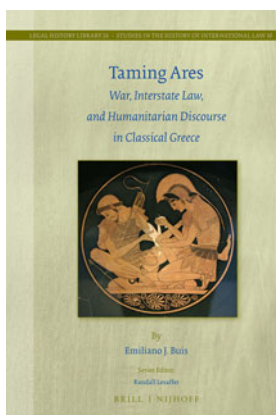


## BOOK REVIEW



# Taming Ares: War, Interstate Law, and Humanitarian Discourse in Classical Greece

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From Hammurabi's Code to the Arms Trade Treaty and the Treaty on the Prohibition of Nuclear Weapons, humanitarian rules have continuously evolved as part of efforts to constraint belligerents' behaviour and provide protection for victims of armed conflicts. Historical analyses of humanitarian rules not only shed light on how wars, hostilities and their limits were conceived throughout history, but can also reinforce the customary nature of these rules.

More than a millennium before Henry Dunant's *A Memory of Solferino* was published, humanitarian ideas and principles were already present in the discourses and norms of the classical Greeks, and war among Greek city-States was regulated by a corpus of norms common to the Greek people. Emiliano Buis's book, *Taming Ares: War, Interstate Law, and Humanitarian Discourse in Classical Greece*, is one of the rare books to look at Classical Greece texts and norms from various religious, political, social, literary and artistic sources, through the prism of international

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humanitarian law (IHL), and offers a fascinating perspective on the historical roots of IHL.

This book allows readers to get an in-depth view into how norms, inter-city relations and laws common to the classical Greeks were conceived during the Peloponnesian War period (431–404 BCE), and provides an enlightening analysis of some of the precursory roots of what we know today as *ius ad bellum* and *ius in bello*. Not only is the book based on meticulous research, but each of its sections is also supported by numerous examples and quotations of the original texts used as reference sources, with their English translation, allowing readers to fully appreciate how the norms and ideas preceding modern-day IHL were expressed.

The first part of the book is dedicated to demonstrating that classical Greek inter-city relations were regulated by norms relating to the legal realm. In the first chapter, Buis introduces what represented the law in the ancient world and argues that this can only be understood when analyzed together with other social regulations such as religious, moral, political and international or inter-*polis* rules. In the ancient Greeks' conception of law, the performative aspect of justice, acts of legislation and citizens' participation were crucial, and are highlighted through the presentation of a shared structural logic between theatre and judicial activities. For instance, in Athens, where judicial functions were not professionalized, justice took the form of oral and public debates, allowing participation of citizens. Performance was a cultural value that allowed both theatre and law to be perceived as dynamic public creations.

In the second chapter, the author explores the notion of international subjectivity at the time of the Greek *poleis*. He argues that international law may have existed even before the theorization of its "subject".<sup>1</sup> His analysis extends from the domestic regulation of associations in Athens during the fourth and fifth centuries to the Greek city-States' conception of social groups and associations. In these contexts, the *poleis* were conceived as not only territories, but also as their people: "For men are the polis, and not walls or the ship empty of men."<sup>2</sup> To exemplify this, Buis presents a study of various treaties signed during the Peloponnesian War analyzing the denomination of the different parties. Indeed, in many treaties concluded between allies during the period, the texts refer to the people (such as Athenians and Rhegians) and not to the cities (such as Athens or Rhegium), showing that Greeks conceived the representation of their *polis* as being based on its people, and not as an entity separated from its members. Based on this analysis, Buis suggests that the idea of starting from subjectivity to conceive international law may have existed before the conception of "subjects", as we know of them today. Indeed, although Greek city-States were not conceived as subjects distinct from their people, they nevertheless concluded treaties and acted as autonomous and, to some extent, sovereign entities.

1 *Taming Ares*, p. 104.

2 *Ibid.*, p. 72, note 65, quoting Thucydes.

