7

ANCIENT AND MODERN WAR: A COMPARISON OF REGULATION OF WARFARE AND LEGAL RAMIFICATIONS IN ANCIENT GREECE AND CONTEMPORARY LAW OF ARMED CONFLICT*

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Introduction

War does not happen in vacuum, but is shaped in response to specific cultural, political, and historical moments. The regulation of warfare has thus always been a contentious issue, especially when new methods are employed. Such regulatory frameworks typically attempt to adapt as new techniques emerge and are perfected. The following chapter attempts to examine how the theory and practice of ancient warfare may help scholars from various disciplines interested in the phenomenon of war understand how the story of contemporary challenges such as cyber or information warfare fit historically within the development of principles of the law of armed conflict. In this manner, the history of ancient warfare, and in particular its practices of remembrance, could provide guidance for how we view modern problems, as the development of warfare has always coincided with the development of human capabilities. The discussions in ancient sources may help to achieve a better and perhaps a novel interpretation of how our contemporary society understands and responds to the hybridity of information warfare, the narrative of warfare, and the utilisation of cyberspace for military purposes. The reframing of the modern issues within their broad historical context can shed light on many aspects of war that remain relevant today. The goal of this chapter is to explore how the fundamental strategies of warfare have remained constant across the millennia even as they show remarkable development in technology and implementation.

The one area in which there has been considerable change in the fundamental methodology of war pertains to historical narrative, namely in the development of active efforts to contain the development of 'war hero'

stories, such as are discussed by Frances Pownall elsewhere in this volume. As Mark Marsh-Hunn also studies in this volume, the stories that shape our understanding of war and its aftermath are a central element of war itself. Modern regulation of war has thus made considerable, and largely successful, efforts to limit the development of pseudo-history, fundamentally changing the nature of the historiography of war, although the emergence of counter-narratives in the cyber world have increasingly challenged these efforts.

In what follows, I argue that certain types of cyber war share more with ancient warfare than the 'traditional' conception of modern warfare as a clearly defined battlespace. I will focus in particular on the control and manipulation of historical narrative, the use of language as disguise, and new manifestations of what might traditionally have been deemed 'treachery': paradoxically, the trappings of modernity are allowing the practice of warfare to revert into something more similar to ancient war.

In what follows, I first discuss the background of how ancient principles of warfare are reflected in or have influenced the contemporary regulatory regime of kinetic warfare and how this regime is applied in order to control new challenges, such as information warfare and cyber-attacks, which in some circumstances may directly target the past itself. This analysis additionally requires a broad background understanding of the most essential principles of contemporary and ancient warfare in order to clarify some of the contemporary challenges to regulating warfare in cyberspace. I will thirdly discuss how the very existence of the principles in law reflect the actors' concerted attempts to preserve and remember the social practices that led to their initial formation.

The very process of creating and applying laws to warfare serves as a formalised type of historiographic enterprise establishing the narrative of the armed conflict in question. The process of law-making and enforcing norms and rules of war is inherently determinative and influenced by both human memories and the account of survivors regarding the practices of war. Modern courts attempting to regulate war or punish abuses suffered in it must interview participants or witnesses in a kind of elaborate and legalistic historiographic enterprise, using (seemingly) objective and unbiased standards and procedures with which to establish 'what really happened'. Von Ranke's famous formulation of 'wie es eigentlich gewesen ist' takes on particular import when the protection of survivor accounts, or the potential incarceration of an alleged perpetrator, is at stake. Although the final historiographic product is produced by a team and in a legal setting rather than by an individual historian conducting research, the stakes in this type of 'historiography' are, if anything, even higher to produce a fair and accurate representation of the past, although, as discussed below, some of the ways of handling (and mishandling) memory remain consistent over time.

The starting point of our journey is the contemporary language and categories which are used in the regulation of warfare, as this is where we see means and methods, some of them timeless, codified in legal terms through the application of the law. The International Humanitarian Law (subsequently referred to as the IHL) is the law regulating armed conflict in the modern era. Officials and individuals who participate in an armed conflict can be held individually responsible for the violations of the rules of IHL in criminal trials for the perpetration of international crimes such as war crimes, crimes against humanity, and genocide. Modern law tends to be far more specific than ancient regulations and norms; for example, although the elements of war crimes require the existence of an armed conflict and a corresponding violation of the IHL provisions, crimes against humanity do not require the existence of an armed conflict but only a widespread or systematic attack against a civilian population, although such attacks usually take place during war. In contrast with the Ancient Greek framework, which often left civilians at the mercy of the victors, the primary emphasis of the contemporary legal regime rests on the protection of a civilian population in a dire situation. The development of International Criminal Law following the Nuremberg and Tokyo Tribunals after WWII clearly indicates that officials are responsible for the decision-making in armed conflicts and must be individually responsible for the violations of the rules, norms, and principles of armed conflicts. Interest in the role of the victims is relatively recent, and has greatly increased since the 1990s, as reflected in the functioning and jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).

In the ancient world, the space between war and peace could be nuanced: Thucydides, for example, makes his characters debate at length whether or not another party's actions constitute war (e.g. 1.71, 86, 88); and in a statement that becomes increasingly familiar as cyber war becomes more prevalent, states in Plato are described as by nature in a state of constant war, with the term 'peace' serving only as a sort of thin veil masking that reality (*Leg.* 626a). The modern term 'warfare', however, has traditionally strictly applied to the existence of an armed conflict between two or more belligerent parties. Further refinements according to the modern law of armed conflict (IHL) determine the existence of war based on the gravity and continuation of the use of force in order to reach the objective criterion of the severity of the use of force, its immediacy, directness, invasiveness, and military character. These are the essential legal elements which must be applied to a particular set of events in order to determine and describe the event as 'war'. The determination of whether there is or is not an armed conflict today is thus a primarily objective legal test that does not require a declaration of war or armies facing each other in a clearly demarcated theatre of war.

Stoyan Panov

The ancient world is often thought of as more amorphous with respect to warfare regulation: while ancient societies had a mix of taboos, traditions, and laws to govern behaviour in conflict zones, the legal regulation of modern warfare is relatively explicit and rigid, at least concerning physical (kinetic) attacks. Modern warfare again has a well-developed framework within the IHL. First, the IHL regulates what means and methods are allowed in armed conflicts (traditionally known as the Hague Law). Its main goal is either to generally or specifically prohibit or to restrict the means and methods (namely some types of weapons) which would cause excessive damage in particular circumstances. For example, treacherous warfare is prohibited (originally codified in Art 23(b) of the Hague Regulations) in terms of killing the members of the enemy army through morally and legally culpable deception. While this law is relatively recent, it should be noted that the revulsion against treacherous warfare (at least as defined by one's own side) is an eternal element of war, and is apparent as early as Homer in an aversion to particular types of 'non-heroic' fighting, such as the use of arrows.[1] The more widely-known contemporary aspect of the IHL is the Geneva Law, which through positive regulations and negative prohibitions focuses on the protection of actual victims of armed conflicts such as persons who are wounded and sick, including combatants who have laid down their arms, prisoners of war, and civilians. The law of contemporary warfare regulates what armed forces may do in a legally conditioned or restricted manner and what the protected individuals should not suffer. Hence, the IHL tries to achieve the difficult balance of determining what is actually military necessity: 'a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources'.[2] While this again has no direct parallel in Ancient Greek wars, revulsion against excessive or unnecessary levels of violence beyond what is necessary is implicit, for example, in tragic literary representations of Greek behaviour during the fall of Troy, or in Thucydides' apparently critical treatment of the Athenian obliteration of Melos for largely symbolic reasons (5.98–9, 116).

