Chapter 2
Chivalry: A Principle of the Law of Armed Conflict?

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Abstract This contribution explores the role and relevance of chivalry in relation to warfare past and present and its relationship to the law of armed conflict and poses the question whether it still is a principle of that body of the law. It also briefly addresses the question of what its potential relevance is as a guiding principle in the interpretation of legal and extra legal obligations alongside rules contained in conventional and customary law.

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Avril McDonald was a lovely person and friend and an esteemed colleague, and this piece is dedicated to her memory with affection and respect.The author is Professor of Military Law, University of Amsterdam and The Netherlands Defence Academy.

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2.1 Introduction

The notion of chivalry has a certain air of romance, and for many perhaps, of being "old-fashioned" and unworldly about it and is often associated with images of knights in shining armour fighting duels on horseback and wooing fair ladies perched on balconies. However, it has played an important role in the development of the law of war, now usually referred to as international humanitarian law or the law of armed conflict. In that context it can better be seen as embodying notions of honourable conduct and fair play, which have their roots in what is sometimes referred to as "the code of the warrior" and military tradition.[1] It has been, and still is, identified in some military manuals as one of the fundamental principles of this branch of the law and elements of it have obtained the status of binding rules of law of a conventional and/or customary nature.[2] It was historically at least partly based on a degree of mutual respect and reciprocity between adversaries sharing the same or similar traditions and subjected to the same dangers on the battlefield. The principal question that will be addressed in this short contribution is what role it has played in the development of the law of war and whether it had and still has a place in the law as a rule or principle of the law of war. If it did or does, what is its status today in the world of asymmetrical warfare and remote targeted killing, which are far removed from traditional face to face encounters between like-minded adversaries sharing a common code of warrior ethics and traditions? Does chivalry still have any relevance on today's battlefield? If so, what might its role and relevance be? Is it still a part of the law of armed conflict?

Before attempting to answer these questions, a short historical overview will be given of the role that chivalry has played in the development of the law (and practice) of armed conflict, alongside discussion of what the notion of chivalry signifies in relation to the law of armed conflict and conduct on the battlefield. The role of the fundamental principles of humanitarian law as general principles of law and as a normative framework for the entire corpus of positive legal obligations contained in conventions and specific rules of a customary nature will be examined and the place of chivalry alongside the other principles will receive attention. This will be followed by an examination of certain rules of treaty and customary law which are directly based upon the principle of chivalry and honourable conduct, followed by a more general discussion of the role of the fundamental principles of the law of armed conflict in general and chivalry in particular, as an assist in interpreting conventional and customary obligations and as a source of guidance or inspiration in applying extra legal considerations of an ethical or policy character, alongside longstanding military practice based on the notion of chivalry to the conduct of warfare. In this context, a particular role of chivalry as a possible

[1] French 2003, pp. 1–19.

[2] British Manual 1958, pp. 1, 2; US Army Manual 1956, p. 3; Canadian Joint Forces Manual 2001, Section 202, p. 2-1; US Navy 1997, pp. 5, 6; But see UK Manual 2004 and US Navy 2007, where no references to chivalry are made.

solution to the controversy surrounding the question of direct participation in hostilities will be advanced. It will be argued that rather than attempting to use the principle of military necessity as a restraint upon rules of a positive legal character, that the question of providing an opportunity to surrender to an adversary incapable of effective resistance, can be found in the notion of chivalry, as an extra-legal consideration based on military practice and tradition. In the final section, these elements will be brought together in an attempt to answer the questions posed above relating to the continued relevance (or lack thereof) of chivalry and notions of honourable conduct in the development of the law of war and its place in the contemporary law and practice of warfare.

2.2 The Relationship of Chivalry to Warfare and its Role in the Development of the Law of Armed Conflict

When referring to notions of chivalry and honourable conduct in relation to warfare, it is essential to identify what their essential characteristics are and to have some idea of how these have influenced the development of the law. Chivalry and martial honour have long been regarded as essential components of warrior ethics and military tradition.[3] They are reflected in most cultures in one way or another, ranging from Western warrior tradition dating back to classic antiquity and medieval chivalry, to the various warrior codes of the ancient and medieval Near East, India, China and Japan.[4] They also were practiced in various forms by many other cultures outside the arc of Eurasian/Mediterranean civilisation, including Native Americans and warrior peoples in Africa and the Pacific. While these traditions differ greatly in many respects, they do share a number of common characteristics. They generally honour bravery in the face of the enemy, loyalty to a common cause or individual, sense of identity (tribe, city state, class or caste, unit, later country), good faith in keeping one's word and honouring agreements and at least some degree of clemency towards those who are harmless, helpless or who have surrendered and requested mercy. While these codes do not always coincide with contemporary notions of humanity (prisoners of war were enslaved or sacrificed in many of them), they share a common idea or ideal that warfare was different from criminal homicide, that risking one's safety and life for the common interest was required from a warrior and that warfare was not reconcilable with wanton cruelty and destruction. All of them shared some notions relating to "fair play" and disdain of treachery in battle. Under the influence of both secular and

[3] French 2003, p. 21; Greenwood 2008, p. 18; Green 2000, pp. 23–25.

