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Volume III:

The Law of Armed Conflict: Historical and Contemporary Perspectives

Edited by Rain Liivoja and Andres Saumets

ESTONIAN NATIONAL DEFENCE COLLEGE
MARTENS SOCIETY

CULTURAL, PEACE AND CONFLICT STUDIES SERIES



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VOLUME III:
**THE LAW OF ARMED CONFLICT:
HISTORICAL AND CONTEMPORARY PERSPECTIVES**
Rain Liivoja and Andres Saumets

Proceedings
15/2012

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PREFACE



Gravely mistaken are those who think that law and war are incompatible phenomena. Throughout human history warfare has been subject to some form of normative regulation – be it religion, ethics, or (more recently) law. And while it may be the case that the laws of war are sometimes honoured more in the breach than the observance, it is the presence of rules that distinguishes warfare from terrorism and other kinds of mindless slaughter. Accordingly, knowledge of and respect for the law of war – referred to as the law of armed conflict or international humanitarian law in more modern parlance – form an important part of the ethos of the military professional

The Estonian National Defence College, as an institution dedicated to educating leaders for the Estonian Defence Forces, and the Martens Society as a professional association promoting the teaching of international law have an obvious mutual interest in deepening knowledge of the law of armed conflict in Estonia. Both organisations would like to see Estonian soldiers and commissioned and non-commissioned officers set an example to others through their respect for the rule of law in military operations. To that end, the ENDC and the Martens Society have embarked on a collaboration which led to a joint conference on the law of armed conflict in Tartu in late 2009, and now to the publication of this collection of essays. This volume presents a series of papers that in many ways seeks to highlight the continued relevance of principles devised many decades and centuries ago for very different conflicts, and show a historical continuity in the law of armed conflict despite changing times and circumstances.

This volume opens with the text of the Fourth Friedrich Martens Memorial Lecture. The Martens Society has established a tradition of organising annual or biennial public lectures to celebrate the life and work of Friedrich Fromhold Martens (1845–1909), a world-renown Estonian-born international lawyer and diplomat. The lectures, delivered alternately by a notable Estonian scholar and a notable foreign scholar, have tended to touch on the humanitarian aspects of international law – after all, Martens himself suggested that “the purpose of international relations is the protection of the [human] person”. This fourth lecture was delivered by *Arthur Eyffinger*, a prominent Dutch legal historian and perhaps the leading authority on the development of The Hague into the legal capital of the world. Most appropriately, Dr Eyffinger discussed in his eloquent and elegant talk the role

of Martens in the emergence of what he calls *l'Oeuvre de la Haye* or “The Hague Tradition” – the peaceful settlement of international disputes and the amelioration of the calamities of war.

In the following chapter, *Erkki Holmila* takes the reader on a historical journey and shows how the reliance on private actors in warfare has been regarded in different eras – from Ancient Egypt up to the French Revolution. This discussion serves as a useful backdrop when reflecting upon the increased use of private military contractors in modern conflicts.

Next, *Rain Liivoja* looks at chivalry as a source of rules of warfare. He argues that the modern law of armed conflict is infused with the influences of the medieval military code of honour (code of chivalry). Consequently, he argues, all rules of the law of armed conflict cannot simply be reduced, as is commonly done, to a balance between military necessity and humanitarian principles.

The subject of *Martin Arpo*’s contribution is a particular aspect of Friedrich Martens’ legacy, namely the Martens Clause which is a provision found in a number of treaties whereby, in the absence of formal rules of warfare, civilians and combatants “remain under 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”. Arpo highlights the role that the Clause has played in the post-Cold War efforts of the Baltic States to bring some of the authors of Soviet-era atrocities to justice, thereby vividly demonstrating the continued relevance of a legal principle more than a century old.

Erki Kodar also takes his cue from the Martens Clause when he examines the applicability of the law of armed conflict to computer network attacks. After careful assessment of a number of specific legal principles and their application to cyber warfare, he suggests that the existing law of armed conflict, though largely drafted and codified before the dawn of the “Internet Age”, may indeed be flexible enough to govern cyber attacks.

Turning next to the enforcement of the law of armed conflict, *Annika Talmar-Pere* provides a brief assessment of the domestic law measures that implement these international law rules in Estonia. Focusing on dissemination efforts as well as administrative and penal measures, she concludes that there is much room for improvement. Talmar suggests that Estonia would particularly benefit from the formation of a national humanitarian law commission.

The final contribution in this volume comes from *René Värk* who gives an accessible overview of the current state of the doctrine of superior responsibility for international crimes. He notes that international lawyers

continue to struggle with the very concept: for example, is superior responsibility a form of accessory liability or a separate offence of dereliction of duty? Having discussed the recent jurisprudence on superior responsibility, Dr Värk concludes on a somewhat sombre note that the concept has not proven to be a “silver bullet” for dealing with international offences as many would have hoped.

As editors, we would like to express our gratitude to the contributors for their patience during a fairly lengthy publication process and to Dr. *René Värk* for his consultation. We would also like extend our appreciation and thanks to *Collin W. Hakkinen*, *David W. E. Thomas* and *Epp Leete* at the Estonian National Defence College for their assistance in copy-editing the papers, and to the staff of Tartu University Press for overseeing the final stretch of the publishing process.

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Andres Saumets, Estonian National Defence College

Melbourne and Tartu, 5 April 2012

FRIEDRICH MARTENS: A FOUNDING FATHER OF THE HAGUE TRADITION

The Fourth Friedrich Martens Memorial Lecture

Arthur Eyffinger



1. The Backdrop

The centenary of Friedrich Martens' demise recalls that complex and highly troubled period in international affairs which, in one of history's great misnomers, was called *La Belle Epoque*. During these decades the Old Continent, not for the first time, lost control of its destiny. This time, however, in ignoring the pulse of time and the winds of change, it outplayed its hand. Letting clashing ideologies run wild and unable to put a check on dynastic rivalry, military contest or commercial competition, it gambled away its time-honoured primacy of directing world events.

Friedrich Martens was a keen witness of these fatal events, indeed a public figure of that day and age, and a leading "internationalist" as the jargon of the time ran. Easily migrating between disciplines, he seemed to be the man for all seasons, who aspired at bridging social gaps. Alarmed by the onmarch of socialism, and putting all his hopes on an enlightened Czar, he invested all his bursting energy in reconciling the world of high diplomacy – that bastion of the reactionary –, the emerging discipline of international law and those fascinating if controversial *gremia* of pacifism and interparliamentarism. Within the crucible of social turmoil throughout Europe, and while representing the most conservative of societies and the most formidable of autocrats, Martens earned himself a reputation of keen advocate of humanitarian thought and renowned arbitrator. Around 1900, Martens, in short, stood out as a guiding light in refurbishing international society. His celebrated epithets of "Chief Justice of Christianity" or "Soul of the Hague Peace Conference" attest to his prestige during his lifetime, as do his many honorary doctorates abroad. Upon the news of Martens' death, the renowned Professor Holland at Oxford opened his obituary with the words "*Magnus vir cecidit!*" The quote from one of Seneca's moral treatises may have lost much of its ring in our day and age. Still, the implied reference to the great

Greek judge Aristides, that epitome of integrity to the classical world, reads as a landmark of Martens' repute.

This is not to say that Martens' views, or for that matter his personality, went uncontested – on the contrary, one is bound to say. If Martens was highly influential among his peers, this was, as many contemporaries would argue, as likely on account of his assertiveness, powers of persuasion and domineering character as by grace of his refined thought or subtle diplomacy. Scholars never failed to point out inconsistencies in his works. The gist of his thought and the drive of his tenets were often found confusing, to the point of compromising his position, as was the case notably with his interpretation of arbitration as a mechanism of peace, rather than an instrument of law. While lawyers often labelled him as first and foremost a politician, diplomats on their part took him for a representative of that suspect group of newcomers and intruders called international lawyers. Martens' clashes and polemics with luminaries such as Rui Barboza, John Westlake, or Bulmerinck were notorious.

However, no doubt about it, for all his eventual shortcomings, Friedrich Martens was one of the most influential men of his day and age, who truly made a difference. At the end of the day, Martens, more than most of his colleagues, knew how to bring ideas from the domain of pure academic speculation to bear on the sphere of down-to-earth politics. There is no coincidence if Martens, for years on end, was considered the most likely recipient of the Nobel Peace Prize. Martens' origins, to be sure, were in Estonia; his career was made at St. Petersburg; yet his indelible imprint was made in The Hague. It is The Hague that, in the long run, profited most from this rare talent.

To his contemporaries Martens' reputation hinged on three issues: his advocacy of international arbitration; his crusade for implementing humanitarian concepts, epitomised in the famous "Martens Clause"; finally, his pivotal role in creating *L'Oeuvre de la Haye* or "The Hague Tradition", first, by heralding the concept of a Permanent Court of Arbitration (PCA), secondly by luring Carnegie into bestowing a Court House to serve this PCA – the venue which today stands out as the icon of International The Hague: the Peace Palace.

Meanwhile, the reception of Martens' character and intellectual legacy over the past century has been less than benign. For this, there are various reasons. The world as Martens had known it came to an abrupt end in the cataclysm of World War I. All optimism that had clung to the idea of arbitration as escutcheon of the weak and as panacea to help ban war as a mechanism of national policy was swept away in the maelstrom of Verdun and the Somme.

All former promise of the all too non-committal PCA had been belied. For four devastating years all concepts of humanitarian relief enshrined in the 1899 and notably the 1907 Hague Conventions were trodden underfoot by all belligerents indiscriminately. The very notions of “public conscience”, “laws of humanity” and “civilised nations”, the legacy of a century that was virtually encapsulated in Martens’ famous Clause, had been put to shame by the nations. Martens’ championship of these tenets seemed all but refuted by history.

The American President who, in 1919, wrought a new beginning from the wreckage hated lawyers with a vengeance and keenly perceived the inadequacy of the pre-war Hague System. Woodrow Wilson institutionalized the idea of congress diplomacy in his essentially political brainchild of the League of Nations. If, at that juncture, the Hague Tradition was salvaged at all, it was not thanks to the Netherlands. That nation had discredited itself in the eyes of the world by its profitable neutrality and by giving shelter to the foremost agent of crime, *der Kaiser*, in flagrant violation of the old adage *dedere aut iudicare*. It was Martens’ co-militant Léon Bourgeois, the French politician, who urged Wilson to reconsider and redirect the tradition of voluntary arbitration towards compulsive jurisdiction by installing a permanent judiciary along the lines staunchly advocated by Martens in 1907. Still, the failure of the mechanism of arbitration and the inconsequential humanitarian codes had inevitably affected the reputation of their foremost protagonist. The *décomfiture* of the pre-war Hague System likewise brought the name of her champion into disrepute.

And there was more to it. At home, in Russia, the Revolution made short shrift with all Romanov ideology. In Moscow, Martens was dismissed as a Czarist Old Hand and reactionary opportunist. During the interbellum period he was perfectly ignored by Communist legal literature. Yet the worst was still to come. In 1949, in the opening years of the Cold War, the *American Journal of International Law* published a most incriminating article accusing Martens of having mishandled his umpireship of the 1899 *Orinoco* case by intimidating the members of its arbitration panel into sharing his views. In 1952, no lesser authority than Arthur Nussbaum rendered a devastating verdict on Martens as the apologist of cynical Russian expansionism and the advocate of political expediency, whose writings were invariably suffering from distortions of facts and inveterate bias, and whose grandiloquent but insincere rhetoric put the law to shame.

Coming from this high authority, these allegations were hard to ignore – or die. It was only in the decade leading up to the centenary of Martens’ finest hour, the 1899 Hague Peace Conference, that authors like Pustogarov and

Butler put these mostly unfounded critics in perspective and Martens back into focus. A great help in that recantation was the revival of the mechanism of arbitration itself, the new boost of the PCA, and the increasing reference by the Hague international benches to the Martens Clause, that “elusive gem of diplomacy” which, with the rise of the Hague international criminal tribunals in the mid-1990s, soon reached the status of *mantra* among judges. In 1999, Martens’ repute as *auctor intellectualis* of both PCA and Peace Palace was vindicated with the unveiling of his bust in Carnegie’s Temple. For, no use denying, in the material sphere, no single man, with the possible exceptions of Tobias Asser or Léon Bourgeois, can be deemed to have been more instrumental in creating *L’Oeuvre de la Haye*.

My intention in having the privilege of addressing you in this Fourth Martens Memorial Lecture, is not to lay stress on the above-mentioned material element, which I have discussed in various writings. Rather, I will try and put Martens’ views on the future of international society into perspective by illustrating the problems that were facing that society and exploring the available remedies. There is no denying that the way international relations were to develop in the decades following Martens’ demise varied in many respects from the way Martens had anticipated or hoped for. With the hindsight of a century, however, it might just be that this weather-beaten diplomat and accomplished lawyer, in proposing his alternative views, did have a point which to our benefit we may take at heart even today. Therefore, let us first recapitulate the genesis and gist of Martens’ views.

2. A Career in the Making

Martens made his career against all odds, one might say. His span of life opened dramatically when, raised in German Lutheran surroundings in Pernov, he became an orphan at nine. The boy who was born in 1845, a single month after Hugo Treffner, and might have become a leading light in the Estonian national movement, instead found shelter with the Lutheran Church gymnasium in St. Petersburg, there to witness from close quarters the social upheaval and revolt following Alexander II’s famous manifesto. To Martens, this Czar would forever remain the epitome of the enlightened ruler. Later on, in his capacity of member of the Privy Council, Martens vainly sought to instil Alexander’s concepts of social reform in Nicholas II.

Friedrich’s relatively uneventful years at the St. Petersburg law faculty were capped by his *peregrinatio* to Leipzig, Heidelberg and Vienna. During this year abroad, in 1867–68, the teachings of Caspar Bluntschli and Lorenz von Stein made a lasting mark on his receptive mind, as we will have

occasion to see later on. These two scholars also secured his move towards international law and diplomacy. Back home, in 1869, Martens embarked on a career at the Foreign Ministry. In all, he would serve no less than six foreign ministers, from Gorchakov to Witte, and help shape Russian foreign policy from Brussels 1874 to The Hague 1907. Throughout these decades, Martens attended virtually all major international congresses from San Stefano and Berlin to The Hague 1907, including all Red Cross conferences and Tobias Asser's private international law meetings.

Still, in Martens' own perception, throughout his official career, his humble German-Estonian pedigree remained a severe handicap which forestalled acceptance among elitist aristocratic circles at the Romanov court. It was a setback which even his change of name from Friedrich Fromhold to Fedor Fedorovich could not help repair. The same held good – Martens claimed – for his legal training, which among reactionary diplomats marked him out as a mere technician, a working horse to be applied or ignored at will. Complaints of maltreatment and disrespect abound throughout his life, in spite of his membership of the Privy Council ever since 1881. In this, we have to take into account that his overt ambition as *homo novus* and his reputed zeal and energy made him a willing tool in the hands of easy-going diplomats like Muraviev and the kind.

Be this as it may, Martens' hierarchic downgrading at international conferences was commented on by foreign diplomats as curiously at odds with his superior intellectual standing. At the Hague Conferences most Russian technical delegates could be relied upon, with just a little help from their British or German counterparts, to let themselves lured into the quick-sands of detail and thus miscarry their own propositions. Having no experience whatsoever with parliamentary procedure, Russian diplomats, even of the calibre of De Staal (1899) or De Nelidov (1907) often enough found themselves perfectly at a loss in the international arena. As it is, Martens' assets for his superiors were indeed numerous. His command of foreign languages was unprecedented, his learning, expertise in the history of diplomacy and command of facts and figures were unparalleled, while his willpower, domineering presence and eloquence never failed to impress his audience.

It was a major disillusion in the sphere of diplomacy in the early years of his career that was to remain of lasting impact on Martens' intellectual outlook. In appreciating this, one has to consider that, throughout his career, Martens expressed sincere pride in the Russian tradition of humanitarian law. At The Hague, he never felt tired – indeed to the amusement of foreign observers – extolling the virtues of Czarina Catharina the Great, who in his perception had been first to formulate the rights and obligations of neutrals;

of Czar Alexander I's policy of peace in the Napoleonic Wars; or of the merits of Alexander II (the "Liberator" and his life-long model) in launching the St. Petersburg Declaration. Against this backdrop, Martens in 1874, at Brussels, seconded Baron Jomini into drafting a Declaration meant to put a halt to endless reprisals and protect civilians from the worst consequences of war. The obstinacy of British resistance on that occasion, which precluded ratification of the Brussels Declaration, turned Martens into a life-long and overzealous missionary of the cause of humanitarianism. To this personal commitment attest his steadfast advocacy of these principles from the San Stefano and Berlin conferences, which concluded the Crimean War, to his presidency of the Second Commission at The Hague in 1899 and the Fourth Commission in 1907.

The same year, 1874, a crucial juncture in his life, saw Martens' election to that selected panel of scholars who constituted the *Institut de droit international*, founded in Ghent the previous year. At these informal gatherings, which did much to develop and test Martens' ideas and tenets, he made the acquaintance of that remarkable generation of lawyers who, within a matter of decades, would overhaul the tradition of Austin's "command" law, thus to develop the discipline of international law as we know it. It was a quite remarkable innovating process indeed, instigated by men like Mancini, Bluntschli, Rolin-Jacquemyns and Asser, the same men who, a mere five years before, had initiated the first proper journal in the field, the *Revue de droit international et de législation comparée*. At the heart of this journal, as its title duly intimates, was the widely felt need for coordination and integration of national legislative traditions, thus to cope with the demands of the Industrial Revolution and transboundary commerce. The agreements on the legal regimes of Rhine and Danube were among the first signal successes of these scholars, who, often enough, were to occupy the first chairs of international law in their home countries.

From early on, however, the *membres* also addressed other topical issues such as humanitarian thought or arbitral procedure. In this, they fought an uphill battle for recognition against the conservative legal departments of foreign ministries. In the quest for help against these reactionary bulwarks of diplomacy, they found ready allies in like-minded parliamentarians and pacifists. Actually, it was the cross-fertilization of these currents, spearheaded by the *Institut*, the Interparliamentary Union and the International Peace Bureau which, towards the end of the century and on account of massive conferences, scores of reports and hosts of publications, made these innovating views, often referred to by the generic title of "internationalism", *salon-fähig*, and an effective counterpoise against the vibrant nationalism and jingoism

of the period. In many respects, the 1899 and 1907 Hague Conferences were the zenith of these aspirations and the intellectual legacy of this generation.

Friedrich Martens felt very much at home in these circles, where over the years he came to cherish many friends. In 1880 he was on the small committee that met at Bluntschli's house in Heidelberg to finalize Moynier's draft of a code on the laws of war, from which the celebrated 1888 Oxford Manual was developed. He was a steadfast member of annual meetings, submitted reports on such topical issues as the Suez Canal, consular procedure, the slave trade, international waterways and the concept of an International Bureau, and twice, in 1885 and 1894, acted as vice-president of the *Institut*. This in itself is fairly remarkable, given his upbringing and legal training within a climate of strictest absolutism and autocracy. By the same token, contemporary scholars such as Westlake, Holland, or Lammasch often expressed reservations with regard to Martens' contributions to the *Revue* and what they claimed to be his apology of Russian foreign policy, notably its expansionism in the Balkan, Persian Gulf and Asia. In now turning to assessing Martens' views on the law, we therefore do well to appreciate his *status aparte* among his peers.

3. Martens' Views on the Law

At St. Petersburg, Martens started out as a teacher of constitutional law. However, starting from 1871 he gradually replaced the fragile Ivanovski at the chair of international law, which he would officially occupy for a full three decades (1876–1905). From the start, his approach was provocatively innovative. In many ways, Martens may count as the founder of the St. Petersburg school of international law. In his view, it was diplomatic practice which, more than anything else, rendered a legal structure to the international arena. Appreciating the role of national tradition, Martens embarked on a lifetime project to compile a comprehensive survey of all treaties concluded by Russia from Westphalia (1648) onwards. The 15 volumes, published from 1874–1909, stand out as a real encyclopaedia of Russian foreign relations and the counterpart to the German collection compiled by his namesake (Georg Friedrich) Martens. In 1880, Martens co-founded the Russian Association of International Law.

The impact of his contacts abroad became first known to the world at large with the publication of his two-volume *The Contemporary International Law of the Civilized Nations*, which appeared in Russian in 1882/3. The work was soon translated into German and French – and subsequently into Serbian, Persian, Chinese and Japanese, or, as opponents subtly pointed out, the

languages of the non-civilized nations, thus to aptly export Russian foreign policy. The manual was never uncontroversial, but was remarkable in many ways. Undisputed was its superb historical introduction, which distinguished three phases of development in the history of international law: the pre-Westphalian natural law period (–1648); the pre-Vienna age of naïve positivism (–1815); finally, the modern age of synthesis (1815–).

Martens' philosophical position at this juncture was a far cry from utopianism. He categorically rejected Kant's proposition of the natural historical process towards perpetual peace. From the sobering observation of the relations of the nations over the centuries, the endless contradictions and inconsistencies, the opportunism and *ad hoc* remedies, Martens had concluded upon the innate, unequivocal status of conflict and dispute in the international arena and the inadequacy of all speculative theory. Diplomacy, he felt, was the key to the riddle. To that extent at least he made himself known as a positivist *pur sang*. Also, the State's autonomy and territoriality he deemed sacrosanct and military intervention he held for unacceptable, within the brotherhood of "civilised nations" that is: the interference with the domestic affairs of barbaric realms, for instance with a view to forestalling the persecution of Christians, he deemed perfectly legitimate.

On the other hand, Martens insisted that modern international exchange and communications of the Industrial Era made compliance, self-constraint and consensus imperative. As he saw it, the imposing of the Rule of Law was a prerequisite to the future of international society. Conflict and excesses had to be anticipated through international organization and regulated through codification, arbitral procedure and humanitarian concepts. Remarkably enough, at this early stage, he still dismissed the call for international tribunals as chasing moonbeams. Nor did he fall in with the prevailing cry for World Federalism or a United States of Europe. His major objection to these concepts concerned their unbalancing repercussions on the international society. Throughout his career, Martens, being the child of his age and of a revolt-ridden empire, urgently voiced his anxiety for social upheaval. He envisaged the future of Europe in a free alliance of autonomous State-entities. The growth of international administration – which in itself he welcomed, indeed took for an unstoppable process – should, in his perception, be implemented in a gradual process spurred by international conferences and a progressive network of international agencies on a voluntary basis.

Highly intriguing were his views with regard to the nature and identity of the State and the obligations to be imposed on it. The State entity, in his perception, was not a national but an essentially cultural concept. Its

policy and constitution were to reflect the people's shared social norms, values and ideals. Its *raison d'être* was the propagation of human rights and self-determination in precluding Hobbesian and Darwinian powerplay. In his perception, a State's level of "civilisation" was actually best deduced from its success in warranting the legal rights of the individual. With the multinational Austrian Empire at jeopardy at the hand of (Russia's backing of) Pan-Slavism, these were noteworthy propositions to say the least.

No less intriguing were the views Martens exposed in 1883 with regard to the interplay between the domestic and international spheres. Insisting on the normative value of organic historical processes, he made himself known as the outspoken dualist in categorically dismissing any parallelism of the two spheres on account of their independent and incomparable processes of genesis. By the same token, a nation's cultural advancement, as he saw it, was measured with respect to its openness to international trade and commerce. In much the same way, the ultimate criterion from which to read its status in international law was the role it allotted to human rights.

Meanwhile, widely criticised was the work's outdated structure, based on Grotius' dichotomy of the laws of war and peace rather than on the contemporary dichotomy of formal and material sources of law. More pertinent, the work's basic concept was felt to be neither Russian nor inherent to international law *in stricto sensu*, but rather to have been borrowed from the concept of *Verwaltungsrecht* as advocated by his teachers at Heidelberg and Vienna, Bluntschli and Von Stein. To that extent, the very title of Martens' work, in its reference to "civilised nations", was tale-telling.

The idea itself had first been coined by Bluntschli in his *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (1868). The work was an ardent plea on behalf of the historic role and sacred duty of the European nations to guide the non-Western world towards a higher level of civilization. In a gradual process, the normative canon of customs and legal norms traditionally prevailing within the cultural and religious cauldron of the European commonwealth should be expanded worldwide. As, from 1800 onwards, this legal sphere gradually had come to embrace the Americas as well, its former label "European" had gradually been replaced with "Christian". Subsequently, the entrance, at least in formal terms, of the Ottoman Empire into the privileged circle of the European Concert at the 1856 Paris Treaty, in turn outdated this term Christian, which was then replaced with "civilised". This concept duly reflected not just the generally professed European superiority in upholding international legal norms but likewise their independence from all religious connotations. In 1884 James Lorimer divided the world into a *humanité civilisée, à demi barbare, et sauvage*. Only

a decade later purely legal norms, rather than cultural, were first laid down as criteria for a nation's entrance in the *Völkerrechtsgemeinschaft* and for its verification as a subject and sovereign actor of international law. By 1905 Oppenheim would complete this process in identifying "civilisation" with the capacity to understand and act in conformity with the principles of the Law of Nations.

Around 1880, Martens clearly was still struggling with the concept, dropping the reference to "civilised nations" in the French translation, referring to "*nations civilisées ou chrétiennes*" in the *Préface*, and mirroring his definition of the Society of Nations after the criteria he had laid down for verification of the State itself: "*die Gemeinsamkeit der sozialen, culturellen und rechtlichen Interessen der durch sie verbundenen civilisirten Nationen*", as the German edition read. In his 1901 *La paix et la guerre* he refers to *nations civilisées* and *le monde civilisé* on every second page. To Martens, as with Bluntschli, "civilised" still had strong cultural connotations: "*das moderne Völkerrecht ist ein Product des Culturlebens und Rechtsbewusstseins der Nationen europäischer Civilisation*", he wrote in 1883. Even religious concepts he did not rule out entirely, witness his exclusion of the Ottoman Empire on account of the *entwicklungshemmende* doctrine of the Islam. As against Bluntschli's *edler und erhabener Kosmopolitismus*, however, and less idealistic, Martens excluded the non-civilised nations from the sphere of positive international law. Their inclusion, he held, would violate the legal principle of reciprocity and thereby devoid the law of all practical value. It was satisfied with these views that Martens entered the 1899 Hague debate.

4. The 1899 Hague Peace Conference

The origin of the Peace Conference, its rationale and its location have always invited much speculation. Let us open our discussion by stating that, on account of its few palpable results in the short-term, the long-term impact of the Conference (and notably of its successor of 1907) in opening the International Era has often been grossly underestimated. Again, that the initiative was a very sensible move indeed, and the later abuse of the idea regrettable but wholly in the line of power politics; finally, that its programme was a most ingenious compromise on Martens' part and that the location, again Martens' choice, was a haven of last resort. Let us briefly recapitulate the story.

Half a century of durable peace in Western Europe after the Napoleonic Wars ended abruptly with the Franco-Prussian clash of 1870 which, after Napoleon III's earlier aspirations in the Crimea and his Mexican adventure in

the previous decade, clearly belied his claims of being the Napoleon of Peace. The foolish invasion of Germany under the slightest of pretences undid centuries of successful French diplomacy to forestall German Unification. The proclamation of the German Empire at Versailles in 1871 left France crippled and mentally disoriented. It was only thanks to Bismarck's superior diplomacy that, in the next two decades, peace was maintained and tension, notably due to French calls for *revanche*, canalized into a chain of skirmishes, mostly in the colonial sphere and on African territory. However, with the installing of the impetuous Wilhelm II in Berlin in 1888 and his dropping of the almighty *Reichskanzler* two years later, Bismarck's ingenious policy to balance the powerblocks soon gave way to a dangerous powerplay of the Triple and Dual Alliances (Germany, Austria-Hungary, Italy vs. France and Russia) that left Europe a powder keg at the whim of despots who were unwisely charmed by the expanding military machinery which was the boast of the Industrial Age.

It was in this context that Lord Salisbury, in a famous speech in the London Guild Hall, called upon Czar Alexander III, the then Head of Christianity, to invite the nations to a Conference to discuss the fragile political balance, alarming armaments race, and wide-spread social turmoil in Europe. Forestalled by the Czar's untimely death, it was this Russian "claim" that was forwarded by Alexander's far less authoritative successor Nicholas II a decade later in his cryptic *Rescript* of summer 1898, in which he invited the nations to a disarmament conference in St. Petersburg.

Foreign observers were quick to pierce the alleged lofty notions of this move. Cartoonists of the period invariably presented Russia as an octopus spreading its tentacles all over the globe. And although this was doing injustice to the precision of the master plan of Russia's foreign policy, the overall tenor of its overt expansionism was never in doubt. Modern research has long verified the move for a Peace Conference as a clever bid for a military moratorium, thus to better implement Russia's ambitious schemes for upgrading the huge Empire's dramatic infrastructure. Needless to say, these investments, in which the Trans-Siberian Railway and the linking of Baltic and Bosphorus through a chain of canals featured prominently, first and foremost served military and economic purposes, as the subsequent Russo-Japanese war would readily prove.

However, unwisely hailed by the media and pacifists as a World Peace Conference, cabinets were hesitant to obstruct the project on principle. Still, they were adamant in declining St. Petersburg as the proposed venue. From the ensuing deadlock among the major powers resulted the invitation to smaller, mostly neutral nations, to serve as host. Once Switzerland,

Scandinavia and Belgium had been dismissed – on account of anarchism, lack of interest, and the stalemate between King and Parliament respectively – it was Martens, who first drew his superiors' attention to The Hague, the somnolent political centre of a then backwards nation. In advocating the unlikely venue, he insisted on his intimate friend Tobias Asser's talents of organization and diplomacy, as exemplified in his successful series of *Conférences de La Haye* that had first been launched in 1893. It was a masterstroke on Martens' part, if not one that was duly appreciated in governmental circles at The Hague, where anxiety to put the nation's time-honoured neutrality at risk prevailed.

Subsequently, Martens was lured into accepting the organization of the Conference programme. Although the solemn promises given at the time were never to come true (the position as his nation's First Delegate at the Conference and a subsequent ambassadorship in The Hague), Martens fully exploited the free hand given to him to extrapolate the doomed disarmament scenario into an agenda which foresaw a comprehensive debate on the rules and customs of war and addressed the institutionalization of the concept of arbitration, in proposing to turn the instrument into a compulsory mechanism and launch a first ever permanent arbitration tribunal. In this way, Martens not only put on the agenda the two most topical issues of the day in circles of the *Institut* and the Interparliamentary Union, but definitely served his own hobby-horses as well. More than anything, The Hague 1899 was to be Martens' sweet revenge for Brussels 1874. In personally chairing the Second Commission he made perfectly sure that no second failure was to occur.

Again, in the course of the previous decade, Martens had won himself a reputation as arbitrator. He had served on the panels of the 1891 *Newfoundland* dispute, the 1893 *Bering Sea* case, and the 1895 *Costa Rica Packet* dispute. Even during the Hague Conference he travelled back and forth to Paris to preside over the panel in the *Orinoco* case (1897–99). Martens' prominence in this domain was perhaps best exemplified by the great mural occasioned by this last case: *Les grands artisans de l'arbitrage*, a glorious survey of 106 historical figures, the world-wide advocates of arbitration through the centuries, produced in 1897 by a French painter. The ambitious mural was reminiscent of Raphael's *School of Athens* in the Vatican (1509). Recently lost by a fire in its Moscow museum, the mural in its centre presented the dedicatee, Czar Alexander III, flanked by Count Orloff and – Feodor Martens. Martens, in short, was from first to last at the heart of the Conference. His pioneering initiatives and successes at conciliation and mediation proved pivotal to the success of the debate and made his well-deserved name in the world.

5. The Martens Clause

At The Hague, Martens' way of steering the 1874 Brussels Declaration virtually unscathed through a prolonged debate was acclaimed by the plenary with a thunderous applause. The Hague Convention was the first stepping-stone along that winding road that would bring the nations to ICC Headquarters a full century later. The first historic moment along that path took place on 20 June 1899, when Martens single-handedly managed to forestall imminent crisis by formulating his conciliatory "Clause", which has not stopped to raise debate ever since:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among the civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

To some the formula stands out as a veritable mantra, to others as just a convenient safety-valve with no palpable purport and to be invoked at no cost. By some the Clause is hailed as a paramount interpretative guideline, bearing a veritable norm-creating character, a historic juncture in the history of the discipline. By others, again, it is downgraded as a formula of, possibly, some moral value, yet devoid of any proper legal impact.

Over the decades, the Clause's constituting elements of *usages établis*, *nations civilisées*, *lois de l'humanité* and *conscience publique* have been interpreted by scholars from a variety of disciplines. The outcome of this in-depth research has been far from unequivocal. There would be nothing dramatic here, if not that a durable lack of consistency in terms of reference in State practice, or in the rulings by some of the highest judicial organs in the world, may eventually turn the Clause into a less innocent instrument. Against this backdrop, reference to the historical context may perhaps be of some interest, if only to counterpoise the Clause's forthright dismissal as a "diplomatic gimmick", intrinsically, if not deliberately "vague", "evasive", "ambiguous", or at least "very loosely worded", in short as "pie in the sky", as one prominent debater has coined it. In this author's perception, nothing could have run more against Martens' intentions – or interests.

The Clause was formulated in the course of a vexed debate within the body of the Second Commission's second sub-commission (which was chaired by Martens himself) concerning the status of belligerents and the reciprocal rights and duties of invading forces *vis-à-vis* defending levies and

the population. These issues were encapsulated in the later Articles 1 and 2 of the Hague Convention. They were a well-known bone of contention, for these were the very articles which had blocked ratification in Brussels back in 1874. At The Hague, their discussion had therefore been postponed and reserved to the very last. The object of the articles, imbued with the best of humanitarian considerations, was to reduce the evils of war for the harmless population of invaded countries. To minimize civil unrest the invaded country was advised to acknowledge *in limine* all rights and claims advanced by the invader, while its population was ordered to abstain from participating in hostilities.

It was Auguste Beernaert, first delegate on behalf of the neutral Belgium, who right from the outset declared himself vehemently opposed to the adoption of the articles, which he felt ran to the exclusive benefit of the major powers when invading small ones. As Beernaert advanced, being compelled by Convention to automatic compliance with the law imposed by the invading army, for the sake of upholding civil order and in order to prevent unnecessary suffering, was identical to acknowledging as *legal right* what was a mere *fact of force*. Beernaert was prepared to fall in with dispositions which accepted the *fact* of conquest – but not the *right* of the conqueror. He wished to see specific obligations drawn up to bind invading armies, so as to warrant moderation on their part – or otherwise leave the rights of the defendant untouched. The proposed articles, as he read them, were militating against all moral notions and the very idea of patriotism. He preferred to leave the matter to

the domain of the law of nations, however vague it may be. ... There are certain points which cannot be the subject of a convention and which it would be better to leave, as at present, under the governance of that tacit and common law which arises from the principles of the law of nations and ... that incessant progress of ideas.

