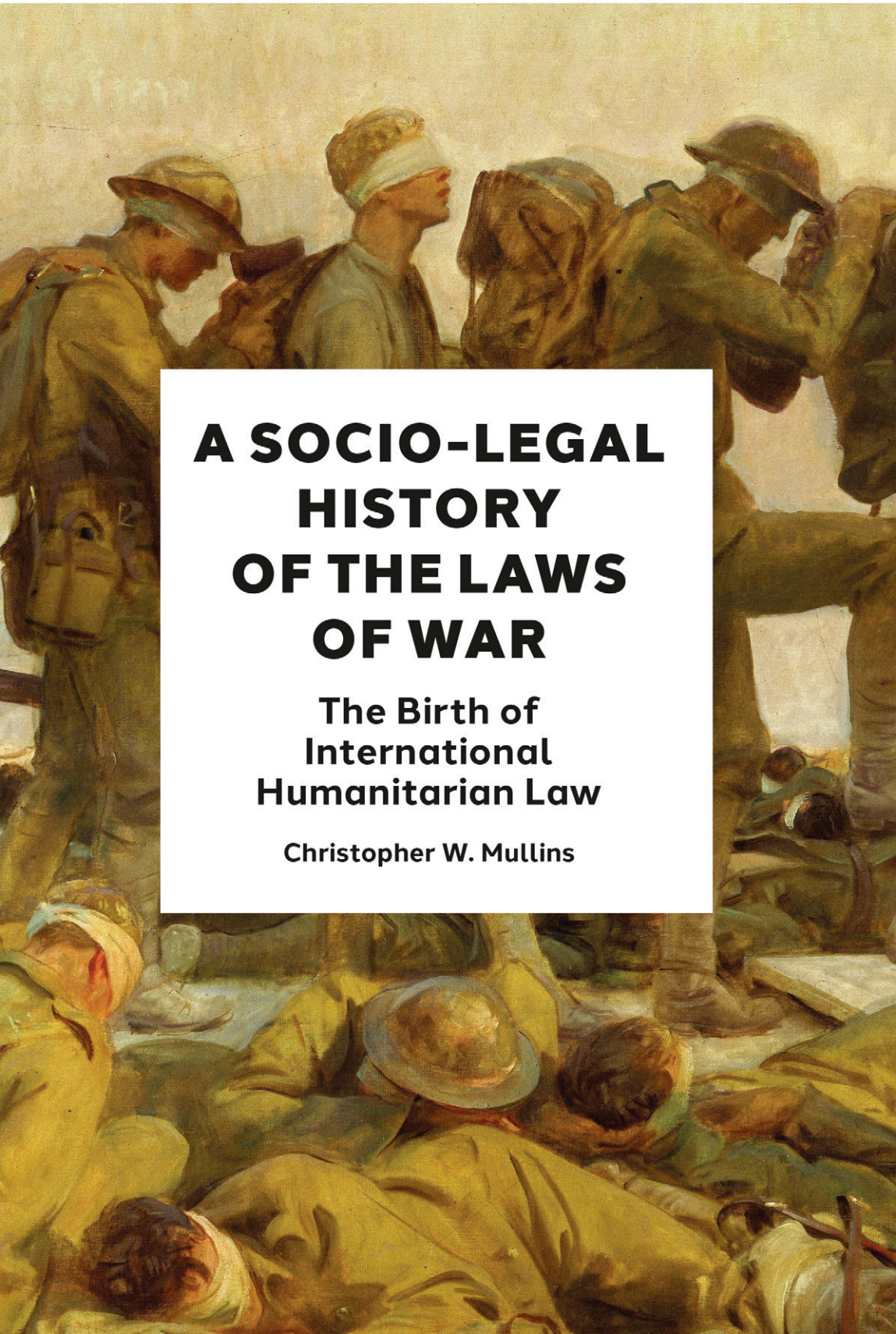
EMERALD ADVANCES IN HISTORICAL CRIMINOLOGY