Simply by the act of regulating war, international bodies have implicitly accepted that wars *will* occur, much as the Greeks largely did, but they try to control its nature when it does so and also attempt to preserve the record

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[1] However, it could not be categorically concluded that the term 'treacherous' still carries the same connotation as in ancient times. For example, perfidy and treachery are used interchangeably in the modern understanding of warfare and they may be exemplified in Article 37 of Protocol I, stating that 'acts 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, shall constitute perfidy'. See, e.g., Lendon (2005) *passim* on the development of ancient ethics about warfare.

[2] See The US Navy Manual on the Law of Naval Warfare (1959).

of warfare for the purpose of determining whether the law was followed in armed conflicts. One core principle of modern warfare is proportionality, which stipulates that all military measures by the belligerents must be proportionate to the aim they attempt to accomplish. Again, a nascent form of this principle can be seen in ancient historiography. Thucydides, again, seems to be a forerunner of modern ethical systems, despite his reputation for amorality. He at least has a careful eye for proportionality—or specifically *disproportionality*—in his depiction of the Peloponnesian War, representing the violence, including against children, at Mycalessus as 'no less worthy of lamentation than anything that happened in the war' in comparison with the tiny size of the city (7.30.3), or the suffering of massacred Ambraciots as 'the greatest of those that happened in this war, to a single city in an equal number of days' (3.113.6).

In this manner, war is carefully defined and modern warring parties perform a cost-benefit analysis in which the military advantage obtained by the military operation must outweigh the damage or suffering caused to civilians or civilian objects.[3] The principle of humanity, similarly, prohibits the use of any kind or degree of force not necessary for the purpose of war, namely for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources. In this manner, the regulatory framework of modern warfare is objective in the sense of the applicability of a given set of rules, most of them expressions of eternal human feelings about violence, to particular circumstances, while relying on social constructs such as law to define and remember processes, acts, events, and the corresponding consequences of such.

Fundamental Principles of Modern Warfare

The theater of war as regulated by the IHL cannot protect all individuals affected by the armed conflict, and ultimately the IHL does not intend to eliminate, but aims at restrictive regulation of the goal of, the armed conflict, namely the military advantage and defeat of the enemy. The practice of warfare, however, is evolving beyond these restrictions, with implications for its 'historiographic', and memory-preserving aspects that mark a significant departure from standards of war that have been relevant since ancient times. A more traditional standard concept of warfare tries to demarcate the actual physical boundaries of the theatre of war. The spatial element of where, exactly, war takes place is becoming somewhat relativised and less relevant in the protection of civilians. The old notion of the military field as the

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[3] Proportionality is also important in deciding whether an attack has been indiscriminate in nature and purpose as Art 51(5)(b) of the AP I says that an indiscriminate attack is such that 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.

theatre of war is replaced by a wider space where the conflict (armed or otherwise) is determined and described to take place. Meeting at a battlefield outside an urban area is no longer strictly required by the customs of war. War has always evolved: for example, when the more traditional practice of phalanx warfare was increasingly replaced by types of violence involving urban areas populated by noncombatants in the Peloponnesian War. This departure from the field of battle takes war onto a new plane.

Total war is restricted in the modern legal framework, similar to the limitations, or at least public censure, imposed in Ancient Greece. The limitations now embodied as legal principles attempt to provide clear and objective protection for civilians by controlling what belligerents may or may not do in war. For example, the principle of limitation, enshrined in Article 35(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), stipulates that the right of the belligerents to adopt means of injuring the enemy is not unlimited, as causing unnecessary suffering is prohibited. Distinction, meanwhile, requires belligerents to distinguish between the military objectives and civilian persons or objects at all times during the armed conflict, and to attack only military objectives (Art. 48 AP I).[4] While such laws did not apply in Ancient Greece, where civilians were subject to terrible fates if their defenders failed, these laws crystallise similar ancient aversions against violence toward civilians, such as the performance of Euripides' *Trojan Women* on the heels of Athenian violence at places like Mytilene, Scione, and Melos, or in the prohibition in the Delphic Amphictyony of cutting off water to member states in wartime, thus targeting trapped civilians as well as soldiers (Aesch. 2.115).

Demarcating War in the Ancient and Modern World

With the development of modern warfare, including both cyber war and armed conflict taking place in urban settings, the principle of distinction plays a special role in ultimately describing and separating what belongs to the sphere of war from what does not, and it is this grey area that will be the primary focus of this rest of this paper, especially information and cyber war as it compares with similar historical phenomena related to knowledge and information in the Ancient Greek world.

Civilian objects may of course become military objects if the use of the object is military in function as long as the use of the objective makes an

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[4] The principle of distinction is particularly important for demarcating what constitutes the theatre of war because military objectives are 'objects which by their nature, location, purpose or use make an effective contribution to military action and whose total of partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'. See Additional Protocol I Art 52(2)–(3) and Burchill, et al (2005) 85–6.

effective contribution to the military action.[5] There are many examples of bridges destroyed, for example, based on their capacity to contribute to the military advantage of the enemy. The growing cyber world is even more problematic in this regard. Particularly relevant for the development of cyber warfare is the question of so-called 'war sustaining' objects and whether they are eligible for lawful attacks. If a certain industry is crucial for the ability of one of the warring parties to sustain its armed capabilities, then such an industry would be targetable, including financial systems of the state. Such industries are particularly susceptible to cyber-attacks. As most dual-use objects are located in or near urban areas, it is necessary to consider the reality of warfare, which often results in collateral damage. The determination through description, application, and interpretation of legal definitions to particular objects indicates if the law is abided by. Nonetheless, the picture is often unclear. Cyber weapons are also relatively precise in their nature and effect, as they are usually deployed against closed military e-infrastructure, although there are examples in which cyber malware may unintendedly (or not) affect civilian systems. Compared to more traditional types of war, cyber-attacks are, however, less likely to cause collateral damage or be indiscriminate in their nature and effect.