It was a booby-trap undermining the whole undertaking: the Brussels nightmare revived by the Belgians of all people! Martens' reply came immediate. It was to the point, consistent, and eminently eloquent, and it can be summed up under the heading "*Cui bono?*" Who were the ones to profit from leaving these issues

in a vague state and in the exclusive domain of the law of nations? ... Do the weak become stronger because the duties of the strong are not defined? Do the strong become weaker because their rights are specially defined and consequently limited? I do not think so. In the midst of combat the more noble sentiments of the human heart very often remain a closed book.

If there were laws of war, Martens argued, one must determine them. Commanders and armies should be given very strict instructions. This was what the proposed Convention was all about.

One repetitive aspect of Martens' speech should be stressed here: "it would be a pity to leave in a vague condition"; "leaving utter vagueness for all these questions"; "in a state of vagueness and in the domain of the law of nations"; "to leave uncertainty hovering over these questions". Martens' *peroratio* read: "It is for you to answer the question: to whom will doubt and uncertainty be of advantage, to the weak or to the strong?" Vagueness was indeed the last thing Martens had in mind. Nor was his intervention meant to reach a futile compromise.

Then a new bomb was planted by the British delegate, Sir John Ardagh. As in 1874 (he observed laconically) his government was prepared to accept the range of articles as a non-committal set of instructions, to be applied, modified, or abandoned at discretion, but the United Kingdom felt unwilling to bind itself to a Convention. Martens must have seen Lord Derby wink from the grave, the British delegate who, in 1874, had been instructed not to commit himself at the conference table and had stuck to that literally by not uttering a single word for days on end. Once more, Martens personally intervened. There could be no question of non-commitment or modification at will. Regulations between contracting and acceding parties needed to be uniform and binding. It was on this occasion that he made his famous comparison with "a mutual insurance association" on terms which were reciprocally binding. "None of the draft articles sanctions the disasters of war which do and always will exist. What the provisions have in view is to bear relief to peaceful and unarmed populations during the calamities of war."

Thus, two perfectly irreconcilable viewpoints were advanced. Martens despaired – momentarily at least. It all but seemed as if there was no alternative left but to leave "to the progress of civilization and to the humanitarian sentiments of heads of armies the task of looking after the interests of the inhabitants." But then, on 20 June, he came up with a formal declaration. He stressed the extreme importance of the articles' "sublime objective" of embodying the sacred duty of governments to diminish the evils and calamities of war. If the right of self-defence of the population was sacred, so was the duty of governments not to sacrifice unnecessary victims in the interest of war. For this reason the forces of the defence should be organised and disciplined. The Brussels code was meant to afford the population more guarantees, not to set limits to patriotism. Heroes were not created by codes, their only code was their self-abnegation, they were in fact above the code. Martens then proposed to have inserted into the *procès-verbal* a Declaration

to the following effect. The Conference was unanimous in advocating the definition and regulation of the usages of war and in that spirit had adopted a great number of provisions. Still, a comprehensive code was as yet unattainable. On the other hand, the Conference did not wish to leave eventualities not anticipated or covered by the written code to the discretion of the commanders of armies. Therefore – followed the “Clause”.

Beernaert immediately accepted the proposition with gusto.

To-morrow as today the rights of the victor, far from being unlimited, will be restricted by the laws of the universal conscience, and no nation, no general would dare violate them, for he would thereby place himself under the ban of the civilized nations.

On 27 July Martens’ Declaration was accepted by the Plenary of the Conference as a *peroratio* to the Preamble of the Convention. On 20 June Martens wrote in his diary: “I myself did not expect such a brilliant success. The Brussels Declaration – my beloved child – has been adopted.” In an article in the *North American Review* of November 1899 he stated: “The treaty on the laws and customs of war will certainly be as notable as the treaty on arbitration.”

The Clause was not a “diplomatic gimmick” and only to a very limited extent a compromise. It did not affect the Convention and Regulations, but offered the maximum of legal warrant subsidiary to these. Bearing a distinct legal basis and character, the Clause filled a vacuum between international humanitarian law as codified in the Convention and Regulations, and the arbitrariness of the “victor’s law”. The Clause was nothing new in itself, but simply recalled well-established principles of international law. It is, for that matter, extremely unlikely that a body of lawyers including prominent *membres* of the *Institut* (Lammasch, Nigra, Rolin, Renault, Descamps, Stancioff) who through their efforts, notably the *Oxford Manual*, were well versed in the substance-matter, would have accepted the introduction of “new sources of law” without any comment. Again, Beernaert on the spot accepted the Clause as relying on the solid basis of well-established principles. Finally, Martens on his part never claimed the Clause as “his own”, neither in later publications nor in his private correspondence.

6. Arbitration

Around the turn of the century, Martens, along with Lammasch and Renault, was among the figures most in demand with nations in search of appeasing disputes in an amicable way. Apart from the cases recorded above, Martens

was invited to act as arbitrator or umpire on many other occasions, in proceedings which either did not materialize or in which he was prevented from assisting by distinct orders of his superiors. His decade of experience with arbitration panels made him a generally acknowledged authority in the scholarly debate at The Hague on the constitution of the Court of Arbitration. This is not to say that he represented the *communis opinio* among lawyers, far from it. Actually, it is on these issues that he incurred the most heated opposition during both Peace Conferences. Still, he expressed his views with admirable lucidity and pertinence.

What Martens had noticed over the past decade was a stealthy “relapse” into that old tradition of submitting disputes not to arbitration panels, but to heads of state, or the Holy See. Thus, in acknowledging defeat in the Italian political arena, Pope Leo XIII had, in past years, successfully mustered all his allies to recapture moral prestige precisely through this mechanism. Martens was categorically opposed to any such relapse. Heads of State were *ipso facto* “under no control and above all contestation”, and therefore unsuited as arbitrators. Martens’ primary goal, therefore, was to check this unwelcome development and bend procedure back from the political towards the legal sphere. However, as he knew all too well, for all the legal niceties, with governments it was *quid pro quo*. The concept of arbitration was to succeed only if it was tailor-made to the stern reality of international relations. Martens’ absolute priority was to offer governments the guarantees of reliability and inviolability of the mechanism. Arbitration should settle disputes for once and for all, and governments had to be sure to rely on this. This made him insist on the finality of awards, and militate against the concept of revision.

For much similar reasons he entertained reservations against the prevailing view among his colleagues of mandatory publication of the substantiation and of the train of reasoning which had brought about the award, including the objections raised by dissenting arbitrators. In Martens’ view, this demand severely impaired the latitude of arbitrators and consequently hamper compromise. Arbitrators, he held, for all their legal learning, also represented Governments. They should protect their nation’s honour and prestige, and not have to feel embarrassed on their return home. In this, Martens’ views may well have been inspired by his own precarious position at home. The same held good, probably, for his preference to have the Peace Conference itself proceed *à huis clos*. Exposure to media attendance would restrain the latitude of delegates, make them hesitant to speak up, and would inevitably affect the results. Many were the lawyers who found Martens’ views hard to swallow. Yet in all of these considerations, Martens definitely

had a point. His approach attests to the weather-beaten diplomat, rather than the legal technician. Experience had made him very pragmatic, a man who was not fooled by learning into losing sight of reality.

Meanwhile, to Martens, the two major objectives at stake at the Hague with regard to arbitration, *viz.* the constitution of a Court of Arbitration and to render the mechanism obligatory, were two parts of the same issue – just like, in his opinion, the obligatory submittal of disputes to a Court and the binding verdict were flip-sides of the same medal. In advocating the obligatory element, Martens found himself summarily checked by an adamant German *Nein* – with other opposing nations gratefully taking shelter behind this formidable shield. On the other hand, the success of the Convention which secured the institution of the Permanent Court of Arbitration was hailed by Martens as a major triumph wrung from prolonged trial. To be sure, he saw the many imperfections of the institution and clearly took the Convention for a first step. As we will see later on, in 1907 he confidently reopened the debate.

At The Hague in 1899, Martens successfully launched yet another brain-child of his, the concept of Commissions of Inquiry. He catapulted the mechanism into the Committee, in his inimitable way, as a safety-valve in emergency situations, to help cool-off emotions by factual examination. The reactions to this proposition varied to the extreme. Some saw it as yet another tool at the hand of the major powers to interfere with the domestic affairs of smaller nations. Still, in this arena Martens obtained an unqualified victory which, much to the surprise of sceptical commentators, soon afterwards proved justified by events following the *Dogger Bank* incident (1904). In his final evaluation, Martens deemed his mission at The Hague an almost unqualified success. He trusted 1899 to be the opening move, the first stage in a series of encounters.

7. The Permanent Court of Arbitration

In 1900, Martens, predictably, was among the first “Members” to be put on the list of the PCA. Indeed, he was elected on the panel of the first two cases submitted to that Court, the *Pious Fund* case of 1902 and the *Preferential Claims* case of 1904. His reputation as an arbitrator was never questioned in his day and age. As stipulated above, all this changed in 1949 with the publication in the *American Journal* of incriminating recollections concerning his chairmanship of the 1899 *Orinoco* dispute. With hindsight, his policy at the time seems very plausible – from his perspective, that is. The *Orinoco* case concerned a boundary dispute that had to be interpreted on the basis

of controversial and hardly verifiable 16th-century maps. Faced with four arbitrators who submitted distinctly different propositions, Martens availed himself of his prerogative as umpire to draw up a line which he felt did justice to both parties.

Whether he based his proposition on legal reasoning, diplomatic experience, or common sense will forever remain debatable. The fact is that, at the time, parties showed themselves extremely pleased with the outcome. So much for certain, Martens will have aimed at attaining a definite settlement of the dispute and at securing consensus. Likewise, the lack of substantiation of the *Orinoco* award, much contested by later scholars, may seem curious to us as running contrary to prevailing practice. However, as Martens himself was to point out during a session in The Hague in 1907, such procedure was well documented. More than this, Martens' position and role in the 1899 case can be easily verified to have been in perfect agreement with the numerous statements on the role of the umpire, the substantiation of the award and the publishing of dissenting opinions which he consistently made during both the 1899 and 1907 Conferences. To that extent at least, it was all well above board. Martens saw the outward radiation of harmony from within the panel as foremost prerequisite for the authority and public acceptance of the award. Again, he urged for legal reasoning not *in abstracto*, but in a political context.

8. The Peace Palace

Much to Martens' distress, the Dutch Government did not incur the risk of investing too deeply in the uncertain undertaking of a first ever international bench. PCA headquarters, established in The Hague city centre, were lodged in fairly modest quarters. On various occasions, Martens in no uncertain terms expressed his discontent with the "utterly inadequate and poorly situated" housing. Now it so happened that, those very months, the American steel tycoon Andrew Carnegie sold out his imperium to Pierpont Morgan and retired from business. The transaction left him the Croesus of his times. In an interview with the English journalist and pacifist William Stead – a prominent member of that colourful coterie of peace apostles that attended the Hague Conference – Carnegie mused on his *Gospel of Wealth*, welcoming any ideas that might help solve his "conundrum" of how to put his amassed wealth to the benefit of the world. Martens, an intimate of Stead, promptly suggested Carnegie's sponsoring a court house with a library of international law to help out the PCA and do justice to the prestige of the institution. It took a while but, with the help of Carnegie's "old shoe", Andrew Dickson White, the US first delegate at the Hague Conference, Martens in

the end persuaded Carnegie to invest deeply in appropriate headquarters for the PCA which should also serve as a centre of studies, a symbol of internationalism and venue for future Peace Conferences. In May 1903, in the very weeks Martens took up his task in the Venezuelan *Preferential Claims* case, his efforts bore fruit when Carnegie awarded 1.5 million US dollars for the establishment of his "Temple of Peace".

The next month, a government-steered Dutch Carnegie Foundation embarked on a veritable tale of misery to implement the gift. The project proved not all that popular in the Netherlands. A full eighteen months later, in December 1904, no palpable progress had been made yet. Some fifteen locations in The Hague had been amply considered and dismissed on account of protests from all quarters of Dutch society. At a loss what to do, and with an infuriated Carnegie insisting on having the project transferred to Brussels, the Carnegie Foundation finally settled for contracting a rather questionable spot, introduced a bill to Parliament, and virtually had the Royal Decree passed, when Martens once more visited The Hague to attend a meeting concerning the Geneva Convention on Hospital Ships. Of his own accord Martens went visiting the allocated spot, felt appalled at identifying what he called a perfect swamp, and wrote a characteristic four-page letter in no uncertain terms to the Carnegie Foundation to have the Board retrace its steps. Astonishingly enough, this is what actually happened. A few months later a new bill was passed allocating the Palace to its present spot, with Martens' approval. All this serves merely to illustrate the length of his arm.

In those very weeks the Hull incident took place. Within a matter of months, Martens saw another brainchild of his, that of the International Commissions of Inquiry, gloriously pass a first test. The incident that triggered the inquiry was dramatic enough. In the early phase of the Russo-Japanese War, the Russian Baltic Fleet, on its doomed way to the war theatre in the Pacific, in the pit of night and alarmed by false rumours of Japanese presence in the area, off the coast of Hull erroneously sank a flotilla of English fishing trawlers. British indignation ran high, yet was appeased by a committee of admirals under the auspices of the PCA.

The outcome of this war, for that matter, was just one of the many unsettling events that would irrevocably change global political horizons in the interval between the 1899 and 1907 Hague Peace Conferences. The successful Boer Revolt against British rule in South-Africa, mere months after the Hague peace talks, had been a first token of the waning supremacy of the European colonial powers. The Boxer revolt and the Venezuela incident were soon to follow. Then, Port Arthur, Mukden and Tsushima Straits, and Russia's clean defeat, both in the military and naval spheres, at the hand

of a rising Asian power, perfectly shocked the world. Martens personally attended the humiliating peace talks at Portsmouth which left a bitter tinge.

Meanwhile, in the world of diplomacy an even more unbalancing revolution was taking place when Britain in 1902 abandoned its time-honoured policy of “splendid isolation”, first to enter into alliances with Japan and Italy, then in 1904 to conclude its epochal *Entente Cordiale* with France, which put an end to centuries of rivalry. This reshuffling of power blocs left Germany out in the cold. Its fear of *Einkreisung* triggered the Algeciras incident and, more pertinent, the naval competition with the British that was to cloud political horizons for the next decade.

And then there was this other unstoppable development, the rise to power of the USA. Ever after, in 1898, it had swept the remnants of Spanish power from its hemisphere, the Glorious Young Republic assertively took over command in the New World. When, prompted by the World Fair, the Interparliamentary Union in 1904 for the first time crossed the oceans for its annual meeting, it paid tribute to the rising power in inviting President Roosevelt, much to Russia’s discomfort, to raise a call for a Second Hague Peace Conference. In the end, Roosevelt courteously obliged Russia in formally abandoning the initiative, but the man who rallied the Pan-American movement under his banners, mediated peace between Russia and Japan at Portsmouth, and won the Nobel Peace Prize for it, made it clear to the world that a new era had opened up, in which Europe’s lead went uncontested no longer.

On the eve of the Second Hague Conference, which was postponed twice on account of a Pan-American Conference in 1905 and the Geneva Red Cross Conference of 1906, the unsettling consequences of the above cavalcade of changes manifested themselves in revolt and social uproar worldwide, which put at jeopardy colonial conquests abroad as much as parliamentary traditions at home. In 1906, the world was definitely not a happy place. It was against this backdrop, and with Bloody Sunday, bread revolts and the disbanding of the Douma in the forefront of his mind, that Martens started preparing a sequel to 1899.

9. The Second Hague Conference (1907)

As before, Martens’ task was precarious: he was hampered by lukewarm Petersburg officials, a wavering Czar, a change of Foreign Minister, and opposition to his person. Still, in January 1907, at the Czar’s invitation and full of optimism, he embarked on a European tour of “shuttle diplomacy” to sound out the position of the respective powers with regard to the conference

programme. His personal authority and the nature of his mission warranted official receptions wherever he came. Wilhelm II, Edward VII, the French Prime-Minister, Franz-Joseph and Queen Wilhelmina all received him in personal audience. Criss-crossing Europe, by early February and on his way to Vienna and Rome, he passed The Hague, where he was “fed from morning to night”. Foreign Minister De Beaufort noted that Martens was in good health and spirit, but had definitely gained weight. On his return home, Martens was in for a serious disillusion. He was duped by the Wilhelmstrasse and grinded between “Nicky and Willy”. Personal resentment in St. Petersburg at his international prominence invited obstructionism and caused ever new delays and irritation.

More pertinently, in preceding years the skies over Europe had darkened beyond compare, to completely change the outlook of the prospective debate. With Britain and Germany engaged in a keen naval rivalry, Russia itself, still licking its wounds, was adamant to repair its former prestige and military power and unwilling to entertain any disarmament propositions. On the eve of the Conference, British proposals for arms reduction were wrecked on Russian reservations and a resolute German *Nein*. As a consequence, all peace and disarmament talks were banned from the Conference beforehand. It was the upgrading of the 1899 Convention on the Laws and Customs of War, and notably its extension to the naval sphere, precisely (and most embarrassingly to Russia) in the wake of gross humanitarian trespassing in the Russo-Japanese War, which dictated the agenda, along with the objective to give the PCA claws and teeth.

In June, at the opening of the Conference, Martens travelled to The Hague outwardly still full of expectations. This in itself was an achievement. At 62, a veteran diplomat, legal luminary, and radiating authority, he had once more swallowed a distinct humiliation. To the embarrassment of all and sundry he had again been passed over as head of his nation’s delegation in favour of Russia’s ambassador in Paris, De Nelidov, otherwise a gentle and intelligent diplomat. Unperturbedly, Martens took up his duties with all the energy and zeal he was known for. His preoccupation was the presidency of the Fourth Committee on the laws and customs of maritime warfare. It was to be his last bow, and it was not to be an unqualified success.

To start with, the Commission worked under a cloud: German–British rivalry and suspicion, such as with regards to the conversion of merchant-vessels into war-ships, precluded all compromise from day one. However, there was also a personal aspect to it. Within a matter of weeks Martens’ wavering health became apparent. It soon dawned on his intimates that this was no longer the Martens of old. Faced with a deadlock within the Commission,

and all too eager to impose his ideas on the Conference, his failing forces, rheumatism and mental depressions made him irritable. In the months to follow, his impatience started to affect his personal contacts. Also, as was plain to see, the Russian delegation was utterly divided. Charykov consistently undermined Martens' authority. Martens, in turn, had some skirmishes with President De Nelidov and henceforward proceeded on his own authority. In doing so, he ignored susceptibilities of colleagues, introduced ill-prepared propositions, embarrassed delegates with untypical rigidity, entered into fierce polemics with the inflammable Rui Barbosa, and, in the eyes of many, among these the Dutch delegation, mishandled a number of propositions with predictable failure to follow. On 17 July Dutch delegate De Beaufort's diaries refer to his handling an American proposition regarding *contrabande* as a "highly biased presentation" by "the most partial chairman I have ever seen".

Unable to bend matters his way in the Fourth Commission, Martens, one may say, took refuge in the First Commission, which dealt with improving the 1899 Convention on the Peaceful Settlement of Disputes. Intent on succeeding this time in advancing his "hobby horses" which we discussed above, Martens' attendance prompted heated debate in all matters which were so close to his heart: his desire to make the instrument of arbitration obligatory; to turn the PCA into a Standing Court with teeth and claws; to enforce the finality of arbitration awards; and to upgrade the role of Commissions of Inquiry and entwine these into the regular dispute settlement procedure. He fought like a lion, one must grant him that.

As in 1899, Martens repeatedly, and in the most eloquent terms, declared himself a staunch opponent of the concept of revision as contrary to the very idea of arbitration. In reply, Beernaert and the American delegate Choate militated strongly in favour of having the revision formula ready at hand in case new facts emerged or an apparent error on the part of the tribunal came to light. As Choate concluded: "The sole object of arbitration is to do justice", to which Martens replied: "No, its sole object is to settle a dispute – for once and for good." On which Barbosa riposted: "Revision is of the essence in arbitration. Arbitration is a means of peace only because it is an instrument of justice." The stalemate was apparent. To Martens, the instrument, more than anything, was an avenue to settle dispute and secure peace. Revision, in his eyes, would open the gates for politicians to "perpetuate" dispute and would involve endless procedural complications. A much similar discussion on principle was entered with respect to the substantiation of the award and the explicit reference to dissenting opinions of arbitrators.

To Martens, 1899 had been sowing-time. In the intervening years various germs had proven their potential of sprouting. Now he intended to reap.

It was not to be. The major powers, feeling to have been taken unaware in 1899, for all their disagreements, easily agreed on putting strict boundaries to these innovative mechanisms which, for all their intransparencies, were sure to intrude on their sovereignty. A good example was the debate regarding Martens' brainchild, the Commissions of Inquiry, first put to the test in the celebrated *Dogger Bank* incident of October 1904.

Tension had run high those days and it was generally felt that the Commission's intervention had probably precluded war. Still, the incident had clearly demonstrated the twilight-zone of the mechanism. According to many political observers, the Commission had distinctly created anomalies by overstepping its boundaries. Firstly, it had not just inquired as to the facts but also spoken up on issues of responsibility, and had actually apportioned blame. Martens, quick in exploiting this experience, proposed to upgrade the status of the Commissions by insisting on their *duty* of fixing responsibility. It was this idea precisely which the major powers disliked heartily. The more so as the *Dogger Bank* Commission had addressed a dispute which had involved the "honour and vital interests" of States, expressly excluded from its competence by Convention. Again, the "logical" consequences, as Martens held it, to be drawn from this precedent were cleverly probed by him – still, again to no avail. Nor were the nations particularly charmed by Martens' proposition to formally link recourse to the PCA for final settlement of the dispute as the "only natural sequel" to the preliminary establishment of facts by a Commission of Inquiry. At The Hague in 1907, the slightest of references to "obligatory" compromised any issue. The commissions, it was decided, were to operate with a strictly factual mandate without binding verdict or legal consequences to parties. It was clear that the compliance of powers had been stretched to its limits.

It was the same lack of political will on the part of the prominent nations to engage themselves in any form of obligation which, much to Martens' frustration, undermined the debate on the launching of two innovative institutions that were put on the agenda in The Hague in 1907: a truly standing court of arbitration, the so-called Permanent Court of Arbitral Justice, and an International Prize Court. For all the striking achievements of the PCA in preceding years, the shortcomings of its system were felt by many to be actually counter-productive to the development of a solid, consistent body of international law. The institution, at the end of the day, was neither a court nor permanent. Its cases were isolated occurrences, dealt with by different bodies of arbitrators, separated in time and disconnected in substance. This lack of continuity and consistency was felt by its advocates to be the major hindrance to the long-term success of the institution. What was required,

therefore, was a true court warranting permanency of organization, consistency of jurisprudence, and impartiality of arbitrators. As the PCA was an instrument deemed competent to deal with disputes of a judicial nature, such as the interpretation of treaties, anyway, the idea imposed itself of creating a permanent bench, made up of competent lawyers (rather than diplomats) who based their decisions on law, not on bargaining.

To that purpose drafts for a “Court of Arbitral Justice” or a “Judicial Arbitral Court” had been submitted by Russia and the US. What Martens proposed on behalf of Russia amounted essentially to a refurbishing of the PCA. The National Groups would assemble annually in The Hague and from their midst select three judges, who would stay ready at hand at the Bureau that year. The US felt differently. It proposed the supplementing (*not* supplanting) of the PCA with an alternative means of recourse: a true bench of fifteen permanent judges, with nine making a quorum, to be appointed by the Highest Courts of the nations.

The protracted debate on principle resulted in a complete deadlock, and we shall soon see why. Still the importance of this single debate ever between the nations of the world before World War I can never be underestimated. For one thing, debate had now reached the crossroads of advancing the institution from the plane of diplomacy onto that of a genuine judicature. From here, there was no way back, as was generally felt. However, the avenue ahead proved to be strewn with obstacles never anticipated. These were of a technical, procedural, and political nature alike. To start with, some nations raised the sound point that a body of permanent judges invalidated the free right of choice inherent to the idea of arbitration. They called the idea of a World Court – or “International High Court of Justice” as the US had labelled it – a dangerous utopia. Still, in the end, the idea was adopted as basis for discussion.

In the end, it proved that the idea itself to create a bench of seventeen salaried judges and deputy-judges, appointed for terms of twelve years and representing the various judicial systems of the world, met with little opposition. Still, when it came to the criteria for selection and representation of judges, all legal genius was trapped into a *cul-de-sac*. The eight great powers, predictably, claimed permanent representation, but then, so did the small ones, protesting their full equality – not just before the law, but as regards factual, political influence – and this, of course, was a different thing altogether.

In short, with the extension of the Conference towards a veritable world *gremium*, including the rising Asian and Latin-American nations, a new point came to the fore, *viz.* the rivalry between the great and the small. The Brazilian representative Barbosa, leading Latin-American opposition, in

a series of brilliant, elaborate addresses and emotional interventions, adamantly insisted on full equality for all, thus precluding all compromise. For all its possible academic merits, such a formula raised all sorts of problems of pragmatics and logistics. It was proposed to have the small states occupy the nine remaining seats by rotation for periods of one to four years and depending on certain criteria; or to implement a regional assignment; or to have each State cast a vote for a prescribed number of judges; finally, to have each State submit its candidate for a judge and deputy-judge to the Hague Bureau, have the nations vote 15 judges and 15 deputy-judges, and settle draws by lot.

The discussion left delegates with the eerie feeling that, whatever the nature of the future International Court would be, due to the prevalence of politics in the international arena this bench would necessarily be of a different kind altogether from national High Courts. Amidst protest and general confusion, the Conference by resolution withdrew to the position of adopting the creation of the Court as agreed upon in principle, conditional to the solution of the riddle on the selection of judges. Delegates felt they had been a hairbreadth removed from creating a first ever global judicial body, only to find the small powers readier to run the risks of waging war with great powers than bow to them in court ... Martens felt devastated.

At this stage, and for all the flourish of rhetoric, the Standing Court and the Prize Court were not to be, whatever stratagem, fallacy, or sophism this would take the nations. In the long run, however, the 1907 debate would prove far from abortive or, as Bourgeois had predicted: “the tree is blossoming, the harvest will come” for “life precedes the law”. It was to be left to the Killing Fields of Flanders and a new generation to break the deadlock. With the creation of the League of Nations and its two-tiered formula of Council and Assembly, the way was paved for solving the baffling riddle of election procedures. In 1920, the Committee of Jurists that was invited to draw up the statute of the Permanent Court of International Justice (PCIJ), when it assembled in the Peace Palace, found the reports of the 1907 debate an invaluable shortcut to traversing political and procedural minefields. The Committee emerged brandishing a Statute for the PCIJ whose very phraseology, to many veterans like Bourgeois, felt like balm to their souls. It was Bourgeois himself who first coined the word “Statute” in this sphere.

10. Epilogue

Clearly, as a tactician Martens was not at his best in 1907. Did he anticipate that this was to be his last stand and simply lose patience? His pressure on delegates, not just to come to terms, but on *his* terms, backfired on his

prestige. Thus, on 10 October reference was made by De Beaufort to the concluding session of the First Commission on obligatory arbitration and Martens' "clumsiness" in advocating what he presented as a Russian conciliatory proposition. In fact Martens had concocted the idea along with his intimate Léon Bourgeois and the French delegation without ever consulting De Nelidov – or for that matter the German delegation. Much to the fury of Kriege, who observed: "*Wir sind furchtbar gereizt, eine Katastrophe ist sehr nahe.*" On an earlier occasion the German first delegate Marschall von Bieberstein had argued most categorically, that *Libertas* was the cornerstone of arbitration. Martens was forced to withdraw his proposition for lack of support.

This kind of surprise attack was not just a single isolated incident. It concerned a recurrent error of judgement which was typical, it would seem, of Martens' obstinacy in 1907 to secure results at all costs and enforce structural progress in the face of blatant opposition. His proposition with respect to the law of prize laboured from similar defects. The previous year, when attending the Geneva Red Cross Conference in Geneva, Martens had made a much similar counter-productive move in taking delegates unaware with the proposition that all disputes on the interpretation of the Convention were to be submitted automatically to the PCA. The idea was as logical and sensible as it was unacceptable.

It was much the same in 1907 with respect to the Commissions of Inquiry, as one will recall. In case of a stalemate or failure of this mechanism, Martens argued, nations should bind themselves to automatically submit the issue to the PCA. For this reason, the third member of the Commission should be selected from the list of arbitrators kept by the Hague Bureau. Clearly, the praiseworthy objective of this "double tie" as Martens called it, was to enhance the effectiveness of the 1899 Convention. However, his insisting on the "moral duty" of the Conference to comply with his propositions merely caused irritation, and it is hard to decide whether Martens was actually blind for the objections raised or simply wished to have it his way.

In tirelessly advocating his various propositions, Martens voiced his firm conviction that arbitration was meant to put an end to disputes between sovereign nations. This conviction was not shared without qualification by the majority of *membres* of the *Institut*. Within this *coterie*, arbitration was generally viewed as first and foremost an instrument of law. Martens' views made him liable to the reproach that he considered arbitration panels as political rather than legal institutions. Merely settling conflict without a solid legal basis, his opponents argued, was to prompt ever new disputes. Martens ended up in the cross-fire between lawyers and politicians.

In spite of all this, one cannot but admire Martens' zeal for what he saw as the best avenue ahead. Although being incessantly implored by relatives at home to return before August, Martens held on doggedly well into October, limping and suffering from spasms of rheumatism. He badly needed a Spa at Baden, but was intent on rounding off what he, with some justice, considered *his* cause. His obsession was to firmly implant the new mechanisms and institutions into the social life of his day and age, and break away from traditional 19th century diplomacy, without bothering too much with legal niceties which, in his view, could be optimized once the instruments had been generally accepted. In the final analysis, much of what he advocated in 1907, if visionary, was premature and had to await a future generation. As the ongoing work of the *Institut* and the 1920 preparatory commission of the PCIJ would tell, there was no way in which the 1907 Conference, in a single move, could have possibly removed all the stumbling-blocks to the implementation of international adjudication the way Martens had envisaged. The 1907 debate first dawned up to, and then only tentatively started mapping, the immense legal and political minefields barring the crossing of that watershed.

Still, whatever else may be said of it, even in the weeks of his last bow, Martens rendered some addresses which may count among the most eloquent and truly inspired ones ever rendered in the history of the Hague institutions. There were moments, in 1907 as in 1899, when the glow of his rhetoric, his deep feeling and humane approach, and his visionary panoramas of a better world to be, swept all before them:

I have concluded, gentlemen; allow me a few words more from the bottom of my heart. There have always been in history epochs when grand ideals have dominated and enthralled the souls of men; sometimes it was religion, sometimes a system of philosophy, sometimes a political theory. The most shining example of this kind was the crusades. From all countries arose the cry, "To Jerusalem! God wills it!" To-day the great ideal, which dominates our time is that of arbitration. Whenever a dispute arises between the nations, even though it be not amenable to arbitration, we hear the unanimous cry, ever since the year 1899, "To the Hague!" If we are all agreed that this ideal shall take body and soul, we may leave The Hague with uplifted head and peaceful conscience; and history will inscribe within her annals: The Members of the Second Peace Conference have deserved well of humanity.

Man is a complicated being. Martens may have struck colleagues as an unfathomable character, reserved, a man of the mind and without much outward warmth. Yet, at his best, he countered legalism with ethics and his

intelligence de coeur. And whenever arbitration or humanitarian issues were at stake, Martens was invariably at his very best.

Martens left The Hague full of anticipation, it was felt, to return within a matter of years to attend a Third Conference on the premises of the Peace Palace, for which his first delegate, Count Nelidov, had laid the founding stone that summer. It was not to be. The end came in 1909, with a disillusioned Martens despairing that he would ever see an enlightened, law-abiding Czar to tread in the footsteps of his beloved Alexander II and preserve his beloved Russia from revolution.

There is one final point to make. Martens, the versatile lawyer and weather-beaten diplomat, was a typical representative of a generation that addressed the problems of its day and age from the sound perception that the law could never flourish in isolation, that its backing by social strata, notably the worlds of politics and diplomacy, was a prerequisite to its proper functioning. Somehow, after the cataclysm of World War I, that piece of wisdom seemed lost to the next generation, as exemplified by the celebrated Committee of Ten which, in 1920, was invited by the League of Nations to draft a Statute for the World Court to-be. It availed itself of all the legal genius and draft concepts amassed by the 1907 delegates, but somehow forgot to take to mind the political lessons to be drawn from that debate. It came up brandishing a draft-Statute which, unwisely, bound the nations into a strait-jacket.

The Committee was mercilessly punished for its impertinence by the concerted action of the League Members. The “obligatory” paragraph of its draft was simply annulled, and the outcome of the debate at Geneva left the PCIJ saddled with a curious dual role, on the basis of a Statute which presented an unlikely mixture of legal and political ingredients. It was a lesson which, one should say, was not to be misunderstood. Still, the next decade would witness two more fallacies: the still-born “Optional Clause”, and the 1928 Paris Pact to have nations abjure war as an instrument of national policy – yet another Pyrrhic victory of the law over politics which soon would backfire. As it was, politicians cunningly rephrased the idiom and definition of war and the use of force, with the reappraisal of the principle of self-defence as perhaps the most striking and dramatic outcome for the century to follow. There is much to be learned from the way Friedrich Martens tried to reconcile the spheres of law and politics into functional harmony.

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THE HISTORY OF PRIVATE VIOLENCE

Erkki Holmila



1. Introduction

Since the very beginnings of organized violence armed force (loosely speaking) has been applied through the use of professional *ad hoc* soldiers, often of foreign origin. Yet in the last few centuries the idea that men should not take part in armed conflict for monetary compensation has come to be an almost unquestionable fact of life. Contracted combatants, including mercenaries, are almost universally condemned and the word itself is highly pejorative. To accuse somebody of being a mercenary is to make a moral statement about the person's character and occupation. This chapter will briefly explain mercenarism in a wider historical context. It would be difficult to understand the practice of using private citizens in warfare without knowledge of the social and historical context in which this activity takes and has taken place.

Another reason for describing the history of the use of mercenaries in some detail is to show that the monopolisation of violence into the public sphere is a rather recent trend. The best example, of course, is the fact that the basic social institution in international relations – the nation state – is merely a few hundred years old. During this short time of the nation state's existence it has become the dominant player in international affairs as well as the primary subject of international law, but it would be wrong to assume that this has always been, or that it will necessarily continue to be, the case.¹ Standing armies are very much connected with the nation state and consequently they are also relatively new in the history of warfare. This chapter demonstrates that non-state actors, both foreign and domestic, have been taking part in military ventures throughout history. Very often they have had dominant positions in state armies, and states have generally been quite willing to buy their armies. From a historical perspective it is only very recently that this trend has changed and, taking the larger historical context

¹ James Cockayne put it aptly, that “the system of territorial states, recognized and constituted by international law, is so central to our lived experience that it is very difficult to imagine how violence might otherwise be organized”. **James Cockayne**. 2008. *The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law*. – *International Review of the Red Cross*, Vol. 88, No. 863, p. 459.

into consideration, it seems that the state's monopoly on violence is merely an exception to the rule. Nowadays, however, the success of the nation state is so deeply embedded in political ideology that one generally assumes its legitimacy for monopolising violence without much further thought; this historical exception has, in the last few centuries, undoubtedly been crystallised into being the new rule.