A SOCIO-LEGAL HISTORY OF THE LAWS OF WAR

The Birth of International Humanitarian Law

Christopher W. Mullins

A Socio-Legal History of the Laws of War

EMERALD ADVANCES IN HISTORICAL CRIMINOLOGY

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A Socio-Legal History of the Laws of War: The Birth of International Humanitarian Law

BY

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List of Abbreviations

AFRC	Armed Forces Revolutionary Council
ASP	Assembly of State's Parties (ICC)
ATO	African Theater of Operations (WWII)
BDU	Basic Daily Uniform
CAR	The Central African Republic
CDL	Community Defense League (Sierra Leone)
CPCPEAC	Convention for the Protection of Cultural Property in Event of Armed Conflict
CRC	Civil Rights Congress
CvH	Crimes Against Humanity
DRC	Democratic Republic of the Congo
ECC	Extraordinary Chambers in the Courts of Cambodia
ECOMOG	Economic Community of West African States Monitoring Group
ETO	European Theater of Operations (WWII)
FRG	Federal Republic of Germany (West Germany)
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Red Cross/Red Crescent Society
ICTR	International Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IJA	Imperial Japanese Army
IJN	Imperial Japanese Navy
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East

INTERFET	International Force for East Timor
KKK	Knights of the Ku Klux Klan (US)
KLA	Kosovo Liberation Army
LEEC	Law on the Establishment of the Extraordinary Chambers
LRA	Lord's Resistance Army
MAD	Mutual Assured Destruction
MITC	Mechanism for International Tribunals
NATO	North Atlantic Treaty Organization
NCO	Non-commissioned Officer
NMT	Nuremberg Military Tribunal
NPFL	National Patriotic Front of Liberia
NVA	North Vietnam Army
OTP	Office of the Prosecutor (ICC)
PCIJ	Permanent Court of International Justice
PMC	Private Military Company
POTUS	President of the United States
POW	Prisoner of War
PTC	Pre-trial Chamber (ICC)
PTO	Pacific Theater of Operations (WWII)
RPF	Rwandan Patriotic Front
RUF	Revolutionary United Front (Sierra Leone)
RUSAR	Revised United States Army Regulations 1861
SCSL	Special Court for Sierra Leone
SLA	Sierra Leone Army
SLTRC	Sierra Leone Truth and Reconciliation Commission
SPSCD	Special Panels for Serious Crimes in Dili
TRC	Truth Reconciliation Commission
UK	The United Kingdom
UN	United Nations
UNAMR	United Nations Assistance Mission for Rwanda
UNGA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
UNOCI	United Nations Operation in Côte d'Ivoire

UNSC	United Nations Security Council
UNTEAT	United Nations Transitional Administration in East Timor
UNUDHR	United Nations Universal Declaration of Human Rights
US	United States of America
USSR	United Soviet Socialist Republics
VC	Viet Cong
WTO	Western There of Operations (WWII)
WWI	World War I
WWII	World War II

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About the Author

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Chapter 1

Introduction: The Rules and Laws of War

Abstract

This chapter provides a brief overview of the history of the laws of war up to the mid-1800s CE. It discusses the interconnection between social and historical forces, armies, and the laws that govern them.

Keywords: Laws of war; warfare; IHL; ICL; military justice

> Is [the object of military law] to punish moral crime, and make men good? No! The object of military law is to produce prompt and entire OBEDIENCE. Charles Napier, *Remarks on Military Law and the Punishment of Flogging* (1837, p. 9)

