illegal and savage Belgian ‘people’s war’. *Francs-tireurs*, they claimed, were resisting their passage. These *francs-tireurs* were cruel and treacherous and governed by the ‘rudest passions’.<sup>57</sup> They came from all sections of society, including priests, women, boys, and girls.<sup>58</sup> They disguised themselves in the garb of Red Cross workers, or as women.<sup>59</sup> They welcomed the Germans cordially, then attacked them when darkness fell. They would shoot from their homes or from church towers. Women poisoned the water and poured boiling oil on the troops. Little girls cut off their earlobes and gouged out their eyes.<sup>60</sup> As the German *White Book* stated,

The fanaticism of the population found its most revolting expression in the cruel murder of sleeping men, in the mutilation of the fallen and in the burning of wounded men who were bound up with wire for this purpose.<sup>61</sup>

This type of warfare was, the Germans said, ‘a satire on civilization’.<sup>62</sup> Faced with such barbarity, the Germans claimed they had no option but to respond with ‘the sharpest measures’. Such people did not deserve to be treated as prisoners of war but as murderers who ought to be cut down.<sup>63</sup>

At Dinant it was not innocent, peaceful inhabitants who fell victims to the Germans’ arms, but murderers, who treacherously attacked German soldiers, and in this way involved the troops in a struggle which destroyed the city. In Louvain the fight with the civil population did not arise because fleeing German troops were involved by mistake in hand to hand contests with their comrades who were entering the town but because a deluded population, unable to grasp the course of events, thought they could destroy the returning German soldiers without danger.<sup>64</sup>

The responsibility for these consequences lay, the Germans argued, with the Belgian government, which ‘in complete perversion of its duties’ had encouraged the ‘senseless passions of the population’.<sup>65</sup>

This rendition of the events of 1914 has been rejected by historians, who argue that there is no evidence that the civilian population opposed the German invasion.<sup>66</sup>

56. J. N. Horne and A. Kramer, *German Atrocities, 1914: A History of Denial* (2001), 74.

57. *The German Army in Belgium: The White Book of May 1915* (1921), xiii.

58. *Ibid.*, at xiii.

59. *Ibid.*, at 101.

60. *Ibid.*, at xv–xvi.

61. *Ibid.*, at 101.

62. Phillipson, *supra* note 11, at 122.

63. *German Army in Belgium, supra* note 57, at xvii.

64. *Ibid.*, at xviii.

65. *Ibid.*, at xiv.

66. L. Zuckerman, *The Rape of Belgium: The Untold Story of World War I* (2004), 58. Horne and Kramer, *supra* note 56, at 419.



This does not, however, mean that the German account was merely a sensational lie concocted for propaganda purposes. Rather, it appears that the Germans sincerely believed that they *were* being attacked by hordes of barbarous *francs-tireurs*. Horne and Kramer argue that the Germans, exhausted and disorientated after their rapid march into Belgium and frustrated by the unexpectedly slow process of the campaign, fell prey to a collective delusion.<sup>67</sup> Drawing on the traumatic cultural memory of the *franc-tireur* campaign in the Franco-Prussian War of 1870, their expectations of civilian resistance shaped their perception of events. As a result, any accident, unexpected event, or confusion was seen as proof of the existence and activity of *francs-tireurs*. If they could not be seen, then that just confirmed the idea of the invisible, lurking enemy, disguised in any innocent form – whether woman, child, or Red Cross officer. As the Germans responded with panicked reprisals, their fear and their belief in the myth became ever more firmly established; it was turned into an article of faith to be defended. In this way the entire population was turned into an enemy.