Buis also illuminates how the notion of the equality of parties was important in inter-*polis* treaties, along with the concept of reciprocal obligations.<sup>3</sup> However, much like some contemporaneous treaties, abuses and hegemony of more powerful cities was evidenced in several inter-*polis* treaties. For instance, in 403 BCE, Sparta, using its privileged position, imposed a treaty obligation on the Athenians to destroy their walls, hand over their fleet and “have the same allies and enemies as the Spartans”.<sup>4</sup> The creation of some international organizations, which for example took the form of religious or military associations, also contributed to the imbalance of power between theoretically equal parties. Indeed, although these associations guaranteed formal equality between city-States, they were in fact controlled by leaders who were entitled to take actions on behalf of the organization.<sup>5</sup> When reading this part of the analysis, one cannot help but reflect on how this aspect of international relations seems to present certain present-day analogues.<sup>6</sup>

In the second part of the book, Buis examines the rules pertaining to the conduct of war and its limits in the normative corpus regulating Greek inter-*polis* relations. He starts by exploring the concept of just war in classical Greece and the grounds it laid for the notion of self-defence. Chapter 3 thus delves into the rhetoric of the use of force used by the ancient Greeks, shedding light on their need to limit military action to cases considered as just. In various sources analyzed by the author, the need to justify war, and to explain its causes through a discourse acceptable both at the political and at the religious levels, is evident. For instance, in *Politics*, Aristotle (384–322 BCE) presents different legitimate justifications for war, among which defence against aggression by others can be found.<sup>7</sup> Also, in respect to the war between the Corinthians and the Corcyraeans (435–431 BCE), appeals to just war are evidenced in the arguments justifying the actions of one party because of prior harm caused by the other. As part of this discourse, the need to help victims of acts of aggression or of unjust or unfair actions of an enemy who had refused arbitration and insisted on the recourse to arms are both presented as justification for waging war in sources from the time.<sup>8</sup> Through drawing on various sources that present the innumerable justifications offered for military action, the author demonstrates how the notion of self-defence was considered as a valid reason to wage war among the ancient Greeks and was often part of official discourses. Based on references to a *right*, or a *universal law*, to defend oneself when one is the victim of an aggression, as well as to a *common legal basis* on which to build a self-defence discourse, Buis traces

3 *Ibid.*, p. 76.

4 *Ibid.*, p. 81.

5 *Ibid.*, p. 82.

6 Indeed, this echoes the criticisms often levelled in recent years against the United Nations system and the role given to the five permanent members of the Security Council. On this issue, see, for instance, Peter Nadin, *UN Security Council Reform*, 1st ed., Global Institutions Series, Routledge, London, 2016.

7 See *Taming Ares*, pp. 126–127. The author quotes a passage from Aristotle’s *Politics*: “The proper object of practising military training is not in order that men may enslave those who do not deserve slavery, but in order that first they may themselves avoid becoming enslaved by others.”

8 *Ibid.*, pp. 128–131.

a possible source of the contemporary right to self-defence under international law. He further notes that “little progress has been made in terms of *ius ad bellum* for pragmatically establishing the grounds that would ‘authorize’ armed attacks against those who are identified as enemies”.<sup>9</sup>

In the fourth and final chapter, the normative framework surrounding the conduct of hostilities and the limits imposed by inter-*polis* law is examined. From an IHL point of view, this chapter is probably the most enlightening. It begins with a presentation of how military organizations developed at the time, and how, by the same token, these organizations shaped the formalities surrounding the conduct of war. Parallels can be drawn with the performative aspect of court proceedings or theatre: for the ancient Greeks, the conduct of war could also be perceived as a performance structured by formal and informal rules. The analysis of those rules and their possible affiliation with the ones of contemporary *ius in bello* compose the bulk of this chapter. For instance, the notion of military necessity<sup>10</sup> was present in the discourse of the Greeks and was often used to explain or justify an attack. Thus, when the Athenians turned a Boeotian temple into a fortification and contaminated its sacred water during the Battle of Delium in 424 BCE, they were accused by the latter of acting contrary to the law. They argued that they were compelled to act in this way after the invasion by the Boeotians.<sup>11</sup>

Buis also traces indications of the existence of a principle of distinction between those directly involved in hostilities and the civilian population to the time of the ancient Greeks. He does this through cited sources which stress the need to fight in a defined battlefield in order to avoid widespread violence that could have unjustifiable consequences for the population.<sup>12</sup> The protection of envoys and heralds was also recognized during inter-*polis* wars, and it was considered contrary to the common law of the Greeks to arrest them.<sup>13</sup> Civilians or non-combatants in general also benefited from the protection of some rules. For instance, Thucydides reports that in the treaty between Argos and Sparta, it was established that all captured minors would be returned at the end of hostilities.<sup>14</sup> Further, it was contrary to the common law of the Greeks to attack

9 *Ibid.*, p. 138.

10 The principles of IHL are based on a balance between considerations of humanity and of military necessity: see Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2016, p. 17. See also, for instance, Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law*, Vol. 50, No. 4, 2010.

