Tilburg University

Siege warfare in the early Modern Age

Lesaffer, R.C.H.

Published in:
The nature of customary law

DOI:
[10.1017/CBO9780511493744.009](https://doi.org/10.1017/CBO9780511493744.009)

Publication date:
2007

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):
Lesaffer, R. C. H. (2007). Siege warfare in the early Modern Age: A study on the customary laws of war. In A. Perreau-Saussine, & J. B. Murphy (Eds.), *The nature of customary law: Legal, historical and philosophical perspectives* (pp. 176-202). Cambridge University Press. <https://doi.org/10.1017/CBO9780511493744.009>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Siege warfare in the Early Modern Age: a study on the customary laws of war

RANDALL LESAFFER

The sack of Tienen

On 8 June 1635, a Franco-Dutch army, under Stadtholder Frederick Henry (1625–1647), arrived before the town of Tienen. Three weeks earlier, the French had entered the Spanish Netherlands and had joined up with the Dutch troops of Frederick Henry. Now, the joined forces had begun their march towards Brussels.

The purpose of the invasion was to drive the Spanish from the Netherlands. Pamphlets were circulated to exhort the people of the Spanish Netherlands to rebellion.¹ The small town of Tienen was part of the first line of defence of Brussels. A Spanish force of 1,200 men under Captain Martino de los Arcos, well supplied with arms and ammunition, was there to defend the town.

Upon his arrival, Frederick Henry sent a trumpeter to summon surrender. He promised the burghers of Tienen their liberties and the practice of their religion. Without consulting the town magistrate, Captain De los Arcos refused. He stated that 'the arms of his Majesty were in town and that it was not customary in such circumstances to surrender a place or town without having seen and heard one another, as both had powder and ammunition'.² The next day, the trumpeter made two more appeals; twice he was turned down. Meanwhile, De los Arcos promised the town magistrate to surrender after the first skirmishes.³

¹ Letter of the Cardinal-Infante, 6 June 1635, Brussels, General National Archives, Council of State 1599.

² Tienen, City Archives, J.L. de Wouters d'Oplinter, *Extract uyt sekere oude schriften, berustende ten comptoir, opden stadhuyse der stad Thienen* . . . (s.d.) (my translation).

³ A. Van Gramberen, 'Over de verwoesting van Tienen in 1635', *Hageland Gedenkschriften*, 6 (1912) pp. 158–63.

Surprisingly, there were no skirmishes before the main assault. Around 1.30 p.m. the enemy artillery opened fire and 6,000 men started the attack. After four hours of fighting, the Spanish captain agreed to request terms of surrender. The town magistrate had convinced him, arguing that his honour was safe.⁴ An agreement to cease hostilities was reached with a French officer. Frederick Henry refused to commence negotiations before the Spanish commander came out to meet him. De los Arcos delayed for half an hour, which proved fatal. During that interval, the Dutch and the French forced an entrance into the now undefended town and started to plunder and sack it brutally.

The French and the Dutch leaders were embarrassed by the events at Tienen. The sack dealt the deathblow to the coalition's hopes to win over the population of the Spanish Netherlands. It did not take the allies long to lay the blame at each other's doorstep.⁵ Frederick Henry attempted to deflect part of the blame by taking some disciplinary measures.⁶ The Spanish government in Brussels made the most of the dreadful event to discredit its enemies and secure itself against an uprising. Its counter-declaration of war against France referred to the cruelties committed against 'the town of Tienen, God, the Sacraments and churches, priests, religious men and women, elderly, women and children'.⁷

Siege warfare before Westphalia

Under the laws of war, a besieged town had the right to a negotiated surrender. When it asked for terms in time, it would be spared plunder or massacre. If it was taken by assault, it could be sacked and pillaged and quarter could be refused to all inside. Moreover, if a town had not surrendered before the batteries of the artillery of the enemy had been

⁴ P. V. Bets, *Campagne des Français et des Hollandais dans les provinces belges en 1635 et Notre-Dame consolatrice de Tirlemont* (Brussels, 1859); Jean-Antoine Vincart, *Les Relations militaires des années 1634 et 1635, rédigées par Jean-Antoine Vincart* (Brussels, 1958); Lutgart Vrancken, 'Tienen in de eindfase van de 80-jarige oorlog 1621-1648', in *Tienen 1635. Geschiedenis van een Brabantse stad in de zeventiende eeuw* (Tienen, 1985), pp. 13-54; Jan Wauters, *Bijdragen tot de geschiedenis van Tienen* (Tienen, 1962).

⁵ See, e.g., J. A. De Worp (ed.), *De briefwisseling van Constantijn Huygens (1608-1687)* (The Hague, 1914), vol. 3, p. 317; François de la Rochefoucauld, *Oeuvres* (Paris, 1964), p. 417.

⁶ Letter of Constantijn Huygens to Amalia of Orange of 10 June 1635, in De Worp, *Briefwisseling* (The Hague, 1913), vol. 2, p. 73.

⁷ *Declaration de son Alteze touchant la guerre contre la Couronne de France*, 24 June 1635 (my translation).

raised and fire had been opened, it lost its right to negotiated surrender. This meant that the garrison and citizens could only throw themselves at the mercy of the enemy in surrendering unconditionally later on.

The sack of Tienen reads like a textbook example for a discussion on these rules. The Spanish felt they had the law on their side in strongly making their case. For his part, Frederick Henry was undoubtedly aware of the rules when he reprimanded De los Arcos for having stalled too long and for having brought disaster over Tienen himself.⁸ Whether the coalition army broke the laws of war turns on the question whether its soldiers took Tienen before negotiations had begun and before a truce had been agreed or not. According to one French commander, a cease-fire was agreed – at least on his section of the parapet – when the Spanish first asked for parley.⁹ But it is not clear whether this truce applied to the entire front. Also, it may have been countermanded by the Stadtholder's demand to see De los Arcos in person before negotiations could start. Frederick Henry was indeed clever, if not sincere, in reprimanding De los Arcos. Under the laws of war, he could not reproach De los Arcos for not answering the first summons, but he upbraided him for having waited so long to ask for terms and for stalling on coming out. In doing so, he did not deny outright that parley had begun, but laid the responsibility for the confusion that led to the sack with the Spanish commander.

The basic rules concerning siege warfare were established in the Late Middle Ages. Beneath them lurked a double logic that made for a self-defeating combination. On the one hand, the besieging army wanted the siege to be brief. Raising the cost of resistance was a potent argument to persuade a town to surrender or to stir up dissent within the walls.¹⁰ Honour was also involved. It was considered an insult for citizens to refuse a summons from a prince. This insult caused the forfeiture of life and goods. On the other hand, the sovereign of the defending garrison had an interest in the defenders holding out as long as possible. Again, honour – of the defending commander – was at stake. The practice of the Late Middle Ages shows both these concerns. According to late-medieval custom, a military commander who surrendered before the first gunshot

⁸ Vrancken, 'Tienen', p. 34.

⁹ Letter of General Espanin to Cardinal De la Valette, 25 July 1635, in Erycius Puteanus, *De obsidioni Lovaniensi* (Leuven, 1636).

¹⁰ Raymond de Fourquevaux, *The Instructions sur le Faict de la Guerre of Raymond de Beccarie de Pavie, sieur de Fourquevaux* (1548, G. Dickinson, ed., London, 1954), chapter 3, pp. 82–3.

was fired was presumed to have acted treasonably. The dual logic behind the rules of siege warfare left him in a quandary. The Hundred Years' War abounds with examples of harsh reprisals against towns that, and commanders who, defended themselves obstinately. Also, examples can be quoted about commanders brought to trial for having failed to hold on long enough.¹¹ In this sense, the behaviour of Captain de los Arcos at Tienen becomes understandable.