The fear and violence that characterized the German invasion shows how committed they were to the idea of a dangerous citizenry, all of whom, including women and children, were imbued with a masculine strength and brutality. And, while this image may have been particularly strong among the Germans, it was familiar enough in other countries to make their narrative appear reasonable – at least at the start. The very fact that the Belgian government, by their own claim, put up notices discouraging the citizenry from attacking the Germans showed that they considered civilian resistance to be a possibility. Moreover, the British and US press initially printed the German accounts of Belgian resistance.<sup>68</sup> On 17 August 1914 the *Daily News and Leader* reported that Visé had been razed to the ground because the townsfolk, according to the Germans, had fired on the military.<sup>69</sup> A few days later, on 21 August, a British reporter described the Belgian fear of the Germans as the ignorance of an excitable, troublesome mob:

As I was going out a peasant fired his double-barrelled gun at the car, mistaking my fishing hat for a German helmet, and successfully blew the tail lamp all to pieces. In case his indiscretions should lead him into far worse trouble I stopped the car, got the gun from him, and broke it across the breech, for quite undoubtedly the German soldier will retaliate on any civilians who use arms. It is devoutly to be hoped that the notice in the streets of Brussels telling everyone to give up arms to the police has been obeyed, otherwise there will be serious trouble.<sup>70</sup>

Before long, however, the stories of civilian atrocities were exchanged for stories of German atrocities. It took a while for the nature and scale of the German violence to become clear but, by the end of August 1914, accounts of atrocities were prevalent in the Allied press. There were stories of massacres, arson, looting, rape, and use of civilians as human shields as well as sensational rumours of mutilations – severed

67. Horne and Kramer, *supra* note 66, at 421.

68. Zuckerman, *supra* note 66, at 22.

69. H. Martin, 'Belgian Town Razed to the Ground', *Daily News and Leader*, 17 Aug. 1914, 5.

70. *Ibid.*; P. J. Phillip, 'The Flight from Louvain', *Daily News and Leader*, 21 Aug. 1914, 1.

hands, crucified children, and bayoneted babies.<sup>71</sup> The reports and personal accounts emphasized the vulnerability and helplessness of the population. The people were shot down 'like rabbits',<sup>72</sup> confused and weak:

When we got into the street we hardly knew what to do. We reached the end of the street leading to the quay and there we stopped, terrified. The sight was a moving one – women, children, wretchedly clothed, nuns holding up their hands to heaven, were standing all along the river side watching the town blazing – hundreds of people worn out with terror and fatigue, old men lying on mattresses, babies in cradles whose parents had gone – none knew where.<sup>73</sup>

These rumours became part of the iconography of the war, replicated in posters and cartoons. The continued emphasis on the vulnerability and suffering of the Belgian civilian victims became a pivotal part of the Allied justification for war and their propaganda effort.<sup>74</sup> For this reason, pictures of women and children were common. While the German myth saw women and children as the most treacherous opponents, examples of the ferociousness of the entire population, for the Allies they were used to symbolize the weakness of the population and of Belgium. Some of the most familiar and memorable images of the war belong to this genre.

The spate of official reports by the Belgian, French, and British governments also supported this new image of the population. The Belgians were the first to issue such a report, in August 1914, followed by the French and the British Bryce Report in 1915. These reports confirmed the atrocity stories and attacked the German vision of a ferocious population. Individuals, such as the Belgian boy who supposedly triggered the massacre at Aerschot by killing the German commander, were exonerated. The Bryce Report described him as quiet and gentle and incapable of such a murder. On a wider scale, the reports insisted that the civilian inhabitants generally were unarmed, peaceful, and placid.<sup>75</sup>

Alongside this redescription of the population was a new interpretation of the German actions under the laws of war. In place of the German account of the rights of an invader faced with a troublesome population was a list of atrocities and *crimes*. Since the victims were so weak, the Allied propaganda held that the German actions were unnecessary, excessive, and illegal.<sup>76</sup> More dubiously, in the context of contemporary law, they suggested that even if there had been civilian resistance the Germans would not have been entitled to take reprisals.<sup>77</sup> In saying this, the official reports characterized the laws and customs of war as being much more protective

71. Great Britain, Committee on Alleged German Outrages, Report of the Committee on Alleged German Outrages, Appointed by His Majesty's Government and Presided over by the Right Hon. Viscount Bryce, O. M. (HMSO, 1915), at 41, 20.

72. H. Martin, 'Awful Story of Louvain', *Daily News and Leader*, 31 Aug. 1914, 5.

73. 'German Vengeance in Dinant: Fate of the Civilian Population, a Dead Woman's Diary', *The Times*, 24 April 1915, 7.