[4] French 2003, chapters dealing respectively with the Western, Chinese Shaolin warrior monastic code and Japanese Samurai warrior traditions, as well as with the warrior ethic of the Native Americans of the Great Plains; Greenwood 2008, pp. 16–17, referring to ancient and medieval traditions in the Near East and India as well as to warrior traditions in Africa and elsewhere.

religious morality, many of these traditions developed quite elaborate moral and legal codes of what was allowed and expected from warriors on the battlefield and for the treatment of persons who were not under arms or who were considered particularly vulnerable, as well as for objects and property considered to be sacred or otherwise worthy of respect.[5]

The influence of this has been acknowledged in writings relating to the historical development of the modern law of armed conflict. The influence of the medieval code of chivalry, along with religious and ethical influences (e.g. in the form of just war tradition), are generally referred to as the two main components of the pre-modern law of war. Rules existed and were enforced relating to the means by which and the manner in which warfare was conducted, respect for emissaries conducting negotiations relating to truces, prisoner exchanges or terms of capitulation, respect for women, clerics, the elderly and children, as well as the right of sanctuary and respect for religious and certain other types of objects and property.[6]

With the decline of feudalism and the gradual rise of dynastic, mercantile and increasingly States, the bearing of arms ceased to be a prerogative reserved to a warrior class or caste and became instead a profession.[7] In the late Middle Ages and Reformation this saw the increasing use of mercenary armies made up of soldiers of fortune who served and fought for pay and booty, and when not paid, were as much a danger to their employers and especially to the civilian population as any enemy.[8] The religious wars of the period were marked by a lack of any limitations and widespread devastation, which led to the attempt at reintroducing restraint through the development of (early) modern international law through the writings of such individuals as Suarez, Vitoria, Gentili and Grotius, who moulded together the traditions of just war into a reasonably coherent legal system, which served as the basis for modern international law.[9] This went hand in hand with the increasing of governmental control over the armed forces after the Peace of Westphalia and their transformation into professional armies and fleets in the service of the monarchical States of early modern Europe.[10] The officer class of these armies largely comprised the nobility and others who otherwise qualified as "gentlemen", who saw themselves as the heirs of the knightly tradition and generally conducted warfare (at least among themselves) in accordance with the emerging law of warfare and in accordance with notions of honour and chivalry.[11] Battles were fought, cease fires were observed and sieges were conducted in

[5] Greenwood 2008, p. 18; Green 2000, pp. 25, 26.

[6] Ibid.; See also Lyons and Jackson 1997, pp. 274–277, relating to the terms of surrender granted the Crusaders by Saladin centralised at Jerusalem.

[7] Howard 1976, pp. 16–19.

[8] Howard 1976, pp. 28–29.

[9] Howard 1976, p. 24; Greenwood 2008, p. 19.

[10] Howard 1976, pp. 48–49.

[11] Howard 1976, Chapter 4, "Wars of the Professionals", relating to eighteenth century armies and warfare.

conformity with sometimes elaborate (unwritten) rules and conventions, and since warfare had become the prerogative of the State which was waged for particular objectives, this led to both a certain limitation in the objectives of wars and the way they were conducted. This in turn also led to a certain degree of humanisation of warfare in the form of increased respect for civilians and their property (with the notable exception of storming a defended city) and more humane treatment of prisoners and the wounded. Under the influence of the Enlightenment, the distinction between combatants and non-combatants, and persons now referred to as *hors de combat,* became well-defined and generally adhered to in the practice of eighteenth century warfare.[12] This gradually became a code of customary law, which was seen as both legally binding as well as being a mark of a professional officer.

This customary code was gradually codified and further developed over the course of the nineteenth century. The famous Lieber Code was the first major step along this route and it was followed by many other such codifications in the latter part of the nineteenth century.[13] This codification process was at first largely a question of national regulation, but with the Hague Conventions of 1899 and 1907, it became part of international treaty law, alongside the adoption of the Geneva Conventions relating to the treatment of the wounded. The Hague Conventions reflected the existing rules and principles of the conduct of warfare that had characterised warfare between European States referred to above and as such were regarded as customary law, even in the face of the mass violence and slaughter of the ensuing world wars.[14] By this time the mass conscript armies of the nineteenth–twentieth centuries had replaced the earlier small professional armies of the previous one[15] and codification was the only means to ensure a reasonable degree of adherence to the law. However, these mass conscript armies, while armed with much more firepower and made up of a much broader spectrum of the population than their eighteenth century predecessors, still incorporated notions of honour and chivalry into their military tradition and attempted to instil them into the training and instruction of the members of the armed forces, in particular the officers who led them. They still form part of military training and instruction at military academies today.

[12] Greenwood 2008, pp. 19, 20.