The Military Revolution (1560–1660) changed the face of warfare. Sieges superseded pitched battles at the apex of war. The Eighty Years' War (1568–1648) between Spain and the United Provinces is a prime example of this new kind of warfare. The war offers insight into the application of the laws of war in relation to sieges. In a letter to King Philip II (1555–1598), the Spanish general Fadrique Alvarez de Toledo (1537–1583) proposed to treat, upon recapture, towns that had surrendered to the Dutch before the batteries were raised while having the means of defence, on the same footing with towns that had acted treasonably and defected to the Dutch. But towns which had been taken by storm or after the batteries of the artillery had been raised, had to be pardoned. Don Fadrique's statement reflected the two concerns underlying the law. Towns that surrendered too readily would be punished, but obstinate defence was not required.¹²

In the first years of the Eighty Years' War, dozens of towns were taken and retaken. Some towns were sacked after they had been taken by storm and some received lenient conditions after an obstinate defence. In 1572, the Spanish sacked Mechelen after it had been taken by storm. Some months earlier, the town had refused entrance to a Spanish garrison and allowed the Dutch rebels in. Many towns, such as Zutphen (1572) and Naarden (1572), were sacked in subsequent years. The Spanish command singled out these towns because of their rebellious obstinacy and hoped to turn them into examples. In all, these massacres remained more exception than rule. Haarlem, which had held out against its besiegers for months and had forfeited its rights to

¹¹ Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London, 1965), pp. 119–29; Theodor Meron, *Henry's War and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (Oxford, 1993), pp. 75–130; Geoffrey Parker, 'Early Modern Europe', in Michael Howard, George J. Andreopoulos and Mark R. Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World* (New Haven and London, 1994), pp. 40–58, at p. 48.

¹² Letter of 30 December 1573, in M. Gachard (ed.), *Correspondance de Philippe II sur les affaires des Pays-Bas* (Brussels, 1851), 1st series, vol. 2, pp. 446–51.

a negotiated surrender, was granted conditions anyway (1573). The citizens were allowed to buy off plunder – not an uncommon feat – and the soldiers were given the choice between departing without their weapons and throwing themselves at the mercy of the victor. Unwisely so, they chose the latter and most were put to death. The leaders of the town archers were killed as rebels, but most other citizens saw their lives saved. The treatment of Haarlem was uncommonly harsh and, being considered treacherous by the Dutch, it did certainly stiffen the resistance. But it did not constitute a clear break with the customs of war.¹³ In the subsequent years and decades, other towns received more lenient conditions, although many of them had refused to surrender before the batteries were raised.¹⁴

The following trends can be discerned from the practices of the Eighty Years' War. First, as a rule terms became harsher the longer the besieged delayed surrender. This was a matter of expediency and deterrence. Secondly, the rule that towns which did not surrender before the raising of the batteries forfeited their right to parley was not disputed but often waived by the besieger. In the context of a rebellion, where royal honour and obedience to royal authority were at stake, this is remarkable. However, conditions were often harsh. In some cases, the town had to buy off pillage and some were killed. In other cases, conditions were more lenient.

The 'classics of international law' from around 1600, such as Pierino Belli (1502–1575), Albericus Gentilis (1552–1608), Balthasar de Ayala (1548–1584) and Hugo Grotius (1583–1645), all addressed the problem of siege warfare in their treatises on the laws of war, albeit briefly. Their expositions were fragmentary and instrumental to more elaborate discussions on enemy personnel and property.

Pierino Belli (1563), who had practical experience in military justice, commented most extensively on siege warfare. A town should only be plundered as a punishment for some 'great wrong and crime in which the whole population . . . had shared'. The resistance of civilians against

¹³ Letter of the Duke of Alva to King Philip II of 28 July 1573, in Gachard, *Correspondance de Philippe II*, vol. 2, pp. 391–2.

¹⁴ Jean-Léon Charles, 'Le sac des villes dans les Pays-Bas au XVI^e siècle. Etude critique sur des règles de guerre', *Revue internationale d'histoire militaire* 24 (1965) pp. 288–301; Léon van der Essen, 'Kritisch onderzoek betreffende de oorlogvoering van het Spaans leger in de Nederlanden in de XVI^e eeuw, nl. de bestraffing van opstandige steden', *Mededelingen van de Koninklijke Vlaamse Academie voor Wetenschappen, Letteren en Schone Kunsten van België*, 12 (1950) issue 1.

a prince was not a crime in itself. For this, Belli invoked Bartolus (1314–1357).¹⁵ But Belli's main concern was the risk of commanders surrendering their fortresses too soon, which he considered treasonable. Belli quoted examples from Roman history to deliver a moral lesson to the commanders of his day and age. Only under extreme duress – 'all the people perishing of hunger and privation' – could surrender be condoned.¹⁶ He referred to *Digest* 48.4.3, which made the commander who 'surrenders in war or recklessly yields a citadel or camp' liable for *maiestas*.¹⁷ However, this rule only applied if the commander had evil intent – treason? – or was manifestly negligent.¹⁸ For this mitigation Belli found support in the Gospel.¹⁹ At the end of his treatise, Belli repeated that a commander must not yield his fortress unless it became impossible to hold it.²⁰

Balthasar de Ayala, military auditor in the Spanish army in the Netherlands, wrote an extensive treatise on the laws of war and military discipline. Ayala referred to the basic rule of siege warfare – only conquered, not surrendered towns could be pillaged – in the context of a general discussion on enemy property. He traced the rule back to Roman history, quoting Livy. Ayala went on to argue, on the basis of *exempla* from classical history, that the division of the spoils fell to the army commanders. Sometimes, generals allowed their soldiers to plunder for themselves. But, even then, the prince must be allowed his share. Ayala also emphasised the many instances of classical history, which showed looting only to be allowed after the commanders had expressly said so. More than once the greed of soldiers had spoiled an uncompleted victory and turned it into defeat. Ayala referred to a recent ordinance of the Spanish King.²¹

In his *De Iure Belli libri tres* (1588–1589), the Oxford law professor Albericus Gentilis, announced, as a principle of the 'rights of humanity and the laws of war, that the life of anybody who surrendered to the enemy ought, on principle, to be spared'.²² The rules of siege warfare

¹⁵ Pierino Belli, *De re militari et bello tractatus* 4.8.23 (Herbert C. Nutting, trans., Classics of International Law, Oxford and London, 1936).

¹⁶ 8.1.38–42. ¹⁷ Trans. Alan Watson *et al.* (Philadelphia, 1985), vol. II.

¹⁸ 8.1.66. ¹⁹ Belli 10.2.93. With reference to Mark 13.34.

²⁰ 10.2.109–10, also 10.2.97–8, 102 and 105–6. With reference to the canon lawyer Martinus Garatus Laudensis.

²¹ Balthasar de Ayala, *De Iure et Officiis Bellicis et Disciplina Militari libri III* 1.5.4–11 (John P. Bate, trans., Classics of International Law, Washington, 1912).