Warfare is deeply engrained in the human experience. For at least 10,000 years, humans have organized soldiers into armies and set the armies against each other on the field of battle. Smaller-scale conflict is even older; raids have been thoroughly documented by 19th- and 20th-century ethnographers (Chagnon, 1968; Evans-Pritchard, 1969; Hoebel, 1954, 1978), as well as by historians of the ancient and medieval English Isles (Bede, 1955). Warfare has been a constant of settled communities and state-level societies. The earliest cities show signs of fortifications, suggesting that intercommunity violence is as old as settled communities themselves. Wars can arise from resource, religious, or ideological competition. High levels of violence seen in the United States Southwest ca. 15th century have been tied to a decrease in precipitation, the movement of a new language group into the region, increased intercommunity violence, and potential cannibalism (LeBlanc, 2007; Turner & Turner, 2011). Resource competition seems to have driven these conflicts as irrigation systems begin to fail and fields grew more saline from evaporation (Diamond, 2005), and crops failed, putting food pressure on communities. Religious fervency saw Arabic and North African Muslims invade Europe deep into France, maintaining a centuries-long presence in Spain. Similar religious fervency drew Europeans to the Levant throughout the Middle Ages

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during the Crusades. Ideological divisions drove World War II and were the foundation of the Cold War of the late 20th century.

The causes and meanings of warfare vary greatly throughout time, space, and populations. Warfare poses unique problems for societies; some aspects are constants that need to be addressed in all times and places. In any war, a belligerent party must make a number of crucial decisions about objectives, resources, and targets. Two key issues stand out as universal: (1) controlling the amount of destruction that is called for and allowed and (2) creating and maintaining order out of inherently chaotic events. Per Clausewitz (1832/1993) "war is. . .an act of force to compel our enemy to do our will" (p. 83). And this force should be aimed at the destruction of the enemy's ability to fight. The aim is to reduce your opponent's ability to continue the contest of force. Clausewitz argues that the only force to be applied is maximal force, and that "there is no logical limitation to the application of that force" (p. 85). Yet his own work and the history of the norms and laws of war show the opposite principle, often guiding military action. Instead of applying maximal force, one need only apply more force than one's opponent: as Clausewitz says, the enemy must be "*destroyed*: that is they must be *put in such a condition that they can no longer carry on the fight*" (p. 102 emphasis in original). He makes it clear that he is not referring to the total destruction of the enemy soldiers and equipment. Nor is he calling for the destruction of civilians and their property. But neither is he calling for their safeguard. One way to "destroy" an enemy in this sense is also through destruction of their will to fight, which can be accomplished through excessive harm to civilians.

In general, we find two broad sets of approaches to laws, writings, thinking, and moralizing actions during war and how to limit the most harmful and destructive. Military law is composed of both "the laws of war" and "humanitarian law." The phrase "the laws of war" refers to those rules and limitations utilized by the military to control its own troops and any prisoners in its protection. For centuries, these have been unwritten, or partially written norms, deriving from and perpetuated by scripture, literature, or other cultural communications. Unwritten aspects of this law are typically referred to as customs or accepted practice (Davis, 1915) uses the phrase "customs of service". This refers to the body of military-generated rules, often shared between belligerent powers, that guide the conduct of the battle and its aftermath.[1] These are rules made by soldiers, for soldiers, to confront the real problems of mass violence or warfare. Military necessity is a key driving force of the sort of rulemaking and imposition, with fulfilling military objectives the necessity. While the laws of war condemn the greatest of atrocities, much is forgiven if it is deemed "necessary" for a quick end to a conflict.[2] Overtime, some of these unwritten rules are codified into military

[1]The origins of customary international law are often as focused on the laws of war as the laws or property, borders, or diplomacy. The transition from unwritten customs to a written military law as exhibited in articles of battle or warrior manuals written for officers is the core theme of the first volume of this work (see Mullins, 2023a).

[2]As a case in point, see the United States use of atomic weapons to end war in the pacific. Such weapons are impossible to use without causing atrocity levels of violence and destruction. Yet the main justification then and now is expediency.