[13] Greenwood 2008, p. 21; Green 2000, pp. 29–31.

[14] Gill 2007, pp. 86, 87; Green 2000, pp. 33–36; Greenwood 2008, p. 24.

[15] Howard 1976, Chapter 6, pp. 96–115, on the character of late nineteenth and early twentieth century armed forces and warfare.

2.2.1 Some Examples of Chivalry in the Practice of Warfare

A few examples from military history may serve to illustrate the influence of chivalry and honourable conduct in warfare. These will be purely illustrative and are not intended to serve as a systematic examination, which would go far beyond the confines of a single short article such as this one.

An example of what was considered to be honourable conduct often cited in relation to eighteenth century and nineteenth century warfare is the notion of "leading by example" and indifference to danger and wounds, as a means of both inspiring the same from the other members of the army and gaining and maintaining the respect of fellow officers. The central motivation of the officer according to one noted military historian was honour: 'honour was paramount and it was by establishing one's honourableness with one's fellows that leadership was exerted over the common soldiers'.[16] This involved not only indifference to danger in one's public comportment, and keeping one's word and faith, thereby setting an example, but also respect for the same qualities in fellow officers, including those from the opposing side. This was the reason why an officer who had fought bravely and honourably was treated with respect upon surrender, for example, by allowing him to retain his sword or sidearm as a mark of respect. It also lay behind the practice of allowing an officer to give his parole enabling him to move about freely within certain agreed limitations and accepting his word of honour to not participate in fighting until officially exchanged for a prisoner of similar rank. It also influenced the practice of sending forward "parlementaires" to attempt to negotiate a surrender when the chances of successful resistance were considered negligible and it lay behind the respect for the "white flag" and the inviolability of such an emissary during negotiations. A well-known example of this was in the final stages of the battle of Waterloo where the elite "Old Guard", surrounded and outnumbered after being repulsed in their final attempt to force the British position and now assaulted on the right flank by the Prussians, were called upon to surrender.[17] The offer was refused, but the offer was made in conformity with established practice and notions of honourable conduct. This practice carried over even into the Second World War, for example, during the battle of Arnhem, when the outnumbered and outgunned detachment of British paratroops defending the tenuously held crucial bridge over the Rhine, were offered the chance to surrender before the main assault commenced. Like the other example, this offer too was rejected, but in the ensuing hard fighting, captured British "paras" were generally treated humanely and with respect, having earned it in the eyes of their adversaries by their tenacious defence and general adherence to the rules of war.[18]

If surrender was accepted, it was almost always respected and was often accompanied by terms allowing for not only respect for the lives of the captured,

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[16] Keegan 1978, p. 191.

[17] Lachouque and Brown 1997, pp. 488, 489.

[18] Kershaw 2009, p. 222.

but often including some degree of respect for the honour and dignity of the defeated party. Two examples will have to suffice to illustrate the point. The surrender of British General Burgoyne at Saratoga in 1777, generally considered as the turning point in the American Revolutionary War, was carried out with full respect for the terms agreed and both sides showed scrupulous attention to the "honours of war".[19] In the final stages of the Crimean War, while peace negotiations were underway to surrender the fortress of Sevastopol and end the war, French and Russian troops who had faced each other over months of gruelling trench and siege warfare fraternised, shared rations and exchanged gifts of tobacco and small items, while the officers exchanged visits and mutual compliments and courtesies.[20] In some cases such expressions of mutual respect at surrender could have far-reaching consequences, as was the case in the American Civil War in relation to the surrender at Appomattox by General Lee, commanding the Confederate Army, to General Grant, commanding the Union Army, with the terms of surrender offered and the way it was conducted, contributing in no small measure to a fairly smooth transformation to peace and reconciliation between the two sides.[21]

Considerations of mutual respect and chivalry have also been observed with regard to the fallen of opposing armies for many centuries. Alexander followed the Greek tradition of burying the dead of both sides after a battle and erecting a memorial to the fallen[22] and the same tradition was observed by the German commander at St. Nazaire following a daring British commando raid in 1942, which put the docks intended to house the battleship *Tirpitz* out of action. In that case, the German Commander ordered that the 169 commandos who had fallen in the action be buried with full military honours and mounted an honour guard at the cemetery in recognition of their bravery.[23]

While examples such as these do not take away from the violence or negate the horror and cruelty of war, they do illustrate that alongside these elements there is room for some degree of mutual decency and respect between adversaries and the notion of chivalry and martial honour has played some part in contributing to this. It formed part of "the code of the warrior" and had an undeniable influence upon the development of "the laws and customs of war". We will now turn to the question whether it actually continues to form part of the contemporary law.

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[19] Hibbert 1990, pp. 196, 197.

[20] Figes 2010, p. 409.

[21] Anderson and Anderson 1988, pp. 448–454.

[22] Keegan 1987, p. 46.

[23] Weider History Group 2012.