2. The Pre-nation State

2.1. *The Ancient World*

Warfare has been a part of human nature ever since social constructions were formed, and references to mercenary soldiers are as old as records of warfare itself.² The oldest known human mummy, Ötzi the Iceman who was found in the Alps on the border of Italy and Austria in 1991, is thought to have been a warrior.³

Mercenaries were commonly used in Ancient Egypt and during the 19th Dynasty foreign mercenaries were in the majority in the Egyptian army.⁴ The 22nd and 23rd Dynasties were ruled by the descendants of Libyan mercenaries that had settled in Egypt generations before.⁵ In the first recorded battle, the Battle of Kadesh in around 1290 BC,⁶ the Egyptian army, led by pharaoh Ramesses II, used Numidian troops to fight the Hittites.⁷ Also, the Bible contains many tales of foreign soldiers including former shepherd and failed musician David who, after killing Goliath (a Philistine soldier) with a sling, realised his potential as a soldier and became a great mercenary

² **Peter W. Singer.** 2003. *Corporate Warriors: the Rise of the Privatized Military Industry*. Ithaca, NY: Cornell University Press, p. 20. For an anthropological account of history of warfare, see **Lawrence H. Keeley.** 1997. *War Before Civilization: The Myth of the Peaceful Savage*. Oxford: Oxford University Press.

³ DNA testing has shown that there were traces of blood in his spear belonging to several other humans. Also, his body was bruised and his hands were cut. It is thought that he died in battle. See **Michael Lee Lanning.** 2005. *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today's Private Military Companies*. New York, NY: Presidio Press.

⁴ **Singer** 2003, p. 20–22.

⁵ **Anita Stratos.** n.d. *The Evolution of Warfare: Part I.* – www.touregypt.net/featurestories/war.htm.

⁶ There appears to be some controversy regarding the year of the battle; different sources quote different years but all of them are in agreement that the battle took place around 1290 BC.

⁷ **James Larry Taulbee.** 1998. *Reflection on the Mercenary Option.* – *Small Wars & Insurgencies*, Vol. 9, No. 2, p. 145; **Lanning** 2005, p. 4–6.

warrior for his former enemy, the Philistine army.⁸ When this army met the Israeli forces, David encountered hostility and mistrust from his fellow commanders. They felt, not unreasonably, that David might change sides (again).⁹ This accusation is common in mercenary history and mercenaries have indeed often been known to change sides. Considering David's past, this accusation was not completely unwarranted and in fact David was later crowned King of Israel in approximately 1006 BC.

The use of mercenaries was also common practice in Ancient Greece and there is a wealth of information regarding mercenary activities during this era.¹⁰ Several historical studies have been conducted on the history of mercenarism in this period. Probably the most famous mercenaries in Ancient Greece were the "Ten Thousand", a band of mercenaries consisting mainly of Hoplites, hired by the Persian Prince Cyrus the Younger to attack Persia (401–400 BC) in order to claim the crown from his brother Artaxerxes. After Cyrus was himself killed in the early stages of the battle an Athenian mercenary called Xenophon took control of the Ten Thousand and led their retreat.¹¹ The stories of Greek mercenaries have been well recorded and there is no need to repeat them here.¹² What is important, however, is to consider the role that they played in Greek society. Matthew Trundle's work is of considerable importance as it sheds light on the use of mercenaries as a social phenomenon (rather than a military one). According to Trundle, Greek mercenaries were not just soldiers of fortune but were accepted in Greek society. This is an interesting proposition since the modern view of mercenaries is quite the opposite and the word "mercenary" itself is often used in a pejorative sense. Greek mercenaries were not terribly highly paid and this pay was often quite irregular. As with other ancient mercenary troops, the spoils of war were often a more lucrative source of income for mercenaries. According to Trundle, there were different kinds of mercenaries in Ancient Greece and these different types were largely motivated by different considerations.

⁸ The Bible, Old Testament, 1 Samuel 27.

⁹ The Philistine commanders complained of David that "he must not go with us into battle, or he will turn against us during the fighting. How better could he regain his master's favor than by taking the heads of our own men?" The Bible, Old Testament, 1 Samuel 29:4.

¹⁰ For example, **Herbert William Parke**. 1933. *Greek Mercenary Soldiers from the Earliest Times to the Battle of Ipsus*. Oxford: Clarendon Press; **G. T. Griffith**. 1935. *The Mercenaries of the Hellenic World*. Cambridge: University Press. For a more recent account, see **Matthew Trundle**. 2004. *Greek Mercenaries from the Late Archaic Period to Alexander* London: Routledge.

¹¹ Xenophon recorded the story of the Ten Thousand in a book *Anabasis*. The story was also turned into several fiction books and a Hollywood movie.

¹² For references, see note 11.

Private gain was certainly an important part of mercenary activity but it often expressed itself in the form of sustenance, just like in any other work.¹³ According to Xenophon, loyalty and other rewards that might flow from military service were considered more important among generals and captains than monthly wages. People with a higher social status (and thus having no need to earn wages) were often inspired by noble and honourable motives and the social status that comes with being a famous military commander.¹⁴

Greek literature also contains discussions on mercenary morality, as evidenced by Plato's *Laws* and Aristotle's *Nichomachean Ethics*.¹⁵ Both writers were against the idea of using mercenaries. Plato considered mercenaries to be insolent, unjust and violent men, whereas Aristotle thought them to be unreliable as warriors. As we will see later, these accusations commonly repeat themselves in discourses about mercenaries.

2.2. *The Dark and Middle Ages*

Mercenary trade also flourished in the Dark and Middle Ages (roughly from the 5th to 15th centuries). In feudal England knights could avoid military service by paying a sum of money, "scutage", to the king. This money was used to pay for mercenary troops.¹⁶ One of the oldest constitutional documents, the Magna Carta, signed in 1215, also had provision for mercenaries. According to Article 51:

As soon as peace is restored, we will remove from the kingdom all the foreign knights, bowmen, their attendants, and the mercenaries that have come to it, to its harm, with horses and arms.¹⁷

The Magna Carta was signed in response to disagreements over the rights of the King. The English barons made King John sign the Magna Carta, promising certain rights and freedoms to the people. Many of these are still valid and enforceable by law today and many consider it to be one of the

¹³ **Trundle** 2004, p. 42.

¹⁴ *Ibid.* p. 43.

¹⁵ **Plato**. 360 BCE. *Laws*. – Benjamin Jowett, transl. <classics.mit.edu/Plato/laws.html>; **Aristotle**. 350 BCE. *Nichomachean Ethics*. – W. D. Ross, transl. <classics.mit.edu/Aristotle/nicomachaen.html>.

¹⁶ **Anthony Mockler**. 1969. *The Mercenaries*. New York, NY: Macmillan, p. 26.

¹⁷ In the original Latin version the text does not have numbered articles. Rather, the text reads continuously. See the website of the British Library, at <www.bl.uk/treasures/magnacarta/magna.html>.

earliest bills of rights. According to Kiernan, the mercenary provision in the Magna Carta was created in response to the use of Flemish mercenaries by King John (John Lackland)¹⁸. The English had had bad experiences with mercenaries, for example in the Battle of Hastings (1066) where mercenaries with specialist skills in using crossbows played a major part.¹⁹ Despite this general contempt for mercenaries, the British were not put off from the practice of hiring mercenaries when it suited their interests. The most notable mercenary episode was the hiring of Hessians to fight in the American War of Independence.²⁰ As we will see later, the use of Hessian mercenaries played an important role in ending mercenary trade in Europe.

The Middle Ages also saw the first private military companies. The Treaty of Bretigny (1360) between England and France marked the end of the first phase of the Hundred Years' War (1347–1453). It also marked the rising of "Free Companies". An important factor was also the decline of feudal society and the increasing importance of a centralised monarchy. Feudal societies could offer very little to those who proved excellent soldiers but were not of noble origin as society was fairly inflexible about the rights and obligations of people from different classes. The Free Companies of the 14th century provide an important historical case to consider. Particularly relevant is the point that they operated completely outside of any state authority. Not only were they foreign for those who hired them, but more importantly they took their commission in a purely private capacity as a commercial company, not as tools of foreign policy. This factor distinguishes them from many other "mercenaries" in history. We will see, for example, how Swiss mercenaries (often considered to be the most famous mercenaries of all) were typically hired out by the Cantons for political or economic reasons. The Free Companies acted outside of state authority and decided who to work for themselves. They were, in the contemporary sense of the word, true mercenaries.

According to Temple-Leader and Marcotti, great numbers of military commanders were dismissed at the conclusion of the Treaty of Bretigny (1360) but, having become "too accustomed to the excitement of fighting and setting ransom in an enemy's country", they were unwilling to go back to England where feudal society did not have much to offer. Temple-Leader and Marcotti note, however, that most English officers from the rank of captain upwards, laden with the spoils of war, obeyed the order of peace and

¹⁸ V. G. Kiernan. 1957. *Foreign Mercenaries and Absolute Monarchy. – Past and Present*, Vol. 11, p. 69.

¹⁹ Lanning 2005, p. 36–38.

²⁰ For example, see Edward J. Lowell. 1884. *The Hessians and Other German Auxiliaries of Great Britain in the Revolutionary War*. New York, NY: Harper & Brothers.

dismantled accordingly. Those who had not yet made their fortune continued in the form of Free Companies. John Hawkwood, the “enemy of God, of pity and of mercy”,²¹ was to become a leader of one such enterprise: the “White Company”.²²

Regarding the legal position of these companies, the medieval jurist Bartholomew of Saliceto wrote that: “There is no doubt about their position, for they are robbers ... and therefore as robbers they should be punished for all the crimes they have committed.”²³ Considering how the Free Companies pillaged Italian cities and the French countryside, this statement might not be completely unwarranted. However this statement is not a comment on their status as soldiers, it merely condemns the Free Companies for being criminals outside of proper conflict. Mockler notes that the Free Companies were aware of and concerned about their status. When they were serving princes in public wars they would be legitimate, but by continuing the life they had chosen beyond the end of hostilities they became bandits and criminals.

2.3. The Italian Renaissance

It was also seen as important that the war in which they were participating should be just.²⁴ The Catholic tradition of righteous war had already been expressed by St. Augustine and Thomas Aquinas. For both writers, one of the central elements of just war was that it is waged by order of proper authority. The right of participation was an important question and Free Companies therefore had to be careful in choosing their commissions. Naturally, some were more scrupulous than others and those who chose to ignore this consideration risked their lives. One of the terms of the Treaty of Bretigny (1360) was that the Free Companies should be dissolved and Edward III eventually implemented this by sending princes to France to seek out those who had not so dissolved in order to enforce this requirement.²⁵

One of the first highly successful Free Companies was the Grand Catalan Company, established at the turn of the 14th century by Roger di Flor. Their first important commission was for the Byzantine Empire to fight the Turks at the beginning of the 14th century. This company was successful and its commander, Roger di Flor, married the Byzantine princess and was made

²¹ Mockler 1969, p. 42.

²² John Temple-Leader & Giuseppe Marcotti. 1889. Sir John Hawkwood: A Story of a Condottiere. Leader Scott, transl. London: T. F. Unwin, p. 9, 10.

²³ Quoted in Mockler 1969, p. 32.

²⁴ Mockler 1969, p. 32.

²⁵ Mockler 1969, p. 34.

grand duke. Di Flor was assassinated in 1305 but the company remained in operation. This shows that even as early as the 1300s a corporation had already been considered as a separate legal person that could survive its individual members. This point is important to note because the claim of legal personhood is one of the arguments used by modern companies to legitimise their business.²⁶ The Grand Catalan Company avenged the death of their commander by pillaging over a period of two years. Later, when it took a commission in 1310 with the Duke of Athens and after again being highly successful in battle, their employer sought to terminate the commission without pay. The company turned against the Duke and took over control of Athens in the battle of Halmyros in 1311, ruling Athens until 1388. According to Mockler, no other mercenary company has ever had so much political power and has managed to hold onto it for so long.²⁷ Its success is one that is yet to be matched by any other mercenary or private military company. The case of the Grand Catalan Company provides a somewhat rare example of military power turning into political power, something that has not happened since on a scale comparable to the ruling of Athens by the Grand Catalan Company. With the rise of private military companies in the late 19th century this consideration emerged again, especially in Africa where private companies could have superior military power compared to their employer.

Private military companies were also highly eminent in 13th and 14th century Italy. Conditions for the military profession were fundamentally more favourable there than in feudal societies. An essential element of the Italian city-states was commerce. Unlike in feudal society, wealth was not tied to the land and was more easily exchangeable for goods and services. In addition, the Italian city-states were very wealthy and cultured. It was considered wasteful to spend one's time in battle. The vast number of powerful city-states practically guaranteed continuous warfare. Their considerable wealth, on the other hand, made it possible to buy private armies called "condottieris".²⁸ Renaissance Italy provides an interesting historical case to

²⁶ According to Spicer, "PMCs are permanent structures, corporate entities, which are run like a business". See **Tim Spicer**. 1999. *An Unorthodox Soldier*. Edinburgh: Mainstream, p. 41. This corporate existence is major factor in the minds of private military companies, as an essential fact that they often use to distinguish themselves from traditional mercenaries. Further discussion will demonstrate, however, that this argument is ill-considered.

²⁷ **Mockler** 1969, p. 54.

²⁸ According to a former UN Special Reporter on mercenaries, Mr. Ballesteros' mercenary activities occur "in inverse proportion to peace, political stability, respect for the legal and democratic order, the ability to exploit natural resources in a rational manner, a well-integrated population and a fair distribution of development which prevents extreme poverty. Where all these factors coincide, the risk of mercenary activity is minimal". See Report on

consider because a typical element of most mercenary activities in the 20th century was that they took place in areas plagued with extreme poverty such as Angola, Sierra Leone, the Congo, Papua New Guinea, *et cetera*. Renaissance Italy has two elements that aptly characterise it: wealth and culture. Usually, when these two elements coincide the risk of mercenary activity is low. Yet the history of Renaissance Italy cannot be accurately told without reference to the condottieris.²⁹ Perhaps the countervailing factors included a high degree of fragmentation among different city-states and the lack of political stability. Foreign mercenaries had already been used in the Italian peninsula in the 13th century Tuscan armies. According to Caferro:

The successive invasions of Italy by foreign armies in the first half of the fourteenth century brought a sharp increase in the number of mercenaries. The 1310 invasion by Henry VII of Luxembourg, whom Dante Alighieri viewed as the savior of Italy, left a residue of German, Flemish, and Brabantine soldiers, who banded together in the armies of the great Luccan exile Castruccio Castracane. The arrival of Ludwig of Bavaria seventeen years later brought additional German soldiers, while the descent of Louis of Hungary into Italy in 1347 introduced bands of Hungarian mercenaries.³⁰

Discussing the Free Companies and condottieris during Renaissance Italy, Mockler importantly observes that the relationship between employer (the prince) and mercenary company was purely a matter of business. Contracts stipulated the terms of service, number of men, salary, the term of the contract, *et cetera*.³¹ This also conforms to the modern idea of the mercenary in the sense that the relationship between a mercenary and his employer is purely commercial. The aspiration for private gain and lack of political motivation is so strong that, in a modern legal sense, a person is not considered a mercenary if he is inspired by the right ideological zeal. According to Temple-Leader and Marcotti, the mercenary companies employed treasurers, bankers, attorneys, secretaries, notaries and registrars to run their business, just as modern private military companies do.³² William Caferro's study on Hawkwood showed that in 1381 when Hawkwood served Florence he was

the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc E/CN.4/1999/11, 13 January 1999.

²⁹ Mockler 1969, p. 43.

³⁰ William Caferro. 1998. *Mercenary Companies and the Decline of Siena*. Baltimore, MD: Johns Hopkins University Press, p. 3.

³¹ Mockler 1969, p. 44–45.

³² Temple-Leader & Marcotti 1889, p. 45.

paid 4,000 florins a year. The highest-paid Florentine civil servant Coluccio Salutati, Chancellor of Florence, had an annual income of a mere 100 florins per year.³³ According to Caferro, Hawkwood was acting primarily on monetary motivation and when the payments stopped so did he.³⁴

Many Free Companies, including the White Company, saw their glory days in Renaissance Italian city-states. Sometime around 1361, Hawkwood crossed the Alps into Italy with his White Company and served various city-states including Pisa, Siena and Perugia. The tactics of the White Company resembled those of the Swiss mercenaries a few centuries later. They advanced in big, compact groups on foot with their lances lowered towards the enemy. There was no element of surprise and their method has been described as defensive even in offence. Temple-Leader and Marcotti note that it was a convenient method for those who did not particularly wish to end the conflict decisively and saw it merely as a trade or profession.³⁵ Their work also lends support to Machiavelli's accusations regarding these mercenaries fighting bloodless wars. In particular, Temple-Leader notes that the White Company would not attack a fortress or enemy that offered real resistance.³⁶

In Italy, where free companies were particularly active, Niccolò Macchiavelli launched a furious attack against mercenaries. He wrote:

Mercenaries and auxiliaries are useless and dangerous. And if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies. ... The fact is, they have no other attraction or reason for keeping the field than a trifle of stipend, which is not sufficient to make them willing to die for you.³⁷

Macchiavelli further states that victory gained by the arms of others is no true victory. In short, Macchiavelli's opposition to mercenaries contains Plato's principled objections as well as Aristotle's pragmatic concerns. Not

³³ **William Caferro**. 2006. *John Hawkwood: An English Mercenary in Fourteenth-Century Italy*. Baltimore, MD: Johns Hopkins University Press, p. 16. It is unclear whether this figure takes into account that Hawkwood had several subcontracts which had to be paid for.

³⁴ *Ibid.* It could be argued that this is one of the essential *practical* problems with mercenaries.

³⁵ *Ibid.*, p. 40–41.

³⁶ *Ibid.* Despite having acted against Florence on many occasions, Hawkwood was in his later years granted Florentine citizenship (despite having previously led campaigns against Florence on several occasions) and in 1394 upon his death was granted a state burial, something denied earlier to the Florentine poet Dante Alighieri.

³⁷ Niccolò Machiavelli. 1532. *The Prince*. – W.K. Marriot transl. <www.gutenberg.org/files/1232/1232-h/1232-h.htm>.

everyone, however, was as opposed to the use of mercenaries. Thomas More in his *Utopia*, for instance, discussed the many advantages of using mercenary warriors. He considered there to be two main advantages in using mercenaries. First, this would spare Utopians from such dangerous activity. The second reason was economic. Mercenaries would be sent to the most difficult battles so that few would survive to collect their pay. Like most other writers, More considered mercenaries to be “lewd and vicious sort of people” so having them die in battle was no great loss to humanity.³⁸

2.4. Catholic Just War Theory and Diplomatic Pragmatism

Discussion on mercenaries arose also in the Catholic just war tradition. Francisco de Vitoria argued in *De Bello* that:

Those who are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides the more pay, and who are, moreover, not subjects, commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing.³⁹

Vitoria’s assumption is that mercenaries are *a priori* greedy and immoral and that the wars in which mercenaries participate are unjust.⁴⁰ Vitoria does not, however, consider the question of mercenaries participating in just wars. Could this be legitimate? Just war, of course, was one that was waged by authority of the Church. Vitoria’s position rests on the consideration that participating in war for private gain is unacceptable. Private gain as motivation for war participation is morally problematic and thus rejected by Vitoria.

Francisco Suárez, on the other hand, was of the opinion that individual soldiers would not have to inquire into the justness of a war provided that it

³⁸ Thomas More. 1516. *Utopia*. – Gilbert Burnet transl. <www.gutenberg.org/files/2130/2130-h/2130-h.htm>.

³⁹ **Vitoria**. *De Bello*. Art. I, para 8, quoted in **L. C. Green**. 1985. *Status of Mercenaries in International Law*. – L. C. Green. *Essays on the Modern Law of War*. Dobbs Ferry, NY: Transnational, p. 530.

⁴⁰ Some doubt can be cast on Vitoria’s position on mercenaries where he argues that anyone, including foreigners, may offer help to the Spanish king in defending a city of which he is in possession (*ibid.*), it appears that for Vitoria such a battle involving a king of Spain is *a priori* a just one. Something similar happened some 400 years later in Geneva when it was decided that ideologically-motivated mercenaries are not really mercenaries after all, but those who serve for the sake of money, if not quite committing a mortal sin, nevertheless unlawfully participate in conflicts.

was unclear whether the war was unjust.⁴¹ Regarding mercenaries, the question was more complicated. The main issue for Suárez was the “giving of the conscience in the keeping of the prince”. For this reason, soldiers were not required to inquire into the justness of the war (unless it was clearly unjust). In normal circumstances they were allowed to trust that the prince had already made this judgement. Suárez examines the question of whether this principle can also apply to mercenaries, especially given that they are not subjects of the prince. He concludes that to require a mercenary to inquire into the justness of the war would be “contrary to all custom, and humanly speaking ... impossible”.⁴² Suárez opined that, from a moral point of view, subjects and non-subjects (i.e., mercenaries) are not in different positions. Also, he saw no moral distinction between selling one’s military labour on a temporary or permanent basis. By committing themselves to the prince, whether for pay or loyalty, temporarily or permanently, mercenaries have the authority of the prince which, according to Suárez, is a principle that guarantees great probability that the war is just.⁴³ This is a crucial difference in the way Vitoria and Suárez considered the legal position of mercenaries. For Suárez, by selling his skills to another a mercenary was merely exercising his right to enjoy the fruits of his labour, an idea later espoused by liberal and libertarian thinkers such as John Locke and many others. Furthermore, the idea of soldiers not having to inquire into the justness of the cause is of course accepted in modern international law. Hence the separation of *jus in bello* and *jus ad bellum*. This distinction, reflected in normative thought but based on morality, that it is possible to fight unjust wars justly and just wars unjustly, is a position of common sense as well as legal reality. Accordingly, any soldier who fights in an unjust war need not be a war criminal, and any soldier who fights in a just war can be.⁴⁴ For Suárez the same separation is true. There is nothing *a priori* unjust in using mercenary soldiers. If the cause is just, motivation is not important and it does not matter who gets on with the job.

Another commentator joining the discussion was the Swiss jurist Emerich de Vattel. The Swiss had already established themselves as leaders in the European mercenary market in the late 14th century when, after the Battle

⁴¹ In **Francisco Suárez**. 1944. Selections from Three Works of Francisco Suárez. Gwladys L. William & Henry Davis, eds. Oxford: Clarendon Press, p. 832.

⁴² *Ibid.*, p. 834.

⁴³ *Ibid.*, p. 835.

⁴⁴ It should be noted that the word “just” is used here merely in purely descriptive sense, not to refer to any notion of the Just War theory as such.

of Sempach, they became known as “bestial mountaineers”.⁴⁵ Swiss cantons would hire out units of soldiers to whoever wanted to buy them. The logic behind this practice was fundamentally different from that of the Free Companies, for example. Swiss soldiers were hired out and paid by the cantons. They were therefore not acting in a private capacity but in modern terms were “sent by the state” to do their job. Despite the fact that Swiss dominance of the “mercenary” market had already ended, Vattel discussed the issue at length in his classic *Law of Nations*. Unlike many other jurists of his time and before him, he saw no moral impediment to using mercenaries. On the contrary, Vattel encouraged mercenarism and considered it to be beneficial to the mercenary’s nation state as well. By engaging in warfare mercenaries learnt an art of war – an art that Hugo Grotius complained had no place among useful arts⁴⁶ – and thus became an even more useful citizen in serving his own country. Vattel wrote that:

the tranquillity, the profound peace which Switzerland has so long enjoyed in the midst of all the commotions and wars which have agitated Europe, – that long repose would soon become fatal to her, did not her citizens, by serving foreign princes, qualify themselves for the operations of war, and keep alive their martial spirit.⁴⁷

From the home state’s point of view, mercenarism was not only allowed but positively encouraged. Vattel attributed Switzerland’s peace to its mercenaries who, by serving foreign princes, trained themselves in an art of war, making Switzerland an unappealing target for foreign invaders. Vattel also saw the mercenary question purely as a contractual matter between the mercenary and the employer and that this contractual stipulation should be “religiously observed”.⁴⁸ He was sympathetic to mercenaries who refused to fight on account of not having been paid. Citizens had this duty, but not mercenaries. Vattel considered such complaints against mercenaries ridiculous and unjust on the grounds that contractual provisions should not be more harshly enforced on one party than on the other.⁴⁹ He also considered the essential question of whether the mercenary profession is in itself lawful or

⁴⁵ Mockler 1969, p. 75.

⁴⁶ Hugo Grotius. 1625. *De Jure Belli ac Pacis*, Book II, chapter 25, ix.

⁴⁷ Emerich de Vattel. 1758/1883. *Law of Nations*. Joseph Chitty, transl. Philadelphia, PA: T. & J. W. Johnson, p. 399.

⁴⁸ *Ibid.*, p. 398

⁴⁹ He further states, “whenever he fails to perform what he has promised, the foreign soldiers are discharged from any further duty to him”. *Ibid.*

not. The answer to him was simple: without the tacit or express prohibition of the sovereign, a man is free to join any society he wishes, “make its cause his own, and espouse its quarrels”.⁵⁰ As already noted above, Vattel in fact encouraged sovereigns to permit their subjects to serve foreign powers in the hope that they would learn the art of war and thus become more useful (a cynical mind would also say profitable) to the sovereign. Vattel does not consider the mercenary issue from a moral point of view, but he does state that if a war is “evidently unjust” a mercenary may relinquish his service; he does not say, nevertheless, that mercenaries cannot serve in unjust wars at all. That Vattel was not overly concerned about the morality of serving a foreign power is further illustrated by his comment that a sovereign should permit his citizens to serve foreign powers “indiscriminately for money”.⁵¹ On the question of mercenaries fighting in unjust wars, Vattel sides with Suárez or can be said to go even further, rejecting the views of Grotius and Vitoria. The lawfulness of the mercenary profession is thus a matter to be decided by each individual sovereign. Because the levying of troops was considered to be a sovereign right, enlisting troops in a foreign country without the consent of the sovereign was considered a crime for which, according to Vattel, the recruiters should be “hanged without mercy, and with great justice”.⁵² Vattel considered that it was lawful to serve as a mercenary in the absence of any specific prohibition to do so. On the other hand, foreign states could recruit mercenaries in a country other than their own only with the consent of their ruler.

2.5. *Swiss “Mercenaries” and German Landsknechte*

No nation has been ever been as renowned for its mercenaries as Switzerland. The Swiss Confederation was established in 1291 when the cantons of Uri, Schwyz and Unterwalden came together and signed the Federal Charter under which they would be united against the Habsburg rule of the Holy Roman Empire. The Swiss army gained its notoriety in the battle of Sempach (1386) where they defeated the Austrian troops of Duke Leopold III. The battle was also noted in France and Italy where the Swiss became known as “bestial mountaineers”.⁵³ The Swiss were particularly known for using

⁵⁰ *Ibid.*, p. 399.

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 400.

⁵³ **Anthony Mockler**. 1985. *The New Mercenaries: The History of the Hired Soldier from the Congo to the Seychelles*. London: Sidgewick & Jackson, p. 8, For a full account of Swiss mercenaries, see **Mockler** 1969, pp. 74–104.

pikes. For about two centuries they dominated the European military market, being especially active in France and Italy. They would migrate as a single unit, usually composed of men from a particular valley or village.⁵⁴ With their common background, these troops were more efficient a unit than they would otherwise have been.⁵⁵ The Swiss cantons hired out these troops and the employer would pay the canton directly.⁵⁶ This is somewhat different from the modern use of private actors in war and, accordingly, the true private nature of Swiss mercenaries can be called into question. It was the cantons who committed their armies to foreign service just like how, in contemporary practice, the UN Member States commit their troops for UN enforcement and peacekeeping missions. One of the most essential characteristics of a mercenary is that he participates in a purely private capacity. Thus, Cuban soldiers fighting with the MPLA forces in Angola were not considered mercenaries (except for, perhaps, in politically motivated rhetoric). The typical Swiss mercenary is therefore not a mercenary at all. They were certainly foreign fighters but they also had the political backing of their cantons, thus making the troops more comparable to mercantile companies or privateers than the traditional mercenary type in the contemporary sense of the word. Although Swiss mercenary soldiers probably fought for private gain, they did so on public authority. Similar arrangements have been made throughout history, including in the 20th and 21st centuries. The most notable example of this is of course the Nepalese Gurkhas in the British and Indian armies. However there is one important difference between the Swiss mercenaries and the Nepalese Gurkhas: the latter form part of the British and Indian regular armed forces. They are not contracted for specific missions but remain in the armed forces of these countries whether there is any ongoing conflict or not. The Swiss, on the other hand, could be bought for individual conflicts.

The glory of the Swiss mercenaries started fading in 1515 when French troops, together with German mercenaries called *Landsknechte*, won a decisive battle against them defending Milan from French invasion. The next year, France and the Swiss Confederation signed a Perpetual Peace treaty which prohibited the Confederation from hiring out mercenaries to France's

⁵⁴ Singer 2003, pp. 26–27.

⁵⁵ The use of modern private military companies provides an interesting comparison. It has been argued that one of the reasons why Executive Outcomes was so successful in their operations in Angola was that the employees nearly all came from the South African Defence forces, thereby sharing a common military and cultural background. See David Shearer. 1998. Outsourcing War. – Foreign Policy, Vol. 112, p. 73.

⁵⁶ Mockler 1985, p. 8.

enemies.⁵⁷ What is more, developments in personal firearms and artillery came to mark the decline of these Swiss mercenaries who were still known for their skilled use of pikes. The Swiss showed little enthusiasm for adopting these new technologies and were soon unable to match their northern colleagues, the German *Landsknechte*.⁵⁸ The supremacy of the new military firearms became apparent in the Battle of Bicocca in 1522 when Swiss mercenaries again suffered defeat to the *Landsknechte* fighting for Spain. Nevertheless, some two decades later there were still almost 20,000 of them stationed in France.⁵⁹

In general, by the end of the 16th century, according to military historian Michael Howard, war was an international profession that lured in adventurous entrepreneurs from various classes of society.⁶⁰ Great military success, whilst making Count Albrecht of Wallenstein the wealthiest man in Europe in the early 16th century, did not generally translate into political power. By ruling Athens in the 14th century, the Grand Catalan Company provided an exception to the rule in mercenary history that mercenaries have not generally held much political power.

2.6. Mercantile Companies

The 16th century marked an interesting development in the history of non-state violence. Mercantile companies, the most famous being the British East India Company and the Dutch East India Company, were delegated the responsibility of conducting trade with colonies and establishing new ones. These companies were given very wide powers. According to Thomson, mercantile companies:

were, as a rule, granted full sovereign powers. In addition to their economic privileges of a monopoly on trade with a given region or in a particular commodity and the right to export bullion, they could raise an army or a navy, build forts, make treaties, make war, govern their fellow nationals, and coin their own money.⁶¹

⁵⁷ *Ibid.*, p. 103.

⁵⁸ **Michael Howard**. 1976. *War in European History*. Oxford: Oxford University Press, p. 28.

⁵⁹ **Kiernan** 1957, p. 72.

⁶⁰ **Howard** 1976, p. 28.

⁶¹ **Janice E. Thomson**. 1994. *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*. Princeton, NJ: Princeton University Press, p. 35.

The power given to these companies was extraordinary and clearly displayed many of the characteristics of full sovereignty, chief amongst them being the capacity to raise armies, wage war, draw up treaties and govern nationals – all typical hallmarks of sovereign power. It may be thought that these mercantile companies were given such powers due to the lack of developed communication systems at that time. However, in the event of a threat (of any sort), requiring companies to wait for the sovereign's instructions would probably not have been a viable option so one can see why sovereign powers like those described above would be necessary to allow the mercantile companies to function properly.

The purpose of these companies was not only to engage in commerce but also to disrupt other counties' commerce with far-off nations. Also, in establishing colonies it was necessary to have the proper means of violence at one's disposal in order to protect the colonies from foreign aggression and to maintain internal order.⁶² The mercantile companies' armies often had large foreign contingents.⁶³ After consideration of the political effects these mercantile companies had, their demise has been attributed to a myriad of unintended consequences. The British and Dutch East India Companies were engaged in warfare against each other in 1618 in the Malay Archipelago, an area that is now composed of countries such as the Philippines and Indonesia. Despite the fact that they signed a peace accord in 1619 and fought together against the Portuguese fleets in the early 1620s, these two companies continued to have an uneasy relationship, culminating in the Amboina Massacre of 1623 in which the soldiers of the Dutch East India Company tortured and killed 20 members of the British East India Company. Another reason for the fall of the mercantile company was that the wars waged by these companies were not always in alignment with the wishes of their home states. Companies would even fight each other when their home countries were at peace.⁶⁴ Displeasure with instructions from their governments resulted in the mercantile companies breaking away from these home governments' political policies. For example, the Dutch East India Company was of the opinion that "the places and strongholds ... in the East Indies should not be regarded as national conquests but as the property of private merchants".⁶⁵ On the other hand, when home governments were at war with each other

⁶² *Ibid.*, pp. 36, 37.

⁶³ **Singer** 2003, pp. 34, 35.

⁶⁴ **Thomson** 1994, p. 61.

⁶⁵ *Ibid.*, p. 62.

their respective mercantile companies would maintain peaceful relations if it suited their interests.

In the end, too much friction existed at many levels. On one level, the mercantile companies proved problematic to their home governments. The companies would engage in war regardless of the home government's wishes; they would co-operate in times of war with companies from enemy states. Their private property interests often conflicted with the political interests of their home state. As a result, problems arose between companies, between their home governments and between the companies and their governments. The Dutch East India Company finally dissolved in 1796, starting the general demise of the mercantile company. In England the government claimed sovereignty over the East India Company's territories in 1813. Two decades later the company was ordered to cease its commercial activities; it then became an agency through which Britain governed India.⁶⁶ The 19th century effectively marked the end of mercantile companies as important players in the international arena.

Mercantile companies represent an interesting phenomenon of non-state actors. Like the Swiss mercenaries, they were backed by public authority. Unlike the Swiss, they were endowed with considerable sovereign powers, unlike others in the history of non-state military affairs. It may be difficult to compare these mercantile companies to modern-day private military companies. The differences are self-evident. The modern-day companies do not have the same political power and their mandates are more limited in scope and time. The following discussion will show, however, that in certain circumstances concern over the political influence of today's private military companies might be warranted. The potential consequences of relying on mercantile companies and mercenaries, including private military companies, appear similar and lead to similar types of problems, namely the loss of central control over violence. This claim is often made against private military companies, especially when they are contracted by weak governments. The mercantile company example empirically shows that such accusations have merit. Even the strong governments of the time (British and Dutch) found it difficult to control these companies who were, after all, their own subjects.