manuals, like ancient Rome's Vegetius (2019), medieval France's Geoffry di Charni's *De Chivalry* (N.D.), or Bovet's *L'Arbre de Batailles* (1387/1949). In the 14th and 15th century, they begin to manifest as articles of battle (aka articles of war), rules laid out for a specific campaign, but often changed little from battle to battle or country to country (at least in Europe). What changes were made between early articles were often done specifically for the conflict at hand (see Mullins, 2023a, Chapters 5 and 6). In the 17th century, we see nations begin to pass statutory law applied to the conduct of its military, one of the earliest being England's Mutiny Act 1689. From here, nation-states will adopt statutory laws to govern their armed forces, formalizing military law and much military custom via this codification. However, many nations will have multiple, active laws or codes simultaneously. For much of its history, the United States Army acted under periodically updated articles of battle as well as the formal United States Army Regulations. The former concerns itself with conduct on the march, the battlefield, and occupied territory. The later governs the daily bureaucratic minutiae of military life (drill, muster rolls, camp construction, etc.) and are the equivalent of regulatory law or intra-organizational rules common to all large complex organizations (Blau & Meyer, 1987; Perrow, 1984, 1996). These rules didn't just control the soldier on the battlefield, but in peacetime as well and in all contexts of his life.[3] While these are codified rules with codified procedures for adjudication and punishment, their jurisdiction is very limited, typically only covering those considered members of the force, be they active or reserve.

Humanitarian law, originating in the mid-to-late 19th and early 20th centuries, though grounded in early medieval peace movements, is law made by *civilians* to reduce the harm and destruction of war to their communities. Unlike the laws of war, which holds accomplishing military objectives as the highest goal, humanitarian law has fought for universal protections of civilians, prisoners of war, and property, individual and cultural. Humanitarian law today exists within the realm of international law, hence International Humanitarian Law (IHL) being the contemporary labeling of these treaties. IHL is composed of a series of multilateral treaties and agreements that evolve in the late 1800s through the mid-1900s. The ending of World War II and the codification of the Four 1949 Geneva Conventions as the core of IHL was a major step toward the generation of universal norms in warfare. The Geneva Conventions remain the core of IHL today.

There is a third form of military law: martial law. Martial law is the state where ordinary law and criminal justice activities are suspended or impossible to carry out due to a conflict. It is replaced by martial law, or the rule by the military following the military's specific rules for conducting an occupation. Some writers insist that martial law can only be applicable in a geography occupied by hostile

[3]I use the male pronoun here as until the late 20th century men were the only sex European and European-derived nation-states utilized in warfare. Save for the rare cases of women masquerading as men to join the armed forces (or to travel with them), it will be the Cold-War era before some nation-states provide equal opportunity by sex in their armed services.

forces (see Davis, 1915). It is much more limited in jurisdiction than the types of military law discussed above. Martial law's jurisdiction is limited in: time (to that of the occupation), place (a specific geography that is under occupation), and target (civilians). It represents the replacement of ordinary law with temporary military control, though at times military leaders have tried to keep both systems active. For example, during its civil war, the US attempted to use ordinary law as much as possible in all theaters of conflict, drawing on martial law when ordinary law failed (i.e., during the Union occupation of New Orleans (Butler, 1862)).

Whether one is referring to the laws of war, IHL, or martial law regulations, they all share certain features. There are unacceptable targets, unacceptable actions, and unacceptable weapons. As the destructiveness of war has evolved so have these rules that guide its use. It is not an historical accident that the *Pax* and *Truega* arose during the chaos of post-Roman Europe in the early Middle Ages. They were a direct response to the lawlessness and wanton use of violence seen in the region. Similarly, the explosion of activity in civilian-led efforts to codify international treaties to reduce the destructive nature of industrializing war in the late 19th and early 20th centuries is a response to the increasingly destructive wars of the mid-to-late 19th century (i.e., the US Civil War, the Franco-Prussian War). There has been stiff and steady resistance to the notion that there is no limitation on the use of military force as far back as we have records, both inside and outside of military organizations. Clausewitz suggests that any rules limiting force in warfare are absurd, as he conceives of war as an ever-escalating reciprocal use of force, each being driven further by the last. While the process he describes clearly has occurred repeatedly through military history, it is neither seen in all conflicts nor is it inevitable. War crimes vary in number, location, nature, and intensity, sometimes in the same conflict (Mullins, 2009; Wood, 2006). The ETO of World War II is a prime example of both belligerents casting aside controlled war for total war with disastrous costs of life, civilian and military. Yet, in the WTO, the war was not characterized by the same disregard for civilians or captives. The Western theater wasn't "clean" by any stretch, all belligerents violated existing international laws and the laws of war there. Yet the number of war crimes in WTO and ATO were fewer in number than those committed in the ETO or the PTO.