11 See *Taming Ares*, p. 149.

12 See, in particular, *ibid.*, p. 146 ff. The principle of distinction is the cornerstone of IHL. See N. Melzer, above note 10, p. 18; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 1, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in May 2019).

13 Non-hostile contact between parties to conflict, especially through the use of *parlementaires* is a long-established rule of IHL, as is the inviolability of *parlementaires* and the protection of the use of the white flag of truce. See ICRC Customary Law Study, above note 12, Rules 58, 66, 67.

14 See *Taming Ares*, p. 172. In 1977, Additional Protocols I and II to the Geneva Conventions set the minimum age of recruitment in armed forces at 15 and prohibit participation of children below that

temples and other religious facilities, or to engage in acts of pillage, illicit entry or destruction of these sites.<sup>15</sup> Religious celebrations of the enemy were to be respected, and attacks during them were prohibited.

As for prisoners of war, an interesting reference in Xenophon's *Life of Agesilaus* mentions that prisoners should be treated not as criminals to be punished, but rather as men to be guarded.<sup>16</sup> The book also offers some examples of prisoners of war exchanges in ancient Greece<sup>17</sup> and cites a passage from Euripides' tragedy *Children of Heracles*, produced c. 403 BCE, suggesting that it was considered contrary to the law to kill a prisoner of war.<sup>18</sup> Some sources studied by Buis also mention the importance of having doctors among Greek armies to take care of the wounded.<sup>19</sup> The respect and honour due to fallen combatants, including enemy ones, was also part of Panhellenic *nomos*.<sup>20</sup>

A fourth-century decree from Tralleis granting a right for supplicants to be accepted in the sanctuary of Dionysus suggests that supplicants and those who had surrendered benefited from some protection as well. This is illustrated by Aeschylus' tragedy *The Suppliants* (463 BCE), in which fifty women from Egypt, known as the Danaides, fled from a forced marriage with their cousin and sought asylum in Argos. In the play, the issue of whether the women can stay is submitted by the king to an assembly of the people, who vote to accept the women. A decree is passed granting them the status of foreign residents. In this case, the author highlights the similarity between arguments presented by the Danaides to advocate in favour of Argos granting them asylum, and present-day refugee status: having crossed an international border, persecution, *non-refoulement* and even the absence of commission of crime by the Suppliants.<sup>21</sup>

The ancient texts that Buis cites also point to how the classical Greeks imposed limits on the means and methods of warfare. For instance, around 595–585 BCE, after the Amphictyonic League contaminated the Pleistus river with a

age in hostilities: see Additional Protocol I (AP I), Art. 72(2), and Additional Protocol II (AP II), Art. 4(3) (c). The Convention on the Rights of the Child (UNGA Res. 44/25, Annex, UN Doc. A/44/49, 1989 (entered into force 2 September 1990)) also contains a similar disposition in its Article 38. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (UNGA Res. 54/263, Annex I, UN Doc. A/54/49, Vol. III, 2000 (entered into force 12 February 2002), Arts 1, 2) raises this threshold to 18 years old. This rule is recognized as a customary rule: see ICRC Customary Law Study, above note 12, Rules 136, 137.

15 See *Taming Ares*, p. 173 ff. Cultural properties are protected by IHL: see AP I, Art. 53(1); AP II, Art. 16; and the Hague Convention on the Protection of Cultural Property (1954) and its Protocols (1954 and 1999). The protection of cultural property is also a rule of customary IHL: see ICRC Customary Law Study, above note 12, Rules 38–41.

16 See *Taming Ares*, p. 179. The same idea is behind the prisoner-of-war status and the combatant privilege granted by IHL: see, among others, N. Melzer, above note 10, p. 175.

17 See *Taming Ares*, p. 179.

18 Passage reproduced in Greek and English in *ibid.*, p. 180. See also p. 181.

19 *Ibid.*, p. 184.

20 *Ibid.*, p. 185.

21 See *ibid.*, pp. 190–200. For more details, see Emiliano J. Buis, "Hyendo a Argos: La proteccionjuridica de las mujeres refugiadas y el lenguaje del humanitarismo griego en *Supplicante* de Esquilo", in Julia Grignon (ed.), *Tribute to Jean Pictet*, Editions Yvon Blais, Montreal, 2016, p. 153.

poisonous plant named hellebore, Aeschines mentions an agreement to prevent such action in the future, suggesting a need to establish norms limiting unnecessary and superfluous suffering.<sup>22</sup>

A passage from Plato's *Republic* (c. 380 BCE) illustrates the importance for the Greek people of respecting some limits in warfare. It also contains an original and innovative proposal: that barbarians – i.e., non-Greeks – receive the same treatment as Greeks, venturing the idea that all those not participating in hostilities should always be protected.