⁶⁶ *Ibid.*, p. 101.

3. The Dawn of Enlightenment and the French Revolution

Like other wars of that time, the Thirty Years' War was fought by nations relying to a very large degree on hired foreign forces.⁶⁷ Originally the dispute was between the Protestants and the Catholics, but very soon all major powers were involved. Following the Peace of Augsburg treaty in 1555, the German princes could choose between Lutheranism and Catholicism and their subjects were obliged to follow that religious choice: *cuius regio, eius religio*. Further to the dispute between Lutherans and Catholics, the Calvinists were not included in this treaty; on the contrary, they were explicitly excluded from its scope.⁶⁸ The Peace of Westphalia (1648) which ended the Thirty Years' War marked an important development: it reiterated the right of a prince to choose the religion of his state and gave the freedom to his subjects either to follow that religion or dismiss it. Because the Thirty Years' War was largely based on religious intolerance, it is not surprising that religious matters were high in the peace treaties' concerns. Importantly, the Peace of Westphalia distanced international law from religion and instead promoted a religious equality which included Calvinism for the first time.⁶⁹ Until then international law, and in particular the just war theory, had been dominated by Catholic thinkers such as St. Augustine, Francisco de Vitoria, Francisco Suárez, *et cetera*. For the Catholic Church the Peace of Westphalia was "a public act of disregard of the international authority of the Papacy".⁷⁰ The Treaty of Westphalia⁷¹ contained many aspects which now have an established place in the international sphere: rules regarding the use of force,⁷² use of waterways,⁷³ liberty of commerce,⁷⁴ settlement of disputes,⁷⁵ collective security and collective sanctions against aggressors.⁷⁶ While these

⁶⁷ **Kiernan** 1957, pp. 77–78.

⁶⁸ Peace of Augsburg, Article 17.

⁶⁹ **Leo Gross**. 1948. The Peace of Westphalia, 1648–1948. – American Journal of International Law, Vol. 42, p. 26.

⁷⁰ **John Eppstein**. 1935. The Catholic Tradition of the Law of Nations. London: Burns, Oates & Washbourne, p. 192, quoted in Gross 1948, p. 28.

⁷¹ The Treaty of Westphalia, 1648, ended the Thirty Years War (1618–1648) and established a new political order based on the sovereignty of the state. See e.g. **Cicely V. Wedgwood**. 1938. The Thirty Years' War. London: Jonathan Cape.

⁷² Sections V and CXXIV.

⁷³ Sections LXX and LXXVIII.

⁷⁴ Sections LXX and LXXXIX.

⁷⁵ Section XXX.

⁷⁶ Sections CXXIII and CXXIV.

were important aspects for the development of international law, they are not the concern of the present study. The main aspect of the Westphalian model for present purposes is the sovereign equality it established among the states and rulers and its consequences on military affairs.

After the Treaty of Westphalia a new type of army emerged, an army that Kiernan calls a “national-mercenary” army organisation.⁷⁷ According to this new model, foreigners would be incorporated into national armies and kept on the list permanently. Again, it was initially a union between the Swiss and the French. Soon, however, the model spread around Europe. According to Thomson, around the mid-1700s there were still considerable foreign elements in the Prussian, British, French and Spanish armies.⁷⁸

Although the Enlightenment was not fertile ideological soil for mercenaries, their use did not come to an end. They were despised but useful. An example of this is the matter of the British use of mercenaries in their handling of American revolutionaries. This was expressed well by Lord Egremount in 1756, saying that “I shall never be for carrying a war upon the continent of Europe by a large body of national troops, because we can always get foreign troops for hire. This should be our adopted method in any war on the continent of Europe”.⁷⁹ As in the Italian renaissance cities and on the imaginary island of Utopia, it was felt that it was better to spare the local population for something more productive and useful, or perhaps the reason might have been that war, as a brutal affair, was not suitable for an Englishman. When the American War of Independence broke out in Lexington on 19 April 1775 the British regular army of 30,000 men did not have sufficient manpower to fight on its own. As the Hessian mercenaries were crossing the Atlantic, the Declaration of Independence condemned the British for “transporting large Armies of foreign mercenaries to compleat the works of death, desolation, and tyranny”.⁸⁰ The use of mercenaries was viewed with great scepticism, but pragmatism won out over idealism in the end. In battle the presence of German mercenaries made little difference. They fought much like the British, proved neither better nor worse, more loyal nor disloyal. When the news of 1,000 Hessian mercenaries surrendering to the Americans hit Europe it was universally welcomed. The general attitude towards using

⁷⁷ Kiernan 1957, p. 78.

⁷⁸ Janice E. Thomson. 1990. State Practices, International Norms, and the Decline of Mercenarism. – *International Studies Quarterly*, Vol. 34, p. 25. For example, according to Thomson, in 1701, 54% of the British army was foreign, whereas in Prussia the same figure in 1743 was 66%.

⁷⁹ Quoted in Green 1985, p. 537.

⁸⁰ The Declaration of Independence, 4 July 1776 (United States).

mercenaries was changing. When Colonel Faucett tried to recruit more mercenaries in Europe he found the task nearly impossible. Mercenary trade was almost unanimously condemned. Frederick the Great of Prussia wrote that he would not furnish the Crown with any mercenaries even if he was offered “all the millions possible”.⁸¹

The French Revolution fundamentally changed late 18th century society. One important development was the abolition of feudal remnants and the rejection of absolute monarchy with the divine rights of the king. The Declaration of the Rights of Man (1789) called for a new concept of sovereignty. It provided that all sovereignty resides in the nation and that no-one may exercise any public authority that does not derive from the people.⁸² The declaration also called for the establishment of national armed forces. It stated that:

The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the *good of all and not for the personal advantage of those to whom they shall be intrusted*.⁸³

This declaration’s principles were largely incorporated into the French constitution of 1791 which rooted sovereign power with the people.⁸⁴ It also established national armed forces (*la force publique*) to defend the state and prohibited the establishment of any national guards by private citizens or the use of any troops within France without the express authority of a requisition.⁸⁵ Also, the question of having foreign troops present in French territory, including the admission of foreigners into the service of the kingdom, was one for parliament rather than the king.⁸⁶ The French revolution caused great disturbances in other European monarchies and was followed by “warfare on a scale unprecedented since the barbarian invasions” between 1792 and 1815.⁸⁷ At the beginning of 1792 when war broke out between Austria and Prussia the French army was numerically inadequate and they had to turn to requisitions and conscription to make up the numbers.⁸⁸ The following year the National Convention decreed that “from this moment until that when the

⁸¹ **Mockler** 1969, p. 127.

⁸² Declaration of the Rights of Man, 26 August 1789 (France), Article 3.

⁸³ *Ibid.*, Article 12 (emphasis added).

⁸⁴ Constitution, 3 September 1791 (France), Title III.

⁸⁵ *Ibid.*, Title IV.

⁸⁶ *Ibid.*, Title III, Chapter III.

⁸⁷ **Howard** 1976, p. 75.

⁸⁸ **Maurice K. Wise**. 1944. Requisition during the French Revolution (1789–1815). – *Louisiana Law Review*, Vol. 6, at p. 50.

enemies shall have been swept from the territory of France, all Frenchmen are on permanent requisition for the service of the armies”.⁸⁹ Conscription was prescribed in law in 1798 and all Frenchmen over the age of 20 were made soldiers in service to the nation.⁹⁰ Napoleon used this conscript army, a “nation in arms”, to battle with almost all major European powers and was successful until his disastrous campaign in Russia ended in retreat in 1813, eventually losing Paris to the Allied armies of Russia, Austria and Prussia. Historian Michael Howard argues that the rise of the Napoleonic armies also led to conscription in Prussia.⁹¹ Prussia’s encounters with the Napoleonic armies during the First and Fourth Coalitions led to decisive victories for Napoleon and, by virtue of the Treaty of Tilsit (1808), Prussia suffered major territorial losses with its army being limited to 42,000.⁹² After Napoleon’s defeat in Russia the situation changed. Prussia introduced universal conscription in 1814 and joined the Sixth Coalition.

4. Early Domestic Legal Regulation

Ideological and political developments also had normative consequences on domestic legal systems. In this historical context, the most important one was the adoption of various laws concerning neutrality and foreign enlistment. Legal norms dealing with mercenaries *per se* did not come about for almost another two hundred years. These foreign enlistment and neutrality laws are important predecessors because they deal with the hiring of personnel into a foreign nation’s armed forces. On the other hand, it would have been impossible to have neutrality laws before the nation state had consolidated its dominance in the military market. According to Lobel, the increasing internal and external control over violence was a condition precedent to neutrality laws.⁹³ The United States was the first country to pass a neutrality law as

⁸⁹ Quoted *ibid.*, p. 54.

⁹⁰ **Paul R. Hanson**. 2004. *Historical Dictionary of the French Revolution*. Lanham, MD: Scarecrow Press, p. 83. Conscription proved largely unpopular and its enforcement led to an uprising in 1798.

⁹¹ See **Howard** 1976, p. 86. Prussia had already had a powerful standing army since the 17th century. According to Singer, more than half of Prussia’s professional army was composed of foreigners during Frederick the Great’s rule in late 18th century. See **Singer** 2003, p. 32.

⁹² **Editors**. 1942. *The History of Selective Service*. – *Indiana Law Journal*, Vol. 7, p. 301.

⁹³ **Jules Lobel**. 1983. *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*. – *Harvard International Law Journal*, Vol. 24, p. 10.

early as 1794. The purpose of the neutrality and foreign enlistment laws was to regulate how the citizens of a country could (or rather, could not) take part in armed activities for a foreign power. The first neutrality act was enacted in the aftermath of the American War of Independence and it has survived with relatively few modifications since then. The purpose of the neutrality acts was to make sure that private individuals would not act in any way that might compromise foreign policy.⁹⁴ Some argue that violating the neutrality act is not merely a crime but rather an usurpation of congressional power.⁹⁵

An important point in the neutrality laws is not only their effect *vis-à-vis* third states, but also the relationship between the government and its own people.⁹⁶ From a historical point of view, the importance of the neutrality laws is that they brought the issue of controlling physical violence into the public domain. The issue is therefore one of sovereignty, both internal and external. The US Neutrality Act prohibited US citizens from accepting commissions to serve in a foreign state's war if that war is against a state with whom the US is at peace. Secondly, it prohibited anyone within the US to enlist as a soldier in a foreign country's military service. The third offence dealt with taking part in private military expeditions against states with whom the US was at peace. The offence would not only be committed by those taking direct part in those expeditions, but also by those funding it. Moving abroad voluntarily and enlisting as a mercenary has been held by the US Supreme Court as lying outwith the scope of the act.⁹⁷ Thus, ideologically motivated fighters are not covered by this prohibition. According to former Attorney General Robert Kennedy, "the neutrality laws were never designed to prevent individuals from leaving the United States to fight for a cause in which they believed".⁹⁸

The British followed suit a few decades later by enacting a string of Foreign Enlistment Acts during the 19th century.⁹⁹ The current legislation in force is the Foreign Enlistment Act of 1870. This legislation made it an offence for British subjects to accept commissions or engagements in the military service of foreign states when they are at war with countries with

⁹⁴ According to Thomas Jefferson it was important to guarantee that wartime decisions should be left for the central government. He argued that the decision whether or not to go to war must not be taken on the authority of individual citizens.

⁹⁵ **Lobel** 1983, p. 62.

⁹⁶ *Ibid.*, p. 24.

⁹⁷ See *Wiborg v. United States*, 163 U.S. 632 (1896).

⁹⁸ Quoted in **Edward Kwakwa**. 1990. The Current Status of Mercenaries in the Law of Armed Conflict. – *Hastings International & Comparative Law Review*, Vol. 14, p. 80.

⁹⁹ Green 1985, pp. 542–543.

whom the UK is at peace.¹⁰⁰ The term “foreign state” includes naturally independent states but also persons exercising governmental authority over *part* of a country.¹⁰¹ This could mean rebel forces who are in territorial control of a certain area of a country. That being said, such legislation in both the US and UK has been left largely unenforced. According to a report by the British Foreign and Commonwealth Office there have as yet been no prosecutions for unlawful enlistment or recruitment.¹⁰²

5. The Decline of Mercenarism

Mercenarism ended for about hundred years from the mid-19th century and several theories have been put forward to explain this. Sarah Percy argues in *Mercenaries: The History of a Norm in International Relations* that mercenarism came to an end at that time because of the existing anti-mercenary norm. The rule was effectively based on a moral question:

As the concept of citizen duty to the state grew, and patriotism and nationalism became increasingly seen as desirable and practical for armies, a selfish and financial motivation became morally inappropriate and practically inferior.¹⁰³

The main argument Percy makes in her study is that the change was a *moral* one. According to Percy, this anti-mercenary norm expressed itself differently at different times but is nevertheless the most plausible explanation for why mercenaries were replaced by national armies in America, France, Prussia and England. In America, the revolutionaries “understood their project in explicitly moral terms, and these terms made the use of mercenaries by the other side heinous, and made the option of using mercenaries for the revolutionary cause unthinkable”.¹⁰⁴ The problem was not the use of foreigners as such but it was seen as problematic to use foreigners who did not share the

¹⁰⁰ Foreign Enlistment Act 1870 (United Kingdom), section 4.

¹⁰¹ *Ibid.*, section 30.

¹⁰² **UK Foreign and Commonwealth Office.** 2002. Private Military Companies: Options for Regulation. London: The Stationery Office, <www.globalsecurity.org/military/library/report/2002/mercenaries.pdf>, p. 20.

¹⁰³ **Sarah Percy.** 2007. *Mercenaries: The History of a Norm in International Relations*. New York, NY: Oxford University Press, p. 121.

¹⁰⁴ *Ibid.*, p.123.

revolutionary cause.¹⁰⁵ The whole war effort was dependent on the contribution of the citizens, a consideration that made hiring mercenaries difficult.¹⁰⁶ In France the anti-mercenary norm also developed from this changed concept of the state and the citizen. Here the problem, according to Percy, was that the use of mercenaries posed a risk to the liberty of the people because mercenaries took orders from the leader of the state, instead of “thinking about the needs of the polity itself”.¹⁰⁷ Based on the enlightened values of the time, “patriotism and republicanism had become so morally powerful that it obscured the fact that conscription was inherently coercive”.¹⁰⁸

In Prussia, argues Percy, the American revolutionary war played a major role in turning public opinion against the use of mercenaries. She continues that Prussia and France had both abandoned mercenaries, but for different reasons. In Prussia the goal was to build a state that would be better able to defend itself. Its focus was not necessarily on guaranteeing citizen rights or replacing the old regime with a new one; rather, the goal was to make the old regime stronger. What makes Prussia’s abandonment of mercenaries remarkable, according to Percy, is the fact that it broke a Prussian military tradition of hundreds of years, and it came with a huge social cost to boot.¹⁰⁹ This decision Percy explains by the existence of the anti-mercenary norm. Finally, in the United Kingdom the situation was different again because of the existence of a strong norm against standing armies. The British had used mercenaries in the past, partly because national sentiment against standing armies ensured that there were no effective domestic institutional structures and this made it difficult to find suitable soldiers otherwise.¹¹⁰ The norm against standing armies was the key factor that made the British use mercenaries and postpone creating national standing armed forces. During the American War of Independence and the Crimean War mercenaries came to be seen as morally unacceptable for various reasons.¹¹¹ The main objection was their improper motivation.

The problem with Percy’s argument is that it is founded only upon this moral norm against the use of mercenaries and ignores or downplays many

¹⁰⁵ As seen above, the Declaration of Independence made explicit reference to mercenaries, saying that they were being transported to America to “complete the works death, desolation, and tyranny”.

¹⁰⁶ Percy 2007, p. 127.

¹⁰⁷ *Ibid.*, p. 129.

¹⁰⁸ *Ibid.*, p. 133.

¹⁰⁹ *Ibid.*, p. 145.

¹¹⁰ *Ibid.*, p. 151.

¹¹¹ *Ibid.*, pp. 152–163.

other plausible explanations. What is more, it is not only in the 18th and 19th centuries that mercenaries were viewed as morally questionable. They have been condemned in almost all eras and usually on similar grounds. Janice Thomson in *Mercenaries, Pirates and Sovereigns* sees the decline of mercenarism as relating to the question of neutrality:

But if the state's right to buy and sell armies was well established, the right of individuals to enlist in foreign armed service was not settled. At issue was the state's responsibility for the actions of its subjects or citizens. Could a state claim neutrality in a particular international conflict while people within its jurisdiction chose to serve in the armed forces of one of the belligerents?¹¹²

Thomson argues that mercenarism ended because it produced unintended consequences for states. In particular, she argues that it became a nuisance to supply states with mercenaries because they could find themselves in a position where the right to claim neutrality was put at risk. Unlike Percy, Thomson does not consider that the problem was one of demand, arguing that states were still perfectly happy to hire mercenaries.¹¹³ She put forward that it was the supply that was drying out. Deborah Avant criticises this by asserting that if this was indeed the case there should be instances of states trying to buy mercenaries but failing, and there is little evidence of that.¹¹⁴ According to Thomson, in order to address the problems mercenaries posed for state neutrality, states started enacting neutrality laws. However, this argument does not fully explain the decline of mercenarism. Thomson's second argument is called the "state building" argument. Here, according to Thomson, the objective is to consolidate the interstate control of violence. The neutrality laws did not only prohibit military service in foreign forces, but also the setting up of private armies within the state.¹¹⁵ As noted above, one important aspect of the neutrality laws was to put control of violence into the public domain, only to be used for public purposes. Accordingly, the issue here is one of sovereignty, i.e., the sovereign's control over its citizens. The decline of mercenarism, according to Thomson, also followed from the

¹¹² Thomson 1994, p. 55.

¹¹³ *Ibid.*, p. 59.

¹¹⁴ Deborah Avant. 2000. From Mercenary to Citizen Armies: Explaining Change in the Practice of War. – International Organization, Vol. 54, p. 67, footnote 112. However, Avant fails to refer to British experiences during and after the American War of Independence. According to Mockler, supply was indeed drying out and there were many instances of the British trying to buy mercenaries and failing.

¹¹⁵ *Ibid.*, p. 86.

state asserting control over violence both domestically and internationally. Unlike Percy, Thomson argues that states took a normative approach to the use of mercenaries because of the practical problems they posed, not because the mercenaries were considered morally questionable.

Avant contends that the decline of mercenarism can be partially attributed to the realist argument that states choose strategies that win wars, and to sociological institutional arguments concerning how ideas shape state behaviour and how states act in a way that best reflects their notions of state identity; but she adds that neither position fully explains why mercenarism ended *when* it did.¹¹⁶ Avant argues that path dependency theory better explains the decline in the use of mercenaries. According to this theory:

One state's solution to the underlying material and ideational challenges that looks successful (wins wars, fits with the prevailing ideas) can become the international model, making the solution more likely to be replicated in other countries. Once a path becomes an international model, it provides a new commonsensical starting point.¹¹⁷

For Avant the new focal points were the French and, perhaps more aptly, the Prussian experiences, in particular the loss of Prussian troops to the French citizen army in Auerstadt and Jena. Avant's argument proposes that the shift from mercenary armies towards citizen armies required material and ideological changes (for example, new values or military strategies), exogenous shock (defeat in battle) as well as the domestic conditions that allowed reform to take place (divergent interests and ideas on military issues). Especially in relation to Prussia, Avant is quick to dismiss Thomson's argument that the ending of supply played any significant role in transforming the Prussian army. Avant contends instead that this change was due to the Prussian belief, based on the French example, that a citizen army would perform better.¹¹⁸ The strength of Avant's argument, overall, lies in the fact that, unlike Percy, she does not try to limit the cause for the decline of mercenarism to just one factor. Rather, she realises that material and ideological changes also played an important role, but that they could not explain the shift by themselves.

Many factors contributed to the decline of mercenarism. The above section has sketched out some explanations and prevalent theories on the

¹¹⁶ Avant 2000, p. 41.

¹¹⁷ *Ibid.*, pp. 42–32. Percy argues that this does not explain why states reject other equally good or better solutions to begin with. For her, the answer to this question lies in norms. See Percy 2007, p. 108.

¹¹⁸ Avant 2000, p. 67.

question of why the use of mercenaries came to an abrupt end in the mid-19th century. This was in order to understand the necessary conditions for the existence of mercenaries as well as the conditions that might make them less likely to be used. There is no one simple answer to the question of why mercenarism died out when it did. It was probably a combination of several phenomena: aspects of material changes; the ideological shift in the relationship between the state and the individual; developments in military tactics and technology; favourable domestic conditions in political life that made reform possible; and possibly many other factors as well. The most pertinent point to note is that the decline and cessation of the use of mercenaries began when nation states became more powerful in both the domestic and international spheres, and also when notions started taking hold of how state sovereignty and legitimacy lay with the people rather than with the ruler.

6. Summary

This brief history of mercenarism brings up many relevant aspects for modern discourse. Majority opinion has generally been very sceptical of mercenaries even in the day when they were the norm.¹¹⁹ From a larger historical perspective, one should keep in mind that the rise of national armies broke the age-old tradition of using paid professional soldiers, both foreign and domestic. Throughout all history warfare has been dominated by non-state actors, often foreign in origin, but the success of the nation state was so rapid and overwhelming that, up until a few hundred years after its inception, virtually nobody dared question the state monopoly of violence or the role national armies played in the execution of warfare.

But, to borrow from Fukuyama, of course history did not end in the mid 19th century. Mercenaries resurfaced in the 1960s in the Congo and soon thereafter in other decolonisation conflicts, and they have probably been present in almost all conflicts since then. From the 1960s onwards they were mainly individual former professional soldiers recruited by African rulers to organise their fighting forces. Many of these men, such as Mike Hoare and Bob Denard to name but two, became famous for their participation in various conflicts in Africa.

Nowadays, most attention is focused on private military companies and the role they play in providing military force or at least in supporting regular combatants in many combatant-like roles. There is currently great

¹¹⁹ See above. This included writers such as Plato, Aristototle, Grotius, Vitoria, Macchiavelli and More.

uncertainty over what roles contracted combatants will play in future conflicts and how their legitimacy will be assessed. Companies such as Executive Outcomes and Sandline International offered full-scale combat services in the 1990s, but they both quickly faded away for various reasons. Since then, most private military companies seem to focus on support rather than direct combat roles. However, lines are not always that easy to draw between exactly what constitutes combat and what constitutes mere support. Many of the services offered by private military companies hover around this important grey area. The private military industry is now clearly pausing for breath while it seeks the appropriate services to offer. Which way the industry will ultimately turn – support or combat – is yet to be seen. Whilst the focus is currently on support roles, there have been reports that the United Arab Emirates has hired Eric Prince, founder of Blackwater USA, to provide elite forces for the oil-rich Gulf state.¹²⁰ Whether this will happen, and whether other states will follow suit, the future will tell.

Domestic Legal Instruments

Foreign Enlistment Act 1870 (United Kingdom).

Magna Carta Libertatum 1215 (England).

The Declaration of Independence, 4 July 1776 (United States).

Declaration of the Rights of Man, 26 August 1789 (France).

Constitution, 3 September 1791 (France).

Cases

Wiborg v. United States, 163 U.S. 632 (1896).

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Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc E/CN.4/1999/11, 13 January 1999.

¹²⁰ See **Mark Mazzetti & Emily B. Hager**. 2011. Secret Desert Force Set Up by Blackwater's Founder. – The New York Times, 14 May, <www.nytimes.com/2011/05/15/world/middleeast/15prince.html> (accessed 6 December 2011).

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CHIVALRY WITHOUT A HORSE: MILITARY HONOUR AND THE MODERN LAW OF ARMED CONFLICT

Rain Liivoja



1. Introduction

Chivalry conjures up an image of a medieval warrior in shining armour, riding into battle on a noble steed, to rescue a sleeping princess from a three-headed dragon. Dragons aside, this popular image is fairly accurate. Chivalry in the broadest sense comprises the ethos of the knight – the mounted combatant that dominated the battlefields of Europe in the Middle Ages – and covers everything from battlefield conduct to courtly love.¹ This association between the mounted warrior and chivalry goes as deep as etymology – in many languages the very word for “knight” is derived from the word for “horse”: thus, in French, *chevalier* comes from *cheval*, in Italian *cavaliere* from *cavallo* and in Spanish *caballero* from *caballo*. The German *Ritter* (or better yet, *Reitter* in Middle High German) comes from *reiten*, “to ride”. Thus, at first blush, chivalry appears to be a distinctly medieval notion, associated as it is with a specific kind of man-at-arms and a peculiar form of warfare – mounted shock combat. Perhaps then, as Noël Denholm-Young famously quipped, “[i]t is impossible to be chivalrous without a horse.”²

But if we strip chivalry of its romantic overtones and literary hyperbole, we find a code of conduct that held currency among the military élite of the era. At the core of this code was an ideal that was certainly not characteristic of the Middle Ages alone: according to Malcolm Vale, “[c]hivalry was often no more, and no less, than the sentiment of honour in its medieval guise”.³ Thus, to speak of chivalry is to speak of a military code of honour, which already sounds far less archaic. Honour, moreover, has played a key role in

¹ The classic general account is **Maurice Keen**. 1984. *Chivalry*. New Haven, CT: Yale University Press.

² **Noël Denholm-Young**. 1969. *The Tournament in the Thirteenth Century*. – R. W. Hunt, W. A. Pantin and R. W. Southern, eds. *Studies in Medieval History*, Presented to Frederick Maurice Powicke. Oxford: Clarendon, p. 240.

³ **Malcolm Vale**. 1981. *War and Chivalry: Warfare and Aristocratic Culture in England, France and Burgundy at the End of the Middle Ages*. London: Duckworth, p. 1.

military thinking over millennia,⁴ so it does not seem out of place to talk about it with reference to modern warfare.

Moreover, there is a concrete link between chivalry and the contemporary law of armed conflict. Geoffrey Best, among others, has pointed out that “[a] large part of the modern law of war has developed simply as a codification and universalization of the customs and conventions of the vocational/professional soldiery.”⁵ The law of war that might be called “modern” came into being in the second half of the 19th century with the adoption of a number of important documents – the Lieber Code in 1861,⁶ the Brussels Declaration in 1874,⁷ the Oxford Manual in 1880,⁸ and the Hague Regulations in 1899 (revised in 1907).⁹ While this new-found enthusiasm for the legal regulation of warfare was certainly quite remarkable, the innovation of these documents lay rather in their form than in their substance. Their drafting was to a very significant extent an exercise in reducing to writing – in a distinctly legal language, although not always in a strictly legally binding form – customs already existing, or behaviour aspired to, within the military community. This even holds true with respect to the 1864 Geneva Convention,¹⁰ the brainchild of Henry Dunant, which has been hailed as the cornerstone of the modern law of armed conflict. While the explicit language and the multilateral scope of this document were certainly innovative and as such had monumental significance in the development of the law of armed conflict, it revived an old idea. Namely, it aimed to keep out of harm’s way non-combatants, in this particular instance, those coming to the aid of wounded soldiers on the battlefield. Of course, as with any other codification process, the work done in the 19th century on the laws of war seized the opportunity to clarify existing practices and to introduce new elements. But

⁴ See generally **Paul Robinson**. 2006. *Military Honour and the Conduct of War: From Ancient Greece to Iraq*. London: Routledge.

⁵ **Geoffrey Best**. 1980. *Humanity in Warfare*. New York: Columbia University Press, p. 60.

⁶ General Orders No. 100 – Instructions for the Government of Armies of the United States in the Field (US, 1863).

⁷ Project of an International Declaration concerning the Laws and Customs of War, text adopted at Brussels, 27 August 1874, did not enter into force.

⁸ **Institute of International Law**. 1880. *The Laws of War on Land*. 9 September.

⁹ Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, in force 4 September 1900, 205 CTS 277; Regulation respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 205 CTS 277.

¹⁰ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, in force 22 June 1865, 129 CTS 361.

the basic rules of armed conflict were not invented in the late 19th century as one of their most significant sources was the medieval code of chivalry.¹¹

This paper considers the imprint that chivalry has left on the modern law of armed conflict. Limitations of space and a regard for the reader's patience do not allow for a discussion of every nook and cranny of international humanitarian law. Therefore, rather than attempt to systematically cover the entire field, I will try to show by way of a few characteristic examples how the notion of honour (especially in its medieval guise) still influences modern law. I also wish to call into question the popular idea that the entire law of armed conflict reflects a delicate balance between the fundamentally conflicting notions of military necessity and humanity. For example, one leading scholar, Yoram Dinstein, claims that the law of armed conflict "in its entirety is predicated on a subtle equilibrium between two diametrically opposite impulses: military necessity and humanitarian considerations."¹² With due respect, there are two problems with this view. First, military necessity and humanity need not be opposing forces – when considered in the long term, they may actually be mutually supporting. The strategic need to win the "hearts and minds" of the adversary's civilian population often goes hand in hand with limitations of a humanitarian nature. Already Shakespeare's King Henry V knew that "when lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner".¹³ Second – and this is what I wish to point out in this paper – the entire gamut of rules that comprise the law of armed conflict cannot be adequately explained with reference to military necessity and humanity alone. The law of armed conflict can only be made sense of if one bears in mind the most rudimentary considerations of military honour.

¹¹ **G. I. A. D. Draper**. 1965. The Interaction of Christianity and Chivalry in the Historical Development of the Law of War. – *International Review of the Red Cross*, Vol. 5, No. 46, p. 7; **Best** 1980, p. 60; **Hubert M. Mader**. 2002. "Ritterlichkeit": Eine Basis des humanitären Völkerrechts und ein Weg zu seiner Durchsetzung. – *Truppendienst*, Vol., No. 2, pp. 122–126.

¹² **Yoram Dinstein**. 2004. *The Conduct of Hostilities under the Law of Armed Conflict*. Cambridge: Cambridge University Press, p. 16.

¹³ **William Shakespeare**. c. 1599. Henry V, Act 3, Scene VI; cited in **Theodor Meron**. 1992. Shakespeare's Henry the Fifth and the Law of War. – *American Journal of International Law*, Vol. 86, pp. 2–3.

2. Prisoners of War

The occasional discussion of honour in the context of the modern law of armed conflict tends to focus on the means and methods of warfare (more on which in due course). Yet arguably the most significant portion of the law that owes an intellectual debt to chivalry is the one dealing with prisoners of war.

This is altogether unsurprising, since the dignified treatment of prisoners was an essential, if not the central, part of the medieval code of military conduct. In battle, knights did not generally attempt to kill each other. Rather, their main goal was the disablement and capture of the noble adversaries. Coming from the upper echelons of society, a knight was presumably wealthy and thus quite literally worth more alive than dead.¹⁴ A knight could be taken prisoner and allowed to purchase his freedom – to ransom himself. To allow a captured knight to raise the necessary money, he was often released upon promise not to raise arms against his captor until having made due payment.¹⁵

Such a system of “parole” was possible precisely because honour stood at the centre of the warrior’s code. The promise not to take up arms against one’s captor was a knight’s word of honour. And “a knight trusted the word and promise of another knight, even an enemy knight”.¹⁶ The financial gain obtained from paroling and ransoming, as well as the reciprocal insurance against mistreatment that the system provided,¹⁷ chimed together nicely with the more noble ideals of the knightly class. Obviously, the purpose of conflict nowadays is not, or at least ought not to be, the enrichment of individual combatants. Thus, while the basis of prisoner-of-war status has changed somewhat, it has not completely detached itself from its historical origins.

¹⁴ **Robert C. Stacey.** 1994. *The Age of Chivalry*. – Michael Howard, George J. Andreopoulos and Mark R. Shulman, eds. *The Laws of War: Constraints on Warfare in the Western World*. New Haven, CT: Yale University Press, p. 36.

¹⁵ **Robert P. Ward.** 1795. *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and Romans, to the Age of Grotius*. London: Butterworths, p. 179. But there was also a specific breed of warfare, called *guerre mortelle*, wherein adversaries “fought by the rules which in antiquity had applied in the wars of the Roman people. There was no privilege of ransom; the conquered could be slain or enslaved.” **Maurice Keen.** 1965. *The Laws of War in the Late Middle Ages*. London: Routledge & Kegan Paul, p. 104.

¹⁶ **Draper** 1965, p. 20.

¹⁷ **John Gillingham.** 1999. *An Age of Expansion, c. 1020–1204*. – Maurice Keen, ed. *Medieval Warfare*. Oxford: Oxford University Press, p. 83.

An illuminating episode in military history in this respect was the disagreement in Nazi Germany over the treatment of prisoners of war. On 8 September 1941, Lieutenant General Hermann Reinecke, head of the prisoner of war department of the German High Command, issued the following orders:

The Bolshevik soldier has ... lost all claim to treatment as an honorable opponent, in accordance with the Geneva Convention. ... The order for ruthless and energetic action must be given at the slightest indication of insubordination, especially in the case of Bolshevik fanatics. Insubordination, active or passive resistance, must be broken immediately by force of arms (bayonets, butts, and firearms). ... Anyone carrying out [this] order who does not use his weapons, or does so with insufficient energy, is punishable. ... Prisoners of war attempting escape are to be fired on without previous challenge. No warning shot must ever be fired. ... The use of arms against prisoners of war is as a rule legal.¹⁸

This call for more enthusiastic use of violence against prisoners of war flew in the face of centuries of settled military practice and drew objections from the braver parts of the German officer corps. Particularly vocal was Admiral Wilhelm Canaris, a naval officer of the old school and the head of the *Abwehr*, the German military intelligence.¹⁹ He directed one of his legal advisers, Helmuth James von Moltke, who himself came from family with a long history of military service, to draw up a memorandum on the international law aspects of the treatment of prisoners of war. This document competently explained that even though the 1929 Geneva Prisoner of War Convention²⁰ might be technically inapplicable to the Soviet prisoners of war since the USSR was not a party to the treaty, the treatment of captured Soviet soldiers was nonetheless governed by principles of customary international law.²¹ In particular, the memo underlined that

¹⁸ Cited in *US et al. v. Göring et al.*, 1 TMWC 171 (International Military Tribunal at Nuremberg, 1946), p. 229.

¹⁹ Canaris, who later suffered death for his role in the attempt to assassinate Hitler, was perhaps one of the most interesting – some might say enigmatic – military personalities of the era. For a biography, see **Michael Mueller**. 2007. *Canaris: The Life and Death of Hitler's Spymaster*. London: Chatham. The incident addressed in this paper is mentioned *ibid.* at 205.

²⁰ Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, in force 19 June 1931, 343 LNTS 343.