2.3 Chivalry and Honourable Conduct as Part of the Law of War

The law of war, like any other branch of international law, is based on the sources enumerated in Article 38 of the Statute of the International Court of Justice. The two primary sources are multilateral conventions, such as those of Geneva and The Hague, and customary law representing practice recognised as legally binding. Alongside these are general principles of law, and as secondary sources, decisions of courts and tribunals and *doctrine*. The place and function of general principles within this system has been the subject of some controversy, but it is generally agreed that principles of law can include both fundamental norms of international law of a more general nature than specific rules, including some norms of a peremptory nature, and elements of municipal law common to most or all legal systems which can have relevance for international law.[24]

The contemporary law of armed conflict consists of hundreds of treaty provisions and according to the ICRC customary law study, over 160 rules of customary law.[25] As such it has become a complex and highly detailed branch or subdiscipline of international law, and while most of its rules are reasonably uncontroversial, some are the subject of diverging interpretation and elements of its relationship to other areas of international law, such as human rights law, have given rise to a considerable degree of controversy. One might question how an individual soldier, or even a commander, could ever be expected to know all of the rules or find his or her way through the controversies and grey areas. The answer is that, while the detail of the law is complex and sometimes controversial, its essence is contained in a handful of fundamental principles which are interrelated and form a system, which have been recognised throughout its long history and which form the foundation for all the rules contained in the two primary sources of treaty and custom. These principles provide the normative framework upon which the entire system of rules is based and can additionally serve as aids in interpretation and as a means to fill gaps and ensure coherence. They underlie and provide the normative basis for every single rule of treaty and customary law and as such, while not normally used to identify specific rights or obligations, are of fundamental importance in the interpretation and application of the rules contained in the primary sources. They are in short, general principles of international law in the sense of fundamental norms of a more general character referred to above.[26]

The fundamental principles of military necessity and humanity are the two keystone principles which lie at the heart of the balance between military requirements and the need and objective to limit the suffering and devastation caused by war and provide protection to those most vulnerable, such as the

[24] Van Hoof 1983, pp. 148–151.

[25] Henckaerts and Doswald-Beck 2005.

[26] Military manuals on the law of armed conflict such as those cited in n. 2 *supra*, usually begin with a treatment of the basic principles of the law of armed conflict.

wounded and captured, and to the civilian population. These two main principles are complemented by several other fundamental principles which are drawn from the two main ones and which complement them in forming the overall system. These include the principle of distinction, which has the function of demarcating who and what is, and is not, subject to attack; the principle of proportionality (*in bello*) which sets out a balance between expected military advantage and probable incidental injury and damage to civilians and civilian objects in conducting attacks upon military targets; the principle of prohibition of unnecessary suffering and superfluous injury in the use of certain types of weapons and means of combat as a sub-principle of humanity; and the principle of equal application, which establishes an equality between opposing forces and participants in the application of the law of war, irrespective of considerations of the legality of resorting to force between States or the motivations of the opposing parties.

The question posed earlier is whether these principles also include considerations of chivalry and honourable conduct, whether in the form of a separate principle, or as part of those named above. Clearly, not all of what is (or perhaps more accurately was) regarded as chivalry or martial honour has been codified into law, but there is no doubt that significant elements have found their way into treaty and customary law and as such represent binding legal obligations. Other elements remain more a question of military tradition or ethics than positive legal obligations, but nevertheless exert some degree of influence. We will examine a few examples of both by way of illustration. Those elements which are the source of binding legal obligations contained in conventions and custom will be examined first, followed by an examination in the next paragraph of the ancillary role of basic legal principles in general and chivalry in particular, as sources of guidance which can and do include extra legal considerations and practices and traditions which, while not legally binding, can nevertheless exert a significant influence.

One area where notions of honourable conduct have become part of the law is in the prohibition of perfidy. This relates to the prohibition of feigning wounded or otherwise protected status, as well as the intent to surrender, as a means of gaining advantage in combat. The Hague Regulations on Land Warfare of 1907 and Additional Protocol I of 1977 lay down strict prohibitions of using treachery (perfidy) to kill or wound (and under API to capture) members of the opposing armed force or to misuse flags of truce, national flags, uniforms and emblems of the enemy or those of neutral States in combat or to misuse the protected emblems and signs of the Geneva Conventions.[27] These prohibitions have obtained a customary status and extended somewhat to include, for example, the flag and distinctive emblem of the United Nations and form part of customary law; violation

[27] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hereinafter HR 1907), The Hague, 18 October 1907, Article 23B jo. Article 23F; Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Hereinafter AP I), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 75, Articles 37–39.

of which can be considered to constitute a war crime.[28] These prohibitions undoubtedly have their root in notions of martial honour and chivalry, which required adversaries to fight openly and without treachery. The same consideration applies to the prohibition of attacking individuals who have laid down their arms and surrendered at discretion.[29] Not only is attacking persons who have surrendered a violation of basic humanity, it is no less a violation of trust and dishonourable conduct to attack a person who has yielded and placed himself at the disposal of the opponent. No honourable warrior in the chivalric tradition would attack an opposing warrior who had yielded and asked for quarter.[30] This also underlies the prohibition of denying quarter and declaring no quarter will be granted, or conducting hostilities in such a manner as to make surrender impossible.[31]