Leaders of all armies must decide on the specific strategic goals of the conflict and the tactics which will be used. This includes where to fight, who is an acceptable target of violence during and after the battle, the extent of violence to be deployed, and what would be considered victory. The army will then channel its martial energies toward the identified target along the routes allowed by the norms a given society applies to warfare. The key point is that the behavior is norm driven, even from the earliest recorded battles. An outside observer, or an internal participant, may perceive war as chaos, a Hobbes (1651/1985) struggle of all against all with nothing but primal survival instinct driving people on. This is not the picture that emerges when one studies even the earliest known armies and conflicts. As large organizations, armies need to be controlled and directed to accomplish their goals (Blau & Meyer, 1987; Perrow, 1996). Order is accomplished through the creation and enforcement of rule systems, as Napier points

out above. Martial rule systems date back to our earliest written records and are essential to the nature of an army itself. Napier speaks the truth, at least according to his day, about the major concerns and functions of military law. The earliest and most harshly punished military norms and laws focus on maintaining order, be it in peacetime, in camp, on the march, or on the battlefield. Article I in the United States Army regulations through the end of the 19th century read: "All inferiors are required to obey strictly, and to execute with alacrity and good faith, the lawful orders of the superiors appointed over them" (US War Department, 1863, p. 9). In the 1914 edition of the Rules of Land Warfare, the US Army shifted to beginning their law manuals with a discussion of the types of law which govern troops (national, international, customary, treaty, statute, etc.) and what the different types of law are with a brief history. The later US Army manuals, down to the current one, provide a discursive approach on where those rules came from, though the message is the same: these are rules that must be followed. By 1914 there is a growing body of treaty law limiting battlefield behavior. As the army revised the manuals through the 20th century, the section on international law gets longer and more complex to address the growth of these new restrictions. The connotative, if not denotative, meaning of the sections is similar. A discussion of a host of laws soldiers is subject to conveys the same "obey" message but indicates that while the troops are obeying their superior officer's orders, these orders are bound by a broader, international legal framework.

Moral concerns, as Napier (1837) calls them, are secondary to obedience, at least in the minds of military commanders through the ages (Clausewitz was completely unconcerned with the moral – see Samuels, 2023). As a military man, Napier served in the British army as an officer and was eventually promoted to Major-General. He sharply distinguishes the differences between civil and military law and what he sees as their separate purposes: civil law's job is to maintain order during peace to keep the peace, and military law's job is to maintain order during war to allow the army to achieve its military objectives. As the 19th and 20th centuries unfold, there are strong, civilian pushes to introduce that moral law into military law. This is not new; during the 9th–11th centuries CE the Catholic Church introduced both the *Pax Deus* (Peace of God) and the *Truega Deus* (Truce of God), both of which attempted to constrain the excesses of military might, especially where the church and civilians were concerned.

Strongly held rules or armed interactions are present from the start of warfare as a phenomenon; such norms of engagement probably predate what we think of as warfare—large numbers of mass troops pitted against each other. Sociocultural anthropologists have described the norms guiding raiding and lower-intensity intergroup violence in many societies (i.e., The Inuit (Hoebel, 1978), The Grand Valley Dani (Heider, 1977), the Nuer (Evans-Pritchard, 1969) the Yanomamo (Chagnon, 1968), among others (see also Keeley, 1996)). These cultures were rule bound in their use of external-focused violence, especially with rules established to reduce casualties and associated harms. War is dangerous to the social order, materially and ideally. The rules are necessary to constrain behavior that by its very nature is oppositional to daily life and social cooperation. It must be constrained, or it will spill over into daily life, disrupting the very lifeways it is