²² Albericus Gentilis, *De Iure Belli libri tres* 2.17.351 (text of 1612, John C. Rolfe, trans., Classics of International Law, Oxford and London, 1933).

were discussed in the context of this general rule. First, the soldiers and citizens found in towns, which had been taken by assault, had not surrendered and thus did not benefit from this *lex generalis*. Secondly, any surrender, even at the latest possible moment, counted as surrender and triggered the application of the general rule of mercy. Gentilis supported his argument with several examples from Antiquity. He then turned to contemporary practice – like that of Alva – of refusing pardon to towns that had surrendered after the batteries of the artillery had been raised. For this practice, he also found support in Roman history – there the right to surrender was lost once the battering ram had touched the walls – and in *Deuteronomy*.²³ Gentilis did not think that this rule should be applied at all times. There was room for the belligerents to make agreements. But he acknowledged that surrender at the last moment might be refused, as a deterrent.²⁴ In relation to conditional surrender, Gentilis elaborated on the agreements whereby the besieged town promised to surrender on a given date, unless it was relieved in time.²⁵ His concern for humanity, which permeates the entire treatise, is clear from his statements about unconditional surrender. Gentilis argued that surrender at the mercy of the enemy meant that at least the lives of the defeated had to be spared. The claim that slavery was out of the question because it constituted a kind of death he called ‘a quibble of the civil law’.²⁶ Unconditional surrender meant surrender to the ‘will, control, consent, power, discretion, judgment, wisdom, grace, piety, equity, conscience, [and] declaration of the enemy’. But all these did not supersede the ‘bounds of law and custom’. Divine and human law commanded men to act according to justice and, in case of doubt, custom ‘furnishe[d] the best rule of conduct’. Custom, so it appeared, dictated moderation.²⁷

Grotius was the least explicit about siege warfare. He enumerated the sacking of a town taken by storm among the cases in which commanders according to custom allowed their soldiers to pillage, quoting examples from Roman history.²⁸ It was Roman custom that commanders could decide upon the division of the spoils, even if they were accountable to the Roman people. Grotius, however, ascertained that the municipal law could deviate from these general rules. In other words, being granted

²³ 20.12–3. ²⁴ 2.17.351–5. ²⁵ 2.17.361–2. ²⁶ 2.17.363. ²⁷ 2.17.365.

²⁸ Grotius, *De Jure Belli ac Pacis libri tres* 3.6.18 (text of 1646, Francis W. Kelsey, trans., *Classics of International Law*, Washington, 1913).

parts of the spoils constituted a favour to the army, not a right.²⁹ Grotius stated that a surrender upon the condition of life should not be rejected during battle or siege. This was a rule from the law of nature and the 'usage of more civilized peoples'.³⁰ He referred to the Roman custom that the right to surrender was lost once the battering ram had shaken the wall. The custom was now applied to unfortified towns that had awaited the opening of cannon fire. But Cicero, so Grotius went on, had counselled mercy even if surrender came after the battering of the walls had begun.³¹

All authors acknowledged the right to pillage a town taken by storm. Gentilis and Grotius had qualms about the old rule that surrender upon terms could be refused once the batteries had been raised, but they did not outlaw the custom outright. They emphasised that the victor could always grant conditions and stated that natural law, justice or honour, or even the 'usage of civilized peoples' dictated a lenient treatment of the vanquished. And, if the rule was applied, the lives of those who surrendered at the mercy of the victor should be spared. While Gentilis and Grotius were concerned with questions of morality and humanity, Belli and Ayala were more interested in military discipline and the authority of the prince over his armed forces. Dissuading commanders from yielding too readily was Belli's foremost concern. Overall, doctrine and practice rather matched.

Siege warfare after Westphalia: practice

During the century after Westphalia (1648), the military, institutional and intellectual context of European warfare changed. There was a substantial increase in the size and cost of armies. A further step was taken in the professionalisation of warfare. The century after Westphalia saw a growing control of public authority over war and the armed forces. After 1660, the old elites lost much of their political and military autonomy, in exchange for which they gained a stake in central government as its officials or officers. Whereas the Thirty Years' War (1618–1648) was the period of the military entrepreneur who rented out his services and those of his mercenaries to princes and republics, after Westphalia state control over the armies grew. The high command of the European states' armies and the corps of regimental officers might still hail from the same international, noble elites from which the great

²⁹ 3.6.19–25. ³⁰ 3.11.13. ³¹ *De officiis* 1.11.35; Grotius 3.11.14.

condottieri of the early seventeenth century sprang, but now they became officers appointed and paid by the governments. In the process of state-building, the emergence of a fiscal and logistic apparatus that served to field and sustain large armies was an important factor. War was gradually monopolised by the sovereigns of Europe.³²

The eighteenth century was the era of the so-called cabinet wars. In historiography, the idea looms large that wars became limited, in both goals and scale. Though many of the eighteenth-century wars were devastating, the thought that war under the late *ancien régime* was the domain of a professional, international elite that went about its business in a civilised way and according to strict rules, is a resilient one. The humanising ideals of the Enlightenment are often quoted in this respect. The famous episode of the battle of Fontenoy (1745), where the English commander invited the 'gentlemen of the French Guard' to fire first – which they gracefully declined – is an image too powerful not to overshadow our views of the period.³³

As a consequence of the gradual monopolisation of war by central government, the 'international' laws of war and the 'internal' rules of military discipline, imposed by public authority or military command upon the armed forces and soldiers of a single state, became two separate bodies of law.³⁴ This development was part and parcel of the more general articulation of the law of nations as an autonomous body of law, separate from private law and from municipal law. This in itself was a consequence of the emergence of the internally sovereign state and its attempt to monopolise international relations, including warfare. Central governments, in their desire to monopolise warfare, tried to usurp the field of military discipline and everything related to the inner control over the army and to isolate it from the body of law dealing with the interaction with foreign body politics and foreign armies. The change can be discerned in practice as well as in doctrine. For practice we refer to the emergence of municipal legislation on military law and jurisdiction in the form of general ordinances issued by the prince, and

³² David Parrott, *Richelieu's Army: War, Government and Society in France, 1624–1642* (Cambridge, 2001); and Guy Rowlands, *The Dynastic State and the Army under Louis XIV: Royal Service and Private Interest, 1661–1701* (Cambridge, 2002).

³³ Armstrong Starkey, 'War and Culture, a Case Study: The Enlightenment and the Conduct of the British Army in America, 1755–1781', *War & Society*, 8 (1990) pp. 1–28.

³⁴ Barbara Donagan, 'Codes of Conduct in the English Civil War', *Past and Present*, 118 (1988) pp. 65–95, at pp. 75–6 and 82–4.

codes of conduct issued by military high command.³⁵ These came, at least partly, to replace the customs of war and military discipline that had been developed by the professional international elites since the Middle Ages. Doctrine offers another example. While Ayala and Belli's treatises, as their titles indicate, covered both the laws of war and the rules of military discipline, later treatises did not. The authors of the seventeenth and eighteenth centuries who dealt with the laws of war restricted their discourses by and large to the 'international' laws of war. References to military law became instrumental to the discourse on the laws of war, for example when the author discussed the application of an 'international' rule at the municipal level.

Let us first turn to the 'international' laws of war. Although many towns were sacked during the late seventeenth and early eighteenth centuries, the large majority of successful sieges ended in negotiated settlements. As the customs and rituals of siege warfare became more elaborate, so did the agreements or treaties of surrender – the capitulations. By the beginning of the eighteenth century, however, some stipulations had become so customary that they were briefly referred to without them being expounded. During the seventeenth century, if a capitulation granted a garrison the right to leave with all honours of war, it was stated in detail what that meant. In some eighteenth-century capitulations, there was only a brief reference to the customary marks of honour.³⁶

If a garrison or city magistrate, or both, asked for parley, a truce was agreed. During the truce, all siege or fortification works had to be stopped. Hostages were exchanged. The surrendering town then proposed terms, which were accepted, amended or rejected by the besieging commander. Besieger and besieged often agreed on a period after which the defenders, if the siege was not broken or lifted, would surrender.

Though it was almost never applied, not all traces of the old rule that a town which had not surrendered before the batteries of the artillery had been raised lost its right to conditional surrender had disappeared from

³⁵ For the Spanish Netherlands, the ordinances of 23 May 1587, 7 November 1601, 13 May 1613, 28 February 1628, 18 December 1701 and 10 April 1702.