²¹ For parallels with the treatment of persons detained in the so-called war on terror, see **Scott Horton**. 2007. *Military Necessity, Torture, and the Criminality of Lawyers*. – Wolfgang Kaleck *et al.*, eds. *International Prosecution of Human Rights Crimes*. Berlin: Springer, pp. 169–183.

war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people²²

These objections were dismissed by Field Marshal Wilhelm Keitel who retorted that they “arise from the military concept of chivalrous warfare. This [war] is the destruction of an ideology.”²³ One cannot but note a perverse contradiction: Reinecke had relied on some perceived lack of honour on the part of the Soviets in order to deny them protection in the first place, whereas Keitel argued that honour no longer played a role in the conduct of hostilities.

Be that as it may, *Graf* von Moltke’s arguments merit attention because they go beyond the specific rules of customary law and provide a glimpse of what underpins them. First, von Moltke mentions “military tradition”, which is clearly a synonym for the tradition of honourable conduct in a military context. Second, he invokes humanity – a regard for “helpless people”. Third, he makes implicit reference to military necessity: if the object of war is, in the language of the St Petersburg Declaration, to “weaken the military forces of the enemy”,²⁴ then as far as an individual enemy combatant is concerned, that objective is attained through capture and detention. “Further participation in the war” being thereby prevented, it is unnecessary to molest the soldier any further. This three-pronged argument shows rather vividly how the general rationale of prisoner-of-war protection incorporated the “late Enlightenment consensus” of the 18th century about limited warfare as well as the broad sentiments of humanity that came to the fore in the late 19th century,²⁵ although without entirely shedding the chivalrous overtones.

The notion of parole has also survived beyond the medieval period. The element of ransom has disappeared and the revised conception of parole simply entails an undertaking by the captured combatant, in exchange for his liberty, not to take up arms against the capturing power in the ongoing conflict.²⁶ Thus, the 1949 Geneva Convention III stipulates that “[p]risoners of

²² Cited in *US et al. v. Göring et al.*, p. 232.

²³ Cited *ibid.*

²⁴ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November/11 December 1868, 138 CTS 297, Preamble.

²⁵ *Best* 1980, pp. 31–74 and 128–215.

²⁶ See generally **Gary D. Brown**. 1997. Prisoner of War Parole: Ancient Concept, Modern Utility. – *Military Law Review*, Vol. 156, pp. 200–223.

war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend”.²⁷

Though this language may be rather bland and generic, there is little doubt that the provision implicitly invokes military honour. To be released on parole means to be released on one’s word of honour. The 1907 Hague Regulations – on some issues a clear predecessor to the 1949 Geneva Conventions – were quite explicit on this point, stating that prisoners of war released on parole were “bound, *on their personal honour*, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted”.²⁸ While the drafters of the 1949 Geneva Conventions deemed it wise to leave a direct reference to honour out of the text, the authoritative commentary to the Conventions still notes that “[a] person who gives his parole gives a personal undertaking *on his honour* for which he is in the first place responsible to himself.”²⁹

Another interesting point arises from the consequences of breaking one’s word of honour. It is well recognised that parolees who are recaptured while bearing arms against the government to whom they gave their word of honour can be punished. Under the express terms of the Hague Regulations, persons violating their parole would “forfeit their right to be treated as prisoners of war, and can be brought before the courts”.³⁰ But what is more illuminating is how the parolees’ own states reacted to violations. The British, for example, used to punish their own officers for violations of parole by stripping them of their commissions.³¹ In similar circumstances, the French apparently sent their own service members back to the enemy for reimprisonment.³² One reason for this austerity may have been that, as the Lieber Code put it, “[t]he pledge of the parole is always an individual, but not a private act.”³³ It implicates the state concerned, because, if properly made, the parole becomes

²⁷ Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135, Article 21.

²⁸ Hague Regulations, Article 10(1) (emphasis added).

²⁹ **Jean S. Pictet**, ed. 1960. Commentary on the Geneva Conventions of 12 August 1949. Geneva: ICRC, p. 180 (emphasis added).

³⁰ Hague Regulations, Article 12. The loss of prisoner-of-war status appears to have been a cryptic admission of the possibility of a death sentence. Under the 1949 Geneva Convention III the consequences do not appear to be so grave, though some punishment is certainly possible. See **Pictet** 1960, p. 181.

³¹ **Brown** 1997, p. 211.

³² **Best** 1980, p. 81.

³³ General Orders No. 100, Article 121.

binding on the state that the soldier serves.³⁴ Paroles are, thus, “sacred obligations, and the national faith is pledged for their fulfillment”,³⁵ suggesting that violations of parole would be disgraceful to the state (though, for practical purposes, perfectly beneficial). But, perhaps above all else, a violation of parole goes beyond a simple breach of the positive rules of law and amounts to the failure of the combatant as a man (or woman) of honour.

Admittedly, paroling prisoners of war has largely become a theoretical affair. Parole has not been used on a major scale since the American Civil War, though sporadic instances occurred during the World Wars. Nonetheless, commentators have pointed out the continued potential of the institution.³⁶ Moreover, the decline of the parole system is not necessarily the result of states being against the release of the prisoners they have caught, but rather stems from their opposition to their own soldiers giving parole to the enemy. For example, US military personnel are precluded from being paroled, because their own code of conduct provides that service members “will accept neither parole nor special favors from the enemy”.³⁷

The rules of parole aside, there are some other elements of the protection granted to prisoners of war which cannot be easily explained in the framework of balancing humanity against military necessity. One of the more “anachronistic remnants”³⁸ is the systemic distinction that Geneva Convention III makes between officers and soldiers. Thus, for example, officers must be accommodated separately from enlisted men³⁹ and “may in no circumstances be compelled to work”.⁴⁰ This reflects the elevated social status of the officer and is in some respects reminiscent of the different treatment accorded in medieval warfare to knights and foot soldiers.

More generally, however, the law reflects a basic premise that a captured enemy combatant – be it officer or enlisted man – is an honourable professional and deserves appropriate respect. This becomes obvious in Article 14

³⁴ **Pictet** 1960, p. 181: “In the first place, the promise given by a prisoner of war is, of course, binding upon him; but, provided this promise was made consistently with the relevant laws and regulations, it is also binding on the Power on which he depends.”

³⁵ **Herbert C. Fooks**. 1924. *Prisoners of War*. Federalsburg, MD: Stowell, p. 299.

³⁶ **Brown** 1997.

³⁷ Code of Conduct for Members of the Armed Forces, Exec. Order No. 10,631, 20 Fed. Reg. 6057, 3 C.F.R. 1954, 58 Comp. 266 (1955), as amended (US, 1955), Article III, 3rd sentence.

³⁸ **Thomas C. Wingfield**. 2001. *Chivalry in the Use of Force*. – University of Toledo Law Review, Vol. 32, p. 113.

³⁹ Geneva Convention III, Article 97(3).

⁴⁰ Geneva Convention III, Article 49(3).

of Geneva Convention III which states that “[p]risoners of war are entitled in all circumstances to respect for their persons and their honour.” Thus, in response to the World War II era German attempts to elicit Nazi salutes from the prisoners of war, Geneva Convention III makes it explicit that “[p]risoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying *in their own forces*.”⁴¹ Also, “[t]he wearing [by a prisoner of war] of badges of rank and nationality, as well as of decorations, shall be permitted.”⁴² Accordingly, General Manuel Noriega, who was arrested by the US forces during the invasion of Panama and later convicted in US courts for drug related-offences, was allowed to wear his uniform during the trial and while residing in a Florida prison.⁴³ Orange jumpsuits appear incompatible with military honour.

3. Means and Methods of Warfare

I now come to the part of the law of armed conflict that is perhaps the easiest to associate with chivalry, namely the limitations placed on the use of particular means and methods of warfare. Here, the Oxford Manual, an influential though non-binding codification of the law of armed conflict completed in 1880 under the auspices of the *Institut de Droit international*,⁴⁴ provides a convenient starting point.

Article 4 of the Manual lays down the fundamental principle that the choice of means and methods of warfare is not unlimited and that the belligerents “are to abstain especially from all needless severity, as well as from all perfidious, unjust, or tyrannical acts”. This rather general stipulation is elaborated on by two articles. Article 9 gives flesh to the idea that “needless severity should be avoided” by explicitly proscribing the use of means of warfare calculated to cause superfluous suffering, as well as attacks on surrendered or disabled enemies. Articles 8, which is relevant for the present discussion, deals with the principle that “the struggle must be honourable”. To that end it declares forbidden:

⁴¹ Geneva Convention III, Article 39(2) (emphasis added).

⁴² Geneva Convention III, Article 40.

⁴³ See *US v. Noriega*, 808 FSupp 791 (US District Court, Southern District of Florida, 1992), finding that Noriega was entitled to full benefits under Geneva Convention III.

⁴⁴ See note 8 above.

- (a) To make use of poison, in any form whatever;
- (b) To make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender;
- (c) To attack an enemy while concealing the distinctive signs of an armed force;
- (d) To make improper use of the national flag, military insignia or uniform of the enemy, of the flag of truce and of the protective signs prescribed by the Geneva Convention [i.e. the red cross]

These prohibitions may be conveniently dealt with under two headings as section (a) addresses a particular means of warfare (essentially, a type of a weapon), whereas sections (b) through (d) deal with methods of combat.

3.1. Prohibited Weapons

The absolute prohibition of poison features prominently not only in the Oxford Manual but also in other instruments of the same period, including the Lieber Code and the Hague Regulations;⁴⁵ at present it constitutes one of the most firmly entrenched customary rules of the law of armed conflict.⁴⁶

The rule can, in many instances, be explained without invoking the notion of honour, to which it is clearly tied to in the Oxford Manual. For example, poisoning the water supply of the enemy would affect both combatants and civilians. In modern parlance, that would amount to an indiscriminate attack and would be prohibited as such.⁴⁷ Furthermore, poison, even when used in a sufficiently discriminating manner against combatants, may violate the prohibition against superfluous injury and unnecessary suffering.⁴⁸ This would be the case if the particular type of poison used would render the death of the targeted combatant inevitable or would have particularly gruesome effects on him or her. However, these considerations hardly justify an absolute prohibition. One could point to types of poison, or come up with scenarios for using poison, that would not be ruled out by the principle of discrimination or by the principle against superfluous injury.

⁴⁵ See General Orders No. 100, Article 70; Hague Regulations, Article 23(a).

⁴⁶ See ICRC. updated 2011. Customary IHL Database. <www.icrc.org/customary-ihl> (accessed 1 December 2011), Rule 27 and the authorities cited in the commentary; Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2000, 2187 UNTS 90, Article 8(2)(b)(xvii).

⁴⁷ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, in force 12 July 1978, 1125 UNTS 3, Article 51.

⁴⁸ See Additional Protocol I, Article 35(2).

The explanation for the complete ban lies in the fact that the knightly class had found poison despicable for a different reason: knights disdained poison because it could be used to kill an opponent without personal risk.⁴⁹ Poisoning was cowardly and therefore dishonourable.⁵⁰ Similar logic applied to early projectile weapons. Since “diabolical machines”⁵¹ such as long- and crossbows could be used to kill another man without putting oneself in harm’s way, the archer, if he fell into the hands of the knight, “suffer[ed] death at once because he [was] without honour”.⁵²

Interestingly, the special contempt for poisoning was not limited to the battlefield but also surfaced in ordinary criminal law. In mid-16th century England, poisoners were boiled to death. This gruesome means of execution is significant in that poisoning was the only other instance beside high treason and heresy where the death penalty was carried out by means of torture.⁵³ French criminal law to this day has a separate provision dealing with *empoisonnement*,⁵⁴ showing, at least initially, “the detestation which the crime inspires”.⁵⁵

The prohibition of poison in warfare, especially in light of the special treatment of poisoning under the ordinary criminal law, not only reflects a moral outrage, but also shows a degree of pragmatism. The ban of poison, according to Hugo Grotius, “originated with kings, whose lives are better defended by arms than those of other men, but are less safe from poison”.⁵⁶ In other words, poison was something by which a lowly commoner could become positively dangerous to a nobleman. That, of course, could not be tolerated.

Rather similarly, the ban of bows by the Second Lateran Council in 1139 can be seen as “man’s first attempt at arms control” and an “effort to enforce

⁴⁹ **Draper** 1965, p. 18.

⁵⁰ See also **Alberico Gentili**. 1598/1933. *De iure belli libri tres* [Carnegie edn]. Oxford: Clarendon, p. 157; **Larry May**. 2007. *War Crimes and Just War*. Cambridge: Cambridge University Press, p. 124ff.

⁵¹ This is how Anna Comnena, the daughter of the Byzantine emperor Alexius Comnenus, described the crossbow. Cited in **Kelly DeVries**. 1992. *Medieval Military Technology*. Lewinston, NY: Broadview, pp. 40–41.

⁵² **Draper** 1965, p. 19.

⁵³ **Sir James Fitzjames Stephen**. 1883. *A History of the Criminal Law of England*. London: Macmillan, Vol. i, p. 476, and Vol. iii, pp. 44–45.

⁵⁴ Code Pénal (Nouveau) [(New) Penal Code] (France, 1992), Article 221–5.

⁵⁵ **Stephen** 1883, Vol. iii, p. 95.

⁵⁶ **Hugo Grotius**. 1925 [1625]. *De Jure Belli ac Pacis Libri Tres*. Oxford: Clarendon, Vol. iii, p. 652.

weapons symmetry”.⁵⁷ Warfare was intended to be carried out by knights and use expensive, “knightly” weapons, it was not meant for peasants wielding cheap bows.

Admittedly, this approach was an ideal view of warfare and quite detached from reality. Even at the height of the era of chivalry, the peasantry participated in wars as foot soldiers and in fairly large numbers.⁵⁸ That said, what is quite clear is that the ban on poison and bows had little, if anything, to do with humanitarian sentiments. The only principled objection that was made against them had to do with honourable conduct in warfare, with a healthy dose of expediency helping to solidify the rule.

The vast majority of innovations in warfare, which have progressively made combat more of a long-distance affair, have attracted criticism similar to that which was made against poison and bows:

The history of warfare has been repeatedly punctuated by allegations that certain new weapons are “unlawful”, because in some way “unfair” by the prevailing criteria of honour, fairness and so on, or because nastier in their action than they need be.⁵⁹

As far as modern law is concerned, the crucial difference is that a weapon that is “nastier” than it needs to be is automatically outlawed. The law generally proscribes the use of any instruments of war that are of a nature to cause unnecessary suffering,⁶⁰ that is to say, are of a nature to cause “a harm greater than that unavoidable to achieve legitimate military objectives”.⁶¹ Yet, under the contemporary law of armed conflict, the “dishonourable” character of a weapon is insufficient, without more, to impact its legality.

3.2. *Treachery and Perfidy*

Behind the historic bans of certain weapons on the grounds of their unchivalrous nature lurks a more general prohibition of dishonourable means and methods of warfare. At stake here is the distinction between permissible

⁵⁷ **Robert L. O’Connell**. 1989. *Of Arms and Men: A History of War, Weapons, and Aggression*. Oxford: Oxford University Press.

⁵⁸ See, e.g., **Stephen Morillo**. 1999. The “Age of Cavalry” Revisited. – Donald J. Kagay and L. J. Andrew Villalon, eds. *The Circle of War in the Middle Ages: Essays on Medieval Military and Naval History*. Woodbridge: Boydell, pp. 45–58.

⁵⁹ **Best** 1980, p. 62.

⁶⁰ See Hague Regulations, Article 23(e).

⁶¹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports (1996) 226, at para. 78.

and impermissible deception in warfare. Many of the ways of surprising or misleading the adversary are legitimate. For example, the use of ambushes, camouflage, decoys, mock operations and misinformation is considered perfectly permissible.⁶² Some forms of deception are, however, prohibited as a matter of law. This proscription of treacherous and perfidious acts, which obtained a clear form in the era of knightly warfare, is widely seen as the clearest manifestation of a principle of chivalry in modern law.⁶³

Additional Protocol I contains a number of provisions dealing with impermissible deception. Article 38 prohibits the “improper use” of emblems reserved for the identification of the medical services (the Red Cross and equivalent emblems) and the emblem of the United Nations. Article 39 proscribes the use of flags or military emblems, insignia or uniforms of neutral states or other states not parties to the conflict, and also prohibits the use of such identifying devices of the adversary “while engaging in attacks or in order to shield, favour, protect or impede military operations”. In other words, it is prohibited at all times to feign to be part of a (protected) medical service or of an armed force not engaged in the hostilities, and one can feign to be an adversary under very limited circumstances (for example, to facilitate escape from a prisoner-of-war camp).

The most far-reaching provision is, however, Article 37(1) which declares that “it is prohibited to kill, injure or capture an adversary by resort to perfidy”.⁶⁴ Perfidy is defined as “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence”.⁶⁵ The critical part of this definition is the characterisation of the deception as an attempt to invoke a “legal entitlement ... to immunity from attack”.⁶⁶ Consequently, “perfidy is the deliberate claim to legal protection for hostile purposes”.⁶⁷

⁶² See ICRC updated 2011, Rule 57 and the authorities cited in the commentary.

⁶³ **Keith E. Puls**, ed. 2005. *Law of War Handbook*. Charlottesville, VA: Judge Advocate General's Legal Center and School, p. 190; **Stefan Oeter**. 2008. *Methods and Means of Combat*. – Dieter Fleck, ed. *The Handbook of International Humanitarian Law*. 2nd edn. Oxford: Oxford University Press, p. 228; **Wingfield** 2001, p. 113.

⁶⁴ Additional Protocol I, Article 37(1),

⁶⁵ *Ibid.*

⁶⁶ **Dinstein** 2004, p. 201.

⁶⁷ **Jean de Preux**. 1987. Article 37 – Prohibition of Perfidy. – Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds. *Commentary on the Additional Protocols to the Geneva Conventions*. Geneva: ICRC & Martinus Nijhoff, § 1500.

The list of examples supplied by Additional Protocol I well illustrates the scope of the rule. The following forms of deception – when used to kill, injure or capture – are expressly mentioned as constituting perfidy:

- (a) The feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) The feigning of an incapacitation by wounds or sickness;
- (c) The feigning of civilian, non-combatant status; and
- (d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

These four examples refer to the protection offered by the law of armed conflict to (a) *parlementaires* carrying the flag of truce⁶⁸ and persons surrendering,⁶⁹ (b) persons incapacitated by wounds or sickness,⁷⁰ (c) civilians,⁷¹ and (d) UN personnel.⁷²

Interestingly, this conception of “perfidy” under Additional Protocol I is narrower than its intellectual ascendant, “treachery”. Article 8(b) of the Oxford Manual, cited earlier, gives two examples of prohibited treachery, namely “keeping assassins in pay” and “feigning to surrender”. A lengthier list can be found in academic writings. For instance, in the 8th edition of *Oppenheim’s International Law*, the editor, Hersch Lauterpacht, regarded the prohibition of treachery as demanding that:

no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted.⁷³

These examples clearly cover the modern concept of perfidy – the simulation of wounds, sickness or surrender for hostile ends – but also include assassinations and outlawry. Support for the inclusion of these types of acts within

⁶⁸ Hague Regulations, Article 32.

⁶⁹ Additional Protocol I, Article 41(1) and (2)(b).

⁷⁰ Additional Protocol I, Article 41(1) and (2)(c).

⁷¹ Additional Protocol I, Article 51(2).

⁷² Convention on the Safety of United Nations and Associated Personnel, GA Res. 49/59 (9 December 1994), in force 15 January 1999, 2051 UNTS 363, Article 7(1). Members of the armed forces of a State not party to the conflict are protected as civilians.

⁷³ **Lassa Oppenheim**. 1952. *International Law: A Treatise*. 7th edn. London: Longmans, p. 341 (§ 110).

the prohibition of treachery can also be drawn from other early instruments, for example the Lieber Code, which stipulated that:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. ...⁷⁴

In contrast, Article 23(b) of the Hague Regulations states rather laconically that “it is especially forbidden ... to kill or wound treacherously individuals belonging to the hostile nation or army”. Yet the provision must be interpreted as covering outlawry and assassination. The consecutive editions of the US Field Manual on the Law of Land Warfare state that Article 23(b) of the Hague Regulations should be “construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive’”.⁷⁵ Similarly, but in some more detail, the 1958 UK Military Manual stated in conjunction with the provision of the Hague Regulations that

[a]ssassination, the killing or wounding of a selected individual behind the lines of battle by enemy agents or partisans, and the killing or wounding by treachery individuals belonging to the opposing nation or army, are not lawful acts of war. ... In view of the prohibition of assassination, the proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy “dead or alive” is forbidden.⁷⁶

In sum, Article 23(b) of the Hague Regulations appears to be broader in scope than Article 37 of Additional Protocol I: perfidy under the latter is shorthand for hostile acts that constitute the abuse of the protective veil of the law of armed conflict, whereas treachery under the former includes perfidy but also covers some other dishonourable ways of harming the enemy.⁷⁷

⁷⁴ General Orders No. 100, Article 148.

⁷⁵ **US Department of the Army**. 1956. Law of Land Warfare. § 31. See also **Michael N. Schmitt**. 1992. State-Sponsored Assassination in International and Domestic Law. – Yale Journal of International Law, Vol. 17, p. 630.

⁷⁶ **UK War Office**. 1958. The Law of War on Land – being Part III of the Manual of Military Law. London: HM Stationery Office, § 115.

⁷⁷ Cf. **Schmitt** 1992, p. 617: “Treachery, as construed by early scholars, is ... broader than the concept of perfidy”.

The continued significance of this broader prohibition under the Hague Regulations is illustrated by an interesting passage from the current British Manual of the Law of Armed Conflict:

Examples of treachery includes calling out “Do not fire, we are friends” and then firing at enemy troops who had lowered their guard, especially if coupled with wearing enemy uniforms or civilian clothing; or shamming disablement or death and then using arms.⁷⁸

The wearing of enemy uniforms in such circumstances would certainly be covered by Article 39 of Additional Protocol I on the misuse of uniforms, and the use of civilian clothing or the simulation of disablement or death would amount to perfidy under Article 37. However, yelling “Do no fire, we are friends” does not seem to be caught in the net of Additional Protocol I. The only way of explaining its prohibition under the law of armed conflict would be to invoke the prohibition of treachery.

That black-letter law leaves treachery substantially undefined leads to a situation where the law reflects developments in military customs and doctrine by relying on extra-legal concepts for what is proper and honourable in warfare at a particular point in time. For example, as concerns the prohibition of assassinations, the US and British military manuals published in the 1950s contain a rather narrow reading of the rule. The 1956 edition of the US manual explicitly stated that the prohibition of assassinations, as deriving from the general rule against treachery, “does not ... preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.”⁷⁹ The 1958 British manual similarly mentioned that “[i]t is not forbidden to send a detachment or individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces.”⁸⁰ Accordingly it may well be the case that in its modern iteration, the prohibition of assassinations as a form of treachery is limited to the situations where the death of an enemy commander is procured by turning the adversary’s soldiers against him or her.

The prohibition of putting a price on the enemy’s head continues to be valid law. The question is not merely of historical and academic interest. On 17 September 2001, US president George W. Bush publicly declared that

⁷⁸ **UK Ministry of Defence**. 2004. *The Manual of the Law of Armed Conflict*. Oxford: Oxford University Press, p. 59, § 5.9, fn. 35.

⁷⁹ **US Department of the Army** 1956, § 31.

⁸⁰ **UK War Office** 1958, commentary to article 115.

Osama bin Laden was “wanted, dead or alive.” A member of the CIA’s 2001 Afghanistan Task Force concedes in a law review article that this

strays dangerously close to those prohibited means of killing. Were the statement more than a figure of speech, it would constitute outlawry, rendering any resulting deaths as assassination under international law.⁸¹

I will defer to the reader as to whether or not this was merely a figure of speech. In any event, it may be worth recalling that the Lieber code, proclaimed by a more glorious American president, added to the prohibition of outlawry the admonition that

[t]he sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.⁸²

The prohibition of perfidy, and treachery more broadly, is easy to dismiss as a remnant of a bygone era. But, as Thomas Wingfield argues, in the context of modern “information operations”, where various attempts are made to affect the thinking of the opposing commander, the distinction between ruses of war and perfidy may become “the principal legal question of operational military lawyers”.⁸³

Be that as it may, the significance of the condemnation of treachery is fundamental to the law of armed conflict. Geoffrey Best notes with some justification that treacherous conduct “points a dagger at the heart of the entire IHL enterprise”.⁸⁴ Treachery is particularly troubling because it “destroys men’s last ties with one another when almost all other ties have already been destroyed by their inability to live at peace together” and

⁸¹ **Nathan Canestaro**. 2003. *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*. – Boston College International & Comparative Law Review, Vol. 26, p. 30

⁸² General Orders No. 100, Article 148. The 25-million-dollar reward offered by the US in 2003 for information leading to the capture of Saddam Hussein or confirming his death raises similar concerns, but probably falls short of outlawry for it does not directly incite violence.

⁸³ **Wingfield** 2001, p. 113.

⁸⁴ **Geoffrey Best**. 1994. *War and Law since 1945*. Oxford: Clarendon, p. 289.

thereby “spits in the face of the law’s rock-bottom assumption of universal kinship”.⁸⁵ Greenspan also notes that:

Good faith between belligerents is essential as a rule of conduct in warfare. In civilized warfare, a belligerent is entitled to rely on certain basic rules of behavior in relation to the enemy. ... Otherwise the restraint of law will inevitably be withdrawn from the conflict, which will then degenerate into excesses and savagery, because in no case would either party be able to place the slightest credence in the word of the other. It is, therefore, an axiom in warfare that no ruse of war may impinge on the good faith which one belligerent owes another, or violate any agreement, expressed or understood, which has been arrived at between them.⁸⁶

Moreover, violations of the rules of the law of armed conflict generally need not be malicious: inhumane behaviour in war is not necessarily aforethought, it can simply be careless or inconsiderate. Treacherous acts are, however, always premeditated and consciously malicious.

There are also very specific practical concerns. Perfidy and treachery create an atmosphere of paranoia, which makes peace negotiations more precarious than they would otherwise be.⁸⁷ In terms of an even more immediate impact, perfidy can have a detrimental effect on humanitarian access. As concerns the latter, one only needs to consider an incident that occurred in 2008 in Columbia. A humanitarian NGO offered its assistance to FARC (*Fuerzas Armadas Revolucionarias de Colombia* – Revolutionary Armed Forces of Colombia) in relocating certain civilian hostages so that negotiations concerning their release could start with the government. On the agreed date, two white helicopters arrived. Once the hostages were aboard, the crewmembers, actually from of the Columbian armed forces, overpowered and captured the rebels,⁸⁸ and the hostages were released to the great fanfare of the media. But what are the chances of humanitarian NGOs getting access to civilians detained by FARC in the immediate future? In a word, slim.

⁸⁵ **Best** 1994, pp. 292–293. Cf. **de Preux** 1987, § 1500, noting that a resort to perfidy “destroys the faith that the combatants are entitled to have in the rules of armed conflict, shows a lack of the minimum respect which even enemies should have for one another, and damages the dignity of those who bear arms”.

⁸⁶ **Morris Greenspan**. 1959. *The Modern Law of Land Warfare*. Berkeley, CA: University of California Press, p. 319.

⁸⁷ **de Preux** 1987, § 1485, fn. 2.

⁸⁸ For an analysis, see **John C. Dehn**. 2008. Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World’s Reaction. – *Journal of International Criminal Justice*, Vol. 6, pp. 627–653.

4. Concluding Remarks

The impact of chivalry on the law of armed conflict seems to be at least threefold. First of all, the law of armed conflict has clearly retained some of the chivalric customs of warfare as discrete rules. Some of the more specific details of the protection of prisoners of war and some of the rules prohibiting particular means and methods of warfare are the best examples. To be sure, in many instances these rules can be reinterpreted so that they are based not so much on the personal honour of a warrior but rather grounded in respect for the humanness of the opposing party. In other words, chivalry as a principle has become subsidiary to considerations of military necessity and humanity.⁸⁹ But I think it is an exaggeration to claim that “we have witnessed over the centuries ... the gradual *elimination* of the ideal of chivalry”.⁹⁰ While chivalry has certainly taken a back seat, its impact is still noticeable, especially considering the specific prohibitions mentioned earlier.⁹¹

Second, the most pervasive, but also the most intangible, impact of chivalry on modern law is that it has set its tone, or given it an ideology. At the core of that ideology is the idea of limited warfare and of combat as an essentially rule-governed activity. Jean Pictet, one of the most influential experts on the law of armed conflict of the 21st century and the editor of the authoritative commentary of the 1949 Geneva Conventions, noted that the institution of chivalry “brought with it the recognition that in war as in the game of chess there should be rules and that one does not win by overturning the board”.⁹² While a direct comparison between chess and warfare may well be somewhat removed from reality, the underlying presumption that organised violence amounts to warfare only when it conforms to certain prescriptions is a fundamental one.

⁸⁹ Cf. **Myres S. McDougal and Florentino P. Feliciano**. 1994. *The International Law of War: Transnational Coercion and World Public Order*. Dordrecht: Martinus Nijhoff, p. 522.

⁹⁰ **G. I. A. D. Draper**. 1989. Humanitarianism in the Modern Law of Armed Conflict. – Michael A. Meyer, ed. *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*. London: British Institute of International and Comparative Law, p. 6 (emphasis added). For a substantially similar observation, see **Julius Stone**. 1959. *Legal Controls of International Conflicts: A Treatise on the Dynamics of Disputes- and War-Law*. 2nd edn. New York, NY: Rinehart, p. 337.

⁹¹ See **Peter Rowe**. 1990. Review of *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, edited by Michael A. Meyer. – *International & Comparative Law Quarterly*, Vol. 39, p. 710; **Canadian Forces – Office of the Judge Advocate General**. 2001. *Law of Armed Conflict at the Operational and Tactical Levels*, § 202(7).

⁹² **Jean S. Pictet**. 1985. *Development and Principles of International Humanitarian Law*. Dordrecht: Martinus Nijhoff, p. 15.

Moreover, the idea of chivalry as a facilitator of effective legal rules may even give support to the claim that international law as we know it today owes a debt to chivalry. Johan Huizinga had argued that while the origins of the law of nations

lay in antiquity and in canon law, ... chivalry was the ferment that made possible the development of the laws of war. The notion of a law of nations was preceded and prepared for by the chivalric ideal of a good life of honor and loyalty.⁹³

Thirdly, and in some sense most interestingly, the law of armed conflict continues to rely on the notion of honourable conduct in warfare for determining what conduct is lawful and what conduct is unlawful. When it comes to distinguishing lawful ruses of war from unlawful treacherous acts, regard must be had to conceptions of proper military conduct that seem to lie beyond the strict confines of black-letter law.

But the question remains as to whether anything practical can be gained from a clearer recognition of the chivalric origins of the modern law of armed conflict and the interplay between law and honour. I believe the answer to be yes. For one, an appreciation of chivalry is key to understanding that the law of armed conflict did not emerge as a body of rules imposed upon the military from the outside by starry-eyed humanitarians or overzealous politicians. Rather, such rules emerged from within the military profession. These rules did not come about as some sort of an unavoidable nuisance; rather, they were concomitant with the idea of a soldier as an honourable professional. Given that, as Michael Waltzer puts it, “some sense of military honour is still the creed of the professional soldier, the sociological if not the delineal descendant of the feudal knight”,⁹⁴ emphasising the intimate link between honour and rules of warfare may be very important in cultivating a respect for the rules which now have become rules of law. From a pedagogical point of view, I believe Mark Osiel to be quite right in observing that the professional identity of an officer “is imparted not by instruction in international law but by stories about the great deeds of honorable soldiers”.⁹⁵

⁹³ **Johan Huizinga**. 1959 [1921]. *The Political and Military Significance of Chivalric Ideas in the Late Middle Ages*. – *Men and Ideas: History, the Middle Ages, the Renaissance*. London: Eyre & Spottiswoode, p. 203.

⁹⁴ **Michael Walzer**. 2000. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 3rd edn. New York: Basic Books, p. 34.

⁹⁵ **Mark J. Osiel**. 2002. *Obedying Orders: Atrocity, Military Discipline and the Law of War*. New Brunswick: Transaction Publishers, p. 21.

To be sure, it is nowadays ideologically more kosher to appeal to humanity as the reason why the law of armed conflict must be respected. But that entails difficulties. It is all too easy to dehumanise the adversary. Just how thin the veneer of humanity really is can be clearly seen from Stanley Milgram's research into the susceptibility of individuals to superior authority⁹⁶ and Philip Zimbardo's infamous Stanford prison experiment.⁹⁷ Against this background it is quite troubling that many US soldiers were told during the recent war in Iraq that the enemy "is called Satan. He lives in Falluja. And we're going to destroy him." This sort of an attitude is hardly helpful from the perspective of upholding the humanitarian constraints that the law prescribes.⁹⁸ What might perhaps help a little is that the notion of honour detaches the propriety of a soldier's behaviour from the qualities (real or apparent) of the adversary. Senator John McCain succinctly captured this point when he argued against the torture of detainees held by the US: "It's not about them, it's about us."⁹⁹

Of course, the notion of honour is not immune from manipulation. Leaders have often sought to appeal to honour when justifying dubious behaviour. The most prominent recent example is perhaps the motto of the Joint Task Force Guantánamo (JTF-GTMO), the US military unit that operates the detention units at Guantánamo Bay, Cuba – "Honor Bound to Defend Freedom". Not only has this phrase been emblazoned on the gates of the various camps, it has been incorporated into the salute. A junior soldier is supposed to salute and say "Honor bound"; the senior must respond by saying "To defend freedom". A lawyer working for the detainees has noted that when he first witnessed this he thought that it was a Monty Python sketch put on for his benefit.¹⁰⁰ Yet it is not difficult to see what purpose this serves: the idea is to instil into the personnel the idea that the dubious practices at

⁹⁶ See **Stanley Milgram**. 1974. *Obedience to Authority: An Experimental View*. New York, NY: Harper & Row.

⁹⁷ For an up-to-date discussion, see **Philip Zimbardo**. 2007. *The Lucifer Effect: Understanding How Good People Turn Evil*. New York, NY: Random House.

⁹⁸ Yet, a certain amount of dehumanisations of the adversary seems to be unavoidable for soldiers to be able to engage in combat at all. For evidence suggesting that soldiers are reluctant to kill, and for a discussion of the methods used in overcoming this reluctance, see **Dave Grossman**. 2009. *On Killing: The Psychological Cost of Learning to Kill in War and Society*. Rev'd edn. Boston, MA: Little, Brown & Co.

⁹⁹ **Jane Mayer**. 2008. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York, NY: Doubleday, p. 329.

¹⁰⁰ See **Reprive**. 2006. Honor Bound to Defend Press Freedom. 29 September. <www.reprive.org.uk/articles/05_10_29_NUJ_alHajj> (accessed 1 December 2011).

the camps are quite compatible with, and even required by, their honour as soldiers. The notion of honour must therefore be approached with due care.