Contemporary laws draw a distinction between an armed attack and other types of the use of force, trying to distinguish a state of war from a state of peace, although today even this question can be murkier, and more reminiscent of the ancient world, than it has been generally believed to be for the past few centuries. The objective case-by-case determination and representation of what constitutes an armed attack or other, less grave forms of use of force, include any account of use of force that injures or kills a person or damages or destroys property, thus triggering the right to self-defence;[6] unfortunately for the Spartan and Corinthian hawks, the actions leading up to the Peloponnesian War would probably not have qualified to trigger their right to self-defence. Non-destructive and non-injurious cyber operations that target the economic infrastructure of a state similarly may not cross the threshold of an armed attack, although 'a significant destruction or injury would qualify as an armed attack'.[7] For example, a disruption of the banking system or banking transactions as in an Estonian case of 2007

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[5] The dual-purpose or dual-use military objective is targetable as the modern armies are contingent on vast networks of supplies and the supply lines, and facilities used in the supply lines are legitimate military objectives in order to defeat the enemy forces. Additional Protocol I Art 52(3).

[6] Schmitt (2013) 55. The regulation of modern warfare allows for exceptions to the prohibition of the use of force. Self-defence is the most widely accepted exception to the prohibition of the use of force. Article 51 of the UN Charter states, 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'.

[7] See also Schmitt (2014) 268, 283.

would not count, as seen below. However, a cyber-attack that affects the whole financial system or prevents the government from carrying out essential sovereign tasks, for example severe intrusions in the military communication lines or command control, would be seen as equivalent to an armed attack.

One of the most significant differences between Ancient Greek and modern war seems to be the absence of a principle of distinction such as is discussed above that could draw a sharp division between those bearing arms and civilians. While certain types of actions in the civilian sphere might have been considered distasteful, almost nothing and no one was truly off-limits once a war had begun. Excesses were often explicitly or implicitly condemned, for example in massacres of suppliant prisoners, as happened at Plataea in 427 BCE; abuse of corpses, as happened in the culmination of the civil war at Corcyra (427); or massacres such as occurred at Melos in 415. Thucydides' account of the Athenian general Demosthenes' deception in sneaking his troops into Idomene in order to slaughter men sleeping in their beds, similarly, could hardly be read in a positive light (3.112.1). The lack of a true principle of distinction meant that norms were thus not inviolable, although they were often observed. Truces for the burial of the dead are often shown as being respected from Homer onward (e.g., *Il.* 24.780–90); even the 'barbarian' Xerxes is not depicted as willing to violate sacred heralds (Hdt. 7.136); and certain weapons were not widely employed in armed conflicts, although, again, they were not formally banned. Disapproval of treachery can, for example, be seen as early as Homer's story of Ilus of Ephyra refusing to supply Odysseus with a poison for smearing on his arrows (*Od.* 1.159).

Evolution of the Arena of War

Warfare has evolved in different eras, as has the way we talk about it. One area that has recently presented particular challenges in modern times, which are remarkably reminiscent of ancient ones, is the issue of remembrance—namely the establishment of accurate records of military actions. The regulation of the use of force in cyberspace, 'a domain characterised by the use of electronics and the electromagnetic spectrum to store, modify and exchange information via networked information systems and physical infrastructures',[8] has proven particularly difficult. This novel 'battlefield', one which is not strictly linked to the kinetic realm of ascertainable, factual damage or harm as a result of the use of force, poses new regulatory questions as well as issues regarding the preservation of the facts of what has actually happened in a military context. It is beyond any doubt that in 2020, critical military infrastructure that protects 'a State's

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[8] US Department of Defense (2006) 11. See also Finkelstein and Govern (2015) 2.

security, economy, public health or safety, or the environment' depends heavily on cyberspace capabilities, which in itself poses security dilemmas.[9] Therefore, if cyber operations are directed against the cyber infrastructure of a State, such a hostile act would constitute a violation of the principle of state sovereignty and non-interference in domestic affairs whenever such operations cause physical damage or injury, since States have the right to exercise sovereign control within their territory including cyber infrastructure.

The most problematic interpretative aspect of cyberspace activities is when cyber operations do not strictly involve destructive force but result in serious non-kinetic consequences. At the core of the modern regulation of circumstances in which armed force could be used is the prohibition of the use of force in international law. Article 2(4) of the UN Charter stipulates, 'All members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. The question of when the threshold of the use of force by cyber operations has been passed is answered by assessing the severity, immediacy, directness, military character, state involvement, invasiveness, and legality of the cyber operation.[10] For example, the damage inflicted on Iran's nuclear facilities and centrifuge capabilities in particular by using the Stuxnet virus would cross the threshold (unless the virus was applied with an alleged legal justification in anticipatory self-defence).[11] The emphasis of the current regulatory framework is on the consequence of the act of violence, the attack.[12]

The cyber domain offers challenges, however, to this traditional assessment of violence, as cyber operations can target communication lines, e-resources, information systems or servers, for example, all without actually inflicting physical damage. Historical memory is also vulnerable, and the crux of the problem today is how such data, especially of a historical nature, fit into existing legal regulatory provisions: should they be protected, as a tangible object, or treated as something that is intangible? If data, facts, or historical narratives are treated as objects, then by analogy, the alteration of data should be considered consequential damage and deletion of it should be classified as harm to a civilian (and thus protected) object. Actors have frequently engaged in such destructive activities with the intent to create a

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[9] Schmitt (2013) 211. See also Schmitt (2014) 268, 271.

[10] Schmitt (2013) 47–51. The standard that is applicable in cyber operations is similar to the standard used in kinetic force, as the assessment is done case-by-case and cyber operations afflicting larger than *de minimis* damage or injury on the attacked State's infrastructure would suffice.

[11] Schmitt (2013) 47.

[12] An attack is 'acts of violence against the enemy, whether in offence or defence' (AP I art 49).

false historical narrative and erase or recast the memory of certain key historical events. Hence, the suggested definition of a cyber attack, 'a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects', does not fit well with evolving uses of cyber war aimed not at practical resources but the historical record.

Cyberspace and Monuments

Modern warfare involves, essentially, complex battles over historiographic memory, incorporating various aspects of the use of both kinetic and cyber capabilities to control the narrative of what has occurred in conflict zones. Some states like Russia have developed military doctrines to include a range of methods and means of warfare which do not fit squarely within the modern world's traditional understanding of warfare. For example, around 2013 the Chief of the General Staff of Russia Gerasimov formulated that 'the role of the non-military means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of weapons in their effectiveness …The open use of forces—often under the guise of peacekeeping and crisis regulation—is resorted to only at a certain stage, primarily for the achievement of final success in the conflict'.[13] In this manner, kinetic capabilities such as use of armed force are coupled with elements of non-linear warfare such as intelligence war (disinformation, propaganda, damaging lines of command and communication) and information war (conspiracy theories, misinformation, fake news, winning the war of hearts and minds). It should be recalled that even if no damage is caused, such operations may qualify as unlawful interventions if there is an intent to coerce the State in matters of sovereignty.[14] Moreover, it comes as no surprise that States have a duty to disallow 'knowingly its territory to be used for acts contrary to the rights of other States',[15] an obligation transposed into cyberspace.[16] For example, States shall remedy or prevent their cyber infrastructure being used for malicious cyber operations against the infrastructure of another State by closing down Internet Service Providers which are used regularly for harmful operations.[17] The principle approach to legal regulation of such issues has been to adjust the existing legal framework to the particular circumstances in order to discourage any

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[13] Gerasimov (2016) 24.