³⁶ [C]on todos los honores militares': Capitulation of Barcelona of 10 August 1697, Art. 1, in Clive Parry (ed.), *The Consolidated Treaty Series* (Dobbs Ferry, 1969), vol. 21, pp. 343–5, at p. 345 (CTS); 'toute marques d'honneur qu'on peut donner en pareil cas': Capitulation of Guelders of 12 December 1703, Art. 5, CTS, vol. 21, pp. 15–23, at p. 18; 'avec les marques d'honneur accoutumées': Capitulation of Ulm of 11 September 1704, Art. 1, CTS, vol. 25, pp. 157–61, at p. 159.

memory. In its stead came the rule that a town which surrendered too late was open to pillage and the commander forfeited his life. Surrendering too late now meant that a breach had been made and the artillery of the enemy had come within a hundred yards of it. But the rule rather served as a threat than that it was actually observed.³⁷ To the contrary, the courageous defence by a military commander – not by a civilian – was often referred to as honourable.³⁸ The balance between deterrence and honour shifted to the latter. The honour of the professional officers was considered of great value and was reciprocally respected. However, obstinacy was not endlessly condoned.³⁹ Also, it came to be expected⁴⁰ that a town or fortress surrendered as soon as its rations and ammunition were down to two days, so that the town would not have to be supplied by the victor.⁴¹ Rationality and honourable behaviour were expected from both sides.

Towns that did not have a royal garrison within their walls were to surrender upon first summons from a royal army. This was an army of a sovereign prince or republic that had artillery. It was also considered dishonourable for the commander of a 'royal' garrison to surrender before the first shots were fired. In view of the evolving rule about belated surrender, this did not leave him with an insurmountable dilemma like before, although municipal rules still could cause this.

In most cases, a capitulation granted the defeated garrison the right to depart with all honours of war. A time was settled at which the garrison would start the evacuation. Often, one of the gates would be surrendered to the besieger in advance, as a surety. The capitulation stipulated through which gate or breach the garrison was to leave. The treaties were most elaborate on the matter of 'honours' granted the besieged. In many cases, these implied that the soldiers would leave with their weapons and luggage, drums beating, trumpets sounding, flags flying,

³⁷ See the fall of Verrua in 1704 to the troops of the Duke of Vendôme (Louis Joseph, 1654–1712). The Duke threatened the commander of the garrison, who had held out to the last moment, with death after he had surrendered to the mercy of the Duke, but the threat was not carried out; John Wright, 'Sieges and Customs of War at the Opening of the Eighteenth Century', *American Historical Review*, 39 (1934) pp. 629–44, at pp. 631–3.

³⁸ Capitulations of Lille of 23 October 1708, CTS, vol. 26, pp. 229–50.

³⁹ Note 37 above.

⁴⁰ When Rheinberg surrendered after all supplies were exhausted, the defending commander received marks of honour: Capitulation of 7 February 1703, in Wright, 'Sieges and Customs of War', p. 640.

⁴¹ Wright, 'Sieges and Customs of War', pp. 631–3.

arms at the ready, match lighted on both ends and bullets in their mouths – as they would have in battle. But in some cases, conditions were not so lenient and the departing garrison had to march in a more subdued way. Leaving without arms was the harshest treatment, short of being made prisoners of war.⁴² The commanders in most cases agreed that the victors would not try to persuade the soldiers of the departing garrison to change sides. The defeated garrison was allowed to take some cannons and ammunition. The capitulation normally stipulated to which place the garrison would retreat, in how many days and by what route. It also included provisions about the escort that would accompany it and about passports. Food and supplies for a number of days – usually four – were to be provided by the victor, as well as transport. The capitulations almost always stipulated the exchange or release – usually without ransom – of prisoners of war. They provided for the payment of all debts the soldiers of the garrison had to the civilian population. But in most cases it was agreed that no soldier could be detained on account of those debts. The departing soldiers – and, eventually, the citizens – were granted a fixed period – often three months – during which they could sell their assets in the fallen town. The terms of capitulations greatly varied in regard to the treatment of deserters. Under some treaties, the defeated army was forced to surrender them; in other treaties, it was stated that the defeated army was allowed to use covered wagons which would not be searched. In still other treaties, it was expressly stated that deserters were allowed to leave with their new comrades.

As the seventeenth century turned into the eighteenth century, the treatment of the garrison and of civilians became formally distinguished in the capitulations. The agreements now fell into two distinct parts and often conditions were negotiated separately. This was a consequence of the professionalisation of war and its monopoly by the state. In the century after Westphalia, war became not only the business of professional soldiers, but also of the princes of Europe, not of their subjects. Though, of course, civilians largely remained the victims of war, they came to be treated to an ever greater extent as its innocent victims, who upon conquest transferred some of their obligations to their new – often temporary – masters.⁴³ On the other hand, rebellious towns as a rule

⁴² Capitulation of Diest of 25 October 1705, CTS, vol. 25, pp. 339–42.

⁴³ Irénée Lameire, *Théorie et pratique de la conquête dans l'ancien droit: Etude de droit international ancien* (5 vols., Paris, 1902–11).

were refused conditions and were expected to throw themselves at the mercy of their sovereign.⁴⁴ Apart from this, the large majority of sieges ended with liberal terms for the civilian population. Their liberties were safeguarded, as were their lives and property.⁴⁵ Some capitulations allowed citizens who chose so to leave with the garrison. Capitulations also laid down the conditions under which the victor could occupy the town.⁴⁶

Let us turn to the municipal laws of military conduct. The municipal ordinances of the seventeenth and eighteenth centuries were by and large concerned with matters of jurisdiction and procedure. The substantive laws applied were either customs and codes of conduct issued by military commanders or rules taken from the *ius commune*, Roman law.⁴⁷ Later on, royal ordinances, such as the famous Ordinance of Philip V of Spain (1700–1746) of 18 December 1701, included substantive military law, defining misdemeanours and punishments.⁴⁸

As regards siege warfare, two things stand out. First, governments aspired to bring plunder under their control. In the Spanish Netherlands, the rule was introduced that soldiers could only gain ownership over booty through a decision of the auditor of the army.⁴⁹ Secondly, concern about early surrender remained. King Louis XIII of France (1610–1643) instructed his commanders only to surrender after the enemy had made a wide breach in the walls and several assaults had been pushed back.⁵⁰ In 1705, Louis XIV (1643–1715) ruled that commanders were only to surrender after the first assault had been repulsed once the breach was

⁴⁴ Wright, 'Sieges and Customs of War', p. 639.

⁴⁵ At Cartagena in Colombia, the French privateers who took the town were less lenient towards the civilians. The latter were allowed to leave the town, but had to leave behind all their money, gold, silver and jewellery. That these conditions were imposed upon them by privateers underscores that this was no longer common behaviour in public warfare; Capitulation of Cartagena of 2 May 1697, Art. 4, CTS, vol. 21, pp. 297–300, at p. 299.

⁴⁶ These generalisations are based on some thirty capitulations from between 1650 and 1710, all to be found in CTS, vols. 2–26.

⁴⁷ 'En jugeant, il se conforment aux Loix, & droit commun, & aux ordonnances, bans, & coutumes, privileges, & constitutions de Guerre . . .': Ordinance of the Duke of Parma of 23 May 1587 for the Spanish army in the Netherlands, Art. 24, in Pierre-Winand Clerin, *Code militaire des Pays-Bas, contenant les edits, ordonnances etc. ensemble un commentaire sur le placard du prince de Parme de 1587* (Maastricht, 1721), p. 136. See also Clerin's commentary on p. 137.

⁴⁸ Published in Clerin, *Code militaire*, pp. 275–313.

⁴⁹ Ordinance of 1587, Art. 22, pp. 127–9.