Another element of chivalry and honourable conduct which is incorporated into the law is the prohibition of using protected persons and objects as shields from attack or in direct support of military operations. Protected persons such as civilians, the wounded and prisoners of war are to be separated from combatants as far as possible and clearly indicated for what they are. Using their immunity from attack as a shield for military operations not only violates their protected status and renders them subject to loss of protection, thereby violating both the principles of humanity and distinction, but is also without doubt a form of dishonourable and treacherous conduct akin to misuse of flags and emblems. The same applies to the use of specially protected objects, such as places of worship, hospitals and cultural monuments as shields from attack.[32]

Another example of how notions of chivalry and honourable conduct have found their way into binding legal provisions is in rules relating to the inviolability of parlementaires and respect for flags of truce and for ceasefires and armistices, for example, to negotiate terms of surrender or to permit collection and treatment of the wounded, or evacuation of non-combatants. These rules of treaty and custom are based on long-standing practices in the conduct of warfare and have their root in notions of chivalry and martial honour as referred to above. This likewise applies to the manner in which capitulations are to be carried out and observed "in accordance with the rules of military honour" and the concomitant requirement that "once terms have been settled they must be scrupulously observed".[33]

A final example of how elements of chivalry and military honour have found their way into the law is to be found in certain of the provisions relating to the

[28] AP I, Ibid., Article 38:2; Rome Statute of the International Criminal Court, Rome, 17 July 1998, U.N. Doc. A/CONF.183/9, Article 8, para 2(b), vii.

[29] HR 1907, *supra* note 27, Article 23C.

[30] Ackerman 2003, pp. 115–137 at 126, 127.

[31] HR 1907, *supra* note 27, Article 23D; AP I, *supra* note 27, Article 40.

[32] AP I, *supra* note 27, Article 51:7.

[33] HR 1907, *supra* note 27, Article 35.

treatment of prisoners of war. Prisoners of war are allowed to wear their uniforms, badges of rank and nationality, decorations and retain personal items, including money and objects of value (within certain conditions). These rules have to do with respect for the military honour of the captured personnel and function alongside provisions relating to prohibition of violence, cruelty, mistreatment and insult to not only safeguard their well-being, but also to set them apart from convicts and persons suspected of criminal offences. They are to observe military protocol and respect in matters such as saluting only officers of higher rank and officers and prisoners of equivalent status and receiving in turn the recognition of respect due to their rank and status.[34] The internal hierarchy and (military) customs of the captured personnel is generally recognised and respected in so far as it is not prejudicial to security and good order, with the ranking officer or non-commissioned officer among the prisoners normally serving as POW representative to the camp commander. They are subject to the military disciplinary system of the detaining power with the same rights and obligations as members of its own forces.[35]

The above-mentioned examples of rules and the practices which underlie them have their root in notions of chivalry, military honour and mutual respect which form part of military tradition. While these examples are not exhaustive, they do serve to illustrate how many elements of chivalry and honourable conduct, alongside military tradition relating to these notions, have been incorporated into binding legal rules of the law of war. As such, chivalry and honourable conduct can qualify as a fundamental principle of the law of war from which rules and prohibitions of a binding legal nature are derived. Whether one sees it as a separate fundamental principle alongside military necessity, humanity, distinction and proportionality, or as being incorporated into these, is less important than the fact that it exercises the function that all of these fundamental principles do as the foundation upon which positive legal obligations contained in treaty provisions and custom are based.

2.3.1 Chivalry as a Guiding Principle

What has been said above in relation to the incorporation of elements of chivalry and honourable conduct into positive legal obligations should not obscure the fact that not all of its elements, especially many notions of martial honour deriving from military tradition, are necessarily "law" in the sense of constituting positive rights and obligations. However, the functions of a general principle are not only to

[34] Convention (III) relative to the Treatment of Prisoners of War (Hereinafter GC III), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf. Articles 27, 39, 40, 43–45.

[35] GC III, Ibid., Articles 22:3, 82:1, 87:1.

serve as a basis for specific rules and obligations, but as a means of aiding in the interpretation of such existing obligations and filling gaps where these exist. In this sense, principles of law are legal tools which aid and complement specific rules contained in treaties and customary law. While principles are rarely cited in court decisions as a source of specific obligation,[36] they are sometimes referred to in the sense of noting a generic obligation, such as is the case with the well-known "Martens Clause", or as an assist in interpreting specific rules.[37]