often waged to protect. This was known and practiced from the earliest generals down to heads of contemporary armed forces. War may be a-social in the sense that it operates in a way that runs counter to daily social life's needs and expectations. However, it is not anomic. Norms structure all aspects of warfare and the armies that wage it. Armies need to be controlled on the march, in camp, and on the battlefield. In peace and war. How that control is structured and what is and isn't allowed varies widely in time and space. For example, terms of service differed widely. For a classical Greek citizen or member of the medieval Saxon Fyrd, if one's political leader had declared war during the fighting season—typically summer before the pre-modern era—then one was to report to their muster location and provide their service. Yet, when it was time to harvest the crops sown before they left on campaign, farmer–citizen armies saw large scale defections if they tried to stay in the field into autumn. The troops needed to go home to harvest their crops to be able to pay their taxes and feed their families for the next year. In these citizen–soldier societies, there were indeed norms of universal male service but there were also norms about how long the commanders could keep their troops in the field. This stands in contrast to a Roman legionnaire or auxilia, who served under contract for a fixed period of years with fixed pay and a specified reward at the end of the term of service. Going AWOL was punished by public lashes or execution. Roman armies stayed in the field or garrison year-round, something we wouldn't see again until the 14th century and the later Hundred Years War.

Armies, like all complex organizations, require common culture and common rules to sustain themselves as entities (Perrow, 1996). Shared beliefs in the nature of the world and in acceptable and unacceptable behaviors provide strong solidarity for troops in the ranks. Solidarity is the social glue, which binds individuals to and into larger entities (Durkheim, 1893/1984). By their nature armies are hierarchical organizations, with top-down chains of command reinforced by clear rules and punishments. The solidarity of shared goals and norms allows an army to function as such—as an organization composed of specific subunits (i.e., different military formations or types, i.e., scouts, infantry, light and heavy calvary, etc.) that need to work together to accomplish their immediate objective: reducing the enemy army's ability to maintain coherence and the ability to fight.

In addition to examining the nature and content of the rules which govern warfare, it is important to place these norms within their organizational and sociocultural context. It is within these contexts and due to these contexts, that changes can be driven. Much of what constitutes the laws of war, those rules armies use to guide their own behavior and the shared military culture behind them, are built and reinforced by those in the military. Yet, there is also a strong thread in the European tradition of civilian involvement is trying to shape and regulate warfare. The medieval Catholic Church's attempted to bring peace to a post-Roman Europe riven by warlordism through the *Pax* and the *Truega* movements. These conclaves attempted to regulate war, especially the destruction that it caused non-soldiers. Pronouncements were issued about when one could and could not fight. Holy days of the week (Wednesday, Friday, and Sunday) as well as Saint's Days and major holy days such as Christmas, Easter, and the like

were off limits. If strictly observed, there were about 30 days of the year when warfare would be permitted under these restrictions. The *Pax* and *Truega* also identified targets to be avoided, especially the clergy, women, children, the ill, and the aged. While neither were adopted whole cloth outside of canon law, they both strongly influenced the creation of the chivalric literary tradition as well as becoming a core of the 19th century European drive to create a codified set of international laws governing war. The priests of the 10th century are replaced by the activists and lawyers of the 19th century and the NGOs of the 20th century. All form a social force external to the military that puts pressure on what military law should look like, but also how it should be enforced. While never fully integrated into military thinking, these civilian-led movements do influence the shape of military law. This movement's influence reaches its apogee in the creation of the International Criminal Court in 2002, via the Rome Statute of 1999 (International Criminal Court, 2021).

By the mid-19th century, the idea of armies fighting under rules is standardized. Typically referred to as Articles of Battle or the like, these codes were initially issued at the start of a campaign and intended to only govern a given conflict. Later, they take on a standing status in some armies, being updated for new wars or due to new concerns or technologies arising. National governments pass statues to constrain the behavior of their soldiers; militaries themselves create more formal codes of self-governance. Behavioral prohibitions include those related to military order but moral, or humanitarian, items are also becoming permanent parts of articles of battle, especially protection of civilians and holy places. Despite Napier's rejection of moral rules for war, in his day they are already part-and-parcel of war norms and laws. And their influence will grow.