⁵⁰ Wright, 'Sieges and Customs of War', p. 630.

made.⁵¹ In combination with the rules under the law of nations, this still left the commanders with a problem. That commanders were at risk of prosecution is shown by the case of the Spanish officer Juan de Lipouby, who in 1652 had unsuccessfully defended the town of Rethel. The charges brought against him – no fewer than thirty-six – read like a catalogue of all things a defending commander could do wrong. It was, among others, alleged that he had wanted to surrender after the first assault while the enemy had only made a small breach, through which no immediate attack was to be feared; that he had refused to defend the castle though it was fortified; that he had not asked for a fixed time for surrender to allow the Spanish army to come to his rescue; and that he had forwarded the terms of surrender to the enemy instead of leaving the initiative with them. While the unlucky officer rejected most charges as being untrue, to the last charge he could answer that he had behaved as was customary under the laws of war.⁵² Though the prosecutor refrained from stating it, he implied that Lipouby had acted treasonably. An even worse fate befell the Dutch commander of a citadel in Julich in 1621. He was put to death for surrendering.⁵³

The separation of the laws of war from the municipal laws of military conduct had a salutary effect on the former. Within the limits of military law, the concern with treason and early surrender continued to loom large, but it was ostracised from the laws of war. This left them free to lord over what now became a game of deterrence and seduction, of stick and carrot, a ritual dance of threats and promises between besieger and besieged. They served as a tool to induce the besieged to surrender quickly, while still allowing leeway for even a late surrender to be worth their while. With time, the focus shifted from the deterrent capacity of the rules of siege warfare to the humanisation of warfare. The professional and international elites that officered the armies of Europe developed an elaborate etiquette, the impact of which was felt in the laws of war and the ways these were applied. The laws of war now allowed a garrison commander to hold out until the fall of his fortress was as good as certain. As long as he remained within the broad limits set by the laws of war, he was assured of honourable surrender

⁵¹ Ordinance of 16 April 1705.

⁵² '[T]oca al sitiador el proponer las condiciones por que toca notoriamente al sitiado, como tambien el cauteralas, y esto es cosa averiguado segun la costumbre de la milicia.' Brussels, General National Archives, Military Tribunals 413, charge 27.

⁵³ Cornelius van Bynkershoek, *Quaestionum Juris Publici libri duo* 1.25.4 (Tenney Frank, trans., Classics of International Law, London and Oxford, 1930).

and retreat. The kings and governments did nothing to stop this development, as they were keen to save their expensive armies from destruction. Professional warfare brought some breathing space for civilians. Though they remained targets, particularly during sieges, they were increasingly treated as non-combatants who should not be held accountable for the war or for what had happened during the siege.

Siege warfare after Westphalia: doctrine

Now we'll turn to some authors of the late seventeenth century and early eighteenth century who covered the customary laws of war of their age: Samuel Rachel (1628–1691), Johann Wolfgang Textor (1638–1701), Cornelius van Bynkershoek (1673–1743) and Emer de Vattel (1714–1767). Of these, only Textor and Vattel made more than a few remarks on siege warfare, and very concise ones at that. They were, just as Rachel and Bynkershoek, more concerned with describing the general rules about enemy personnel and property in a somewhat systematic way. The rules of siege warfare were considered either a particular application thereof or *lex specialis*.

Rachel, writing in 1676 when professor at Kiel, recognised that the law of nations – that is, the enforceable, positive law of nations – allowed the killing of all enemies, including women, children and prisoners of war, and the destruction and plundering of all enemy property.⁵⁴ This extended to private property owned by the enemy sovereign and by his subjects. For this he found support in Justinian.⁵⁵ Rachel also referred to the *Digest* to sustain his claim that enemies who had surrendered became slaves.⁵⁶ But, with Grotius,⁵⁷ he ascertained that this rule had fallen into disuse among Christians, so that it was hardly applied under the law of nations.⁵⁸ Rachel distinguished between rules of positive law of nations that were in accordance with the law of nature (*ius gentium verum*) and those that were not (*ius gentium putativum*). Whereas they were both enforceable *in foro externo*, only the former were just and enforceable *in foro interno*, in conscience. This may be seen as an implicit appeal not to apply the harsh and unjust laws of war. Rachel did not elaborate.⁵⁹

⁵⁴ Samuel Rachel, *De jure naturae et gentium dissertationes* 2.47–8 (John P. Bate, trans., Classics of International Law, Washington, 1916).

⁵⁵ 2.49. With reference to D. 41.1.5.7 and Inst. 2.1.17.

⁵⁶ D. 49.15.5.1 and 49.15.12 pr., with power over life and death, D. 1.6.1.1 and Inst. 1.6.1.

⁵⁷ 3.7.8. ⁵⁸ 2.50. ⁵⁹ 2.42 and 2.56. Some brief remarks in 2.99–100.

Johann Wolfgang Textor, professor of law at Altdorf and Heidelberg, authored *Synopsis iuris gentium* (1680). Textor accepted that, according to the positive law of nations, one was allowed to harm his enemy, his subjects and their property during war.⁶⁰ Women and children, however, often fell within the protection of the law of nations; Grotius had made a provision to that extent.⁶¹ Textor acknowledged that the killing of people should be tempered for some categories of persons – elderly, children and women – referring to a decree by Pope Alexander III (1159–1181).⁶² Whereas killing was allowed during battle, it was not when an enemy had surrendered or laid down his arms. Among those who had surrendered, the instigators of the war were allowed to be singled out for punishment, even to be killed.⁶³ Textor agreed on principle with Grotius that one should spare the lives of those who offered surrender during a battle or a siege.⁶⁴ There were, however, two exceptions. First, a besieger might refuse surrender if the town had almost been taken, as Gustav Adolph (1611–1632) had done before Frankfurt-an-der-Oder (1631). Secondly, those who had committed grave offences could be refused the right to surrender upon condition of their life.⁶⁵ Textor clung to the old rule from Roman law that prisoners of war were to be enslaved,⁶⁶ but he acknowledged that this rule had fallen into disuse among Christians. Some three hundred years earlier the custom had been introduced to ransom prisoners of war instead. Turks and other ‘barbarians’ did turn their prisoners into slaves. Though they certainly had the right to retaliate in kind,⁶⁷ Christians did not do so.⁶⁸ Whereas the law of nations allowed a victor to kill the enemies who had thrown themselves at his mercy, it befitted the captor to show clemency. Textor, however, condoned setting examples in order to secure the future safety of the state.⁶⁹

As far as captured property was concerned, immovable goods fell to him ‘under whose auspices the war [was] being waged’.⁷⁰ The same went, as indeed was customary in reality, for valuable goods such as artillery and important prisoners.⁷¹ All other booty belonged to the soldiers who took it. On this point, Textor disagreed with Grotius and other writers.⁷² Textor argued that states did not wage wars to enrich

⁶⁰ Johann Wolfgang Textor, *Synopsis iuris gentium* 18.15 (John B. Bate, trans., Classics of International Law, Washington, 1916).

⁶¹ 3.4.6–9. ⁶² X. 1.34.2; Textor 18.16. ⁶³ 18.17–9. ⁶⁴ 3.11.13. ⁶⁵ 18.22–4.

⁶⁶ With reference to Inst. 1.2.2 and 1.3.2 and to the Old Testament, Joshua 9.23–7.

⁶⁷ With reference to Alciatus (c.1490–1550) on D. 50.16.118. ⁶⁸ 18.38–42.