In a wider sense, general principles can also refer to extra legal considerations, which function alongside the law in a strictly positive sense, as a means of regulating conduct and denoting obligations of a moral or ethical character which have a place alongside the binding rules of law. No aspect of human behaviour, including warfare, is simply a question of legal rights and prohibitions, important as these are. Behaviour in war as in peace is also regulated by considerations of morality, trust, courtesy and tradition, as well as on the basis of considerations of policy and good sense. This applies in a more general sense as well. For example, while the concept of equity is part of the law in most legal systems, the broader notion of "fairness", from which equity is largely derived, includes both legal and extra legal considerations and as such is more than just a purely legal notion. Certain legal rules may be perfectly "legal" in the sense of being legally binding and having been adopted in accordance with established procedure, however, this does not guarantee they will inevitably be "fair" in all circumstances in the sense of providing the right outcome and doing justice to all concerned.[38] Likewise, while law and fundamental notions of morality generally coincide to a considerable extent, this is not inevitably the case, nor is it always possible, or perhaps desirable in all situations, particularly in cases where morality is equally "grey" or contested just as law sometimes is. It can be highly dangerous to allow individual notions of morality to prevail over legal considerations, since the latter normally represent a *communis opinio* of what is acceptable conduct and what is an acceptable response to misconduct, rather than one's own private sense of what is "right" or "wrong". Nevertheless, there is still a place, indeed a need, for extra legal considerations as a means of governing conduct alongside positive legal obligations, as a complementary means of regulating conduct.[39] In almost all cases, in the event of a clash between positive legal obligations and those of an extra legal character, the former will prevail at the level of society at large (if not always at the individual level), although most legal systems will take account of non-legal considerations and ethical motivations to at least some extent in

[36] Van Hoof 1983, pp. 144–146.

[37] For example in ICJ, *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, General List No. 95, 8 July 1996, I.C.J. Reports 1996, http://www.icj-cij.org/docket/files/95/7495.pdf, p. 226, para 78 at p. 257.

[38] For an extensive treatment of "fairness" as both a legal and overarching ethical principle, see Franck 1995, Chapters 1 and 2.

[39] A modern classic dealing with the ethical dimension of war is Micheal Walzer's *Just and Unjust Wars*, Walzer 1977.

apportioning blame and determining the consequences of unlawful behaviour. The notion of peremptory norms of a *ius cogens* nature is an instrument which brings together, to a large extent, the concepts of law, justice and morality,[40] and many of the rules and fundamental principles of the law of war constitute such universally binding obligations, but even these do not cover all possible situations and contingencies.

What does all of this have to do with chivalry, one might ask? The answer may lie in this ancillary function of general principles of law (and conduct) in general sense as a guiding principle alongside the law, and a possible complementary role or function of chivalry and honourable conduct in particular. An example may serve to illustrate what this function might be.

In the ongoing controversy relating to "Direct Participation in Hostilities", one of the most contentious issues has been the purported effect of the principle of military necessity as an additional restraint upon the conduct of hostilities, with one side of the argument contending that, in addition to the rules of humanitarian law and without prejudice to the applicability of other bodies of international law (i.e. human rights law), hostilities are also limited to what is strictly required under the circumstances, leading to an additional legal obligation to capture enemy personnel rather than target them in combat situations when this is not strictly required by the rules of International humanitarian law. This is fiercely contested by a significant number of experts in the humanitarian law of armed conflict who argue that the constraints on attacks cannot be derived from general principles and are contained in the rules themselves, and that there is *a fortiori* no legal obligation to capture persons subject to attack, rather than target them in the conduct of hostilities.[41]

Without pronouncing either side in this contention to be either "right" or "wrong", I believe a possible solution lies elsewhere, namely in looking for the influence of chivalry and military tradition, not so much in the sense of a guiding legal principle, but as an extra legal consideration, which has long played a role in the way battles and engagements are conducted when circumstances and conditions permit. There is a long tradition of offering surrender as an "honourable alternative" to hopeless resistance in situations of overwhelming superiority, which has been referred to previously. While part of this has long been part of the law, in the sense of requiring quarter be granted when surrender is offered, there is no strictly *legal* requirement to offer surrender to an outnumbered, outgunned or surrounded adversary who has no realistic option of prevailing or escaping intact, but has not (yet) indicated the intention to surrender. This is neither a part of the law now, nor has it ever been so. Nevertheless, this has a long tradition in the practice of adversaries on the battlefield, and while it is not a matter of the *law* of war, it could be said to be part of the *custom* of war in a non-legal, but no less

[40] Van Hoof 1983, pp. 153–156.

[41] ICRC 2008, Chapter IX; For criticism see *inter alia* Schmitt 2010, Watkin 2010, and Hays Parks 2010 and the reply thereto by Melzer 2010.

persuasive sense. It is not derived from an additional legal constraint on the conduct of hostilities emanating from the principles of military necessity, or humanity, but rather from a tradition and custom which has its roots in chivalry and "fair play" between adversaries. Unlike legal obligations under the contemporary law of armed conflict, it is largely a matter of reciprocity in the sense of honour and respect for adversaries who have conducted themselves bravely and in accordance with the rules and customs of war, as well as from a sense of sharing the same dangers. It flows additionally from a sense of basic humanity; humanity here not in the sense of a binding legal rule, but as a consideration of morality and ethics.