[14] Schmitt (2014) 275.

[15] Corfu Channel case (UK v Albania) [1949] ICJ Rep 4, 22.

[16] Schmitt (2013) 32–3. States are required not to 'knowingly allow the cyber infrastructure located in their territory or under exclusive governmental control to be used for acts that adversely and unlawfully affect other States'.

[17] Schmitt (2014) 277.

development of legal loopholes. In this manner, there is a continuous evolution in how the law adjusts to new facts and phenomena. There has been increasing interest in controlling the process of memorialisation or preservation of fact, an aspect of war that has become especially central with the proliferation of such narratives in cyberspace.

One of the first examples of such a hybrid scenario, in which complex cyber capabilities respond to a physical movement of historic or cultural property, and with revealing parallels in the ancient world, occurred in Estonia in April–May 2007. The Estonian government relocated the bronze statue of the Unknown Soldier (erected in 1947 by the Soviets as homage to the 'liberation' of Estonia at the end of WWII), removing it from downtown Tallinn to a military cemetery on the outskirts of the city on 27 April 2007.[18] The statue of the Unknown Soldier had become a gathering place for the 400,000-strong minority of ethnic Russians in Estonia, and had therefore become a political flashpoint in the conflict over Estonian identity. The statue commemorating the Red Army in WWII provoked different reactions within the Estonian and Russian populations: for some Estonians, the memorial represented the occupation and subsequent annexation of Estonia into the Soviet Union after WWII, serving as an affirmation of the occupation, and an attempt to erase independent Estonian ethnicity by the Soviets. For others, the statue was a homage to the sacrifice of the Soviet troops in WWII.[19] The Russian reaction reached the highest ranks of the Government in Moscow as the First Vice Prime Minister called for a boycott of Estonian goods and services.[20] When the memorial was physically relocated, it spurred a series of reactions in cyberspace amounting to a battle to control the history of the place, the relocation of the monument being seen as a kind of *damnatio memoriae* to be resisted. The subsequent response by Russia indicates a key difference between ancient and modern struggles over memory: as Russia could not physically control the material relocation of the monument, the dispute was moved into another medium, cyberspace. The cyber sphere offered an opportunity for Russian-backed hackers to respond to what they perceived as an unjust *damnatio memoriae*.

The initial phase of the operation against Estonian cyber infrastructure consisted of low-sophistication cyber operations that did not result in serious disruption of information infrastructure or data in the Estonian cyber system. For example, Russian-language web forums openly criticised the decision to relocate the statue and, on some occasions, webmasters employed strong, abusive, and provocative language such as invoking 'patriots' to protect Mother Russia from 'f-cking Estonian Fascists'.[21] The next phase of

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[18] Ruus (2008).

[19] Evron (2008) 122.

[20] Schmitt (2013) 1–3.

[21] Ruus (2008).

the attacks was more disruptive, preventing interaction between parts of the Estonian cyber infrastructure for prolonged periods of time. The Estonian e-infrastructure would be overloaded with unprecedented traffic of data in cyber operations that were conducted through botnets, a network of affected 'zombie' computers which generate numerous requests for information to the targeted websites. In this manner, the electronic attack was launched on the premise of taking control over a high number of computers which generated millions of requests to access the targeted Estonian sites.

Control of the narrative and communication in cyberspace was crucial for the Russian hacking attempts, but maintaining possession of the narrative of war has been a key part of fighting them since ancient times. The strong reaction to the relocation of the statue resembles, with some differences, erasure such as we hear of in the story of the Spartan king Pausanias. Thucydides describes an ugly conflict between Greek cities a generation after the Persian Wars and discusses the importance of the Plataea monument (1.132.1–3):

> [Pausanias] by his contempt of the laws and imitation of the barbarians, … gave grounds for much suspicion of his being discontented with things established; all the occasions on which he had in any way departed from the regular customs were passed in review, and it was remembered that he had taken upon himself to have inscribed on the tripod at Delphi, which was dedicated by the Hellenes, as the first-fruits of the spoil of the Medes, the following couplet:
>
> > The Mede defeated, great Pausanias raised
> >   This monument, that Phoebus might be praised.
>
> At the time the Spartans had at once erased the couplet, and inscribed the names of the cities that had aided in the overthrow of the barbarian and dedicated the offering. Yet it was considered that Pausanias had here been guilty of a serious offence.

Like Estonians in Tallinn or the Russian-affiliated hackers online, the Spartans attempt to erase a boastful claim of power and authority (albeit one coming from their own side), through physical removal and erasure of a monument. This monument had constituted a threat to their identity, as the famously self-controlled Spartans display their modesty and commitment to their city, rather than their status as individuals, even on their notably restrained tombs for the war dead. Pausanias' showy boast thus not only threatened impiety but also undermined the value system that Sparta hoped to project, the basis for their feeling of superiority in the Greek world. The story of Pausanias demonstrates both the efforts to control the physical record of the historical narrative, and also the failure of such efforts. Just as

the Russian efforts to smear Estonia became public, Thucydides, after all, knows (and shares) this story: the cover-up did not work.

While there is considerable continuity in the efforts by authorities to control or shape historical narrative in various eras, we can also see in this comparison one of the unique features of modern war: changes in who gets to narrate history and the evolution of the cyber world as an arena in which historiography is both controlled by state forces and open to the input of anyone at all. Although the relocation of the monument of the Soviet soldier was not an act of total erasure, unlike the Spartans' action described above, the complementary cyber response represents the attempt to re-draft or control the narrative about the past. The relocation of the monument in Estonia served a function of reconciling with a particularly problematic moment in Estonian history and loss of independence. The monument could be considered just a symbol and its relocation could be seen as a sign of self-determination and dealing with the past.[22] With labels that suppress the role of the Estonian population in earlier conflicts and with goading language of division, the hackers showed, and attempted to sow, contempt for Estonian identity and its supporters. The usurpation of the message about the past is comparable to Pausanias, but in the contemporary example the response by the Estonian authorities was no simple erasure of the wrongful record. The control of history has become even more complex in cyberspace as the medium allows for nearly unhindered spread of messages, and may have a counterintuitive negative effect on the ability of communities to meet, discuss, and ideally bridge the differences in a reasonable manner with respect to the past.

Another similarity between the two stories can be found in the reaction of Sparta and Estonia as regards a problematic aspect of their respective histories. The Spartans opted to erase and rewrite the record in the form of inscription, not necessarily with an eye to changing history itself, but with the intent to reshape an offensive representation of it. The Estonians decided to relocate the monument which commemorates a problematic and contentious moment in its past, one which still provokes strong reactions from various actors in different media, as observed above. Thus after many millennia we still try to find the appropriate manner to understand, represent, and commemorate the past.