In the end, one may still ask whether there is any room for chivalry or honour in modern conflicts. Is it not the primary concern of an officer to bring his men out of a battle *alive*?¹⁰¹ This is not how all see it. At least one young marine officer has noted that

getting my men home alive ... set the bar too low. I had to get them home physically and psychologically intact. They had to know that, whether or not they supported the larger war, they had fought their little piece of it with honour and had retained their humanity.¹⁰²

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¹⁰¹ For the argument that a state has a greater duty to prevent harm to its soldiers than to enemy civilians while attacking an enemy-controlled territory, see **Asa Kasher and Amos Yadlin**. 2005. Military Ethics of Fighting Terror: An Israeli Perspective. – *Journal of Military Ethics*, Vol. 4, pp. 3–32. A serious debate (fuelled by Avishai Margalit and Michael Walzer) ensued in the *New York Review of Books*: see 14 May, 11 June, 13 August, 24 September and 8 October 2009 issues. See also **Robinson** 2006, p. 178–179.

¹⁰² **Nathaniel Fick**. 2005. *One Bullet Away: The Making of a Marine Officer*. Boston, MA: Houghton Mifflin, p. 241.

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THE MARTENS CLAUSE AND INTERNATIONAL CRIMES IN ESTONIA

Martin Arpo



The year 2009 saw several anniversaries related to international humanitarian law and to the life and work of Friedrich Fromhold Martens. Here in Estonia, it also brings to mind two other anniversaries – unpleasant, but nevertheless necessary to remember in the same context:

First, 70 years would pass since the 1939 Molotov–Ribbentrop Pact that started the nearly two year cooperation between Hitler’s and Stalin’s regimes; regimes which launched the Second World War in the same year. Although the large-scale terror against the civilian population in the Soviet Union and Nazi Germany had begun several years earlier, it was the Pact and the following aggressions that revealed the international dimension of the crimes of these regimes.

Second, 60 years would pass from the 1949 deportation of more than 100,000 Estonians, Latvians and Lithuanians, mostly women and children. The deportation of March 1949 was not the only crime against humanity committed by the Soviet regime, but because of the vast number of civilians deported in only a couple of nights, it is perhaps the most infamous. The deportees made up only a smaller part of the total number of the victims of Communism in the Baltic countries in the 1940s and 1950s.¹⁰³ In turn, the victims of Communism in these countries were only a small part of the total number of victims of Communism and Nazism all over Europe in the 20th century. At the same time, it is remarkable that such an act of mass deportation took place four years after the signing of the London Agreement and the adoption of the Charter of the Nuremberg Tribunal by the winners of the Second World War, *inter alia* the Soviet Union.

So, the century without Martens turned out to be a much more violent one than he probably would have expected. At the same time, his contribution to international humanitarian law turned out to be extremely valuable for

¹⁰³ See, e.g., **Estonian International Commission for the Investigation of Crimes Against Humanity**. 2006. Estonia 1940–1945. Tallinn: Estonian International Commission for the Investigation of Crimes Against Humanity.

seeking justice for civilians who suffered from the terror of the 20th century totalitarian regimes.

It is somehow ironic that more than 110 years ago Martens was the representative of the Russian Empire at the 1899 Hague Peace Conference. Of course, the aims and values of Russia's foreign policy in those days were much different from those of the Stalinist Soviet Union. But Russia was a big empire – even bigger than Stalin's Soviet Union – and definitely not built on the principle of self-determination of nations. As we know, at the Hague Conference, a group of smaller nations, led by Belgium, did not agree with the majority on the rights and duties of occupation armies. Contrary to the interests of greater powers, the smaller nations demanded an unlimited right of resistance for the population of occupied territories. As a satisfactory solution for both sides, Martens, an Estonian representing Russia, made the following proposal to be added to the Preamble to the Convention under discussion:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.¹⁰⁴

Martens' proposal was greeted with applause and the Convention was adopted unanimously.¹⁰⁵ The above-quoted clause found its way also into the Fourth Hague Convention in 1907¹⁰⁶ and became an important part of several subsequent international agreements, including the four Geneva Conventions of 1949,¹⁰⁷ which became the most important acts of modern international humanitarian law. Even today, the provision proposed by Martens is known and quoted as “the Martens Clause”.

¹⁰⁴ Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, in force 4 September 1900, 205 CTS 277, at Preamble.

¹⁰⁵ **Dieter Fleck**. 2003. Friedrich von Martens: A Great International Lawyer from Pärnu. – Baltic Defense Review, No. 10, Vol. 2, pp. 19-26.

¹⁰⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 205 CTS 277, at Preamble.

¹⁰⁷ See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31, Article 63(4); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, in force 12 July 1978, 1125 UNTS 3, Article 1(2).

The Hague Conferences were the last major efforts before the World Wars to set standards for conflict resolution between nations. We will never know if Martens contemplated the tragic future of tens of thousands fellow Estonians in the possibly predictable wars and occupations of the 20th century Europe. Nor can we think that Martens could predict the Holocaust that, as elsewhere, destroyed the small Jewish community in his home town, Pärnu.¹⁰⁸

But at the Nuremberg trial, held in the wake of the Second World War, the Martens Clause was a decisive legal argument against the assertions that the tribunal's Charter was retroactive penal law. Referring to the Martens Clause, the tribunal found that the crimes defined in the Charter, including, of course, deportation of inhabitants of occupied territories, was prohibited and constituted a crime under customary law.¹⁰⁹

The same idea can be seen in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which recognises that certain acts are punishable regardless of the will or wording of the current legislator, if these acts were "criminal according to the general principles of law recognised by civilised nations" at the time of commission (Article 7(2)).

In the 1990s, when Estonia, along with Latvia and Lithuania, became able to investigate and prosecute serious international crimes, the principle was seen as a commitment to investigate war crimes, crimes against humanity and genocide, binding through several international conventions.¹¹⁰

Since 1995, the Estonian Security Police and the Public Prosecution Service have investigated crimes against humanity committed as part of Soviet large-scale and systematic actions against the Estonian population. The courts have convicted eleven persons for such offences: eight persons (J. Klaassepp, V. Beskov, M. Neverovski, V. Loginov, J. Karpov, A. Kolk, V. Kask and P. Kislyiy) for participating in the 1949 mass deportation and 3 persons (K.-L. Paulov, V. Penart and R. Tuvi) for killing civilians who were hiding in the forests to avoid repressions by the Soviet authorities.¹¹¹

¹⁰⁸ Having lost both of his parents when he was nine, Martens grew up in a Lutheran orphanage in St. Petersburg. While making an amazing international academic and diplomatic career, he came back to Pärnu to spend his summers.

¹⁰⁹ Fleck 2003.

¹¹⁰ In particular, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force 12 January 1951; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, entered into force 11 November 1970, 754 UNTS 73.

¹¹¹ **Estonian Security Police**. n.d. Criminal Cases. <www.kapo.ee/eng/areas-of-activity/international-crimes-not-subject-to-statutory-limitations/criminal-cases>, (accessed 29 August 2011).

However, the legal dispute about deportation as a crime against humanity continued until 2006, when two Estonian cases – one regarding the 1949 deportation (*Kolk and Kislyiy v. Estonia*) and the other regarding civilians murdered by the Soviet authorities in 1953–1954 (*Penart v. Estonia*) – were brought before the European Court of Human Rights.

In both cases the Court rejected the applications submitted by the Russian lawyer as “manifestly ill founded”.¹¹² For Estonia, these cases were more than just disputes about maintaining human rights during a criminal proceeding. They were actually disputes about the universal validity of international humanitarian law. The result was an important landmark for our law enforcement authorities and courts.

The European Court of Human Rights very clearly pointed out legal arguments that had never before been brought to such a high international judicial body:

1. There was a clear connection between the Molotov–Ribbentrop Pact and the Soviet Occupation, which, interrupted by the German occupation in 1941–1944, lasted from 1940 to 1991.
2. The totalitarian communist regime of the Soviet Union conducted large-scale and systematic actions against the Estonian population, including (but not limited to) the deportation of about 10,000 persons on 14 June 1941 and of more than 20,000 on 25 March 1949.
3. The Nuremberg Principle that deportation and murder of the civilian population constitutes a crime against humanity has universal validity. It means that the responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War.

Last but not least, the European Court of Human Rights reminded that deportation was a crime in 1949, because it was criminal according to the general principles of law recognised by civilised nations.

The Court did not refer to the Martens Clause, as the clause itself is still strictly legally relevant only in war crime cases. But crimes against humanity committed after 1946 are clearly criminal under the Nuremberg Principles – the same principles that owe their validity to the Martens Clause.

¹¹² *Kolk and Kislyiy v. Estonia*, Application nos 23052/04 and 24018/04, ECtHR, Decision (17 January 2006); *Penart v. Estonia*, Application no. 14685/04, ECtHR, Decision (24 January 2006).

In 2010, in the case of *Kononov v. Latvia*, the Grand Chamber of the European Court of Human Rights adopted a remarkable judgement.¹¹³

The case originated in an application from former Soviet “red partisan” Vasily Kononov against the Republic of Latvia. Mr. Kononov was convicted in Latvia for war crimes, including the murder of nine civilians, six of whom – including three women, one in the final stages of pregnancy – were burned alive, and the burning down of two farms. The applicant alleged that his conviction for war crimes resulting from his participation in a military expedition on 27 May 1944 violated Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In 2008, the Chamber of the Court delivered a judgment in which it found, by four votes to three, that there had been a violation of Article 7 of the Convention and that just satisfaction should be awarded to the applicant.

The Latvian Government requested the referral of the case to the Grand Chamber. The Government of the Russian Federation exercised its right of third-party intervention to support the applicant. Finally, the Grand Chamber found, by fourteen votes to three (!) that the applicant’s conviction for war crimes in Latvia was lawful as it did not constitute a violation of Article 7 of the Convention.

In the legal argumentation of the case the 110 years old Martens Clause was referred to several times and once again turned to be a key to a just judgement. The Court pointed out, *inter alia*, that the Martens Clause constituted a legal norm against which conduct in the context of war was to be measured by courts.¹¹⁴

The Martens Clause has influenced the development of all international humanitarian law. Thus we can thank Martens for making it possible to condemn Communist crimes together with Nazi crimes. It has helped us to re-establish justice and secure a future for smaller nations of the international community just as it did more than a century ago.

Treaties

Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, in force 4 September 1900, 205 CTS 277.

Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 205 CTS 277.

¹¹³ *Kononov v. Latvia*, Application no. 36376/04, ECtHR GC, Judgement (17 May 2010).

¹¹⁴ *Ibid.*, para. 215.

- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31.
- Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 222.
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force 12 January 1951,
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, entered into force 11 November 1970, 754 UNTS 73.
- Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, in force 12 July 1978, 1125 UNTS 3.

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APPLYING THE LAW OF ARMED CONFLICT TO CYBER ATTACKS: FROM THE MARTENS CLAUSE TO ADDITIONAL PROTOCOL I

Erki Kodar



1. Introduction

The operational environment is in a state of flux, presenting operators, lawyers and soldiers with new challenges on the battlefield. The legal tools applicable to the changing environment have often been created before modern advancements in the methods and means of warfare. The technological leaps of the past three or four decades create unique challenges for lawyers as the applicable norms predate the inventions. Nevertheless, numerous international and non-international conflicts and international disputes have shown that the “old law” is capable of answering new questions. The adaptability of the Law of Armed Conflict (LOAC) is a core characteristic of this, providing analytical tools for unforeseen circumstances and enabling the provision of sound legal advice to commanders.

The Martens Clause is an apt starting point for the discussion of one of the challenges facing LOAC: cyber attacks.¹ Public international law as a whole is struggling to come to grips with cyber attacks as this phenomenon presents complex questions.² Cyber attacks – or Computer Network Attacks (CNAs) – are, according to the US definition, “actions taken through the

¹ See **D. Hollis**. 2007. Why States Need an International Law for Information Operations. – Lewis & Clark Law Review, Vol. 11, p. 1023; **M. Schmitt**. 2002. Wired Warfare: Computer Network Attack and Jus In Bello. – International Review of the Red Cross, Vol 84, No 846, p. 367; **K. Dörmann**. 2001. Computer Network Attack and International Law – Extract from The Cambridge Review of International Affairs “Internet and State Security Forum”. Trinity College, Cambridge, UK, 19 May. <www.icrc.org/eng/resources/documents/misc/5p2alj.htm>; **ICRC**. 2003. Direct Participation in Hostilities under International Humanitarian Law. Report. September. <www.icrc.org/ara/assets/files/other/direct_participation_in_hostilities_sept_2003_eng.pdf>.

² See **E. Kodar**. 2009. Computer Network Attacks in the Grey Areas of Jus ad Bellum and Jus in Bello. – Baltic Yearbook of International Law, Vol. 9; **M. Benatar**. 2009. The Use of Cyber Force: Need for Legal Justification? – Goettingen Journal of International Law, Vol. 1, pp. 375–396; **S. J. Shackelford**. 2009. From Nuclear War to Net War: Analogizing

use of computer networks to disrupt, deny, degrade or destroy information resident in computers and computer networks, or the computers and the networks themselves.”³ Rain Ottis, a scientist at the Cooperative Cyber Defence Centre of Excellence, defines cyber attacks as “the malicious use of information systems in order to influence the information, systems, processes, actions or decisions of the target without their consent.”⁴ The scope of cyber attacks is thus extensive and, by whichever definition, encompasses a range of actions available to military planners.

Under which circumstances can a cyber attack be attributed to a state? Can a cyber attack exceed the threshold of use of force established in the UN Charter? Can a cyber attack constitute an armed attack that would justify the right of self-defence? As the Internet is not a centralised networking system, is there a way to defend against cyber attacks that overlap different jurisdictions? Perhaps there are no easy answers, but existing law most definitely provides guidance on these issues. Whether the answers provided are adequate or sufficient is up for debate. Nevertheless the need to comprehend these issues is urgent as even the Group of Experts on NATO’s new Strategic Concept foresee cyber attacks as one of the most probable threats to the Alliance in the next decade.⁵

Cyber attacks turn the attention of LOAC to a set of pressing questions. Many of these questions are fundamental to the law – are there concrete and precise restrictions regarding the employment of cyber attacks? Can LOAC, a body of law mostly regulating international conflicts and conventional weapons, provide workable solutions? As cyber attacks require a high level of knowledge of information technology and are thus more likely to be executed by civilian experts, are the perpetrators of cyber attacks then entitled to combatant privilege or is it a case of direct participation in hostilities? Can cyber attacks be regarded as a means of warfare? Are cyber attacks in compliance with the requirements of neutrality? What restrictions and modalities arise during targeting? Can cyber attacks be construed as constituting perfidy or

Cyber Attacks in International Law. – Berkley Journal of International Law, Vol. 25, No. 3, pp. 191–250.

³ **Department of Defense.** 2009. Dictionary of Military and Associated Terms. – Joint Publication 1–02. 12 April 2001, as amended through 31 October 2009, p. 111.

⁴ **R. Ottis.** 2009. On Definitions. 14 July. <conflictsincyberspace.blogspot.com/2009/07/on-definitions.html>.

⁵ **North Atlantic Treaty Organisation.** 2010. NATO 2020: Assured Security; Dynamic Engagement. Analysis and Recommendations of the Group of Experts on a New Strategic Concept for NATO. <www.nato.int/nato_static/assets/pdf/pdf_2010_05/20100517_100517_expertsreport.pdf>.

other prohibited methods of warfare? The field for legal research is ripe for practitioners and academics.

The aim of this article is to describe, in general, the interaction between the current norms of LOAC and cyber attacks, whether they be state-coordinated or perpetrated by individuals. The focus is on *jus in bello* and on the practical problems that the use, or defence against the use, of cyber attacks brings forth. The article will try to provide indicative answers to the questions posed above and argue that the current body of LOAC applies to cyber attacks by way of fundamental principles or norms, and that the law is capable of providing guidance to operators and practitioners in the conduct of military operations.

2. Prerequisites for the Application of LOAC: Invoking the Spirit of Martens

Applying LOAC norms to cyber attacks is only possible in the event of an armed conflict (mostly in international armed conflicts, possibly in non-international armed conflicts). The current article is based on the presumption of an established armed conflict governed by LOAC. When and in cases where cyber attacks fall under the purview of LOAC, the legal restrictions regulating the means and methods of warfare will apply to cyber attacks as well. These restrictions limit the freedom of permissible actions either in defence (actions taken whilst defending a cyber attack) or offence (actions taken whilst conducting cyber attacks against a belligerent).

LOAC contains no explicit treaty provision or custom regulating conduct in relation to cyber attacks. To date, there has been no international arms control treaty that would either ban or place restrictions on cyber weapons. This *lacuna* has bred two differing viewpoints. One school of thought plays the devil's advocate by stating that the absence of a treaty should be interpreted to mean that the law does not apply to cyber attacks and states are free to conduct actions in this field. A similar argument was put forward to the International Court of Justice (ICJ) in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion,⁶ but ultimately rejected. The ICJ's approach in the case created the basis for the second school of thought, which

⁶ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports (1996), pp. 226–267 (hereinafter *Nuclear Weapons*).

takes the more balanced view and tries to avoid the legal gap by way of interpretation and analogy.⁷

The ICJ invoked “the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons”.⁸ Hence, in the absence of explicit norms, one can turn to the Martens Clause to ascertain the limits of freedom of action. The clause states that

in cases not included in the [Hague] Regulations ... populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience.⁹

The aim of the clause is to specify that the belligerents’ choice of methods or means of warfare is not unlimited, and to either eliminate or minimise any incidents in armed conflicts that are not covered by treaty regulation or customary law. This principle reaffirms that even without the explicit mention of cyber attacks in modern treaties or customs, certain fundamental restrictions derived from LOAC still apply.

A more modern sentiment regarding the application of LOAC to cyber attacks can be ascertained from the statements of the states themselves. In November 2009, the International Committee of the Red Cross (ICRC) organised the conference “60 Years of the Geneva Conventions and the Decades Ahead” in Geneva, Switzerland.¹⁰ The conference focused on the challenges

⁷ It has been argued that “[i]t is perfectly reasonable to assume that also the new forms of CNA, which do not involve the use of traditional weapons, are subject to IHL just as any new weapon or delivery system has been so far when used in an armed conflict”. **Dörmann** 2001, para. 7.

⁸ *Nuclear Weapons*, para. 87.

⁹ Preamble of the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land (entered into force 4 September 1900) and 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (entered into force 1 January 1910). The modernised Martens Clause is contained in Article 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force 7 December 1978, 1125 UNTS 3 (hereinafter AP I) which states that “[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.

¹⁰ **J. Kellenberger**. 2009. Statement by ICRC president Jakob Kellenberger. 9 November. <www.icrc.org/eng/resources/documents/statement/geneva-convention-statement-091109.htm>.

to LOAC, new threats, new actors, and new means and methods of war. The main discussion was about whether LOAC applies to the new actors, threats and means and methods of war. Most of the representatives agreed that LOAC is a sufficiently flexible tool that can overcome abstract challenges and the main issue is actually the enforcement of LOAC. Nevertheless, one of the issues under discussion was cyber attacks wherein the majority view was that the Geneva and Hague laws provide guidance on these matters. In his official statement, the Permanent Representative of the Federal Republic of Germany to the United Nations, Ambassador Reinhard Schweppe, expressed the view that cyber warfare is a real issue, but LOAC can be applied to the problem and it can address the challenge.¹¹

If, by way of the Martens Clause, cyber attacks are not beyond the pale of law, it is possible to agree that LOAC applies to cyber attacks. If cyber attacks are perceived as a means of warfare, then discerning between different types of cyber attacks is a must, as not all attacks would be regulated by LOAC. The question to be asked is: does a cyber attack constitute the use of violence in an attack? The Geneva Conventions of 1949 and especially the Additional Protocol I of 1977 (AP I) define violence through attacks – attacks are acts of violence against the adversary in offence or defence.¹² The picture is blurred with regard to cyber attacks as some types of attacks or intrusions might only cause inconvenience – disruption of a commercial or military intranet, downloading financial or personal information, temporary loss of access to Internet or to some websites. To this list it is possible to add cyber espionage which is more concerned with intelligence gathering and would usually breach the computer systems but might not cause any tangible or harmful effects. On the other hand there exist cyber attacks that can cause, directly or indirectly, damage or injury to persons or objects in a manner similar to kinetic weapons.

Thus it can be argued that the effects of cyber attacks do not always constitute violence in the strict sense of Article 49(1) of AP I, as it would be counterproductive and even dangerous to regard in every case everyday hacking and espionage as an attack under LOAC. But where can one draw the line? The Commentary on AP I states that Article 49(1) has been constructed with the civilian population in mind and as such has been intended to be interpreted in a broad and generic manner, as the attacks (or combat actions, as the Commentary suggests) and the effects of these attacks

¹¹ **R. Schweppe.** Statement by H. E. Ambassador Reinhard Schweppe. 9 November.

¹² AP I, Article 49(1).

may affect the civilian population.¹³ According to Article 49(1) “violence” is defined in terms of the consequence of physical (in case of objects and physical persons) or mental (in case of physical persons only)¹⁴ damage.

Schmitt proposes an effects-based approach to distinguish between cyber nuisances and cyber attacks proper under LOAC. Deriving from the interpretation of Article 49(1) of AP I, the term “violence” is “prescriptive shorthand intended to address specific consequences” and “it must be considered in the sense of violent consequences rather than violent acts”.¹⁵ Thus, cyber attacks fulfil the requirements of Article 49(1) when the consequences of such attacks are not sporadic, isolated cases of inconvenience, and are intended to cause injuries, death, damage and destruction, and where such consequences are predictable or desired. This approach gives better guidance when discerning whether operators are dealing with a common nuisance or a full-fledged cyber attack under LOAC.

If LOAC wants to impose rules on cyber attacks, the effects of cyber attacks in most cases cannot be intangible and they need to be the source of, or contribute to the physical destruction of a military target. Nevertheless, even under this approach some grey areas will remain – it is debatable whether the remote formatting of an adversary’s command and control database and corrupting the hard-drive concerned is an act of physical destruction. *Prima facie* the act brings forth destruction of data and such an outcome is desired by the attacker but the hard-drive would still exist unharmed in its physical state.

3. Specific LOAC Issues Related to Cyber Attacks

The aim of the following section is to give a brief, and by no means comprehensive or exhaustive overview of LOAC issues that must be assessed when conducting offensive or defensive cyber attacks. The issues at hand are the law of neutrality, cyber attacks as weapons systems, targeting challenges (conventional, economic, dual-use targets and facilities containing dangerous forces), indiscriminate attacks, direct participation in hostilities and the question of perfidy.

¹³ C. Pilloud & J. Pictet. 1987. Article 49. Definition of Attacks and Scope of Application. – Y. Sandoz *et al.* (eds). Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Geneva: Martinus Nijhoff, pp. 602–603.

¹⁴ For example, spreading terror among the civilian population is prohibited per AP I, Article 51(2).

¹⁵ Schmitt 2002, p. 377.

3.1. Cyber Attacks and the Law of Neutrality

The law of neutrality under LOAC could be the main obstacle impeding the conduct of either offensive or defensive cyber attacks. Most of the body of law regulating the law of neutrality is contained in the 1907 Hague Convention V, which predates the existence of Internet and cyber weaponry by more than a half a century. Neutrality is the right of the State to have relations with other belligerents. This right is counterbalanced with the obligation to refrain from assisting the belligerents' war efforts.

If a state declares itself neutral, it is entitled to immunity from attack, and the territory of the neutral state is inviolable. Per Article 2 of the Convention, "[b]elligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power". It is also prohibited to conduct hostilities within neutral states' territory; and Article 3 prohibits the belligerents from using communications installations on the territory of the neutral State purely for military purposes. Korns and Kastenbergh define cyber neutrality as "the right of any nation to maintain relations with all parties engaged in a cyber conflict", and postulate that "to remain neutral in a cyber conflict a nation cannot originate a cyber attack, and it also has to take action to prevent a cyber attack from transiting its Internet nodes."¹⁶

Articles 2 and 3 of the Hague Convention create peculiar legal outcomes when applied to Internet communications and cyber attacks. Cyber attacks challenge neutrality on two levels. Firstly, can cyber attacks be construed as troop movements? If the effects of the attack cause death or damage, the author of this article would be inclined to give an affirmative answer. Secondly, the exclusion of military use of communications installations might have been reasonable in 1907 when such a ban could have been easily enforced.

Unfortunately, the architecture of Internet does not facilitate neutrality. The internet is a global network of networks encompassing the private and public sector. Network connections are not restricted to one territory as the transmitted information transcends jurisdictions. For example, an email sent from the jurisdiction of State A could pass through the networks of States C, D and E before reaching the recipient in State B.¹⁷

¹⁶ **S. W. Korns & J. E. Kastenbergh**, 2008–2009. Georgia's Cyber Left Hook. – Parameters, Winter, p. 62. The article gives an overview of problems of cyber neutrality in relation to the Georgia–Russia conflict of 2008.

¹⁷ Cloud computing will create even more peculiar situations. Cloud computing is a general term for anything that involves delivering hosted services over the Internet. These services are broadly divided into three categories: Infrastructure-as-a-Service (IaaS), Platform-as-a-Service (PaaS) and Software-as-a-Service (SaaS), thus creating possible scenarios where a

As the Internet is not a “series of tubes”, as infamously proclaimed by US Senator Ted Stevens,¹⁸ self-contained military networks are not viable because they would go against the general architecture of Internet. Such networks could be built but their efficiency would most probably be hampered without a connection to the Internet and difficult to maintain in military operations that go beyond the physical restrictions of peacetime infrastructure. The military would most probably want to use the Internet as a backup communications system in case of an armed conflict. In the remote possibility of a cyber war, the belligerents’ military action would not be confined to military networks but would most likely also be conducted in “civilian networks”.

It would seem that cyber attacks are in conflict with the law of neutrality and raise the question of whether cyber attacks can be conducted with such precision and sophistication that neutral states would not be maliciously affected. The risks for a neutral state are high: it could be facilitating the war effort of belligerents by use of its networks unbeknownst to itself.

3.2. Cyber Attacks as Weapons Systems and Related Restrictions

A feasible solution could be the equation of cyber attacks or such capabilities with weaponry, in which case the norms applicable to the means of warfare could be applied to cyber attacks. The US Operational Law Handbook eloquently states that the “use of various forms of information operations generally requires the same legal analysis as any other method or means of warfare.”¹⁹ Use of weapons is subject to concrete restrictions under LOAC. The ICJ has opined that two fundamental customary law restrictions apply to weapons. First of all, “[s]tates must never make civilians the object of attack and must consequently never use weapons that are incapable

person is in the jurisdiction of State A, but uses either infrastructure, a platform or software that is located in the jurisdiction of State B. This creates a possibility where a cyber attack by an individual in State A against State C is prima facie attributed automatically to State B and even in this scenario the attack data could cross different jurisdictions before reaching its target. **SearchCloudComputing.com**. 2010. Definitions – Cloud Computing. 5 April. <searchcloudcomputing.techtarget.com/sDefinition/0,,sid201_gci1287881,00.html>.

¹⁸ **K. Belson**. 2006. Senator’s Slip of the Tongue Keeps on Truckin’ Over the Web. – New York Times. 17 July. <www.nytimes.com/2006/07/17/business/media/17stevens.html>.

¹⁹ **The Judge Advocate General’s Legal Center & School, International and Operational Law Department**. 2008. Operational Law Handbook. Charlottesville, VA: US Army, p. 149 (JAG School 2008).

of distinguishing between civilian and military targets”.²⁰ Secondly, “it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. ... [S]tates do not have unlimited freedom of choice of means in the weapons they use.”²¹

The first restriction, an affirmation of the applicability of the principle of distinction, runs again counter to the general nature and structure of the Internet. The principle of distinction requires that belligerents always be capable of distinguishing between civilians and combatants, civilian objects and military objects.²² In conjunction with the principle of proportionality, belligerents are obliged to minimise collateral damage to civilians and civilian objects when attacking military objects. This also obliges the belligerents to abstain from attack if the damage of the attack would be disproportionate to the military advantage gained.

The crux of the matter seems to be that if cyber attacks could be considered as weapons, then they can be employed during the conduct of hostilities and they must be aimed at specific military targets so as not to be indiscriminate. As with conventional weaponry, cyber attacks could be employed in an indiscriminate manner.

A belligerent could be tempted to initiate large-scale cyber attacks against the networks of other belligerents. But without the ability to distinguish between targets this attack would be indiscriminate. Another possibility is the so-called “hope and pray” attack where a belligerent launches a cyber attack of low sophistication in the hope that the civilian networks would not be affected. There is no foolproof segregation between public or private, military or civilian networks on the Internet as it is inherently dual-use. Creating a cyber attack that is fully in compliance with the principle of distinction requires high levels of sophistication which still might not guarantee the avoidance of knock-on effects to civilian systems and to civilians. Employing cyber attacks of low sophistication could run the risk of an indiscriminate attack.

On the flipside, modern technology is increasingly utilizing electronic circuitry and control software that can be compromised by cyber attacks or hacking.²³ Even though modern technology is far away from the dystopia

²⁰ *Nuclear Weapons*, para. 78.

²¹ *Ibid.*

²² API, Articles 48 and 52(2).

²³ For example, cars, pacemakers, fridges etc contain electronic control units (ECU) which oversee the functions of different electronic components. The BBC News reported recently that a group of researches were successfully able to hack into ECUs of cars enabling them

seen in the Terminator movies,²⁴ militaries all over the world are starting to employ combat function robots and sentry guns.²⁵ Some of these are autonomous robots – they can distinguish between friends or foes and are fitted with weapons.²⁶ Thus some combat robots are already programmed to act in accordance with the principle of distinction. The IT security of combat robots is essential since where there is IT capability, there are also vulnerabilities and the adversary can launch a cyber attack that modifies the robots to conduct “friendly fire” or force them to act indiscriminately. Unforeseen consequences may also rear their ugly head when the robot confuses its target sets owing to human programming error.

Additionally, when cyber attacks are regarded as weapons systems, LOAC prescribes an obligation to evaluate the new weapons to determine whether the employment of the new weapon would, under some or all conditions, be prohibited or restricted under the standards of humanitarian, or some other category of international law.²⁷ Unfortunately states have no obligation to publicise these findings; thus the majority of these analyses are not available to the general public. As far as the author is aware, there is no public information at present on whether states have conducted such research on specific cyber capabilities.

Notwithstanding the abovementioned caveats, cyber attacks could theoretically be executed in line with the LOAC requirements against military objects such as the belligerents’ command and control centres, military

to remotely shut off car engines, brakes and make the instruments give false readings. **BBC News**. 2010. Hack Attacks Mounted on Car Control Systems. 17 May. <www.bbc.co.uk/news/10119492>.

²⁴ **J. Markoff**. 2009. Scientists Worry Machines May Outsmart Man. – New York Times. 25 July. <www.nytimes.com/2009/07/26/science/26robot.html>.

²⁵ The Phalanx Close-In Weapons System is a fast-reaction, rapid fire 20-millimeter gun system “capable of autonomously performing its own search, detect, evaluation, track, engage and kill assessment functions”. **United States Navy**. 2011. Phalanx Close-In Weapons System. – United States Navy Fact File. 21 November. <www.navy.mil/navydata/fact_display.asp?cid=2100&tid=487&ct=2>.

²⁶ The iRobot 710 Warrior can carry payloads weighing more than 150 pounds and has some autonomous functionality. **iRobot**. 2010. iRobot 710 Warrior. Product Details. <www.irobot.com/gi/ground/710_Warrior>. The defunct Gladiator Tactical Unmanned Ground Vehicle besides being weaponized was supposed to employ scouting, reconnaissance, surveillance and target acquisition capabilities. **GlobalSecurity**. 2006. Gladiator Tactical Unmanned Ground Vehicle. – GlobalSecurity.org. 16 January. <www.globalsecurity.org/military/systems/ground/gladiator.htm>. For a general overview on different combat robots, their uses in the field and discussion on ethical and legal questions, see **P. W. Singer**. 2009. *Wired for War: The Robotics Revolution and Conflict in the 21st Century*. New York, Penguin Press.

²⁷ API, Article 36.

communications networks, combatants etc.; but the commanders' responsibility with regard to precautions in attack is probably relatively higher than the standards applied to conventional weapons.

3.2.1. Conventional, Economic, Dual-use Targets and Targets Containing Dangerous Forces

The principle of distinction restricts the totality of permissible targets to combatants or military objects while protecting the civilian population as much as possible. But what can be considered as concrete targets for cyber attacks? It is most probably the same set of targets that are available to conventional kinetic weapons – combatants, military targets, civilians taking direct part in hostilities, dual-use objects etc.

If a “cyber target” meets the criteria set out in AP I Article 52(2), it is a legitimate target for cyber attack. Before launching an attack against the chosen target, an assessment must be made whether the attack is in conformity with the principles of distinction and proportionality.²⁸ Thus, aiming cyber attacks against combatants is permissible, and when conducting attacks against military targets, the target must considerably contribute to military action and provide a definite military advantage (e.g. command and control networks).²⁹ Difficulties arise when the cyber attack does not bring forth any physical destruction, because the affected adversary must conclude whether such action is a military action or just an inconvenience. If the purpose is only to cause inconvenience, this does not cross the threshold of a military attack.

But what would be the guidance for military planners and targeting officers? The principle of distinction is under fire because cyber attacks open a door to operations that are not directed at military targets, but which can nevertheless impede or disable such targets. The universality and suitability of cyber attacks can create a counterproductive environment where LOAC is pushed aside in favour of political or military expediency. Military planners could be tempted to target sets which do not conform to LOAC standards but which contribute to the achievement of political or strategic objectives.

One such example is the broad interpretation of “definite military advantage” contained in AP I Article 52(2). The United States of America

²⁸ AP I, Article 52 notes that civilian objects shall not be the object of attack and that attacks shall be limited to military objects. Article 57(2)(a)(i) demands that the attackers must do everything feasible to verify that the objects to be attacked are not civilian objects, but military objects.

²⁹ AP I, Article 52(3).

considers certain economic targets to be covered by the definition when such targets “indirectly but effectively support and sustain the enemy’s warfighting capability.”³⁰ Such an interpretation can blur the lines between participation in the general war effort and direct participation in hostilities, and might erode the protection afforded to a civilian population. If the belligerent reasons that making the adverse party unable to pay wages to its armed forces is military tactics, is it then acceptable and legal to target the adversary’s banking system or the stock exchange to force the adversary’s economy into submission? Unfortunately, there is no clear answer with regard to this issue, other than to weigh the pros and cons on a case by case basis and to interpret the criteria of Article 52(2) in good faith.