⁶⁹ 28.15–22. ⁷⁰ 18.63. ⁷¹ 18.63–4. ⁷² Grotius 3.6.8; Textor 18.65–6.

themselves, whereas soldiers often took considerable risk to plunder. The German professor claimed to have contemporary practice on his side.⁷³ The many examples quoted by Grotius and others to show that the spoils of war did fall to the state or were divided among the troops by the military commanders did not serve to contradict him. These were all examples whereby the enemy had surrendered or had been completely conquered. In these circumstances, of course, the spoils – all the enemy has owned – fell to the conquering state to which the former enemy now belonged.⁷⁴

The Dutch Cornelius van Bynkershoek, President of the Court of Appeal of Holland and Zeeland (since 1724), was a practitioner of law. In his *Questionum Juris Public libri duo* (1737), he stated that in war one had the power of life and death over one's enemies. If this right was seldom exercised and wars rarely escalated into wars of extermination, this was the consequence of voluntary clemency. Bynkershoek claimed that a victor might still exercise his right and was able to quote two examples from recent history where acts of treason and privateering were declared punishable by death.

He went on to relate how the right to kill had been replaced by the custom of turning enemies into slaves. This custom had, in its turn, fallen into disuse among Christians. Prisoners were now often held for ransom; they were sometimes released without ransom, or exchanged according to rank.⁷⁵ Bynkershoek also found the right to kill captives fallen into disuse. He considered it cruel and disgraceful to punish an enemy for his courage in battle.⁷⁶ Enemy property was open for capture.⁷⁷ With regard to siege warfare, Bynkershoek only addressed the matter of contraband and the supplying of a town under siege. 'Common sense and the usages of nations' asserted that it was 'not lawful to carry goods to besieged cities'.⁷⁸ Bynkershoek argued, on the

⁷³ Textor also referred to D. 41.1.5.7, Inst. 2.1.17 and D. 49.15.51.1 in support of his interpretation: 18.67–9.

⁷⁴ 18.70–5. Textor is in agreement with Hugo Donellus (1527–1591), *Commentaris de jure civili* 4.21 (Frankfurt, 1595–6).

⁷⁵ Bynkershoek here refers to the cartels of the seventeenth and eighteenth centuries, which regulated the exchange of prisoners.

⁷⁶ 1.3.18–22.

⁷⁷ Bynkershoek did not go into the question whether the booty fell to the captor or the state, but he did discuss whether it fell to the captor himself or to the person on whose behalf he worked, like a captain for a ship-owner: 1.20.

⁷⁸ 1.11.83–4.

basis of common sense, that it was forbidden to supply a besieged town with any goods, as one was not to know what the town was in need of.

In *Le droit des gens ou principes de la loi naturelle* (1758), the Swiss diplomat Emer de Vattel argued that public war pertained to the whole nation, not only to the sovereign. This was customary, but it was also in accordance with right reason and the precepts of the natural law. Enemy property was liable to capture.⁷⁹

The basic right of killing all enemy subjects and capturing all enemy property was, however, mitigated. According to Vattel, the conduct of war was governed by the – natural law – principle that a belligerent had the right to do everything necessary to attain his goal. This meant that a belligerent could do whatever was necessary to weaken the enemy as long as the act was not proscribed *per se* by the law of nature. The voluntary law of nations, as he called the positive law, laid down general rules defining these actions that were considered necessary *in abstracto* – that is, without looking at particular circumstances – to defeat the enemy and that were thus acceptable. These actions permitted by the law of nations were not punishable. Even so, taking such actions as were allowed under the law of nations might in particular circumstances be unnecessary to the war effort, and thus unjustified under the law of nature. This law was, however, not enforceable in external law, but the act then must be ‘condemned before the tribunal of conscience’.⁸⁰

From all this, Vattel deduced that one had the right to kill an enemy who had taken up arms if it was necessary to prevent him from inflicting harm. As soon as the enemy had laid down his weapons, the right to kill ceased to exist. Therefore, one had to provide quarter to enemies who surrendered or accept terms of capitulation from a town even if it was ‘reduced to extremities’. Only if the enemy had committed a ‘grave violation of the law of nations’ could death be inflicted as punishment.⁸¹ Vattel did not justify the killing of a commander who had defended his fortress to the very last, although he acknowledged this custom had not completely fallen into disuse. He found it went against the grain of his enlightened age. Vattel quoted examples from classical, medieval and modern history where the old rule had not been applied. After all, there was some rationality in obstinate defence, which might prove beneficial for the general war effort, by delaying or exhausting the enemy. Vattel

⁷⁹ Emer de Vattel, *Le droit des gens ou principes de la loi naturelle* 3.5.69–76 (Charles G. Fenwick, trans., Classics of International Law, Washington, 1916).

⁸⁰ 3.8.136–7 and 3.9.173. ⁸¹ 3.8.138–42 and 149, about not killing prisoners of war.

also rejected using the old customary rule as a mere threat, because its non-application would make it obsolete. It was permitted to try and persuade the besieged by offering gracious terms and to threaten to sharpen them as the siege continued. But one could not go beyond making the commander a prisoner of war. Only if the obstinacy was most manifest and without any purpose, as in the event that an entire state had surrendered and one single town held out, then a subordinate officer who commanded a garrison could be threatened with death.⁸² All this implied that the garrison itself and the population could never be put to death or threatened with it. On the basis of the same principle that killing could only be condoned in order to stop the enemy from doing harm, it was not allowed to kill women, children, the elderly and sick men as long as they did not take up arms. The same went for clerics, men of letters and others. Because war was the business of regular armies, all citizens who did not take up arms should be spared. This did not prevent a belligerent from capturing these people and turning them into prisoners, though Vattel recognised this was hardly ever done.⁸³ Vattel stated that prisoners of war could be kept in captivity until the end of the war, in order to prevent them from rejoining the war effort. At the end of the war, a ransom could be exacted as an indemnity. During war, ransom was a means to weaken the enemy. Vattel pointed to the humane custom of release or exchange of prisoners during war and the cartels of his day.⁸⁴

Enemy property could be captured or destroyed to the extent that it served as an indemnity for the war, induced the enemy to accept peace or weakened him. All lands and movables taken from the enemy belonged to the prince upon whose authority the war was waged. He could distribute the booty. Vattel acknowledged that soldiers were sometimes permitted to pillage the towns, though this had become exceptional. Instead, it was now customary to demand contributions from the population.⁸⁵ Vattel applauded the practice of bombarding only the ramparts and fortifications and not the town itself, but he found the other course of actions justifiable if necessary to defeat the enemy.⁸⁶

Vattel acknowledged the importance of capitulations in modern warfare. He stated that the commanders of towns and fortresses had

⁸² 3.8.143. ⁸³ 3.8.145–8. ⁸⁴ 3.8.152–3.

⁸⁵ John A. Lynn, 'How War Fed War: The Tax of Violence and Contributions during the *Grand Siècle*', *Journal of Modern History*, 65 (1993) pp. 285–310.

⁸⁶ 3.9.160–72.

the right to surrender. Thereby they had to stay within the confines of their office. They were possessors, not owners, of the place. They could negotiate about the actual surrender of the town and the treatment of the garrison. The victor might make concessions as to the treatment of the citizens and the upholding of religion and of privileges. The garrison commander was allowed to surrender unconditionally, or to give himself and his soldiers up as prisoners of war. Also, he could concede that he and his soldiers would not fight during the remainder of the war.⁸⁷

All writers emphasised that war was a public conflict between states, involving all subjects and their property. Their first and foremost concern was to strengthen the public character of war and the monopoly of the state on warfare. This explains why they all took the rule that all enemy personnel and property was liable for killing or capture as the basic precept of the laws of war. From thereon, they endeavoured to mitigate the application and the consequences of this basic rule. They did this by referring to custom and treaties and by an appeal to the precepts of natural law and right reason, and, sometimes, to honour. Their musings on the treatment of prisoners of war and unconditional surrender show that none of them was prepared to accept the old right to refuse quarter to a town that had surrendered belatedly. The same went for the newer custom to threaten the enemy commander with death, a practice Vattel expressly condemned.

