Book Review

Lincoln’s Code. The Laws of War in American History, John Fabian Witt*

In the past few years, the policies enacted by the government of the United States of America in the context of the so-called War on Terror have brought the legal regulation of war once again to the centre of heated public discussions over, for instance, the status and treatment of the detainees held at Guantanamo and the practice of targeted killing. Two arguments sustained by assumptions on the customary attitudes with which the United States has related to the laws of war, have been juxtaposed to each other. Critics have argued that the Bush and the Obama administrations have made choices in the context of ‘war on terror’ that represent a departure from a constant American law-abiding attitude. The apologists, on the other hand, consider the laws of war a normative body foreign to the American culture of pragmatism, forced on the United States through idealistic views of European origin.

With Lincoln’s Code. The Laws of War in American History, Professor John Fabian Witt of Yale Law School seeks to overcome the above dichotomy. He simultaneously provides the reader with a historical perspective based on extensive archival research in order to favour a more balanced understanding of current issues of war and terrorism. The book narrates the influence of the “idea that the conduct of war can be constrained by law” (p. 1) in the time span between the American War of Independence and the first years of the 20th century. Lincoln’s Code shows how the United States cherished, respected and critically developed the laws of armed conflict while disregarding or shaping them according to its own interests when situations of crisis demanded so. The management of the Civil War by the

Lincoln administration is at the core of Witt’s analysis. It exemplifies the United States’ government skillful use and readaptation of the rules of warfare for political purposes and the parallel pursuit of an idealistic interpretation of justice.

The prologue opens with the image of Francis Lieber working feverishly, while the Civil War is raging, on the text of his Code, generally considered the first modern attempt of codification of the laws of war. Indeed, the book title is not intended to diminish Lieber’s role as the material author of and legal mind behind General Orders No. 100 of 1863, the official title of the Lieber Code, but rather to recognize the crucial importance of the document in the larger political strategy pursued by Lincoln, a strategy that, by reconnecting the ends of war with its means, would prove to be of long lasting influence on the development of the laws of war.

Part I begins by retracing the key role of the Enlightenment rules of civilized warfare in the Independence War and the birth of the American State. The Founding Fathers were, by their own admission, heavily influenced by the Swiss jurist Emer de Vattel’s *Droit des gens*, which enjoyed a significant and long lasting authority in the United States. In the text, published in an English translation only two years after its original publication in French in 1758, Vattel designs a system of rules limiting war conduct, for instance through the prohibition of poisoning and assassination or the obligation to concede quarter to surrendered enemies. The core argument was an overcoming of the just war paradigm and a focus on the means rather than on the cause of war, means to be regulated in line with the humanitarian spirit attained by European civilization. In the hands of Franklin and Jefferson, Vattel’s declination of the legal limits of war became a powerful political tool for a militarily weak young country trying to establish its own very existence. The insurgents did not always refrain from acting as just warriors in contrast to Vattel’s humanitarian principles and from occasionally resorting to retaliation. However, the largely prevailing attitude was one of respect of the rules of warfare, as a means of vindicating the belonging of the United States to the family of civilized nations and securing through it the people’s support. Indeed, according to Witt, “No Nation in the history of the world has made the law governing the conduct of armies in war more crucial to its founding self-image than the United States” (p. 15). He points to the text of the Declaration of Independence as a clear evidence of his affirmation. Its list of accusations of “barbarous” acts of “Cruelty” perpetrated by King George III, aimed at asserting the right