When the principle of proportionality is added to the mix, then there is an obligation to balance the damage caused to the civilian population or civilian objects with the military advantage gained from the attack.³¹ The attack is not illegal if the incidental effects of the attack are not excessive to the military advantage anticipated. The problem with cyber attacks is, as referred to above, the fact that the effects of the attack are unpredictable and could endanger the civilian population. These are called knock-on effects which are “known as second and third tier effects that were not accounted for in the planning stages of the attack, but occur due to some unexpected agent or circumstance”.³² The US Operational Law Handbook contains an example of conducting a cyber attack against an electrical grid, which would have an effect of degrading the command and control systems of the adversary, but at the same it may

have the effect of shutting down electricity for civilian facilities with follow-on effects such as: unsanitary water and therefore death of civilians and the spread of disease because the water purification facilities and sewer systems don’t work; death of civilians because the life support systems at emergency medical facilities fail; or death of civilians because traffic accident increase due to a failure of traffic signals.³³

A recent study conducted by the North American Electric Reliability Corporation identified cyber attacks as one of the vulnerabilities of the electrical

³⁰ **JAG School** 2008, p. 149.

³¹ **API**, Article 57(2)(a)(iii).

³² **E. T. Jensen**. 2003. Unexpected Consequences from Knock-On Effects: A Different Standard for Computer Network Operations? – *American University International Law Review*, Vol. 18, p. 1177.

³³ **JAG School** 2008, p. 151.

grid.³⁴ So far there has been only anecdotal evidence regarding attacks against electrical grids,³⁵ but the analysis of the mentioned study suggests that the risk is clear. For example the study foresees that a cyber attack or simultaneous cyber attacks could facilitate long-term damage to key components and systems. Such damage could bring forth an outage that would “affect a wide geographic area and cause large population centers to lose power for extended periods”.³⁶ If such acts were conducted by belligerents then adequate means must be employed so as not to endanger the civilian population³⁷ or cause harm disproportionate to the military advantage.³⁸

If a commander wants to utilize cyber attacks, he or she must also take precautions in the attack during the planning of the operation – assess the damage which might be caused by the attack, foresee positive and negative causal sequences, and seek mitigating actions against such harmful effects. But a cyber attack can also be an enabler during military operations as it may help to decrease the incidental damage by turning off certain infrastructure, or contain the incidental effects of cyber attacks (Schmitt gives an example

³⁴ **North American Electric Reliability Corporation.** 2010. High-Impact, Low-Frequency Event Risk to the North American Bulk Power System: A Jointly-Commissioned Summary Report of the North American Electric Reliability Corporation and the U.S. Department of Energy’s November 2009 Workshop. – NERC. June. <www.nerc.com/files/HILF.pdf> (hereinafter **NERC** 2010).

³⁵ The Wall Street Journal has reported that hackers from China and Russia have penetrated the computer systems of the U.S. electrical grid and have also left behind a computer code that could be used for disrupting the system. Although no damage was afflicted there existed speculations that these backdoors were to be utilised during conflict. **S. Gorman.** 2009. Electricity Grid in U.S. Penetrated By Spies. – The Wall Street Journal. 8 April. <online.wsj.com/article/SB123914805204099085.html>. Worries over the security of the electrical grid against cyber attacks were already prevalent in 2008 when the U.S. Congress considered legislation that would have given more authority to the federal government over the electric companies. See **S. Condon.** 2008. ‘Cybersecurity’ Worries Spur Congress to Rethink Electrical Grid. – CNET News, Politics & Law. 12 September. <news.cnet.com/8301-13578_3-10040101-38.html>. The Center for Strategic and International Studies has published a paper that concentrates on the issue why electrical grids are priority targets and contains evidence of successful laboratory tests conducted against computer systems of electrical grids. See **J. A. Lewis.** 2010. The Electrical Grid as a Target for Cyber Attack. – Center for Strategic and International Studies. March. <csis.org/files/publication/100322_ElectricalGridAsATargetforCyberAttack.pdf>.

³⁶ **NERC** 2010, p. 26.

³⁷ For example by way of disabling objects indispensable to survival of civilian population. AP I, Article 54.

³⁸ AP I, Article 57(2)(a)(iii).

that instead of bombing an airport it is possible to disturb the operation of the flight control systems).³⁹

Dual-use targets are targets that serve both military and civilian purposes, and they are closely intertwined with collateral damage. Such targets are, for example, airports, railways, electrical grids, communications systems etc.⁴⁰ Dual-use targets are also such objects that normally are used by the civilian population, but by necessity are also used by the military. If such an object is used for military purposes, the object becomes a military objective that can be targeted. When targeting dual-use systems, all LOAC norms and principles regarding the conduct of hostilities are applicable. Such objects can be targeted by conventional weapons but also by cyber attacks, even though targeting such installations is usually contentious and sensitive, and therefore calls for meticulous planning. Cyber attacks might provide more flexibility for the commanders as, for example, they can disable the flight control systems of an airport, but leave the runways and other objects intact. As O'Donnell and Kraska opined in 2003, "information warfare may prove to be an effective means of coercion that is more adept at insulating civilians from the dangerous kinetic effects of war".⁴¹

Besides dual-use targets, cyber attacks could facilitate the execution of attacks against installations and infrastructure containing dangerous forces.⁴² Under LOAC, objects such as dykes, dams, nuclear power plants are granted special protection because an attack on such facilities may unleash dangerous forces and cause serious losses among the civilian population. The aim of the law is to protect against the release of dangerous forces as these would most likely harm the civilian population (radiation, flooding). Nevertheless, the prohibition is not absolute as belligerents may attack such installations if precautions are taken to eliminate the possibility of the release of dangerous forces. Cyber attacks could be problem solvers in this regard. Even though it is advisable to keep these facilities disconnected from the Internet, the reality seems to be the opposite. Many critical infrastructure installations such as water treatment facilities, electrical power grids, oil and gas pipelines would most likely employ Supervisory Control and Data

³⁹ Schmitt 2002, p. 394.

⁴⁰ Schmitt 2002, p. 384.

⁴¹ B. T. O'Donnell & J. C. Kraska. 2003. Humanitarian Law: Developing International Rules for the Digital Battlefield. – Journal of Conflict and Security Law, Vol. 8, No. 1, p. 134.

⁴² API, Article 56.

Acquisition (SCADA) accessibility.⁴³ SCADA computer systems monitor and control different industrial processes (transmission of electricity, transportation of oil and gas, etc.) and it is recommended that they be disconnected from the Internet. Nevertheless, connecting SCADA systems to the Internet gives the administrators the possibility to conduct maintenance and other actions remotely and as such it is likely that security will be undermined by the comfort factor. Although cyber attacks can be conducted over the Internet against critical infrastructure, the SCADA systems can be enabled to conduct operations in such a way as to neutralise the chances of launching dangerous forces and give the attacking belligerent a new tool for the successful completion of their mission.

3.2.2. Indiscriminate Attacks

The principle of distinction outlaws the use of indiscriminate attacks. These not only comprise attacks that are not directed at a specific military object; the prohibition also bars the employment of a method or means of combat which cannot be directed at a specific military object or the effects of which cannot be limited.⁴⁴ The latter seems to be the main challenge to the legality of cyber attacks.

The difficulty of cyber attacks is that, to be conducted legally, they have to be of high sophistication so as not to violate the requirements of LOAC. But a cyber attack can easily, either intentionally or through a human or technological mistake, transform into an indiscriminate attack. If a belligerent programs a virus the sole purpose of which is to replicate in IT-systems, infect as many computers as possible and destroy all the data on infected machines, then it would be hard to argue that such a cyber attack is in accordance with LOAC. In this example, the cyber attack (virus) would be uncontrollable and spread through military and civilian systems alike, constituting an indiscriminate attack. Therefore, a cyber attack must be of high sophistication and adhere to the principle of distinction and to LOAC in general.

But then again, even with the best programming skills, there is still the possibility of human error and unforeseen consequences. Even if it were possible to construct a cyber attack that *prima facie* is legal under LOAC, the uncertainty of unforeseen consequences or knock-on effects would not be

⁴³ **Wikipedia**. 2010. SCADA. <en.wikipedia.org/wiki/SCADA>; **Centre for the Protection of National Infrastructure**. 2010. Supervisory Control and Data Acquisition (SCADA). <www.cpni.gov.uk/advice/infosec/business-systems/scada/>.

⁴⁴ API, Article 51(4).

eliminated. Notwithstanding the architecture of the Internet, which does not distinguish between military and civilian networks, there is also the indeterminacy of different operating systems and connections between both user-sides of the Internet. Thus, the employment of cyber attacks would, most of the time, be in conflict with the prohibition on endangering the civilian population.

For example, there is evidence from NATO's history of cyber attacks that have been planned but not executed. In the first case, there was a plan to launch a cyber attack against certain bank accounts in Switzerland belonging to Slobodan Milošević. The train of thought involved went as follows: if Milošević cannot fund the conflict and the armed forces subordinated to him, the conflict would die out sooner. In the end, NATO did not launch such a cyber attack as there was no guarantee that the attack would have distinguished between the accounts of Milošević and those of non-affected persons.⁴⁵ The case also brings up an interesting question which is still unanswered to this date – is it legal to conduct cyber attacks against the assets of the belligerent which are not located on the territory of either party to the conflict? Even more, is it legal under LOAC to attack the assets of belligerents on a neutral state's territory? *Lex lata* is more likely to answer both questions in the negative but cyber attacks could definitely modify our understanding of the law in this regard if such operations were to be conducted.

Kelsey gives an example that

[d]uring NATO's Kosovo campaign, NATO air war planners devised a cyber attack to insert false messages and targets into the Serbian military's air-defense command network. NATO could have delivered the weapon via the host country's Internet or possibly could have "beamed" the weapon to the target directly from a NATO warplane. This attack would have limited Serbia's ability to accurately target NATO warplanes, but, if improperly planned, such a cyber attack could have put civilian targets at risk, with the air-defense network possibly confusing relief planes or commercial aircraft for military targets. Fuel-depleted missiles launched at false targets could have fallen on civilian structures, such as homes, hospitals, and schools. NATO did not ultimately launch this cyber attack, but in the future NATO

⁴⁵ Jensen 2003, p. 1146; W. M. Arkin. 1999. The Cyber Bomb in Yugoslavia. – Washington Post. 25 October. <www.washingtonpost.com/wp-srv/national/dotmil/arkin.htm>; E. Morozov. 2010. Battling the Cyber Warmongers. – The Wall Street Journal. 8 May. <online.wsj.com/article/SB10001424052748704370704575228653351323986.html>.

commanders might be tempted to risk additional harm to the civilian population to reduce risk to the lives of NATO pilots.⁴⁶

When viewing the current operations of NATO, the last sentence might not reflect reality, but on the whole, it is an exemplary account of the problems for operators and lawyers who are tasked with the operational evaluation of the weapon. Even though the Kosovo campaign is over 10 years old and the technology has advanced in leaps and bounds, the above is a stark and sobering reminder of the weak points of cyber attacks.

A more recent example is the Conficker worm which infects computers using advanced malware techniques.⁴⁷ When the worm takes over a computer it registers it onto a network called the “botnet”, which is a collection of compromised computers running software under a common command-and-control server. Once a hijacked computer is on the botnet, the owner of the botnet can give commands to the hijacked computers and pull data from them. This simplifies the work of cyber criminals and, at the same time, places an unprecedented amount of computing power into the hands of criminals who can conduct Distributed Denial of Service (DDoS)⁴⁸ attacks against different targets. DDoS attacks are conducted when the targeted server is bombarded with queries from different sources in such quantities that the available bandwidth for the server is overloaded. The result is that the server cannot process the requests and slows down or goes offline. This can also compromise the server and the data within the computer system. Estimates differ, but the worm could have infected from nine to 15 million computers. The worm breached the French Navy (forcing aircraft at several airbases to be grounded), the United Kingdom Ministry of Defence (including computers on Royal Navy warships and submarines), Bundeswehr, the Manchester City Council, the Greater Manchester Police, the House of Commons and numerous home computers. It is not certain what the Conficker worm is or what it was supposed to do, but if it had been a military cyber attack with physical damages and consequences, it is obvious that the effects

⁴⁶ **J. Kelsey.** 2008. Hacking Into International Humanitarian Law. – Michigan Law Review, Vol. 106, pp. 1434–1435.

⁴⁷ **Wikipedia.** 2010. Conficker. <en.wikipedia.org/wiki/Conficker>; **Microsoft.** 2010. Protect Yourself From Conficker. <www.microsoft.com/en-gb/security/pc-security/conficker.aspx>; **McAfee.** 2010. W32/Conficker.worm. <vil.mcafee.com/vil/content/v_153464.htm>.

⁴⁸ **Wikipedia.** 2010. Denial-of-service Attack. <en.wikipedia.org/wiki/Denial-of-service_attack>.

are indiscriminate as the worm cannot distinguish between civilian and military targets.

3.3. Combatants and Direct Participation in Hostilities

Combatants are permitted to take part in hostilities, while civilians are afforded protection so long as they do not take direct part in the hostilities.⁴⁹ Direct participation can involve causing damage to the belligerent or supplying the enemy's armed forces.⁵⁰ The ICRC has released guidelines which establish a three-pronged test for direct participation. Firstly, the act must be likely to adversely affect military operations or the military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack. Secondly, there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part. Finally, the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.⁵¹

Due to the characteristics of the field, modern weapons and IT systems are seldom operated exclusively by the members of armed forces. The phenomenon is not constrained to cyber attacks but it is even more pressing in the field of drone warfare where there have been reports of employees of intelligence agencies flying operations.⁵² Cyber attacks and direct participation are also specifically elaborated in the HPCR Manual on International Law Applicable to Air and Missile Warfare. The Manual considers an example of direct participation as “[e]ngaging in electronic warfare or computer network attacks targeting military objectives, combatants or civilians directly participating in hostilities, or which is intended to cause death or injury to civilians or damage to or destruction of civilian objects.”⁵³

It is relevant to note the trend because at the heart of LOAC is the notion of combatant privilege and civilian immunity. Not all civilians who conduct

⁴⁹ API, Articles 48, 50(1), 51 (2) and 52(1).

⁵⁰ API, Article 51(3).

⁵¹ **N. Melzer**. 2009. *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. Geneva: ICRC, p. 46.

⁵² **Human Rights Council**. 2010. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston. – Study on Targeted Killings*. A/HRC/14/24/Add.6, paras 18–20 (hereinafter **HRC** 2010).

⁵³ **HPCR**. 2009. *Manual on International Law Applicable to Air and Missile Warfare*. Bern, HPCR, p. 15.

activities with the belligerents are taking direct part in hostilities. More and more civilians and civilian experts are employed by the armed forces to be responsible for the so-called non-military duties and for providing the necessary know-how for operational effectiveness. The other side of the coin is that the IT operators could be geographically situated “thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audio-feed”.⁵⁴ This spatial disconnect with the real combat space could give facilitate the development of a so-called “PlayStation mentality”⁵⁵ where the operator is desensitised from the consequences of his or her actions, which then can also bring forth abuses of power and breaches of law.

The trend of civilians or sub-contractors accompanying armed forces seems to be increasing because of the complexity of the technology used by the armed forces. The need is understandable, but also increases the risk that civilians working in the armed forces, especially in the area of operations, will be considered to be direct participants in hostilities.⁵⁶ And even more so, when civilians or contractors conduct the operations on the orders of commanders and initiate or control the cyber attacks. As such, civilian IT specialists run the risk of becoming legitimate targets. This uncertainty creates a harmful situation for LOAC as it can erode the humanitarian guarantees set forth for the civilian population and for civilians accompanying the armed forces, because belligerents cannot make a reasonable distinction between combatants and civilians.⁵⁷ Ideally, members of the armed forces should conduct the cyber attacks, but this does not seem to be a realistic expectation. Watts argues that

as an irreducible minimum of lawful participation in CNA, state affiliation preserves the spirit and intent of the traditional criteria of combatant status, including the dual principles of distinction and discipline, while offering

⁵⁴ **HRC** 2010, para. 84.

⁵⁵ *Ibid.*

⁵⁶ **Schmitt** 2002, p. 384; **Dörmann** 2001; **ICRC** 2003; **K. Dörmann**. 2004. Applicability of the Additional Protocols to Computer Network Attacks. – ICRC. Conduct of Hostilities, Information Warfare. 19 November. < <http://www.icrc.org/eng/resources/documents/misc/68lg92.htm>>, pp. 8–9.

⁵⁷ For an in-depth analysis of the issue see **J. R. Heaton**. 2005. Civilians At War: Reexamining the Status of Civilians Accompanying the Armed Forces. – *Air Force Law Review*, Vol. 57, pp. 155–208.

states workable options to develop capacity for what is perhaps unfortunately, yet inevitably, a new domain of warfare.⁵⁸

Recent conflicts have brought forward contentious examples of civilian participation in hostilities. For example, a case in point is the Conficker worm mentioned above, which involves participation by ignorance, in which case either home computers or business computers are hijacked and bandwidth is used for the facilitation of cyber attacks. The Project Grey Goose has produced two reports on the Georgia–Russia conflict of 2008 which state that botnets were used to conduct DDoS attacks against Georgian websites and the majority of the owners of the hijacked computers were unaware that they were participating in hostilities.⁵⁹

The other side of the coin is the so-called “patriotic hacking” where computer users voluntarily, willingly and knowingly allow their computers to be used or they themselves conduct actions harmful to the belligerent. This was prevalent again during the 2008 Georgia–Russia conflict where certain Russian message boards provided simple instructions on how to attack Georgian websites. Evgeny Morozov has shown that with some vested interest it is fairly simple to take part in a cyber attack:

Not knowing exactly how to sign up for a cyberwar, I started with an extensive survey of the Russian blogosphere. ... As I learned from this blog post ... all I needed to do was to save a copy of a certain Web page to my hard drive and then open it in my browser In less than an hour, I had become an Internet soldier. I didn't receive any calls from Kremlin operatives; nor did I have to buy a Web server or modify my computer in any significant way. If what I was doing was cyberwarfare, I have some concerns about the number of child soldiers who may just find it too fun and accessible to resist.⁶⁰

The phenomenon is not confined to the Georgia–Russia conflict, as even during the Operation Cast Lead in Gaza there were instructions from both

⁵⁸ **S. Watts.** 2010. Combatant Status and Computer Network Attack. – Virginia Journal of International Law, Vol. 50, No. 2, p. 396. The article as a whole gives an excellent overview of issues regarding combatant status in cyber attacks.

⁵⁹ **Project Grey Goose.** 2007. Phase I Report: Russia/Georgia Cyber War – Findings and Analysis. 17 October. <www.scribd.com/doc/6967393/Project-Grey-Goose-Phase-I-Report>; **Project Grey Goose.** 2009. Phase II Report: The Evolving State of Cyber Warfare. 20 March. <www.scribd.com/doc/13442963/Project-Grey-Goose-Phase-II-Report>.

⁶⁰ **E. Morozov.** 2008. An Army of Ones and Zeroes: How I Became a Soldier in the Georgian-Russian Cyberwar. – Slate.com. 14 August. <www.slate.com/id/2197514>.

Pro-Palestinian and Pro-Israeli civilian groups on how to attack the other party's websites and networks.⁶¹

Both participation by ignorance and "patriotic hacking" show an alarming upward trend in voluntary civilian interest in conducting actions harmful to the enemy.⁶² The aim of this paper is not to analyse whether the actions above constitute direct participation or not, or whether there is state involvement in coordinating the civilians. But these examples highlight at least two concerns. Firstly, the alarming ease with which civilians can take part in hostilities either involuntarily or knowingly. Secondly, the author would venture to suggest that civilians who conduct cyber attacks against belligerents are not aware of their obligations under LOAC and do not understand what such participation can bring in worst case scenarios – in some cases, they can either be targeted for the duration of their direct participation or prosecuted for direct participation later on.

3.4. Ruses and Perfidy

Prohibition of perfidy is an important building block of LOAC. Ruses of war are permitted but there is a fine line between a legal ruse and a perfidious act. AP I defines perfidy as the feigning of protected status with the intent to kill, injure or capture an adversary.⁶³ A permissible cyber ruse could be the communication of incorrect information on the location and manoeuvres of troops, and the forging of the enemy's reconnaissance database.⁶⁴ Deceptive use of codes and signals given to medical transport by the International Civil Aviation Organisation would constitute cyber-perfidy,⁶⁵ as would, most likely,

⁶¹ **N. Shachtman.** 2009. Wage Cyberwar Against Hamas, Surrender Your PC. – *Wired*. 8 January. <www.wired.com/dangerroom/2009/01/israel-dns-hack/>.

⁶² A. K. Cronin foresees that "[m]ost important is the 21st century's levée en masse, a mass networked mobilization that emerges from cyber-space with a direct impact on physical reality. Individually accessible, ordinary networked communications such as personal computers, DVDs, videotapes, and cell phones are altering the nature of human social interaction, thus also affecting the shape and outcome of domestic and international conflict." **A. K. Cronin.** 2006. *Cyber-Mobilization: The New Levée en Masse*. – *Parameters*, Summer, p. 77. D. Brown opines that cyber-levée en masse is not possible because most cyber attacks will be conducted against targets not resident in the non-occupied country and as such "operations go beyond the purpose and purview of the levée en masse, which is intended to provide for spontaneous civilian defense of their homeland. There is no legal precedent for a levée en masse bringing the fight to the attacker's homeland." **D. Brown.** 2006. A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict. – *Harvard International Law Journal*, Vol. 47, p. 192.

⁶³ AP I, Article 37(1).

⁶⁴ **Dörmann** 2004, p. 10.

⁶⁵ *Ibid.*

the creation of a lifelike 3D live-image of the adversary's military or political leader giving the troops the order to surrender or to commit war crimes or serious violations. With the growth of computing power, more methods and means will be invented that can be used on the battlefield, but the line between cyber ruse and cyber perfidy could prove to be a blurry one indeed.

4. Conclusion

The main characteristic of the Internet is its structural anarchy; advancements in technology show that this will evolve into more uncertainty with cloud computing. There is no working distinction between different military or civilian networks; thus, theoretically, everything is possibly connected to everything. With the use of cloud computing, there are viable scenarios where the data of terrorist groups or belligerents are stored in the same cloud side by side, unbeknownst to the parties. Taking legal restrictions into account, the conduct of cyber attacks is difficult and challenging but possible. On a positive note, cyber attacks can provide working, even non-lethal, alternatives to kinetic weapons and diversify the methods available to military operational planners.

The question still remains – is the current law sufficient to address cyber attacks? A strong argument is made for the existing LOAC to be applied to cyber attacks. Even though the law did not foresee such weapons upon its inception, the fundamental principles and norms of LOAC are flexible enough to facilitate the extension of the LOAC umbrella to cover cyber attacks and prevent the emergence of lacunae. Some challenges remain – when is a cyber attack an “attack” under LOAC and when is it only a hindrance? The lack of legally relevant state practice is a concern in this field, but does not warrant the rush to a new legal instrument. The unity and indivisibility of LOAC's body of law is capable of dealing with this phenomenon on paper. Only practice will show whether it is also capable of doing that in reality.

Disclaimer

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NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: THE CASE OF ESTONIA

Annika Talmar-Pere



1. Introduction

International humanitarian law is a set of rules that seeks to limit the effects of armed conflict. Its goal is to protect people who are not taking part in hostilities and to restrict the means and methods of warfare to what is necessary for the attainment of a military aim. The 1949 Geneva Conventions,¹ the main treaties of humanitarian law, have been accepted by every state in the world. However, becoming a party to these instruments is only the first step. The rules must be acted upon, that is to say humanitarian law must be implemented.

If international law is seen as a part of national law, as is the case in Estonia, then it may presumably also be implemented and interpreted as national law. In such case international law may have as many interpretations as there are different nations.² This is one of the reasons why national implementation must be examined when addressing international humanitarian law. The implementation of humanitarian law is the domain of states that can choose the best measures for doing so. In that sense, international treaties never stand alone, but rather take effect when states begin implementing what is in them. While the Geneva Conventions and other related documents are the same for every state party, national implementation gives the rules within them a distinctive face.

¹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War], 12 August 1949, in force 21 October 1950 – 75 UNTS 31, 85, 135 and 287 (in force for Estonia 18 July 1993 – RT II 1999, 17, 107; 18, 116; 19, 117; 20, 120).

² V. Heiskanen. 1990. The Relation of International and Municipal Law. – Finnish Yearbook of International Law, Vol. 1, p. 179.

All states have an obligation to adopt and carry out the measures necessary to implement humanitarian law.³ Bodies responsible for this can be various ministries, the parliament, the courts, the armed forces, universities, etc. In some cases the Conventions stipulate specific responsibilities and in others they create general obligations to make sure that internal laws are in conformity with the Conventions.

Measures for implementation must be taken in both wartime and peacetime, as it may be too late to implement many of the provisions if hostilities have already begun. Three keywords could be used to summarise such measures: disseminating, organising and sanctioning. The dissemination of international humanitarian law means that both civilians and military personnel are made familiar with the rules within this branch of law. Organising means that all the structures, administrative arrangements and personnel required for compliance with the law are in place. Sanctioning means that violations of humanitarian law are prevented as much as possible and punished when they do occur.

Each of these obligations will be briefly analysed below, followed by comments on the situation in Estonia. As there are over forty provisions in the Geneva Conventions and their Additional Protocols that require implementation only a brief overview will be given in this article.

2. Disseminating and Other Informative Obligations

Popular knowledge of humanitarian law serves the aim of the law – rules help to spread the idea that not everything is “fair in love and war”. Moreover, as the law stipulates the rights and obligations of individuals, they must have access to the texts of the Conventions. Since they can not be presumed to be fluent in English or French, which are the authentic languages of the Conventions, the Conventions must be translated into the national language of every state party.⁴ This obligation inarguably calls for action from states. Furthermore, compliance with this obligation allows the fulfilment of many others as well, for example, making the Conventions available in prisoner-of-war camps in the prisoners’ native language.⁵

³ Geneva Convention I, Article 27; Geneva Convention II, Article 48; Geneva Convention III, Articles 41 and 127; Geneva Convention IV, Articles 99 and 144.

⁴ Common Article 48/49/128/145 of the Geneva Conventions.

⁵ Geneva Convention III, Article 41.

Estonian translations of the Conventions were published in 1999 in the State Gazette.⁶ Careful reading of the Estonian texts reveals quite a few errors of translation. Nevertheless, the translations are by and large understandable and are available to the public; they have also been duly forwarded to the depositary.

Careful reading of Common Articles 48/49/128/145 of the Conventions suggests that not only the Conventions themselves, but all the national implementation acts must be translated and forwarded to the depositary. Some authors even argue that even the preparatory works for the Conventions should be translated into national languages, to allow thorough interpretation for those unable to understand English or French.⁷ While doubtless very useful, this would probably be overly time and resource consuming for public administration.

Knowledge of the Conventions must be spread as widely as possible both within the armed forces and the general population. This is described in the Conventions as an

obligation to undertake, in time of peace as in time of war, to disseminate the text of the Conventions as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may be known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.⁸

Estonia is not in full compliance with this obligation. To begin with, there are no legislative acts concerning the dissemination of humanitarian law. However, basic rules of humanitarian law are taught to military officers at Estonian National Defence College; pre-mission training of military personnel also involves instruction in humanitarian law. During compulsory military service, on the other hand, conscripts only receive a few classes in humanitarian law. The law is not taught on a regular basis to police officers, boarder guard officials or rescue workers. Yet, all of them should receive some training because humanitarian law stipulates rights and obligations to those groups of people under certain circumstances (e.g. while participating in civilian defence works or in international missions).

⁶ For publication details, see note 1 above.

⁷ **H. Vallikivi.** 2001. Välislepingud Eesti õigussüsteemis: 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus. Tallinn: Õiguskirjastus, lk 106.

⁸ Geneva Convention I, Article 47; Geneva Convention II, Article 48; Geneva Convention III, Articles 41 and 127; Geneva Convention IV, Articles 99 and 144.

As for the civilian population, humanitarian law is taught at the Faculty of Law of the University of Tartu and at the Institute of Law of the Tallinn University of Technology. The Estonian Red Cross has done some work on disseminating humanitarian law, but it has often reached only a limited audience. Some years ago a teaching programme for high schools was launched; a teachers' handbook has been translated into Estonian. The Martens Society, a non-profit organisation, has also contributed lately by organising seminars and conferences on international humanitarian law as well as translating a few essential materials into Estonian.⁹

All in all the dissemination of humanitarian law should be taken more seriously in Estonia – not only are all states parties under a formal obligation to do so, but it is also in everyone's best interest. The principle *ignorantia iuris non excusat* applies here as it does in national law. If soldiers or even police officers are not familiar with the rules of international humanitarian law, the burden under certain circumstances may easily fall upon the individual or state. Lack of education in the armed forces can lead to devastating mistakes on the battlefield. It is unthinkable of course to require all officers to have law degrees. However, people who have been specially trained in the field of humanitarian law should be appointed to the armed forces. Such lawyers must be available when an officer is making difficult decisions concerning the use of force in an armed conflict.¹⁰

3. Administrative Measures

In a broader sense, all persons who fall into the hands of the enemy are protected persons. But certain individuals, such as medical and religious personnel and the staff of civil defence organisations enjoy special protection.¹¹ States who are party to a conflict must ensure that these persons are identifiable, particularly by means of special emblems.¹² Some objects are also

⁹ In particular, **F. Kalshoven & L. Zegveld**. 2007. Sõjapidamise piirangud: sissejuhatus rahvusvahelisse humanitaarõigusesse. Tartu: Tartu Ülikooli Kirjastus; **J.-H. Dunant**. 2009. Solferino mälestus. Tartu: Tartu Ülikooli Kirjastus.

¹⁰ Protocol Additional (I) to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, in force 7 December 1978, 1125 UNTS 3 (in force for Estonia 18 July 1993 – RT II 1999, 21, 121), Article 82.

¹¹ **L. C. Green**. 2008. The Contemporary Law of Armed Conflict. Manchester: Manchester University Press, p 230.

¹² See for example Geneva Convention I, Articles 36, 38–42, 44, 53, 54; Geneva Convention II, Articles 39, 41–45; Geneva Convention IV, Articles 18, 20–22, 56; Additional Protocol I, Articles 8, 18, 23, 37, 38, 85.

entitled to special protection. These objects include, for example, cultural property, as well as military medical facilities and ambulances. These objects must also be properly marked. While the armed forces can issue armbands to medical personnel during the conflict, the marking of specially protected cultural property should already be done during peacetime.

As will be discussed below, the marking of medical persons and property with the protective Red Cross emblem is regulated in Estonia by law. The marking of cultural property is a bit more problematic, but a lot of work has been done in this regard lately. A special joint commission of the Ministry of Culture and Ministry of Defence was formed in 2005 to implement the protocols to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹³ (The ICRC suggests that such commissions be formed for the overall implementation of international humanitarian law. Many states, for example Finland, Lithuania, Sweden and Germany have done so and it has proven effective.¹⁴)

The Penal Code criminalises attacks against protected persons, non-military objects and cultural property. Civil defence workers are also protected by the code, but there are no provisions concerning their identification in any other legislative act.¹⁵ In Estonia there are in fact no provisions at all that concern civil defence, other than the one penal code provision in at all. The protection of journalists covering armed conflicts¹⁶ is also not regulated in Estonia.

Prisoner of war status and confinement are not regulated by national law. This is quite regrettable, since it is a lengthy set of provisions that can not be implemented overnight. The Penal Code contains just two provisions concerning prisoners of war that ensure liability in cases of maltreatment.¹⁷

States are also encouraged to establish national Red Cross Societies, civil defence organisations, National Information Bureaux and other such organisations.¹⁸ This is a set of rules that certainly needs to be acted upon by the states who subscribe to the Conventions. It is the prerogative of each

¹³ Formed by a directive of the Minister of Culture on 21 September 2005.

¹⁴ ICRC. 2011. National Committees and Other National Bodies on International Humanitarian Law. 31 October. <www.icrc.org/eng/assets/files/other/national-committees-icrc-30-10-2011-eng.pdf>.

¹⁵ Karistusseadustik [Penal Code], 6 June 2001, in force 1 September 2002 – RT I 2001, 61, 364 ... RT I, 29.12.2011, 190.

¹⁶ Additional Protocol I, Article 79.

¹⁷ Penal Code, sections 98, 99.

¹⁸ Geneva Convention I, Article 17; Geneva Convention III, Articles 120, 122 and 123; Geneva Convention IV, Articles 136–141.

State to choose the best way of doing so. For example, the duties of these organisations can either be divided up between the different ministries, or independent organisations can be formed. The civil defence is a good example – in many states it is part of the general rescue service and works as a civil defence organisation only during times of war. Red Cross Societies are examples of important, autonomous organisations that can play a major role in the overall implementation and compliance with humanitarian law.

The Estonian Red Cross was formed in 1919. This is an organisation with a long history and many tasks, but remains the only organisation provided for in humanitarian law, that has been formed in Estonia. It is a non-governmental organisation and as such differs from other organisations described below that should be organised by state powers.

A separate civil defence organisation does not exist in Estonia, nor is there a National Information Bureau. The latter is a central agency that deals with the identification of the wounded and sick. A graves registration service is also stipulated by the Conventions, but does not exist in Estonia.¹⁹ In addition States are encouraged to provide for the establishment of hospital zones, neutralised zones, and demilitarised zones²⁰. It is a question of careful consideration whether such zones and organisations should be established in peacetime or after a conflict has already broken out.

States have an imperative to take international humanitarian law into account when selecting military sites and developing military tactics.²¹ According to Additional Protocol I “The Parties to the conflict shall, to the maximum extent feasible ... avoid locating military objectives within or near densely populated areas”.²² This is done to protect the civilian population from direct or collateral damage. While not the biggest issue for Estonia, some remarks are worth considering. For example, military bases or other significant defence structures (e.g., the Ministry of Defence, the headquarters of the Defence League) should not be located in densely populated areas or near an immovable cultural property (e.g. the Old Town of Tallinn).

¹⁹ A war graves protection act has been adopted, but this only includes the graves of those who fought for Estonia’s independence in the 1918–1920 war and the period that followed. See Sõjahaudade kaitse seadus [War Graves Protection Act], 10 January 2007, in force 20 January 2007 – RT I 2001, 4, 21.

²⁰ Geneva Convention I, Article 23; Geneva Convention IV, Article 15; Additional Protocol I, Articles 59 and 60.

²¹ Additional Protocol I, Article 36 and 58.

²² Additional Protocol I, Article 58(b).

4. Penal Measures

States who are party to the Conventions, Protocols and other humanitarian law instruments must prevent and put an end to acts contravening these instruments. In short, states must repress all violations and, in particular adopt criminal legislation for the punishment of those who commit grave breaches of the Conventions.²³ Article 129 of Geneva Convention III states: “the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.”