The hacking in Estonia demonstrates a new tool with which states can apply to exercise the same type of censorship, offering insight into the relationship between the use of botnets and the spread of requests originating from various allocations of internet protocols, thus obfuscating the exact origin of the operation and offering a veil of anonymity or at least non-attribution. It was a highly organised and coordinated operation.[23] It was

[22] Serhan (2020).

[23] Evron (2008) 123.

estimated that at least one million botnets were used in the digital bombardment on the Estonian servers, servicing a population of only 1.3 million people. This number of requests blocks or overwhelms the ability of the targeted site to respond and offer the requisite services, resulting in Distributed Denial of Service (DDoS). The DDoS attacks did not result in destruction of data or hardware, but rather shut down websites of various newspapers and media, limited access to various governmental websites, made unavailable the services of two large Estonian banks, and interrupted the online services of private and state entities.[24] The email system of the Estonian Parliament was inoperable for two days and the largest daily paper was down for some time. The economic damage was limited to approximately US $40 million but the message was sent that the Estonian cyber infrastructure was vulnerable.

The described operations in cyberspace may be novel, as they take place in a new medium. Further inspection, however, reveals that there are certain similarities with the past. The ability of the Russia-affiliated hackers to disrupt the cyber capabilities of Estonia could be compared, for example, in design, function, and effect to Demosthenes' trickery in Thucydides' account of his campaign in Idomene. As computers communicate by using a cyber 'language' to connect with each other, language in ancient Greece was used as medium of communication as well as a shorthand for what we currently regard as ethnicity.[25] One of the markers of ethnicity is common culture, which may be based on shared language. As linguistic ties imply the same ethnicity or cultural identification, it is not surprising that shared dialects would present a golden opportunity to infiltrate or 'hack' an enemy. Thus, Demosthenes in Thucydides (3.112.3–5; 4.3.3, 41.2) employs tactics of infiltration through common language that could be compared to the modern use of bots or hacked computers which try to overload the responding server with multiple access attempts. Demosthenes uses the Doric dialect to infiltrate unsuspecting Idomene in the middle of the night (3.112.1). He launches an attack on the Ambraciots in their sleep by placing Messenians, who speak the same dialect as their foes, in front of his army in order to gain the trust and fool the enemy. The following excerpt from Thucydides (3.112.3–5) illustrates the trickery applied by Demosthenes:

> At dawn he fell upon the Ambraciots while they were still abed, ignorant of what had passed, and fully thinking that it was their own countrymen—Demosthenes having purposely put the Messenians in front with orders to address them in the Doric dialect, and thus to inspire

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[24] Haataja (2017) 161.

[25] See Hall (1997) 5: 'No other ancient people privileged language to such an extent in defining its own ethnicity'. Dialects seem to have been mutually intelligible (Morpurgo Davies (1987)), but ties among ethnic groups were normally closer than those to other Greeks (Anson (2009) 12–13). See also Whitehorne (2005) 39.

confidence in the sentinels who would not be able to see them, as it was
still night.

The language ruse that was implemented by Demosthenes resembles
botnets' attempts to trick the servers they access into responding as if they
are legitimate users, with the actual goal of overloading, hacking, and
bringing down the system. Moreover, the botnets were unseen invaders
much as the Messenians used the darkness of night not to reveal their true
identity. In this manner, Demosthenes strategically implemented a well-
coordinated ruse in order to infiltrate the enemy that prefigures modern
efforts to do the same.

Demosthenes employs similar tactics on at least one more occasion, when
he deploys the Messenians at Pylos with the purpose of infiltrating the
Spartans since they speak the same dialect. Thucydides confirms the success
of Demosthenes' calculation (4.41.2): 'The Messenians from Naupactus sent
to their old country, to which Pylos formerly belonged, some of the most
suitable of their number, and began a series of incursions into Laconia,
which their common dialect rendered most destructive'. Similar effects could
be observed in DDoS attacks, as the botnets aim to simulate on the surface
a legitimate attempt to seek access to the attacked network. Once the
infiltration or the overload of the system is achieved, the damage and
disruption could be massive. In this manner, a similar disregard for the rules
of engagement are achieved in modern times by the trickery of hacking as
used by Demosthenes in the past. Both use what might be thought of as
treachery, in the layman's mind, but in a time before such actions would be
formally labeled as such.

Warfare has always spurred and fed on technological innovation (e.g.,
Thuc. 1.71.3, 122.1; 3.82.3), and in the case of Estonia, new developments in
the conflict over narrative emerged in a place of increasing technological
warfare capabilities. Estonia prides itself as a pioneer in digitalising many
aspects of governmental and transaction services: 97% of all bank
transactions are conducted online and more than 60% of the population uses
the internet daily.[26] The disruptive attempt to interfere with this critical
infrastructure could be interpreted as sending a message in a specific area in
which Estonia felt that it had developed significant capabilities. The hijacked
botnets were used as a ruse to trick the Estonian e-infrastructure into
believing that real requests were generated to access its websites although in
reality it was a campaign that was designed to result in DDoS. The political
and ethnic tensions were transferred onto and through cyberspace in an
attempt to undermine identity as well as security, repudiating the Estonian
claim of having become a truly online society.[27]

[26] Ruus (2008)

[27] Evron (2008) 122

The technological progress forced by this 'war' went further. The cyber operation against Estonia also raised pressing questions as to the definition of cyber-attack, the role of NATO in responding to cyber operation against Members of the Alliance, and under what circumstances the digital intrusion could be similar in effect and damage to traditional means of warfare. The then Defence Minister of Estonia, Aaviksoo, compared the cyber assault to cutting off a state from the world by blockading all ports to the sea, an accepted *casus belli*.[28] The incident exposed structural vulnerabilities in cyber defence through the inability of the State to protect its citizens against the external attack. The US also reacted by declaring that the domination and structuring of the regulation of cyberspace would henceforth be crucial for dominating air, space, land, and sea, according to a special assistant to the US Air Force Chief of Staff.[29] It was crucial to construct a narrative of legal standards that could be applicable in similar situations in order to design and streamline a common framework of reaction to such cyber incidents.[30]

Sacred Places

Another aspect of warfare with continuity from the ancient world to the modern one, but also with some evolution, is the protection of certain treasured spaces, which also tend by nature to be loci of memory. Sacred places and localities were inviolable under the principle of *asylia* during armed conflicts in ancient Greece. The punishment for destruction of religious property was a sanction of divine vengeance, and this threat seems to have been nearly universally taken seriously. The distinction and immunity of places of worship were therefore generally observed and respected. For example, the temple of Zeus was spared during the sack of Syracuse by Athens in 414 BCE (Paus. 10.28.6). As the significance of temples was crucial for Ancient Greeks, the response to attacks on temples might be a declaration of sacred war, even though some sanctuaries such as Delphi also had secular purposes in preserving and enforcing treaties or arbitrating disputes. The role of the sanctuaries and the administration of dispute settlement has modern echoes, resembling, to some degree, the role of the UN Security Council as regards the determination whether the norms and rules of maintenance of peace and security have been upheld. Thus, it is not surprising that the sanction of destroying religious property was upheld even by entities outside of the Greek city-states such as the Macedonians. Priests and heralds were also immune from armed conflict and attacks, and, again, these rules were largely observed.