74. N. F. Gullace, 'Sexual Violence and Family Honor: British Propaganda and International Law during the First World War', (1997) 102 *American Historical Review* 714, at 737–8.

75. Report of the Committee on Alleged German Outrages, *supra* note 71, at 34.

76. *Ibid.*, at 33.

77. Phillipson, *supra* note 11, at 168; C. E. S. Turner, *The Story of Belgium: From Prosperity to Desolation: Murder, Rapine and Ruin: A Description of the Wonderful Ancient Towns . . . Other Atrocities of which the German Officers and Men Have Been Proved to be Guilty* (1915), 79.

of non-combatants than they had been understood to be by all European nations before the war.<sup>78</sup> This new-found emphasis on the traditional protection of the civilian was repeated again and again in the frequent accusation that the German actions had no precedent in any civilized war.<sup>79</sup> In this way, it was asserted that the German actions against civilians not only broke the laws of war but destroyed the whole structure of civilized, legal warfare<sup>80</sup> – in much the same way as it was earlier believed that civilian belligerents undermined the laws of war. Thus although the civilian had only just begun to be envisaged as a vulnerable group, this term was already described as an established and accepted measure of civilized warfare and adherence to the laws of war.

The perceived reliability of these official reports, especially the Bryce Report, lent credibility to the Allied propaganda around the world. The German *White Book*, written to counter the Allied claims, was unable to find support for its argument that the reprisals against civilians were justified. Therefore the contest of narratives left the German vision of the dangerous citizen diminished and their version of a punitive international law damaged. Even after the war, when the atrocity stories were questioned, the German account of the *franc-tireur* was not reclaimed. The citizen had begun to give way to the civilian.

## 2.2. Aerial warfare

The Belgian invasion may have led to a concerted effort to reimagine the population, but the development of aerial warfare took an even more inexorable toll on the image of the enemy citizen, passive or violent. Aerial warfare, viewed through the prism of contemporary military theory, seemed designed to attack the non-combatant population in a way that had not previously been possible. In this way, aerial warfare shattered the old categories of war and turned citizens into a helpless civilian population, at the same time that they seemed a more valuable target than ever.

Aerial warfare was still at a formative stage when the First World War began, but its potential and purpose in warfare had long been plotted out. Centuries before the invention of a functioning aeroplane, aircraft had been imagined as weapons in a new and terrible form of warfare.<sup>81</sup> Tennyson's lines were recalled by those observing the birth of aerial warfare:<sup>82</sup>

Heard the heavens fill with shouting, and there rained a ghastly dew  
From the nations' airy navies grappling in the central blue.

Aircraft were seen not only as the harbingers of physical destruction, but also of psychological terror.<sup>83</sup> This second element became more significant in the period leading up to the appearance of aircraft and afterwards, since the fashion for

78. Gullace, *supra* note 74, at 742.

79. Report of the Committee on Alleged German Outrages, *supra* note 71, at 31.

80. Phillipson, *supra* note 11, at 159.

81. T. D. Biddle, *Rhetoric and Reality in Aerial Warfare: The Evolution of British and American Ideas about Strategic Bombing, 1914–1945* (2002), 12.

82. Higgins, *supra* note 16, at 46–7, quoting 'Locksley Hall', 1842.

83. Biddle, *supra* note 81, at 12.

Carl von Clausewitz's military theory placed a new-found emphasis on the importance of attacking the enemy's morale and undermining their will to fight.<sup>84</sup> The horror of air bombardment seemed made to order for such a purpose. Now one could strike directly at the will of the nation as a whole, terrorize the people, and create panic, dismay, and, ultimately, capitulation. Contemporaries described such consequences as the 'moral effect' – the favourite phrase of the time in military theory and strategy.

With the advent of the First World War, the ability to attack national morale took on a new significance. In such an industrialized war, every citizen was necessary for the war effort. The 'home front' was as important as the army and female workers were as essential as male soldiers. This new aspect of war was recognized by everyone. As the British press put it, 'Rachel no longer sits at home and weeps', but

Side by side with the noisier mustering of men for the field of battle has silently and swiftly sprung up a mighty mobilization of women of all ages, creeds, and classes, the like of which has surely never been seen since the world began.<sup>85</sup>

The involvement of strong, capable, *important* women in the war effort was a common image from the war.