Chapter 8 of the Estonian Penal Code covers war crimes. Crimes listed in this chapter do not fully correspond to those under international law but an effort has been made to at least describe and prohibit the core war crimes.²⁴ There is also a special saving clause which states that offences committed in war time which are not listed as war crimes are punishable on the basis of other provisions of the special part of the Penal Code.²⁵ While it is useful, the clause can lead to a situation where a war crime may be perceived as an ordinary, and therefore less serious, crime under Estonian legislation.

Another interesting interaction between national and international law is the principle of non-retroactivity. Section 2(1) of the Penal Code stipulates that: “No one shall be convicted or punished for an act which was not an offence pursuant to the law applicable at the time of the commission of the act”. But in international law non-retroactivity is not that strict. For example, the war crimes tribunals in Nuremberg and Tokyo had to first define the crimes they were prosecuting, they were not yet working with an established law.

This is generally allowed in international criminal law in connection with crimes against humanity and war crimes. In compliance with this trend, the Estonian Supreme Court has decided that the principle *nullum crimen sine lege* does not apply when an act is a crime under international law and

²³ Common Articles 50, 51, 130 and 147 of the Geneva Conventions; Additional Protocol I, Article 11, 85 and 86; **L. Hannikainen, R. Hanski & A. Rosas**. 1992. Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland. Dordrecht: Martinus Nijhoff, p 114.

²⁴ In detail see: **R. Liivoja, R. Värk & M. Kastemäe**. 2005. Implementation of the Rome Statute in Estonia. – Finnish Yearbook of International Law, Vol. 16, pp. 79–101.

²⁵ Penal Code, section 94(1).

becomes criminalised nationally only after the commission of the act.²⁶ This might cause problems with legal certainty on the national level, especially in the light of the broad language used in the provisions defining war crimes in the Penal Code.

States must also adopt measures to prevent the misuse of the Red Cross, the Red Crescent, and other civil defence emblems. Correct usage of those emblems and protection of objects and persons marked with them is what makes achieving the goals of humanitarian law possible. Contemporary international humanitarian law is based on the idea that people who help others in times of conflict, should be properly identified, protected and allowed to do their work.

Estonia has an Act of Parliament concerning the use of Red Cross and Red Crescent from 2006. The Act deals with the wrongful usage of the emblems in a satisfactory manner.²⁷ The Penal Code stipulates that misuse of those emblems during wartime can result in up to three years of imprisonment.²⁸ Unfortunately, the use of the emblem of civil defence organisations is not regulated by Estonian law, although some states have integrated this in the same acts as are used to regulate the usage of Red Cross symbols (e.g. Finland, Sweden, Canada).

5. Conclusion

Humanitarian law advocates regularly deal with the challenges of implementing the law. People of a more practical bent may ask whether it is worth to implement rules that seem necessary only in times of war. When resources are scant it is difficult to justify the means necessary to prepare for some (unlikely) future risks.

When implementing humanitarian law every state must take into account its recent history and the overall state of affairs of the world at large. Although international armed conflicts are not that common anymore, humanitarian law also applies to non-international conflicts (and to some extent to new forms of war) which are occurring in many parts of the world and can start virtually overnight.

²⁶ *Criminal matter of Vladimir Penart*, Case No. 3-1-1-140-03, National Court of Estonia, decision, 18.12.2003, para. 10.

²⁷ Punase risti nimetuse ja embleemi seadus [Red Cross Designation and Emblem Act], 5 April 2006, in force 1 June 2006 – RT I 2006, 18, 141 ... RT I, 08.07.2011, 46.

²⁸ Penal Code, section 105.

Implementing many of the provisions of international humanitarian law would be without doubt very expensive for Estonia, but there are some things that could be done at a relatively small cost. A Humanitarian Law Commission should be established to analyze all of Estonia's obligations. Through its Advisory Service, the International Committee of the Red Cross also provides advice and documentation to governments regarding national implementation. Raising the overall awareness of the need of implementation should be the first step.

Treaties

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, in force 21 October 1950 – 75 UNTS 31 (in force for Estonia 18 July 1993 – RT II 1999, 17, 107).

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SUPERIOR RESPONSIBILITY

René Värk



1. Introduction

International law imposes individual criminal liability upon those who commit international crimes. Such liability is normally direct, i.e. focused on the personal conduct of the actual perpetrators.¹ An individual is prosecuted for the active and direct commission of a crime (i.e. principal perpetrator) or for a crime committed by others if he instigated, ordered, planned or assisted the commission of that crime (i.e. aider or abettor). International crimes, however, are often committed during armed conflicts or other unstable situations being a component of large scale atrocities that involve many different perpetrators on various levels. As a result, it is often very complicated to determine the personal criminal liability of each individual who contributed to the commission of specific international crimes. Herein lies the paradox: although international criminal law is essentially individual-oriented, it usually must be concerned with collective criminal phenomena as well. For these reasons, international criminal law has developed some additional forms of liability, namely joint criminal enterprise and superior responsibility.

Superior responsibility is a form of indirect liability as the superior is not held criminally liable for the criminal acts in which he participated (e.g. planned, gave orders, assisted), but in connection with the criminal acts committed by his subordinates.² Nevertheless, it is wrong to assume that a superior is simply liable for the criminal acts of his subordinates – his liability derives from his failure to prevent and punish such acts, and to exercise proper supervision and control over his subordinates. This is because international crimes are often committed in the framework of hierarchical organisations, e.g. armed forces or rebel movements, where some individuals physically perpetrate the crimes (subordinates) and certain individuals are not usually directly involved, but indirectly enable the commission of such

¹ See Statute of the International Criminal Tribunal for the former Yugoslavia [hereinafter the ICTY Statute], Article 7(1); Statute of the International Criminal Tribunal for Rwanda [hereinafter the ICTR Statute], Article 6(1); Rome Statute of the International Criminal Court [hereinafter the Rome Statute], Article 25.

² ICTY Statute, Article 7(3); ICTR Statute, Article 6(3); Rome Statute, Article 28.

crimes or create favourable conditions by inactivity (superiors). Such “facilitation” may have a decisive role in the commission of international crimes and therefore it is necessary to hold superiors liable in order to prevent atrocities and to ensure that the duty of exercising proper supervision and control over their subordinates is fulfilled.

Although superior responsibility has been recognised as a part of customary international law for quite some time already, its precise content is still controversial and open to debate. This paper first examines briefly the historical background and codification of a superior’s duties and responsibility and then analyses the required elements of superior responsibility. Before venturing any further, a comment on terminology is necessary. Traditionally, the notion “command responsibility” has been used because it is associated foremost with *military* commanders, but it is preferable (more accurate) to use the notion “superior responsibility” that clearly covers both *military* and *civilian* leaders.

2. Historical Background

The earliest origins of superior responsibility trace back to the fifteenth century,³ but the modern doctrine did not develop until the Second World War. The post-war trials of Japanese and German commanders and leaders established the fundamental principles (although the beginning was controversial), but the elements of responsibility were first elaborated by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In the end, the practice and theory were codified in the Rome Statute.

The International Military Tribunal in Nuremberg did not deal with superior responsibility. The Tribunal of Tokyo applied the concept in a way (very broadly) that it effectively became a joint criminal enterprise in the modern sense.⁴ It is the *Yamashita* case which was before the United States Military Commission that brought prominence to the principle of superior responsibility in the aftermath of the Second World War.⁵ The case itself was

³ See, for example, **W. H. Parks**. 1973. Command Responsibility for War Crimes. – *Military Law Review*, Vol. 62, pp. 4–5.

⁴ **N. Boister & R. Cryer**. 2008. *The Tokyo International Military Tribunal: A Reappraisal*. Oxford: Oxford University Press, pp. 205–236.

⁵ See **Parks** 1973, pp. 22–38 for detailed discussion.

controversial and deserves a more detailed discussion.⁶ General Tomoyuki Yamashita took command of the Japanese army in the Philippines on 9 October 1944. His headquarters were moved to the mountains, 125 miles north of Manila in December. The United States forces reached Manila on 4 February 1945 and the entire Japanese naval forces defending the capital were destroyed by 3 March. While defending the city, the Japanese forces tortured and killed thousands of civilians.⁷ Yamashita was at his headquarters during the operation and supposedly knew nothing of what was happening in the city as communications were cut off. He had given the order to evacuate Manila, but his order was resisted by the Japanese army and navy (only 1,600 left and about 20,000 remained). In September, Yamashita was detained and charged with “unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines”.⁸ He was sentenced to death and was hanged on 23 February 1946.

The military commission found that there had been widespread atrocities and Yamashita failed to effectively control his troops as was required by the circumstances, but drew no express conclusion regarding his knowledge of these crimes. After being found guilty, he appealed to the United States Supreme Court, but the petition was rejected. The trial has been criticised widely for not showing any culpability on the side of Yamashita.⁹ Supreme Court Justices Murphy and Rutledge disagreed with the majority. The former wrote an especially critical dissenting opinion:

He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts

⁶ The overview is mostly based on **K. Ambos**, 2002. *Superior Responsibility*. – A. Cassese et al. (eds). *The Rome Statute for an International Criminal Court: A Commentary*. Oxford: Oxford University Press, pp. 825–828.

⁷ Figures differ considerably. Over 8,000 killed and over 7,000 wounded in **Parks** 1973, p. 25, but nearly 100,000 in **A. M. Prévost**, 1992. *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*. – *Human Rights Quarterly*, Vol. 14, p. 314.

⁸ *In re Yamashita*, 327 US 1 (1945), pp. 13–14.

⁹ For example, **Prévost** 1992, p. 337.

of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.¹⁰

Still, it seems that Yamashita was not convicted under strict liability, i.e. simply because he was the superior of the Japanese forces in Manila. There are two potential explanations for the outcome – the commission did not believe the plea of ignorance given the extensiveness of the atrocities and it was not sure whether the requirement of knowledge should be applied. But it is still impossible to say whether the commission believed that Yamashita knew or should have known about the atrocities. Nevertheless, such a broad interpretation of superior responsibility was not applied in the subsequent cases.

Superior responsibility was used in several cases after the Second World War. These cases (e.g. *Pohl*, *Brandt*, *Hostage*, *High Command*) referred to the case of *Yamashita* in order to prove the existence of the concept of superior responsibility, but did not apply the case as a precedent. Indeed, they partially rejected the low standard of *Yamashita* and adopted approaches more similar to contemporary superior responsibility.

3. Codification of Duties and Responsibility

The first international instrument to expressly address a superior's duties and responsibility was Additional Protocol I to the Geneva Conventions (1977).¹¹ Its provisions serve as a basis for further codifications (foremost ICTY, ICTR and the Rome Statutes) and their interpretations. The Protocol confirms the general obligation of States to repress grave breaches of the four Geneva Conventions (1949) and the Protocol in question, "which result from a failure to act when under a duty to do so".¹² This provision indicates that a superior can only be held responsible if two conditions are met, namely subordinates have committed such breaches and the superior had a duty to act in regard of these breaches. Next, the Protocol explains the nature and conditions of a superior's responsibility (parallel to subordinates):

The fact that a breach of the [Geneva] Conventions or of [Additional Protocol I] was *committed by a subordinate* does not absolve his superiors from

¹⁰ Cited in M. C. Bassiouni. 2011. Crimes against Humanity: Historical Evolution and Contemporary Application. Cambridge: Cambridge University Press, p. 535.

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3.

¹² *Ibid.*, Article 86(1).

penal or disciplinary *responsibility*, as the case may be, if they *knew*, or *had information which should have enabled them to conclude* in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take *all feasible measures within their power to prevent or repress* the breach.¹³

Then, the Protocol describes what is expected from a superior.¹⁴ *First*, military commanders must (with respect to members of the armed forces under their command and other persons under their control) prevent and suppress the above-mentioned breaches as well as report them to competent authorities. *Second*, in order to prevent and suppress these breaches, commanders must ensure that members of the armed forces under their command are aware of their obligations under the Geneva Conventions and Additional Protocol I. *Third*, any commander, who is aware that subordinates or other persons under his control are going to commit or have committed these breaches, is required to take such steps as are necessary to prevent such breaches and, where appropriate, to initiate disciplinary or penal action against the perpetrators.

The ICTY Statute contains a provision that is similar to Additional Protocol I:

The fact that [crimes were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁵

The corresponding provision in the ICTR Statute is essentially the same.¹⁶ The provisions in the Protocol and the statutes have different temporal references regarding a superior's duty of intervention – the Protocol covers situations where a subordinate “was committing or was going to commit” a crime, but the phrasing of the statutes is “was about to commit [a crime] or had done so”. Additionally, when referring to taking measures to prevent crimes, the statutes omit the clarifying condition of “within [a superior's] power” and therefore potentially extending responsibility.

¹³ *Ibid.*, Article 86(2) (emphasis added).

¹⁴ *Ibid.*, Article 87 (to be precise, the article imposes upon States an obligation to ensure that superiors carry out these duties; it is also vital for the clarification of a superior's duties).

¹⁵ ICTY Statute, Article 7(3).

¹⁶ ICTR Statute, Article 6(3).

The Rome Statute provides a much more elaborate formulation (reflecting essentially both the statutes and case law of the ICTY and ICTR). After extensive negotiations,¹⁷ it was agreed that there should be separate conditions for military commanders and other (civilian) superiors:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁸

4. Nature of Responsibility

Superior responsibility is an original creation of the international criminal justice system, although the idea has been adopted afterwards by numerous domestic systems. Although superior responsibility is generally considered to be a part of customary international law,¹⁹ its precise legal nature is still

¹⁷ **P. Saland.** 1999. *International Criminal Law Principles*. – R. S. Lee (ed.). *The International Criminal Court: The Making of the Rome Statute*. The Hague: Kluwer Law International, pp. 202–204.

¹⁸ Rome Statute, Article 28.

¹⁹ See, for example, **L. C. Green.** 1995. *Command Responsibility in International Humanitarian Law*. – *Transnational Law and Contemporary Problems*, Vol. 5, p. 350; **A. Cassese.**

open to debate. Foremost, for what exactly is the superior responsible? Is it responsibility for complicity?²⁰ Is it a separate crime for dereliction of a superior's duty to control, prevent or punish?²¹ Is it a special mode of liability for the crimes committed by subordinates?²²

It should be the latter. The superior is not directly responsible for the crimes committed by his subordinates, but for his omission, failure to properly discharge his duty. Even though the superior is considered responsible in connection with the same crimes committed by the subordinates (i.e. if they have committed war crimes, the superior is also charged with war crimes), it does not mean that the superior becomes an accomplice and actually committed these crimes. It was correctly stated already in the *Yamashita* trial that "it is absurd ... to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape".²³ How could the superior physically deport thousands of civilians in a day? So, when it is claimed that the superior is responsible for the crimes committed by subordinates, it does not mean that the superior personally committed these crimes, but that the punishment for his failure to exercise proper authority is measured in the light of the crimes committed by subordinates. But this does not transfer the actual criminal conduct from the subordinates to the superior.

True, there is some resemblance to complicity and joint criminal enterprise.²⁴ However, unlike aiding and abetting, there is no requirement that the superior actually knew what the subordinates were doing (level of awareness is discussed below). Unlike a joint criminal enterprise, there is no requirement of a plan or common purpose. This may leave a misleading impression that it is easy to obtain a conviction under superior responsibility, but in fact, the elements of responsibility (discussed below) usually render it quite difficult. Practice has shown that superior responsibility has not turned into a

2008. International Criminal Law. 2nd edn, Oxford: Oxford University Press, p. 241; *Zejnir Delalić and Others*, Case No IT-96-21-T, ICTY, Judgement of the Trial Chamber, 16 November 1998, paras 333, 343.

²⁰ For example, United Kingdom's International Criminal Court Act (2001), Section 65.

²¹ *Ambos* 2002, p. 851.

²² *Enver Hadžihasanović and Amir Kubura*, Case No IT-01-47-T, ICTY, Judgement of the Trial Chamber, 15 March 2006, para. 75.

²³ Cited in *Bassiouni* 2011, p. 535.

²⁴ **W. A. Schabas**. 2006. *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*. Cambridge: Cambridge University Press, p. 315.

“silver bullet” – delivering convictions where traditional grounds of responsibility are inadequate – as once was predicted.²⁵

The ICTY has experimented with different ideas on superior responsibility, but has settled (so it seems) upon a similar interpretation, i.e. superior responsibility is the responsibility for omission in connection with the crimes committed by subordinates. It was well explained in the case of *Halilović*:

[C]ommand responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus “for the acts of his subordinates” as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.²⁶

This position has been confirmed by other chambers²⁷ and this paragraph has been frequently cited as an authoritative statement. In the case of *Blaškić*, it was emphasised that direct and superior responsibility are distinct grounds of criminal responsibility and it is not appropriate to convict under both grounds for the same count. In such a case, the accused should be convicted for direct responsibility and his superior position should be considered as an aggravating factor in sentencing.²⁸ Full enquiry into superior responsibility would be “a waste of judicial resources”²⁹ if the liability of a person is already convicted as a principal perpetrator or accomplice.

²⁵ W. A. Schabas, 2011. *An Introduction to the International Criminal Court*. 4th edn, Cambridge: Cambridge University Press, p. 234.

²⁶ *Sefer Halilović*, Case No IT-01-48-T, ICTY, Judgement of the Trial Chamber, 16 November 2005, para. 54.

²⁷ For example, *Zlatko Aleksovski*, Case No IT-95-14/1-T, ICTY, Judgement of the Trial Chamber, 25 June 1999, para. 67; *Milorad Krnojelac*, Case No IT-97-25-A, ICTY, Judgement of the Appeals Chamber, 17 November 2003, para. 171; *Enver Hadžihanović and Amir Kubura*, Case No IT-01-47-A, ICTY, Judgement of the Appeals Chamber, 22 April 2008, para. 39.

²⁸ *Tihomir Blaškić*, Case No IT-95-14-A, ICTY, Judgement of the Appeals Chamber, 29 July 2004, para. 91.

²⁹ *Milomir Stakić*, Case No IT-94-24-T, ICTY, Judgement of the Trial Chamber, 31 July 2003, para. 466.

Under the Rome Statute, the nature of superior responsibility is slightly different – it is treated more like a form of liability for underlying crimes. Article 28 provides that “military commander shall be criminally *responsible for crimes* ... committed by forces under his or her effective command and control ... as a result of his or her failure to exercise control properly over such forces”.³⁰ This implies that the crimes of subordinates are imputable to the superior, which is more similar to complicity (e.g. aiding, abetting) than to the form of liability discussed above. In other words, the superior is responsible and should be punished for the principal crime committed by his subordinates. However, it is necessary to avoid the risk of holding someone guilty for an offence committed by others in violation of the principle of individual and culpable criminal responsibility.³¹

The ICTY clarified that superior responsibility applies equally to non-international armed conflicts although Additional Protocol I (establishing superior responsibility) concerns only international armed conflicts.³² This rational position was reaffirmed by the inclusion of superior responsibility in the ICTR Statute (concerning a non-international armed conflict) and the Rome Statute (applicable to both international and non-international armed conflicts).

5. Elements of Responsibility

Fortunately, the ICTY has elaborated on the conditions of superior responsibility. The commission of crimes by subordinates is evidently a necessary prerequisite of superior responsibility. But additionally, three essential elements were identified:

1. The existence of a superior-subordinate relationship;
2. The superior knew or had reason to know that crimes were about to be or had been committed;
3. The superior failed to take the necessary and reasonable measures to prevent these crimes or punish their perpetrators.³³

³⁰ Emphasis added. See also *Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08, ICC, Decision on the Confirmation of Charges, 15 June 2009, para. 405.

³¹ **C. Meloni**. 2007. Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior. – *Journal of International Criminal Justice*, Vol. 5, p. 633.

³² *Enver Hadžihasanović, Mehmed Alagic and Amir Kubura*, Case No IT-01-47-AR72, ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

³³ *Zejnir Delalić and Others* (Trial), para. 344.

5.1. Superior-Subordinate Relationship

Establishing a superior-subordinate relationship has proved to be a major obstacle in the practice of the ICTY and ICTR. If there is a clear and formal chain of command (typical regular armed forces), it should not be difficult to determine who the superior is, who the subordinates are and whether the former is responsible for the crimes of the latter. But the reality is often much more difficult, for example, in modern conflicts like those in the former Yugoslavia and Rwanda “where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures, may be ambiguous and ill-defined”.³⁴ So, who is a genuine superior? It is a crucial question because “only those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility”.³⁵ This sentence holds several key aspects to the understanding of the superior-subordinate relationship.

The ICTY adopted a concept of “effective control over a subordinate” referring to a “material ability to prevent or punish criminal conduct, however that control is exercised”.³⁶ This was taken over by the ICTR which emphasised that general influence is not sufficient to establish a superior-subordinate relationship.³⁷ At the same time it is not necessary to show direct or formal subordination, but “the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator”.³⁸ Therefore both the ICTY and ICTR have underlined that an official position is not determinative for superior responsibility because it is the actual possession or non-possession of powers to control subordinates that may lead to conviction or acquittal.³⁹

In the case of *Orić*, the ICTY stressed that the possession of *de jure* authority does not result in a presumption of effective control, because

³⁴ *Ibid.*, para. 354.

³⁵ *Dario Kordić and Mario Čerkez*, Case No IT-95-14/2-T, ICTY, Judgement of the Trial Chamber, 26 February 2001, para. 416.

³⁶ *Zejnir Delalić and Others*, Case No IT-96-21-A, ICTY, Judgement of the Appeals Chamber, 20 February 2001, para. 256.

³⁷ *Laurent Semanza*, Case No ICTR-97-20-T, ICTR, Judgement of the Trial Chamber, 15 March 2003, para. 415.

³⁸ *Sefer Halilović*, Case No IT-01-48-A, ICTY, Judgement of the Appeals Chamber, 16 October 2007, para. 59.

³⁹ *Zejnir Delalić and Others* (Appeals), paras 186–198.

otherwise the prosecution would be exempted from its burden to prove effective control beyond a reasonable doubt.⁴⁰ Such a possession provides merely some evidence of effective control.⁴¹ For example, Milan Milutinović was the President of the Republic of Serbia (1997–2002) of the Federal Republic of Yugoslavia. According to the Serbian Constitution (1990),⁴² the president commands the armed forces in peacetime and in war. The ICTY found that this function was actually a reserve competency to be triggered in the event that Serbia became an independent state. Accordingly, in 1998 and 1999, Milutinović was not given any commanding authority over the Yugoslav army (confirmed by the questioned senior military and political figures). Instead, Slobodan Milošević was the actual commander-in-chief.⁴³

These standpoints were basically endorsed by a Pre-Trial Chamber of the ICC,⁴⁴ which provided a compilation of factors that may indicate the existence of a position of authority and effective control (taken from the case law of the ICTY).⁴⁵ These include a person's official position, the power to issue or give orders, the capacity to ensure compliance with the issued orders, the capacity to order units under his command to engage in hostilities, the capacity to re-subordinate units or to make changes to command structure and the power to promote, replace, remove or discipline any member of the forces. Several elements refer, directly or implicitly, to the authority to issue orders. Giving orders may indeed be good evidence of being a superior, but if they are not obeyed, it seems to prove the opposite.⁴⁶

Command is not necessarily permanent, but may well be temporary, for example, a soldier taking command in the battlefield.⁴⁷ Additionally, analogous to this example, the effective commander might not outrank his subordinates. In more complicated situations, a person may come under the concurrent command of several superiors, which may extend command responsibility to multiple individuals.⁴⁸

⁴⁰ *Naser Orić*, Case No IT-03-68-A, ICTY, Judgement of the Appeals Chamber, 3 July 2008, para. 91.

⁴¹ *Ibid.*, para. 92.

⁴² Article 83(5).

⁴³ *Milan Milutinović and Others*, Case No IT-05-87-T, ICTY, Judgement of the Trial Chamber, 26 February 2009, paras 106–107, but also 108–143.

⁴⁴ *Jean-Pierre Bemba Gombo*, paras 414–416.

⁴⁵ *Ibid.*, para. 417.

⁴⁶ *Tihomir Blaškić* (Appeals), paras 69, 399.

⁴⁷ *Dragoljub Kunarac*, Case Nos IT-96-23-T & IT-96-23/1-T, ICTY, Judgement of the Trial Chamber, 22 February 2001, para. 399.

⁴⁸ *Zlatko Aleksovski*, para. 106.

The superior-subordinate relationship applies also to civilian superiors.⁴⁹ While the tribunals reached this conclusion in their findings, the Rome Statute explicitly states that superior responsibility covers both military commanders and civilian superiors (although the rules are not identical as discussed below).⁵⁰

In sum, a superior (whether military or civilian) is thus the one who possesses the power or authority in either a *de jure* or *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

5.2. A Superior's Knowledge of Criminal Conduct

If the superior is not responsible directly for the principal crime committed by subordinates, but rather assumes liability through omission in connection with that crime, it is then necessary to demonstrate that the superior has a certain degree of knowledge (actual or constructive knowledge) of that crime. The mental element (*mens rea*) has been the most controversial element of superior responsibility, mainly because knowledge was not proven beyond reasonable doubt or the judges imposed an unrealistic duty to know on the superior. A superior's knowledge is often presumed either from the official position in the state hierarchy or from the notorious and widespread character of the crimes committed by subordinates.⁵¹ Although these assumptions are not completely unreasonable (e.g. a true superior should make sure that he is adequately informed of what his subordinates are doing, as it is not plausible that a superior can remain unaware of widespread and long-lasting horrific crimes committed by his subordinates), this is not a proper approach for judicial institutions.

There are usually few difficulties if the superior had actual knowledge ("knew") of the crimes committed by subordinates. The problems arise when the superior has, at most, constructive knowledge ("had reason to know" in the ICTY and ICTR Statutes and "should have known" or "consciously

⁴⁹ *Clément Kayishema*, Case No ICTR-95-1-T, ICTR, Judgement of the Trial Chamber, 21 May 1999, paras 213-215; *Zejnir Delalić and Others* (Trial), paras 355-363; *Ignace Bagilishema*, Case No ICTR-95-1A-A, ICTR, Judgement of the Appeals Chamber, 3 July 2002, para. 52.

⁵⁰ Respectively, Article 28(a) for military commanders and Article 28(b) for civilian superiors.

⁵¹ **B. I. Bonafé**. 2007. Finding a Proper Role for Command Responsibility. – *Journal of International Criminal Justice*, Vol. 5, p. 606.

disregarded information which clearly indicated” in the Rome Statute) of those crimes. So, what amounts to constructive knowledge?

The ICTY has frequently explained that superior responsibility is not a form of strict liability (the ICTR has concurred), i.e. a person is responsible simply because he is the superior.⁵² In the leading case of *Zejnir Delalić and Others*, the ICTY (both the trial and appeals chamber) found that a superior

may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes ... or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.⁵³

Accordingly, the superior has no “duty to know” (as in the case of *Yamashita*).⁵⁴ The mental element is “determined only by reference to the information in fact available to the superior”.⁵⁵ However, it is not necessary to prove that the superior had specific information about the crimes – even general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, is sufficient to prove that he “had reason to know”.⁵⁶ Additional Protocol I puts an emphasis on the information actually available to a superior which should have enabled him to conclude in the circumstances at the time that crimes were committed by subordinates.⁵⁷ Therefore, constructive knowledge should not be evaluated retrospectively in the light of information that became available afterwards. The ICTR has underscored the need to make the distinction between information about the general situation prevailing in a certain area at the time and general information which should put the superior on notice that his subordinates might commit crimes.⁵⁸ But neither is the awareness of a general form of criminality enough,⁵⁹ although such information can be relevant for proof that the

⁵² *Zejnir Delalić and Others* (Appeals), paras 226, 239.

⁵³ *Zejnir Delalić and Others* (Trial), para. 383.

⁵⁴ *Zejnir Delalić and Others* (Appeals), paras 228–239.

⁵⁵ *Pavle Strugar*, Case No IT-01-42-T, ICTY, Judgement of the Trial Chamber, 31 January 2005, para. 369.

⁵⁶ *Zejnir Delalić and Others* (Appeals), para. 238.

⁵⁷ Article 86(2).

⁵⁸ *Ignace Bagilishema*, para. 42.

⁵⁹ *Krnojelac*, para. 155.

superior had reason to know.⁶⁰ Regarding the form of information, it may be written or oral and does not need to have the form of specific reports submitted pursuant to official procedures.

In the case of *Blaškić*, the Trial Chamber suggested a broader approach for interpreting “had reason to know” condition. The latter was satisfied

if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties.⁶¹

Although this argument sounds reasonable and has found considerable academic support, it has not prevailed and was rejected by the Appeals Chambers.⁶² Hence, the statement in the case of *Zejnir Delalić and Others* remains authoritative.

The Rome Statute approaches the mental element a little bit differently. *First*, it has separate rules for military commanders and civilian superiors. In case of military commanders, the prosecution must show that they “knew or, owing to the circumstances at the time, should have known”.⁶³ The standard is higher for civilian superiors because the prosecution must demonstrate that they “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes”.⁶⁴ This is probably a progressive development, not the codification of existing customary international law.⁶⁵ *Second*, the standard for military commanders is higher than in the ICTY and ICTR Statutes. While the ICTY and ICTR have stressed that the mental element is not about negligence (“had reason to know”), the ICC Statute introduces negligence (“should have known”), i.e.

⁶⁰ *Pavle Strugar*, Case No IT-01-42-A, ICTY, Judgement of the Appeals Chamber, 17 July 2008, para. 301.

⁶¹ *Tihomir Blaškić*, Case No IT-95-14-T, ICTY, Judgement of the Trial Chamber, 3 March 2000, para. 332.

⁶² *Tihomir Blaškić* (Appeals), para. 63; *Ignace Bagilishema*, paras 34–35.

⁶³ Article 28(a)(i).

⁶⁴ Article 28(b)(i).

⁶⁵ **G. Vetter**. 2000. Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC). – *Yale Journal of International Law*, Vol. 25, pp. 89–143. The ICTR has rejected the idea that military commanders and civilian superiors have different standard for the mental element. *Ignace Bagilishema*, paras 26–37.

failure to look for information may lead to criminal liability.⁶⁶ In the case of *Jean-Pierre Bemba Gombo*, the Pre-Trial Chamber confirmed explicitly that the “had reason to know” and “should have known” standard are different, but the interpreting criteria developed by the tribunals may still be useful when applying the “should have known” standard.⁶⁷

5.3. Failure to Prevent and Punish

The superior must take “necessary and reasonable measures” to prevent or punish the crimes. There are two distinct obligations, i.e. duty to prevent and duty to punish, and disregard of both may lead to criminal liability.⁶⁸ These obligations do not present a choice, e.g. if the superior knowingly does not prevent the crimes, then the subsequent punishment of the perpetrators does not release the superior from responsibility.⁶⁹ In other words, “a superior’s failure to prevent the commission of the crime by a subordinate, where he had the ability to do so, cannot simply be remedied by subsequently punishing the subordinate for the crime”.⁷⁰ However, if the superior really did not know or have reason to know that crimes were committed, but learns about these crimes later, he must punish the perpetrators. Otherwise, the failure to punish may be considered an implicit acceptance of the crimes.⁷¹

The ICTY has, on several occasions, explained which measures are necessary and reasonable. In the case of *Blaškić*, the Appeals Chamber expected the superior to take, generally, measures that “can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates” and noted that “what constitutes such measures is not a matter of substantive law but of evidence”.⁷² Hence, the assessment is inherently subjective, taking into consideration the situation and actual control exercised by the superior. In the case of *Orić*, the Trial Chamber elaborated on the criteria for failure to prevent, e.g. the measures depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act; measures must be taken to prevent

⁶⁶ *Jean-Pierre Bemba Gombo*, paras 432–433.

⁶⁷ *Ibid.*, para. 34.

⁶⁸ *Tihomir Blaškić* (Appeals), paras 78–85; *Sefer Halilović* (Trial), para. 94; *Naser Orić*, Case No IT-03-68-T, ICTY, Judgement of the Trial Chamber, 30 June 2006, paras 325–326.

⁶⁹ *Tihomir Blaškić* (Trial), para. 336; *Pavle Strugar* (Appeals), para. 373; *Jean-Pierre Bemba Gombo*, para. 436.

⁷⁰ *Naser Orić* (Trial), para. 326.

⁷¹ *Sefer Halilović* (Trial), para. 95.

⁷² *Tihomir Blaškić* (Appeals), para. 72.

subordinates from planning, preparing or executing the prospective crimes; the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react; although the superior is not obliged to do the impossible.⁷³ Regarding the last criterion, the superior's obligation to take necessary and reasonable measures is a due diligence obligation, not an absolute obligation to achieve results no matter what.

The Rome Statute includes an explanation of what is expected from the superior. He is responsible if he "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission, or to submit the matter to the competent authorities for investigation and prosecution".⁷⁴ These include measures

- (i) to ensure that superior's forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.⁷⁵

The ICTY has clarified that "the duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected" (indeed, the superior is acting before the perpetrator is convicted in the court of law).⁷⁶ It does not mean that the superior must conduct the investigation or dispense the punishment in person, but that he has initiated the investigation, submitted the case to a higher level, taken extra precautionary measures to prevent future crimes, etc.

Additional Protocol I provides that the superior may initiate disciplinary or penal action against violators.⁷⁷ In the cases of international crimes, disciplinary action is unlikely due to the gravity of crimes, which means that the duty to punish is primarily the duty to take the necessary and reasonable measures to trigger the action of another body, ideally an independent judiciary.⁷⁸

⁷³ *Naser Orić* (Trial), para. 329.

⁷⁴ Article 28(a)(ii).

⁷⁵ *Jean-Pierre Bemba Gombo*, para. 438.

⁷⁶ *Naser Orić* (Trial), para. 336.

⁷⁷ Article 87(3).

⁷⁸ *Naser Orić* (Appeals), para. 12.

6. Conclusion

Superior responsibility is a mode of liability which may help in situations where it is difficult or impossible to demonstrate that the superior participated in the commission of crimes, but where it is clear that he played an indirect role in enabling their commission or creating favourable conditions by inactivity. Despite the fact that superior responsibility is a generally recognised principle of international criminal law, its precise content and criteria of application are still open to debate.

The superior is not directly responsible for the crimes committed by his subordinates, but for his omission, failure to properly discharge his duty, i.e. to prevent the crimes or punish the perpetrators. This is not a form of vicarious responsibility, where one may assume that superior is certainly responsible for his subordinates no matter what. To be held criminally liable, it must be shown that the superior had actual or constructive knowledge of the crimes in question and failed to take “necessary and reasonable measures”, within his power, to prevent or punish. Case law emphasises that the possession of actual authority over subordinates is decisive (*de facto* superiors), while an official position does not equal effective control (*de jure* superiors) and may be some evidence of such control.

Although superior responsibility was once seen as a “silver bullet” for the prosecution, it has proved to have limited practical impact. There have been few convictions based purely on superior responsibility due to the fact that most persons charged under such responsibility are found guilty for direct participation in the crime, in one form or another. But this does not diminish the importance of superior responsibility in international criminal proceedings.

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