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[28] Ruus (2008)

[29] Ruus (2008)

[30] Evron (2008) 126.

Today, international law imposes prohibitions; it is forbidden '(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals'.[31] In comparison with prohibitions in the ancient world, modern law is more focused on cultural value rather than the objective 'sanctity' of the space that ancient Greece might have attributed to such places. The specific modern prohibition aims to preserve for present and future generations important sites which carry a particular religious or cultural value for the preservation and continuation of protected religious, ethnic, and cultural groups. Moreover, there is a separate international treaty for the protection of cultural property which provides that states 'undertake to respect cultural property situated within their own territory as well as within the territory of other [states] by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict'.[32] In these regulations, we can see both continuity and change: like the Greeks, modern societies are concerned to preserve sites that are of particular cultural value. The motivation, however, has become increasingly oriented toward cultural and historical preservation for its own sake, rather than fear of divine retribution.

Nonetheless, the modern prohibition is not absolute, in contrast to Greek protection of holy sites, since the duty 'may be waived only in cases where military necessity imperatively requires such a waiver' (Article 4(2) Hague Convention for the Protection of Cultural Property).[33] This waiver is based on imperative military necessity and may only be invoked 'to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage'.[34] The militarisation of cultural and religious property is possible only in extremely limited circumstances, but, as in the case of cyberwar above, can leave the situation murky and open to subjective analysis.

Unlawful attacks on protected property carry criminal liability if intentionally directed against buildings dedicated to religion, education, art, science, or charitable purposes, as well as historic monuments, 'provided they are not military objectives' according to Article 8(2)(b)(ix) and (e)(iv) of the Statute of the International Criminal Court. The criminal responsibility attempts to deter and punish perpetrators whose main aim is oftentimes the

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[31] Additional Protocol I art 53.

[32] 1954 Hague Convention for the Protection of Cultural Property art 4(1).

[33] Although Thucydides' Athenians represent the protection of religious sites as also flexible under duress (4.98), most readers do not find this argument persuasive.

[34] 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property art 6(b).

alteration of history or knowledge (in the case of educational objects) and erasure of artifacts and monuments which preserve identity and memory. In this manner, these violations of international law control and alter memories which are crucial for group identity in certain localities, especially among minority populations: these laws aim to protect not only individuals or places but also history. It is thus considered a war crime when the public historical record, in the form of religious or cultural sites, is attacked and 'rewritten' violently by means of forceful control of changing, altering, or destroying memories and protected monuments.

Bodies, Graves, and 'War Heroes'

The most painful reminder of a war is the actual bodies of the dead, which are often used, in both ancient and modern contexts, as tools to control remembrance. The scope of the regulation of warfare in this area has expanded greatly since the origin of modern warfare in the mid-nineteenth century, but there are still revealing parallels with the ancient world, showing both how war has changed and how it has remained the same. In more recent times, there has been a constant push for enlarging the protective scope of IHL: from only the military dead in the Geneva Convention of 1864 to the entire affected civilian population in 1949. The IHL has also managed to respond to new types of warfare that fall within its regulatory ambit, along with the extension of the protective regime related to victims in international or non-international armed conflicts.

The central focus on the victims as protected groups of individuals who suffer during armed conflict has resulted in a notable move away from the traditional narratives of 'war hero' stories, altering the way that conflict is preserved in both historiographic and popular memory. In this regard, modern war has made a significant shift from ancient war, and specifically in terms of the way that the narrative is preserved rather than the techniques or strategic goals of the conflict. While many of the developments discussed here have been quantitative rather than qualitative in nature—as discussed above, modern war maintains many of the same fundamental goals and taboos while pursuing and regulating them through novel means—, in this respect, war has changed. In the legal framework that is established by the Geneva Conventions, narratives that fit the 'war hero' type, as embodied in the popular imagination by figures such as Achilles, have become particularly suspect. Today, a 'war hero' would not be considered a belligerent who inflicts the most damage on the other side and defeats the enemy, as traditional stories might have it, but rather an officer who carefully follows the complex regulatory regime that the IHL requires, while many 'heroic' stories are seen as fomenting further conflict. Additionally, behaviour resulting in many victims, as 'war hero' stories often do, is now criminalised

and considered a violation of the IHL, something to be condemned rather than idealised.

As part of this attempt to control the engagement between fantastic war-hero stories and the behaviour of real human beings, courts today are charged with producing a kind of highly structured, legal 'historiography' recording what has occurred in a conflict, partly with the goal of controlling the development of false narratives or those that incite further conflict. Rather than allowing the kind of mythmaking that may emerge from the storytelling behaviour of groups of stressed individuals, courts have attempted to redirect the production of popular history into a highly formalised and factual arena, correcting errors and suppressing lies. Perpetrators, too, of course make extensive efforts to control the historical narrative today, as is discussed further below and by Pownall in the context of ancient Sicily, and thus there is often a push and pull between the legal system and those violating the law and their supporters. In the international proceedings producing such knowledge, the victims typically share their stories on the witness stand. With the creation of the first permanent International Criminal Court, victims have the opportunity not only to testify to the most serious violations of international criminal law, but also to ask for reparations for the damage incurred during the armed conflict from the most responsible perpetrators, based on the strength of their stories and evidence. The complex contemporary theatre of war involves increasing, and increasingly undefined, categories of group and individual participants, posing unprecedented challenges to peacekeepers, who have in recent years recognised the importance of both establishing true war narratives and eradicating false ones in order to appropriately reflect and influence the unfolding of real-life events. This can be particularly complicated because, rather than existing simply in oral narrative and stone inscriptions, the record of modern warfare typically consists of a convoluted web of stories represented in the media, internet, individual accounts, and literature, as well as the testimonies and evidence presented in international and domestic courts.

The legal framework, in its sheer promise to create documentation and potential deterrence, helps to control potentially criminal behaviour of soldiers and commanders, as well as offering a unique opportunity to delegitimise and 'steal the limelight' of the persons most responsible for the commission of war crimes. The categories of 'national heroes' or 'war heroes' that might have dominated narratives in the past are today considered misnomers, because with the widespread and easy exchange of information, evidence for the behaviour of the belligerents in war becomes easily accessible and widely reported. The stories that a society or individuals tell about action in war is thus more closely tied to potentially uncomfortable factual information than it might have been in an era with more limited information-sharing platforms. Military campaigns of the late-nineteenth–early-twentieth-century still generate heated debates as to the role and

behaviour of commanders in the theatre of engagement. One must not look further than the complicated engagement of European powers in their colonies in that period. The military played a crucial role in establishing colonial subjugation around the world, and ultimately, the top generals were instrumental in the war efforts. For example, the decorated general L. von Trotha commanded several military campaigns in intra-European conflicts such as the Austro-Prussian and Franco-Prussian Wars and colonial military suppressions of various rebellions such as the multi-national Boxer Rebellion and the Herero rebellion in Namibia. The extermination colonial campaigns perpetrated under the command responsibility of the decorated general have sparked a strong reaction that is continuing today, as societies challenge how the brutal acts are remembered,[35] similarly to the challenges of confederate memorials in the United States today. In the case of the von Trotha monument, the role of the once celebrated general is reconstructed and re-examined in order to capture what actually happened in brutal campaigns of mass extermination of civilians under his command. The narrative of what happened has been re-evaluated in different manners: from acts on local level—renaming a street in Munich dedicated to the general[36]—to official apologies by the German state for the extermination campaign,[37] to class-action lawsuits filed by the descendants of the victims for genocide reparations before US courts.[38] Similar trends are observed in various states around the world such as the recent debate on how to evaluate and respond to Belgium's King Leopold II's atrocious campaign in the Congo.[39] Through a careful and thorough evaluation of the evidence, the narrative becomes one of the anti-hero.