The presentation of the population generally and of women in particular as an essential part of the military machine meant, logically, that they were also converted into a valuable target. 'Moral effect' was therefore redefined to include agitation and even panic among the people, discontent with their government leading to the relocation of military resources to protect towns, lost work hours and productivity, a halt to military industry, and even the destruction of industry generally.<sup>86</sup>

Yet despite the recognition that almost every man and woman was involved in the war, there was outrage when air raids began killing civilians. Nor did the legal position, accepted at the beginning of the war, that cities such as London were legitimate targets of bombardment,<sup>87</sup> prevent government and population alike calling the air raids illegal. While the people called the enemy 'murderers',<sup>88</sup> their governments wrote reproaches. Germany argued that its targeted towns, such as Karlsruhe, were open towns, far from the theatre of operations, and therefore illegitimate targets.<sup>89</sup> The British, however, made a more original argument, stating that the bombed places in England had no military purpose and were, therefore, illegitimate targets.<sup>90</sup> Both they and the French claimed that the correct test was one of military significance.<sup>91</sup> In making this claim the English departed from the traditional legal position as expressed by the Germans – a position which would not have supported their reproach. Instead, they adapted the established principle of military necessity to produce the more flexible, indeterminate formulation of

84. *Ibid.*, at 14.

85. 'How the Women Mobilised', *Daily News and Leader*, 14 Aug. 1914, at 3.

86. Biddle, *supra* note 81, at 57.

87. J. H. Morgan, 'What an Enemy May Do', *Daily News and Leader*, 17 Aug. 1914, 3.

88. 'Two Southend Raids', *Daily News and Leader*, 1 June 1915, at 1.

89. J. M. Spaight, *Air Power and War Rights* (1924), 200.

90. Royse, *supra* note 47, at 179. Phillipson, *supra* note 11, at 179.

91. Spaight, *supra* note 89, at 199.

'military significance'. Even this principle is problematic in the context of the pivotal 'home front'. Yet in the very process of putting it forward the English obscured the image of the mobilized population with an image of an innocent, defenceless, civilian population which had no military significance. Such civilians were the ward and protected subject of the amended law. To kill them was an act of untold barbarity. Thus, as in the response to the Belgian atrocities, the law was reinterpreted to provide greater protection for civilians and to make their treatment the foundation of civilized warfare.

The argument that the places bombarded and people injured had no military significance was emphasized by descriptions of the victims as women, children, and babies. Soon the Germans were called 'baby-killers',<sup>92</sup> and headlines proclaimed the numbers of female and child casualties, sometimes without listing the men.<sup>93</sup> The victims were described going about their own business – sleeping, shopping, attending school – before they were killed without warning and without any chance of defence.

The raid was but a repetition of the exploits of the Zeppelin. It killed and maimed with the same wanton, indiscriminating ferocity. It slew women and children as well as men. It wrecked buildings of no greater military value than a warehouse here, a tobacconist shop there, and a school not far away.<sup>94</sup>

In this way the women who were the bulwark of the home front, empowered and important, became again a symbol of weakness. The munitions workers and patriotic, economical housewives who would win the war were simultaneously described as defenceless innocents. By the same technique, the civilian population was portrayed as weak, feminized, and infantilized at the same time that they were a significant target. This can be seen in the representations of aerial warfare and the civilian population.

Thus the exigencies and developments of the First World War erased the image of the citizen. Gone were the private, passive enemies who never needed to be targeted. Gone too were the dangerous, powerful, masculine (even when female) *franc-tireurs*. In their place was a new idea of a civilian. The civilian was too weak, too feminized, to be any kind of threat to an army; she was defenceless against aerial bombardment yet important enough to be a primary target. With this change in the perception of the population came a change in the interpretation and invocation of the law. Citizens no longer threatened the conduct of civilized lawful warfare; now it was threatened by the treatment of civilians.