Customary law and the laws of war

What can we learn from all this with regard to customary law? What were its constitutive elements? We will address this question making use of the dual notions of *usus* and *opinio iuris*. Though the latter term is a fairly recent addition to the language of international law, the awareness that both a corporal and a mental element were necessary for a custom to be law dates from Roman times.⁸⁸

First, a word needs to be said about the actors behind the *usus* and *opinio*. During the century after Westphalia the laws of war and military law grew apart. One should be careful, however, not to overstate the consequences thereof. When current international lawyers discuss *usus* and *opinio iuris*, they refer to the behaviour and opinions of states, acting through their agents. In relation to the laws of war, these might be

⁸⁷ 2.14.207 and 2.16.262–3.

⁸⁸ D. 1.3.32 and 35; for the Middle Ages, see Ibbetson, chapter 7 in this volume.

military as well as civil authorities, but they are seen to represent the state and act in its name. Though the Early Modern Age may have marked the transition to the monopoly of the state over war, the process was, however, far from complete by the early eighteenth century. Many customs of war of the Early Modern Age can be traced back to the late-medieval codes of chivalry. These were customs developed by the members of an international and professional military class. After the Middle Ages, these customs were inherited by the new military elite of the mercenary armies. As state control over the armies grew and this military elite was incorporated into the state, these customs were adopted by the state. The great ordinances on military discipline were first and foremost concerned with matters of jurisdiction, and only gradually ventured into substantive law, often doing little but confirming, clarifying or detailing existing customs and regulations. The formal and conceptual emancipation of the law of nations and of war made it appear that the practices of military commanders and soldiers became practices of the state; but that is overstating reality. In fact, the customs of war were still very much determined by the same professional elite that had dominated them for ages and whose incorporation into the state was as yet far from complete. This was not without its practical consequences. While today's international lawyers take it for granted that state authorities dictate the behaviour of their military agents and lay down the law, during the century after 1648 it was often the other way round. The capitulations themselves offer a good illustration of this. These were agreements between military commanders, and as such, to a large extent, these commanders determined their contents. Most capitulations were not ratified by the sovereigns, but the right of military commanders to make such agreements binding upon the prince was not contested. The incorporation of the army into the state was a two-sided process.

Secondly, the customs of siege warfare were based on longstanding usage. The fundamental rules of siege warfare went back far in time and had been continuously applied and invoked since the Late Middle Ages.

Thirdly, it can be ascertained that the fundamental rules of siege warfare were broadly accepted as legally binding. But what was this acceptance based on, apart from long usage? The analysis of the practices of war indicates two bases: honour and reciprocity. The customs of war were respected because it was the honourable thing to do, as the customs themselves were designed to safeguard the professional soldier's honour. The customs of war were considered binding because they guaranteed equal treatment of the soldiers on both sides, and they guaranteed such

treatment because they were considered binding. Reciprocity was at the heart of the customs of war. It came naturally to a professional warrior class, whose members all wanted to live to fight another day and were inclined to respect the other's wish to do so as well. It was also, again, a matter of honour to treat the soldiers of the enemy with the same decency as they treated yours. By the early seventeenth century, the indiscriminate character of the laws of war had also been accepted in doctrine, replacing the old idea that the laws of war only benefited the just belligerent fighting a just war.⁸⁹ Donagan refers to the laws of war as 'a kind of contractual etiquette of belligerence'.⁹⁰ Our analysis of the evolution of the customs of siege warfare makes clear that usage alone did not suffice to have a rule considered binding. The old rule about the fate of places that surrendered belatedly was not applied and sustained as a rule of law, because it was not the honourable thing to do.

Fourthly, the early modern practices of siege warfare also shed some light on the interaction between customary and conventional law. The many capitulations from the century after Westphalia not only applied and thus bear witness to the existing customs of war, they also helped form and develop those customs. The honours of war for a departing garrison were developed with time in the capitulations, up to a point where they had gained a strong enough foothold to be referred to as customary.

Let us now turn to doctrine. First, a significant difference between the pre- and post-Westphalian writers should be noted. The authors from around 1600 acknowledged that the fundamental rules of siege warfare were established practice, but that did not suffice for them. They also based these rules on the authority of classical and medieval texts. These included the Bible, the Church Fathers, the Justinian Code, the medieval canon law texts and the writings of medieval Roman and canon lawyers. This reliance upon the canon of authoritative texts was in the tradition of medieval, scholastic scholarship.

Ayala, Gentilis and Grotius had undergone the influence of humanism. To the traditional canon, they added some of the great Roman historians, particularly Livy. They furnished their argument with examples from Greek or Roman history. This not only served to indicate the longevity of a certain *usus*, but gave it authority and sanction. The humanists may have considered the authority of the traditional canon

⁸⁹ Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge, 2005).

⁹⁰ Donagan, 'Codes of Conduct', p. 78.

of texts no longer to be absolute and timeless. They may have understood these texts to be the fruit of human labour. But they certainly held the drafters of these texts and the historical figures of whose deeds they spoke in the highest possible regard. A usage that went back to the Greeks and the Romans was clothed with the authority of its *exemplum*, worthy of imitation and emulation.⁹¹

After Westphalia, arguments on the basis of textual or historical authority started to become less frequent and finally disappeared.⁹² The writers continued to refer to the old texts and to examples from ancient history; but they attributed far less authority to these past authorities and displayed greater intellectual autonomy.⁹³ This was the outcome of the shift from the scholastic to the humanist paradigm. Consequently, a link between *usus* and Antiquity, let alone between *usus* and the *auctoritas* of the canonical texts, was no longer considered necessary. Custom became a more independent source of law.

Secondly, authors became less concerned with the longevity of a custom. References to ancient history remained popular throughout the seventeenth century, then gradually became less frequent. As the authority of the ancients faded and the self-confidence of the moderns was raised, the literal antiquity of a *usus* was not considered to offer sufficient proof of acquiescence any longer. Recent practice and acquiescence became more significant.⁹⁴ Underneath lay the awareness that customs did evolve.⁹⁵ Textor may have been keen to note that the custom of ransoming prisoners went back 300 years, but he also argued that no fixed rules on longevity could be laid down and that one instance of assent sufficed to make a custom binding upon a given state.⁹⁶

Thirdly, tacit agreement, or tacit mutual consent, was the fundament on which the *opinio iuris* of a customary rule was based. As Grotius before, all four authors of the post-Westphalian era recognised customary law based on tacit agreement or tacit mutual consent as one of the

⁹¹ Peter Haggemacher, 'La pratique chez les fondateurs du droit international', in *La pratique et le droit international* (Paris, 2004), pp. 49–78, at pp. 67–70. See Gentilis 1.1.15.

⁹² David Kennedy, 'Primitive Legal Scholarship', *Harvard International Law Journal*, 27 (1986) pp. 1–98.

⁹³ Rachel took offence at adherence to the authority of the old jurists: 2.35.1.

⁹⁴ Textor advised looking at recent practice, particularly if old examples contradicted one another: 1.19.

⁹⁵ Rachel 2.37; Textor 1.15; Bynkershoek *Ad lectorem*. ⁹⁶ Textor 1.20.

sources of the voluntary law of nations.⁹⁷ It mirrored the reciprocity that was fundamental to the workings of the customs of war in reality.