The work of the courts, albeit after the fact of the commission of the crimes, further insists on the establishment of factual truth. The 'war hero' who plunders and kills the enemy forces and civilians is not a hero in the eyes of the law. Strict sanctions are possible consequences, and humanity has witnessed cases where former Heads of State such as Milosevic or (former) Heads of Government such as Al Bashir of Sudan could be indicted for the perpetration of war crimes, crimes against humanity, and genocide. The construction of narrative in war crimes trials is thus now structured around an adversarial process in which the defendant, witnesses, and victims create a complex nexus of stories in the form of testimonies. The role of these testimonies could be seen as the modern equivalent of oral story-telling, under strict legal restrictions, rules, and documentation.

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[35] Hull (2005) 55–63 (for the extermination campaign against the Herero and Nama people).

[36] *EPV* (6 October 2006).

[37] Federal Minister Heidemarie Wieczorek-Zeul (14 August 2004).

[38] *The Guardian* (16 March 2017).

[39] Serhan (2020).

The traditional 'war hero' designation, a narrative type originating before the formal development of the idea of war crimes, often refers to one who commits crimes intentionally or has the knowledge of such commissions or has superior command responsibility for his or her forces. This 'anti-hero' is ultimately responsible for the violations of international law but attempts to construct a factually misleading narrative that obfuscates what actually happened or even eliminates references that may be used as evidence of his actual behaviour. The court system of constructing historiography and the commander today exert a kind of mutual pressure on one another, with historical knowledge and narrative again central. The 'anti-hero' or 'non-hero' war criminal today, knowledgeable about potential legal ramifications of his actions, typically does not attempt to glorify his activities publicly, as such narratives could be used against him in the court of law as evidence. Such glorification of misdeeds might indeed exist, but exclusively within very private circles of officials who aided, conspired or co-perpetrated the crimes. For example, military and police commanders in Yugoslavia at the end of the 1990s attempted to alter the historical record by digging up the graves of their victims and transporting the remains hundreds of kilometres away from the crime scenes, purely to remove evidence of the commission of the crimes. Hiding the dead in order to obscure the historical record has indeed become a hallmark of modern conflicts, and can be seen in instances as distant as the Irish Troubles to the 'Disappeared' of Latin America. The defeated enemy and the slaughtered civilians would not be left in peace as the simple principle that guides the 'non-hero' is based on the concept of concealment and attempt to evade criminal liability: 'no body in evidence, no case to answer'. In this manner, actions that might have been trumpeted as heroic in previous generations become non-heroism, a closely-knit secret to navigate a complex framework of criminal law by removing the evidence from the crime scene or the theatre of war. What factually happened is internalised in a close group of officials, a criminal design of officials, who share the responsibility for the crimes while retaining some internal, accurate knowledge of the acts. Pressure is thus exerted on inside witnesses not to break the secret or disclose the mode of the elimination of evidence. In a sense, the pattern of obfuscation resembles fragmentary mosaics that seem randomly placed over the actual events, in which pieces are held together by the fabricated narrative of non-truth, i.e., by not disclosing the truth about what actually happened and what responsibilities the act may or should entail.

The concealment of bodies and prevention of judicial proceedings in terms of identifying the perpetrators and the victims reaches unprecedented levels in some conflicts. It is categorical that despoiling the dead 'is and always has been a crime'.[40] The mutilation of dead bodies is also strictly

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[40] *United States v. Pohl et al., Case No. 4* (Opinion and Judgment and Sentence, Green Series) Mil. Trib. No. 21947-11-03 [235].

prohibited as the act is a war crime of committing outrages upon personal dignity.[41] The graves of the dead must also be respected and properly maintained, and States are encouraged to maintain grave sites permanently.[42] In one particular example, in order to ensure that no investigation could take place against perpetrators who may be law-enforcement authorities, clandestine re-burial operations were often implemented under the coordination and guidance of the authorities responsible for the investigation of the crimes committed against the victims in the Kosovo conflict in 1999. The transportation of the remains of the deceased and their subsequent re-burial or attempt to submerge them in rivers and lakes are in 'complete defiance of the operative law … and … in grave dereliction of … duties and responsibilities' of the investigating and law enforcement authorities.[43] Such highly clandestine operations resulting in outrageous burial in mass unidentified graves and the destruction of the vehicles used for the transportation of the deceased from the crime scenes were coordinated with the sole purpose of 'clearing the terrain' of the evidence of the crimes committed during armed conflicts against civilian population,[44] and indicate the significance attached to 'controlling the narrative' on the perpetrators' side.

The intentional tampering with evidence in hiding the bodies of the deceased in order to prevent their subsequent acknowledgement in the process of establishing the legal 'historiography' of a war in criminal trials is a disturbing deviation from a long-established regime of treatment of the dead in armed conflicts since ancient times. One of the most significant characteristics of the regulation of armed conflict in ancient Greece was the retrieval of the dead from the theatre of war. Although the victor of a battle was entitled to the spoils such as the armour from the body of the defeated enemy, the treatment of the dead body was to be respectful and dignified. The treatment of the dead was indeed a quintessential part of 'Hellenism and Panhellenic morality itself'.[45] The commanders of the armed forces engaged in the armed conflict were obligated to recover the remains of the belligerents fallen in battle. Truces were also made between the belligerent parties in order to bury the dead.[46] The earliest and perhaps most memorable illustration of the outrage caused by mistreatment of human remains can be found in the reaction to Achilles' desecration of Hector's body (*Il.* 22.472–5, trans. Fagles): 'And a thick cloud of dust rose up | from the man they dragged, his dark hair swirling round | that head so handsome

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[41] ICC Statute art 8(2)(b)(xxi).

[42] Additional Protocol I art 34(2).

[43] *Prosecutor v Djordjevic* (2011) ICTY Case No IT-05-87/1-T [1973].

[44] *Prosecutor v Djordjevic* (2011) ICTY Case No IT-05-87/1-T [1980].

[45] Lateiner (1977) 97, 99.