### 3. THE POSTWAR PERIOD: THE CIVILIAN AND MILITARY STRATEGY

The end of the war did not bring with it an end to the threat to civilians. Indeed, the postwar period only consolidated the belief that aircraft were a weapon to be directed against the general population. After the years of bloody stagnation in the

92. 'The Baby Victim', *Daily News and Leader*, 28 May 1915, at 2.

93. 'Daylight Air Raid', *The Times*, 28 May 1917, at 7.

94. 'Air Raid on London', *The Times*, 14 June 1917, at 7.

trenches, military strategists eagerly seized this new type of warfare. As Captain Liddell Hart argued in *Paris, or the Future of War*, the old strategy of destroying the enemy's armed forces was misguided and outdated. Rather, the purpose of war was to destroy the enemy's will to resist – the moral objective. This objective should be pursued in the easiest and most cost-effective way possible. And now the aeroplane had exposed the easiest target, the Achilles heel of civilization – the civilian. Liddell Hart writes,

Imagine for a moment London, Manchester, Birmingham, and half a dozen other great centres simultaneously attacked, the business localities and Fleet Street wrecked, Whitehall a heap of ruins, the slum districts maddened into the impulse to break loose and maraud, the railways cut, factories destroyed. Would not the general will to resist vanish, and what use would be the still determined fractions of the nation, without organization and central direction?<sup>95</sup>

Liddell Hart's expectation that civilians would be the primary target in the next war was generally shared.<sup>96</sup> This military consensus also held that it would be useless to try to defend civilians. In the influential *Air Warfare*, Sherman explains that using aircraft for defence was a misallocation of resources that would ultimately lead to defeat. Anti-aircraft guns, according to Douhet – the accepted authority on air strategy – were also a useless waste of energy and resources.<sup>97</sup> In this situation, Douhet asks, 'How can we defend ourselves against them? To this I have always answered, "by attacking".'<sup>98</sup> The threatened state must send their bombers against the enemy. War would no longer be a battle between soldiers but a contest to see which population would crack first. 'To put it vulgarly', as Colonel Fuller wrote, 'in the next great war [the civilian] is going to be "in the soup", and what kind of soup will it be? A pretty hot one!'<sup>99</sup>

Most military writers accepted this development and some actively embraced it. Writers such as Liddell Hart, Fuller and Mitchell tried to suggest that it might humanize war.<sup>100</sup> Faced with the destructive potential of the aeroplane, states might hesitate to go to war. When they did start a war, it would be sharper and shorter and, therefore, more humane.<sup>101</sup> Instead of the appalling slaughter of millions of soldiers as in the last war, Fuller suggested that an air campaign could end a war with only a few thousand of the enemy's men, women, and children killed.<sup>102</sup> He also thought that technical developments might allow non-lethal gases to be used in air raids.<sup>103</sup> At any rate, both he and Liddell Hart felt that everyone would attempt to limit the destruction in the hope of future friendly relations between the warring states.<sup>104</sup>

95. C. B. H. Liddell Hart, *Paris, or the Future of War* (1972), 41.

96. See, e.g., W. C. Sherman, *Aerial Warfare* (1926), or C. J. F. C. Fuller, *The Reformation of War* (1923).

97. Douhet, 'Command of the Air', in D. Jablonsky (ed.), *Roots of Strategy* (1999), 329.

98. *Ibid.*, at 326. See also W. Mitchell, 'Winged Defense: The Development and Possibilities of Modern Air Power – Economic and Military', in Jablonsky, *supra* note 97, at 571.

99. Fuller, *supra* note 96, at 149.

100. *Ibid.*, at 72.

101. Mitchell, *supra* note 98, at 441.

102. Fuller, *supra* note 96, at 150.

103. *Ibid.*, at 111.