Viewed in this way, there are few military officers who would deny the existence of such a tradition or deny that when circumstances permit, it would be the honourable and "decent" thing to do to offer an adversary a fair chance to surrender rather than fight on hopelessly and needlessly sacrifice lives. Of course, since this custom is based largely on mutual respect, it is hard to imagine such an offer being made to an adversary which had not fought honourably and who instead had used every opportunity to violate the law and custom of warfare. Nevertheless, even in such circumstances, considerations of ethics, alongside those of policy (for example, counter insurgency doctrine poses restraints on hostilities which can go well beyond what is required as a matter of legal obligation), might well militate in favour of moderation. Regardless of whether one acted out of a sense of moral obligation, mutual respect and sense of honour or policy; it would not be a question of binding legal obligation, but a matter of either morality and chivalry, or good sense and expediency, which acted as a restraint in situations where one enjoyed overwhelming superiority and offered an adversary the option of surrender. Such restraints could well have the same effect in many cases, without causing the level of controversy that has resulted over the purported binding nature of obligations not contained in positive rules of law. They would act as a complement to binding legal obligations, also based on a combination of considerations of chivalry and humanity (now as part of the law), which prohibit denial of quarter and conducting hostilities on the basis of "taking no prisoners" when surrender is offered. There is a fine line between legal and extra legal considerations, but they are distinct. Violation of a legal obligation, carries with it legal responsibility and possible trial and conviction for commission of a war crime, while the other does not. Nevertheless, non-binding moral obligations and traditions can also act as a powerful incentive for particular conduct and are no less relevant for not having a legal sanction attached to them.

2.4 Chivalry's Relevance and Limits in Warfare

The example of the role of chivalry in relation to the controversy surrounding the role of basic principles in relation to the question of direct participation in hostilities illustrates how chivalry and honourable conduct is both part of the law in

the sense of being partly incorporated into binding rules, in this case relating to the duty to accept surrender when offered, while at the same time acting as a guiding principle which has a legal function in assisting the interpretation of specific rules and an extra legal dimension alongside the law as a reflection of practice and military tradition, for example, in offering an adversary which has no prospect of successful resistance or escape a chance to surrender. It also is an indication that chivalry is both a general principle of the law upon which specific rules are based as well as a principle of the custom or practice of warfare in a non-legal sense. It provides a good case for illustrating its continued relevance, even in contemporary warfare between mismatched opponents in terms of capabilities, motivation and methods of fighting, at least in some circumstances.

While this does not signify that considerations of chivalry will always determine the way in which adversaries conduct themselves, it does show that such considerations can have relevance even now. It should be borne in mind that even in "classical warfare" between reasonably like-minded opponents pitted against each other in face to face battles, chivalry never determined the outcome, nor did it prevent the intensive use of force and violence to achieve the desired outcome (eighteenth and nineteenth century battlefields were "killing fields" by today's standards). Likewise, it never prevented the use of weapons and tactics aimed at negating the advantage of the opposing side as a whole or of neutralising the superiority the adversary possessed in a certain arm of the army or method of fighting. Archers were used to mow down mounted knights at Crecy and Agincourt, just as massed volley fire smashed the assault of Napoleon's cavalry and elite infantry at Waterloo, and guerrilla tactics and deception have been used throughout warfare by a weaker opponent against a stronger one to neutralise their superiority in open engagements. (Long range) missile warfare, whether by means of ballista, long or crossbow, musket, artillery, machinegun or sniper rifle (or for that matter helicopter gunships or missile armed unmanned aerial vehicles or "drones"), has been part of warfare for centuries and is the "great leveller", making no distinction between rank, class, skill or bravery of the recipients. Superior firepower has also long been used to neutralise superior skill, location or mobility possessed by an adversary as, for example, in the use of aerial supremacy by the Allies in their breakout from Normandy in 1944, or its use by US forces in the fighting in Vietnam.[42] In short, chivalry and martial honour have never precluded maximising one's advantages and neutralising those of the opponent, except in so far as certain conduct (e.g. perfidy) or weaponry (e.g. poison) has been banned as illegal. This has not, however, prevented it from exerting an influence on the way war was conducted and inducing a degree of restraint and mutual respect between adversaries in so far as this was feasible and not incompatible with military requirements under the circumstances.

[42] For a comprehensive study of how the elements of firepower, manoeuvre and mobility interacted in Western military history from ancient to modern warfare see Jones 1987.