Fourthly, a distinction was drawn between particular and general customary law. Customs were based on consent. In consequence, they were solely binding upon those who had consented to them. In reality, this meant that they could hardly ever become universally applicable. Still, custom could also give rise to generally applicable law. The writers of the post-Westphalian era acquiesced to the fact that it was impossible to check whether all nations had effectively consented – as not even all nations were known, as Rachel cleverly pointed out.⁹⁸ Nevertheless, a custom could give rise to general law of nations. For Rachel and Textor, as for Grotius, a wide spread acceptance sufficed.⁹⁹ Vattel for his part based the general application of his ‘voluntary law of nations’ on presumed consent.¹⁰⁰ Rachel stated expressly that particular customary law could deviate from general law.¹⁰¹

Fifthly, doctrine acknowledged the existence of a Christian, or ‘civilised’, customary law of nations. In relation to the laws of war, many authors from both the pre- and the post-Westphalian periods pointed to the custom of Christians not to enslave each other, but to ransom, exchange or release prisoners. Textor considered rules that were established among the more ‘cultured’ or ‘civilised’ nations or the nations of a single continent – more particularly Europe – to be generally binding.¹⁰² Vattel referred to customs which were generally accepted among the civilised countries of the world, or within a continent, or among the countries that had frequent intercourse with one another as a distinct category of ‘particular’ customary law.¹⁰³

Sixthly, according to all authors the positive law of nations, based on human will – which they called voluntary or arbitrary – was distinct from the law based on natural reason – either natural law or the natural law of nations.¹⁰⁴ For Rachel, Textor and Vattel, natural law or the natural law of nations served as an autonomous body of law to judge over and criticise the existing voluntary law of nations. With Bynkershoek, reason

⁹⁷ Grotius *Prol.* 15; Rachel 2.10, 2.16, 2.28–30 and 2.42; Textor 1.3–6 and 1.8; Bynkershoek *Ad lectorem* and 2.10; Vattel *Préliminaires* 25.

⁹⁸ 2.11. ⁹⁹ Grotius 1.1.14; Rachel 2.11–12 and 2.23–5; Textor 1.3.

¹⁰⁰ Vattel *Préliminaires* 21 and 26–7; Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris, 1998), pp. 92–3.

¹⁰¹ 2.73–4. ¹⁰² 1.3. But not Rachel 2.74. ¹⁰³ Vattel *Préliminaires* 26.

¹⁰⁴ Natural law applies to men and nations; natural law of nations is a law applicable to nations, derived from natural law.

itself – common sense and rationality – rather than a distinct body of natural law, served this very purpose.¹⁰⁵ As was shown above, the precepts and dictates of right reason and nature were constantly appealed to by the great authors of the sixteenth to eighteenth centuries to mitigate voluntary law regarding siege warfare. Accordance with natural reason was certainly a criterion for judging a customary rule's fairness and desirability. However, if the law of nature was a touchstone for the fairness of a customary rule, it was not for its being externally binding. None of the authors rejected the external validity of a customary rule that did not meet the standards of natural reason. Whereas customary law was considered externally binding, law based on natural reason alone was not. It was only binding in conscience. Some authors expressly stated that customary law that deviated from the precepts of reason and nature, or even contradicted them, remained law – even though it would have to be rejected *in foro interno*. The moral deficiency of positive law was criticised, but did not undo its legality.¹⁰⁶

And yet, customary law was not completely independent from natural reason. In the minds of the authors of the seventeenth and eighteenth centuries, consent to a custom was more likely if that custom was in accordance with natural reason. According to Textor, reason formed the basis of both usage and natural law.¹⁰⁷ With Vattel, accordance with the natural law of nations was of greater consequence to general than to particular customary law. The presumption of general consent on which the general voluntary law rested was tantamount to the rationality that came naturally to all rational human beings and to states. The general voluntary law of nations might set lower moral standards than the necessary law of nations, but it was as much the result of the dictates of natural reason. General voluntary law might differ from the necessary law of nations, but it was hard to conceive of a rule that went against natural reason that was the common source of both bodies of law.¹⁰⁸ Particular customs should heed natural law, but their going against the grain of the natural law of nations did not invalidate them *in foro externo*.¹⁰⁹

¹⁰⁵ Kinji Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law* (The Hague, London and Boston, 1998), pp. 21–33.

¹⁰⁶ Rachel 2.56 and 2.89–102; Textor 1.2 and 2.1–3; Vattel *Préliminaires* 9. On Bynkershoek, see Akashi, *Bynkershoek*, pp. 29 and 81–6.

¹⁰⁷ Textor 1.10–11; Jouannet, *Vattel*, pp. 72–3. ¹⁰⁸ Vattel *Préliminaires* 28 and 3.12.

¹⁰⁹ Vattel *Préface* and *Préliminaires* 9; Akashi, *Bynkershoek*, pp. 150–4; Jouannet, *Vattel*, pp. 85–104 and 153–4.

The general law of nations of Vattel and his immediate predecessors was largely the product of their own intellect. They valued practice more than the writers of older times, but it was their ambition to construct a rational and just system of law. In that context, customary law could not be divorced completely from natural law. Consent, the ultimate foundation of a customary rule, was or could be presumed general because it was reasonable and natural to consent. But, by and large, these writers did not take it upon themselves to outlaw customs that went against their understanding of natural reason. Accordance with right reason might be a criterion for the universality of a customary rule, but not for its application between states that had clearly consented to it. For these rules, it was only there to judge on the moral justice of it. While it would go too far to state that accordance with natural reason had nothing to do with *opinio iuris*, even for particular customs, the writers of the century after Westphalia surely helped doctrine underway in that direction. In the final analysis, doctrine acquiesced to the fact of life that customary law in reality was not and did not have to be in accordance with rationality and morality to be accepted by states as constituting law. Consent – the doctrinal tantamount of the reciprocal acceptance of rules from military practice – rather than reason, was forwarded as the foundation of *opinio iuris*.

In conclusion, let us bring all this to bear on the evolution of siege warfare through the Early Modern Age. In the century after Westphalia, the laws of war became more humane. A well-understood self-interest in the reciprocal preservation of life and honour had imbedded itself into the mores of a professional military class and had led to more humane customs and practices of war. The growing monopolisation of war by the state had led to distinguishing combatants from non-combatants.

The writers of the seventeenth and eighteenth centuries were not unaware of the gradual humanisation in the practices of war, but did little to further it or to vest it on strong theoretical foundations. They sat in judgment over modern practices as being in accordance with natural reason or not, but recognised that an unreasonable rule could nonetheless be binding under the positive law of nations. Moreover, notwithstanding their desire to build a rational system, they took little trouble to introduce new rules and make their own suggestions towards a more comprehensive body of law of concrete rules. Concrete regulations were the domain of the voluntary, and, even more so, the particular law of nations, and not of natural reason. This reluctance was consequential to the authors' acknowledgment that there could be consent without

reason. Thereby, they jeopardised the basis from which to influence the law outside the *forum internum*.

But, even there, they did more harm than good. Because of the authors' focus on the control of the central government over war and its machinery, they largely overlooked the opportunity to introduce the distinction between combatants and non-combatants as a basic principle of the laws of war. They preferred not to make the humanisation of war their main concern, but to help underpin the process of state-building. Though for all practical purposes Vattel might come close to making the distinction between combatants and non-combatants, his fundamental principle that gave the green light to everything necessary for the war effort could always be revived to justify any attack on civilians. This allowed him to condone the practice of siege warfare, whereby citizens were made the targets of war. But its consequences were more gruesome. Once the dynastic state of the eighteenth century had given way to the nation-state and war became the affair of an entire nation, the justification for all-out war could be made on the basis of the intellectual tradition laid out by Vattel and his predecessors. In the end, mankind would have to live through the atrocities of the total wars of the twentieth century before the starvation of civilians through sieges was outlawed.¹¹⁰

¹¹⁰ Additional Protocol I to the Geneva Conventions, Art. 54.