104. Liddell Hart, *supra* note 95, at 43–4.

Yet even if there were greater civilian casualties than they forecast, these writers agreed that it would still be no more immoral than traditional forms of warfare. Killing civilians in an air raid, they argued, was no worse than the cannon-fodder wars of the past, sinking ships, or starving people.<sup>105</sup> Moreover, there was no reason why civilians should be immune from war. When a nation went to war the entire population was involved and the solidarity and capacity of the fighting forces depended on the people at home.<sup>106</sup> Indeed, as Fuller suggests, the civil population is responsible for its government and must bear the consequences of its decisions:

When, however, it is realized that to enforce a policy and not to kill, is the objective [of war], and that the policy of a nation, though maintained and enforced by her sailors and soldiers, is not fashioned by them, but by the civil population, surely, then, if a few civilians get killed in the struggle they have nothing to complain of – ‘*dulce et decorum est pro patria mori*’. And, if they will not accept these words as their motto, then, in my opinion, their government should altogether abstain from war, however much they may be spat upon.<sup>107</sup>

This acceptance of civilians as targets was even shared by some international lawyers. The postwar editions of Oppenheim’s *International Law* suggested that the development of aerial warfare, the idea of the nation-in-arms, and the spread of democracy had threatened any distinction between the armed forces and civilians. Meanwhile Royse argued that there had never been an effective norm that protected non-combatants and that aerial bombardment directed at civilians was legal.<sup>108</sup>

Not everyone was as sanguine or as resigned to aerial warfare. Many writers of fiction, policy, and law foretold that the next war would be a truly terrible, apocalyptic battle in which major cities could be flattened in days, their populations wiped out with gas bombs, and civilization ultimately destroyed.<sup>109</sup> Some others stated that the very idea of targeting civilians was an affront to civilization.<sup>110</sup> It was even beginning to be said that there was a ‘time-honoured norm’ that protected civilians.<sup>111</sup> Thus the construction of the civilian population as an appropriate and easy target made some concerned jurists feel that they should be protected. In order to support this claim they employed a rhetorical slip that is often found in international law, and stated that they *were already* protected. New as the concept of civilian was, it was thereby endowed with a legal history. In this way, the paradoxical characteristics that made the civilian peculiarly vulnerable were introduced into legal and humanitarian discourse.

105. Fuller, *supra* note 96, at 105.

106. *Ibid.*, at 112.

107. *Ibid.*, at 107–8.

108. Royse, *supra* note 47, at v.

109. F. E. Quindry, ‘Aerial Bombardment of Civilian and Military Objectives’, (1931) 2 *Journal of Air Law* 474, at 474.

110. Garner, *supra* note 41, at 64.

111. Oppenheim, *supra* note 45, at 121. This comment, which appears for the first time in the 1926 edition, sits rather awkwardly alongside other comments that doubt the existence of civilians in the modern world.



#### 4. THE HAGUE RULES OF AERIAL WARFARE: THE IDEA OF THE CIVILIAN IN INTERNATIONAL LAW

It was in this environment that the Hague Rules of Aerial Warfare were drafted. The Washington Conference of 1922 had set up a commission of jurists to decide whether the 1907 Hague Convention dealt adequately with new methods of warfare. The result was a set of novel, although ultimately unsuccessful, rules that shattered the old categories and subjects of international law and replaced them with the civilian.

The members of the commission felt that aerial warfare obviated the old distinction between defended and undefended places. It seemed to them that if this distinction were applied to aerial warfare the results would be 'illogical and absurd'.<sup>112</sup> All places, from the perspective of an aircraft, would be at once both defended and undefended. Nowhere could be defended in the same way that a town could be defended against land or naval bombardment.<sup>113</sup> Indeed, as was mentioned above, defence against aircraft seemed inadvisable if not impossible. At the same time, however, it would be very difficult to say that a place was undefended. Defence could come in the form of aircraft from a distant aerodrome.<sup>114</sup> Finally, commentators questioned whether there was any point in discussing defence in terms of aircraft. The question of defence traditionally came into play as a prelude to the occupation of a town. Land or naval bombardment of a town was aimed at inducing the surrender of a defended town. Since, contemporaries felt, aircraft could not occupy a town, the purpose of their bombardment was quite different. As Garner argued, 'it is simply to destroy the place or certain persons or things in it'.<sup>115</sup> As such, a new distinction was needed to govern this different sort of aim.