Does this still hold true today? Can notions of chivalry and honourable conduct still have relevance in the context of post modern asymmetrical warfare? The answer to this is, in my view, a qualified "yes". On the negative side of the ledger are several considerations, including: a much greater gap in capability between modern well equipped armed forces on the one hand and their increasingly likely opponents on the other, a corresponding greater disregard by most non-State armed groups for the laws of war (much less for extra legal notions of chivalry and honourable conduct) than in traditional engagements between regular armed forces, and the influence of extremist ideology, religion and ethnic hatred, along with extreme reactions thereto in the form of bending or violating the rules and conventions of warfare as both a means of punishment and as a form of expediency to overcome (perceived) disadvantages posed by the disregard of legal and moral restraints by many such non-State armed groups. Put simply, many would question why one should fight in accordance with notions of chivalry and honour, or even in accordance with the laws of war against a foe which has no regard for them and routinely violates the law of war, indeed sometimes uses it as a means of gaining a military or propaganda advantage.

On the positive side of the ledger is the fact that the law of war has obtained a degree of acceptance, authority and universality that has made it an inescapable part of today's perception of what is minimally required conduct in armed conflict. This includes those rules and principles which have their roots in chivalry and honourable conduct, some of which were referred to above. Another factor is the fact that, notwithstanding the above-mentioned negative considerations relating to much of contemporary warfare alongside the inherent limitations of chivalry in relation to maximisation of advantage in weapons and tactics which have always existed, there are compelling legal, moral and policy reasons for conducting oneself honourably irrespective of whether the other side does so. From a legal standpoint, adherence to the law is required, regardless of whether the opponent does so or not. From a moral standpoint, disregard of law and indeed of extra legal considerations of basic humanity and honourable conduct strips the violator of the right to condemn the conduct of the adversary and risks sacrificing the very values one is defending. From a policy standpoint, respect for the law, fairness and honourable conduct will strengthen morale and sense of purpose among the forces engaged and will significantly strengthen domestic and international acceptance of the use of force and the way it is employed.

In sum, while there are undeniable challenges to the law and to conducting warfare in accordance with notions of chivalry and honourable conduct, in contemporary warfare there are compelling reasons to do so despite them. Such challenges have always existed in one form or another and some of them are not as new as is sometimes supposed (irregular/asymmetrical warfare and even the use of terror tactics as psychological warfare, for example, are nothing new). Adherence to the law and to ethical and other principles, such as military honour, are both required from a legal and ethical standpoint and moreover do not prevent or significantly hinder achieving the objective of war, which is, as it always has been "to win". On the contrary, they can make a significant contribution to achieving

one's objectives both in a narrow sense of achieving military objectives (for example, treating prisoners humanely and honourably, not only is the "right" thing to do, but makes it more likely that an adversary will surrender when successful resistance is no longer possible, thereby saving lives and resources of one's own side) and in a wider sense of adhering to fundamental notions of decency, humanity and fairness which are what one is ultimately fighting to preserve. Adherence to chivalry and honourable conduct may also well contribute to achieving a reconciliation between former adversaries once hostilities have been concluded.

2.5 Conclusions

Our short examination of the notions of chivalry and honourable conduct leads to a number of conclusions. Firstly, chivalry and martial honour have always been part of the "the code of the warrior" and have played a significant role in the development of the law of war. Secondly, they have been incorporated into numerous binding rules of treaty and customary law and as such perform the function of a general principle of law, which include the fundamental principles of the law of war as a normative framework and a basis upon which specific obligations are based. Thirdly, that as a fundamental principle of the law of war, they perform another of the functions of a general principle of law, namely as a means to assist in the interpretation of the law and as a guiding principle in both a legal and in a wider sense of incorporating extra legal considerations of ethics and military tradition into the practice of warfare. On the basis of these conclusions, it seems fair to say that chivalry and honourable conduct are still a principle of the law of armed conflict and can have relevance in contemporary warfare, notwithstanding undeniable obstacles and challenges to their application.

One area where these different functions of chivalry operate as a basic principle of the law of armed conflict and as a guiding principle which takes account of extra legal considerations of an ethical and policy nature as well as incorporating long-standing military practice and tradition is in relation to the controversy surrounding the question whether the principle of military necessity provides for legal restraints in addition to obligations contained in treaties and custom; specifically in relation to the question whether a legal obligation exists to capture rather than target an enemy combatant or fighter directly participating in hostilities under certain circumstances. I have argued that the solution to this controversy may lie in the double role of chivalry, both as a foundation for positive legal obligations prohibiting denial of quarter and the duty to not conduct hostilities in a manner which precludes survivors being taken prisoner, and as a guiding principle based on ethical considerations and long-standing military practice and tradition, whereby an adversary who has no feasible chance of successful resistance is offered a chance to surrender.

The profession of arms has always included considerations of honour in the conducting of hostilities and treatment of a defeated or helpless adversary and persons not under arms, alongside considerations of basic humanity and military necessity. There are no compelling reasons to conclude that this has fundamentally changed in contemporary warfare, or that it ought to change as a result of changed technology or lack of adherence to such considerations by many adversaries. Chivalry and honourable conduct in this context are not about romantic notions of courtly behaviour and jousting on horseback to win the favour of a fair lady, but rather are part of the professional and ethical code of any member of the armed forces, as well as being part of the law of war as long as it has existed.

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