WAR AND LAW SINCE 1945 by Geoffrey Best (Oxford: Oxford University Press, 1994).

In *War and Law Since 1945*, Geoffrey Best rightly points out that "all law-making is at some level a political process."[1] In the international sphere, where state interests are frequently at stake, this is even more true than at the national level, and it is particularly true when states consider that their vital security is involved and consider it necessary to resort to armed force to preserve that security. Nevertheless, going back to ancient times, there have always been attempts to control the horror and violence that is involved in war, especially where non-combatants are concerned. This has been especially true of the Eurocentric states since the middle of the nineteenth century, which saw the establishment of the International Committee of the Red Cross. Best, unlike so many humanitarians, is honest enough to inform us that he "does not believe that war must in all circumstances be a bad thing or the worst of all conceivable things," but he is among those who believe that "there has often been and that there continues to be more armed struggle than there should be, and that much of it is more deadly, destructive and cruel than it need be."[2]

In this work, Best, who is primarily an historian and a political scientist, does not always appreciate that any efforts to control the means and methods of warfare will inevitably be limited by what is considered realistically acceptable if a belligerent state is to survive. Moreover, he does not appear to appreciate that the concept of international humanitarian law (IHL) is only part of the law of war, for he states in many places that "the Laws of War as they were formerly known, have become ... popularly known as International Humanitarian Law."[3] The majority of military personnel and international lawyers concerned with this aspect of the law still refer to the totality of the Law of War as "the law of armed conflict."

While it cannot be denied that it is difficult for the ordinary citizen to see the connection between *War and Law* and that political and national interests will often appear to give full honour to the maxim "all's fair in love and war," it must also be recognized that there is always a tendency, even among people whose countries are at war, to see the need for a minimum of respect for humanitarian principles. Cynics among politicians will often pay lip service to this humanitarian instinct, particularly where human rights and humanitarian law are concerned, even though they have little intention of abiding by their apparent commitment. This means that often they will accept treaty commitments that are ambiguous or vague or so technical that only specialist lawyers can interpret them. This is why Best has written his book, which many may regard as unduly critical and even destructive, but which finds its justification in his statement that the "book's aim [is] not simply to describe contemporary IHL but rather to explain it, not to assume that it functions adequately but to enquire whether it functions adequately or not."[4] This leads him to examine in

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1 G. Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994) at 342.
2 *Ibid.* at 3.
3 *Ibid.* at vii, 256.
4 *Ibid.* at 336.

some detail the political motives that have guided states when driven to participate in international conferences directed toward pronouncing what may and what may not be done in armed conflict, especially with regard to those who have never been involved in the conflict or who are, for various reasons, *hors de combat*. Best's description of some of the political and even military difficulties that were experienced in the framing of the 1949 Geneva Conventions and the two Protocols of 1977 will be of particular interest to political scientists and to those more concerned with why the law has developed as it has, rather than those concerned with the law itself.

At times, it seems that Best assumes too much on the part of his reader and his comments become excessively cryptic. For instance, this is the case when Best refers simply by name to incidents which may be remembered only by those who lived through World War II. However, for others, a hint as to what actually occurred might have been helpful.[5] Another illustration of Best's cryptic comments exists where he simply states that in relation to his discussions of the problems of open cities, this was "a confused business, which R.J. [*sic* R.Y.] Jennings did his best to sort out in the 1945 *BYIL*."[6] Equally, it would be interesting to know how many of the participants in the 1974-1977 Geneva Conference which produced the two Protocols would agree that "the attention of the CDDH [Conférence Diplomatique de Droit Humanitaire] was focused more on the requirements of NLMs [National Liberation Movements] and guerrilla warfare than on those of regular armed forces."[7] In fact, Best himself does not seem to accept this assessment, in view of the lengthy discussion which he provides with regard to prisoners of war and their treatment. At the same time, he seems ambivalent as to the significance of the post-1945 war crimes trials of which he says, "all in all, the war-crimes trials did not have as much of an effect on the international law of war as might have been expected"[8] since they only applied "established law."[9] However, it was these trials that made clear what the law was, and Best himself regards them as having formed the background to later developments in treaty law. In view of the history of war crimes trials going back to feudal times and the 1919 Leipzig trials of Germans by German courts, it is difficult to appreciate why Best regards Nuremberg as having clarified the issue of superior orders or having been innovative with respect to "personal responsibility."[10] Equally interesting, especially in light of the discussion on gun and ammunition control, is the account he provides of unlawful weapons and the meaning of "unnecessary suffering."[11] With the alleged invention of "RHINO ammunition" one can only conclude, as is already the case when examining certain weapons used by some police forces, that the law of armed conflict is more protective of potential enemy subjects than is the law of the state when confronted with threats against its own citizens.

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5 See *e.g. ibid.* at 260, 5n.
6 *Ibid.* at 318.
7 *Ibid.* at 339.
8 *Ibid.* at 245.
9 *Ibid.*
10 *Ibid.* at 206.
11 *Ibid.* at 293ff.

It is easy for a lawyer, particularly one interested in the law of armed conflict, to pick holes in or disagree with Best's interpretation of specific rules which he skilfully summarizes but does not always fully analyze from a practical point of view. To do so, however, would defeat the author's purpose. That is, as a believer in international humanitarian law and an admirer of the International Committee of the Red Cross and its work, particularly in wartime, Best has sought to illustrate how difficult it is in practice to reconcile the realities of war with the demands of humanitarianism. As such, even the most critical readers will find it difficult to disagree with Best's statement that one should:

> [P]reface examination of these [humanitarian] rules with a reminder of the philosophy to which they owe their being. In that philosophy, the importance of avoiding civilians is twofold. There is the simply humanitarian ground that it is *good, i.e.* ethically admirable, humanly worthy, and, to the minds of the law makers, 'natural', not to hurt fellow human beings unless you absolutely have to, and, with the same qualification, good also to avoid damaging civilian property, especially if it is of cultural interest. And there is the utilitarian ground ('artificial' by comparison with the other) that hurting civilians and their property is *pointless*; civilians being theoretically of no consequence in a military contest between armed forces, which is IHL's rock-bottom understanding of what armed conflict is.[12]

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[12] *Ibid.* at 271.