The criterion they settled on was the distinction between military and civilian, a standard they justified by reference to both British and French practice during the Great War<sup>116</sup> and to principles of humanity and civilization.<sup>117</sup> These principles, they said, demanded that there must be a distinction made between combatants and non-combatants and that a belligerent ought not to direct attack against civilians.<sup>118</sup> As the Draft Rules stated, the 'conscience of mankind revolts against this form of making war in places outside the actual theatre of military operations'.<sup>119</sup> In this way, the Rules introduced the idea of a vulnerable civilian population, historically protected by law and civilized values, into international law.

Nevertheless, the protection afforded to the civilians was rather more complicated than it is in current international humanitarian law. Although Article 22 prohibited

112. Garner, *supra* note 41, at 70.

113. *Ibid.*, at 57.

114. Spaight, *supra* note 46, at 23.

115. Garner, *supra* note 41, at 70.

116. Spaight, *supra* note 46, at 23.

117. Garner, *supra* note 41, at 66–7.

118. *Ibid.*, at 66.

119. 'General Report of the Commission of Jurists at the Hague', (1923) 17 *AJIL Supplement: Official Documents* 242, at 249.

the use of aerial bombardment for the purpose of terrorizing the civilian population, destroying private property, or injuring non-combatants, Article 24 turned this simple protective clause into a more complex set of rules. Article 24, according to contemporaries, divided potential targets into zones. Near the front, in the 'theatre of operations', bombing was considered to be generally permissible.<sup>120</sup> The exhortation in Article 24(4) to have 'regard to the danger thus caused to the civilian population' apparently did not carry much weight with these commentators. In this area, as Garner argues, 'war and violence reign; the destruction of towns and villages in this area may generally be justified as a legitimate part of the field operations'.<sup>121</sup>

The area behind the front constituted another zone. At the time the Rules were read to mean that bombing was admissible behind the front if it was directed at points of military importance.<sup>122</sup> It should be pointed out that both the Rules and the commentators explicitly stated that munitions factories and munitions workers were military targets.<sup>123</sup> Taking into account the lack of precision in bombing this essentially meant that all centres of population would be subject to bombardment. As a result, the Rules had incorporated the paradoxical characterization of the population as a military aid and a protected victim, thereby perpetuating their position as a target.

Thus the Draft Rules and their interpretation gave a great degree of leeway to air bombardment and little protection to the civilian. Moreover, even these limited constraints were not ratified and were therefore seen as a failure by contemporary commentators.<sup>124</sup> Nevertheless, the Rules had succeeded in introducing the idea of the civilian, complete with the paradoxical characteristics that ideology and technology had given them, into the purview of law.

This success is, of course, just the beginning of the story of the civilian. The concept of the civilian had to undergo a slow, disjointed process of development and change before it could achieve its current importance. It was not until the 1949 Geneva Convention IV that any protection for civilians was codified, and not until the 1977 Additional Protocols that the principle of distinction was ratified. Yet this slow trajectory should not negate the importance of the Rules. Despite the changes in the status of the civilian since 1923, the civilian of the Rules shares many characteristics with the contemporary image of the civilian. The vision of civilians as an endangered population, victimized and feminized, persists, unquestioned and unquestionable. Moreover, the Rules used this subject to create the new categories and distinctions that continue to shape international law. In this way, the Rules launched the concept of the civilian on the path that would eventually lead it to the centre of international law.

120. Colby, *supra* note 48, at 708.

121. Garner, *supra* note 41, at 73.

122. Colby, *supra* note 48, at 708.

123. Garner, *supra* note 41, at 66.

124. M. O. Hudson, 'The Development of International Law since the War', (1928) 22 AJIL 330, at 335.

## 5. CONCLUSION

From the beginning of the First World War to the 1923 Draft Rules of Aerial Warfare a dramatic shift took place in the way in which non-combatants were seen. The citizens of the prewar period, who were considered to be more of a threat than as a target, began to fade away. In their place, the ideological and technological imperatives of the First World War inserted a civilian. The civilian was weak where the citizen was strong, exposed where the citizen was ignored, feminine and childlike where the citizen was ferocious, and esteemed where the citizen was despised. The paradoxical construction of the civilian, as a desirable target and a protected victim, was echoed and entrenched in the Draft Rules of Aerial Warfare. Despite the limited success of these rules, they nevertheless mark the point at which the civilian, conceived of in this way, appeared as a concept in international law.