[46] Bederman (2004) 259.

once, all tumbled low in the dust— | since Zeus had given him over to his enemies now to be defiled in the land of his own fathers'. Even the gods of the *Iliad*, hardly humanitarians, object (*Il.* 24.104–7).[47]

Into the historical period, the proper treatment of war dead remained a central value. One example is Herodotus' account of the aftermath of the Greek victory over the Persians at the battle of Plataea in 479 BCE (9.85), and especially the Spartan care with their dead. The latter applied three distinct burial practices: the young men between the age of twenty and thirty, known as irens, were buried separately from the rest of the fallen Spartans. Interestingly, a third burial site was reserved for the helots, the Spartans' slaves. In contrast, the Athenians and the Tegeans did not differentiate between the fallen and buried all bodies together. Falsification of the historical record occurred here, too, albeit in the opposite manner as is discussed above: later, other cities constructed fake tombs at Plataea to suggest that they, too, had taken part in the heroic battle (Hdt. 9.85.3). The real tombs maintain their emotional and political significance for a generation, as recorded by Thucydides. This historian records the Plataean plea during the Peloponnesian War: 'Look at the tombs of your fathers, slain by the Persians and buried in our country, whom year by year we honoured with garments and all other dues, and the first fruits of all that our land produced in their season, as friends from a friendly country and allies to our old companions in arms!' (Thuc. 3.58.4–5). Although the plea is unsuccessful, it can hardly fail to move the reader.[48]

Tampering with remains in order to alter the historical record went beyond the production of sham tombs, as can be seen in another passage from Thucydides (5.64.1, 74.2) dealing with the Battle of Mantinea, although again in this case the treatment of the dead involved respect and proper burial, unlike in the modern parallels. After the battle in 418 BCE, the Spartans removed their own dead and carried them to Tegea, where they buried them. Tegea is a traditional ally of Sparta at a considerable distance from the battlefield on which the dead lay, but, as Low has demonstrated, this apparently strange action can be explained in that the burial at Tegea of Spartan remains can be read as both a claim and a commitment by the Spartans that they intend to maintain their ties to the place.[49]

The strength of the taboo against mistreatment of corpses can be seen in the rare circumstances in which they are not treated with respect. Removal of bodies is, for example, the most extreme form of civic punishment for traitors. Isocrates relates the story of the Athenian tyrants' hatred of the Alcmeonidae, which was so potent that they had their tombs dug up (16.26). On another occasion, Thucydides describes the treatment of the Cylonian

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[47] Such a treatment caused an uproar of indignation as an example of grave violation of the customs of war: see, e.g., Bederman (2004) 258.

[48] See, e.g., Macleod (1977) 236; Low (2006) 98.

[49] Low (2006).

conspirators and their families: 'the living were driven out, and the bones of the dead were taken up; thus they were cast out' (1.126.12). Similarly, Athenians were horrified when a storm prevented the collection of the dead after the naval battle at Arginusae in 406 BCE. The fact that those generals who did not flee were sentenced to death over this failure, despite the mitigating circumstances, suggests the power of the prohibition against neglect or mistreatment of corpses. The 17-day delay in returning corpses at Delium is presented as a similarly appalling violation in Thucydides (4.97–101).

Although modern combatants do not seem to feel equally strongly about proper treatment of remains, legally, just as was the case in ancient Greece, all possible measures must be taken to search for, collect, and evacuate the dead per Article 15(1) of the First Geneva Convention. The obligation extends to the search and collection of the wounded, sick, and shipwrecked along with the dead. Both sides of the conflict must take all possible measures to search for and collect the dead. The duty is applicable to the remains of the dead without adverse distinction—namely, without differentiating whether the dead are belligerents or civilians. The international community at the UN General Assembly level has reminded parties to armed conflicts, regardless of their character, 'to take such action as may be within their power … to facilitate the disinterment and the return of remains, if requested by their families'.[50]

Facilitation of return of the remains of the deceased to the party of which they belong or to their kin is also provided for in international law. There is a general obligation to return the remains as laid down in Art 130(2) of the Geneva Convention IV.[51] State practices also indicate that the return of remains is an established principle of international law as observed in the exchange of mortal remains between Israel and Egypt in 1975–76. Various military manuals also provide guidance as to the process of returning remains to the opposing party. Additionally, some states follow the duty to collect and return personal items/effects of the dead such as last wills, documents of importance to the next of kin, objects of sentimental value, and money.[52] Such regulations exist in order to facilitate the preservation of the memory and dignity of the dead.

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[50] UN General Assembly, 'Assistance and co-operation in accounting for persons who are missing or dead in armed conflicts' A/Res/3220 (XXIX).

[51] The graves of the dead must also be respected and properly maintained, and States are encouraged to maintain grave sites permanently (see Additional Protocol I art 34(2)). The Geneva Conventions specify that the dead must be buried, if reasonable and possible, according to the rites of their religion. Collective graves could be used in exceptional circumstances and graves should be grouped by nationality if possible.

[52] See the military manuals of Argentina, France, Hungary, Israel, Netherlands, Nigeria, Spain, United Kingdom, United States.

Conclusion

The regulation of warfare in ancient Greek city-states and contemporary times seemingly differs, as societies, technologies, and means and methods of warfare inherently change. As seen above, however, there are strong reminiscences of the regulatory framework from ancient Greece, often in the form of taboos, that could be still found in the contemporary regulatory regime of warfare. The purpose of this chapter was not to prove the degree of legal regulation in the ancient world but to selectively compare various areas of the complex regime of war and how such areas affect the historiography of the development of the law and narratives of use of force and armed conflicts. In this manner, it was established that some areas of modern warfare are more complex and restrictive, such as the applicability of a detailed set of rules and norms in armed conflicts. Simultaneously, we are witnessing other rapid developments in cyberspace activities which provoke a great detail of re-evaluation of the applicable legal framework. What is striking is that analogies or metaphors from the narratives of the past could clarify how modern technology functions. In this manner, we understand how complex digital operations can be compared to known narratives from the past, a process that ultimately helps us in regulating such novel activities. A comparative analysis of ancient and modern war can thus show us constant features of war even while it changes and develops: many of the fundamental strategies and goals remain precisely the same, even if they have migrated to the internet or metamorphosed so as to reflect other artifacts of modernity.

Nonetheless, one key difference is the way that the historiography of war is handled: in ancient times, control of the story was unregulated and open to dramatic 're-writing', as is discussed, for example, by Pownall in this volume. While similar attempts to control historical narrative occur today, especially online, international bodies such as the ICTY and ICC attempt to carefully control any development of 'war hero' stories and to establish, through the court system, accurate accounts of what occurred and especially of any wrongdoing. The narrative of describing and evaluating the warfare reflects this change: the current language of the law of armed conflict seems more technical, codified, and rich in tests and principles, while ancient definitions are rooted in shared understanding and the customary source of their binding force. The historiography of warfare has thus become more formal, with higher stakes, as we attempt through modern legal means to control humans' ancient impulse to make war on each other.

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