New Concerns with Procedure

As the 19th century unfolds, we begin to see a greater concern placed on the procedural aspects of military law and trials. While early articles of war, such as Richard II's simply listed a punishment, such as execution, or used a vague language allowing the court martial to punish the soldier as it and law saw fit. By the 16th century, articles of battle begin to contain more rules on procedures. In 1796, Stephen Adye, a First Lieutenant in the UK's Royal Regiment of Artillery, published *A Treatise on Courts Martial*, the first known (but not the last) extensive mediation on courts martial, their procedures and their purposes. As modernizing nations develop modernizing militaries, procedural law becomes a strong concern, reflecting the broader rise of civil rights and liberties in Europe and the west. Domestic legal codes are beginning to constrain the state's power against its citizens, especially in how it must bring and prosecute criminal charges. It is not surprising to see a similar concern in military law, though soldiers are given fewer rights and protections.

The composition of the panel of officers that constitute the court-martial is an often debated topic that swings between pure exigency and complicated permutations dependent upon the rank of the accused. In general, officers (or commissioned

officers once that distinction arises) act as a panel of judges that hear the evidence, ask questions of all parties, render a verdict, and impose punishment if necessary. Formal regulations often insist that those officers on the panel be greater, or at least equal, rank as the accused. This is not a problem when the accused is an enlisted soldier but can become more problematic the greater the rank of the accused. If the legal procedures are being carried out in the field, it can be difficult to find enough Colonels or men in higher ranks if the accused was a Lieutenant Colonel or full Colonel (see Lowery, 1997). In the field, especially if the commanding officer deemed the issue significant and wanted an immediate court-martial, rules about size of the panel or rank of members would be bent or ignored. Defendants could and did protest such compositions, often prevailing with decisions made by those not in the field. This concern with procedural law is reflective of the increasing legalization of norm governance in militaries. It becomes important not to just have rules and enforce rules but also to do so in a fair and just way.

This brings us to the second growing concern: the right of review or appeal. As in civilian courts, those who receive an undesirable outcome will be given the opportunity for an appeal in some military justice systems. Within a military organization, these reviews were conducted by command officers (generals or equivalent), or in some cases reviewed by a chief political executive. These concerns and changes in military law evolve military justice toward the form and structure of civilian justice. As recently as the 1700s, armies included rules giving soldiers the right to shoot deserters or "cowards" fleeing the battleline on sight. If given a court-martial, punishments were to be dispensed immediately after the hearing. Adding reviews creates the problem of containing a soldier found guilty until reviews are complete or transporting them elsewhere. In cases not involving death, field officers preferred to deliver punishment quickly with the offender returning to service as soon as possible (unless the punishment was being discharged from service, then the officer would want the soldier off the pay rolls and provision lists).

As military law develops in tandem with ordinary law, often sharing the same principles, often not, it begins to become clear in the 19th century, and it is patently obvious by 1945 that there is a key problem within the core of any military legal system. As Scheider (2023, p. 180) points out "the military justice system was. . .built to enact an older conception of the laws of war, one designed to provide a system of punishment to increase a commander's control over his forces." At the same time, the civilian world is moving toward an ideal of justice more generally that demands due process protections, systematic control of all crimes (ordinary or war), and delivering justice, not conformity. As IHL develops in the civilian world, there will be increasing pressure on states to follow along and adopt these humanitarian principles over the "laws of war"—in essence giving precedence to controlling excessive harm to those not or no longer participating in hostilities.

With the defeat of Napoleon arose many questions, the specific one of interest to us here is how the allied powers chose to deal with French art looting. Until this time, looting was acceptable practice for victorious armies. The French regime defended its actions not only via recourse to customary laws of war, but claiming