“They will not, being Greeks, ravage Greek territory nor burn habitations, and they will not admit that in any city all the population are their enemies, men, women and children, but will say that only a few at any time are their foes, those, namely, who are to blame for the quarrel. And on all these considerations they will not be willing to lay waste the soil, since the majority are friends, not to destroy the houses, but will carry the conflict only to the point of compelling the guilty to do justice by the pressure of the suffering of the innocent.” “I”, he said, “agree that our citizens ought to deal with their Greek opponents in this wise, while treating barbarians as Greeks now treat Greeks.”<sup>23</sup>

In the last part of his book, Buis addresses post-conflict resolution, prosecution and transitional justice. While the author admittedly notes that there have been very few instances of prosecution for acts committed during armed conflicts in classical Greece, he does highlight these thought-provokingly rare cases. One example, found in Xenophon's writings, is the tribunal set up in 405 BCE by the Spartan general Lysander, to judge his enemies, especially the Athenians, who voted that if they were victorious they would cut off the hands of the vanquished. Another case is that of the “Trial of the Generals”, which took place in 406 BCE before the Assembly, rather than before a court. According to Xenophon's writings, the generals were put on trial on the basis of their failure to rescue the shipwrecked, but there are also indications that they were tried for treason.<sup>24</sup>

The most interesting example of post-conflict resolution in ancient Greece put forth by Buis is probably the tribunal established to judge those leaders in positions of power during the four-month Thirty Tyrants reign. This reign ended with the killing of many Athenians and the displacement of about half of the city-State's population. The decision to judge only the main leaders and not everyone involved was praised by Aristotle in *The Constitution of the Athenians*:

22 *Taming Ares*, pp. 203–208. IHL prohibits the use of biological weapons. See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925. This is also a customary rule: see ICRC Customary Law Study, above note 12, Rule 73. IHL also protects objects that are indispensable to the survival of the civilian population such a water: see AP I, Art. 54(2); AP II, Art. 14; ICRC Customary Law Study, above note 12, Rule 54.

23 *Plato in Twelve Volumes*, trans. Paul Shorey, Vols 5–6, Harvard University Press, Cambridge, MA, and William Heinemann, London, 1969, reproduced, along with the Greek version, in *Taming Ares*, p. 172.

24 *Taming Ares*, pp. 217–220.

But [the Athenians] appear both in private and public to have behaved towards the past disasters in the most completely honourable and statesmanlike manner of any people in history; for they not only blotted out recriminations with regard to the past, but also publicly restored to the Spartans the funds that the Thirty had taken for the war.<sup>25</sup>

Although it is incontestable that the rules governing classical Greek inter-city conflicts and relations were mainly developed and imposed by the most powerful political entities, and that the rules of armed conflict were – as they still are – subject to political manipulation, it is also evident that some inter-*polis* values and principles were the basis for several rules of restraint in respect to warfare. Buis's meticulous analysis of various sources, including treaties, decrees, theatre pieces and literature, evidences that the basis of contemporary IHL can find roots in the distant and archaic humanitarian principles and rules of ancient Greece. It also provides a rich background for understanding the legal framework relating to the conduct of hostilities and the use of force at that time, and an excellent reference for a historical perspective on customary *ius ad bellum* and *ius in bello*.

In a surprisingly strong manner, the remote legal norms of ancient Greece analyzed by Buis echo many of the contemporary rules of IHL and thus provide a relevant precedent for some current rules of *ius ad bellum* and *ius in bello*. The book also offers an occasion to reflect on the origin and nature of the elementary considerations of humanity as a general principle of law, and on the Martens Clause, which, for the first time, made explicit on the pages of a treaty regulating the conduct of hostilities something that may have always have been there – i.e., laws of humanity and the dictates of public conscience.<sup>26</sup> As Cassese has said: “Clearly, in spite of its ambiguous wording and its undefinable purport, [the Martens Clause] has responded to a deeply felt and widespread demand in the international community: that the requirements of humanity and the pressure of public opinion be duly taken into account when regulating armed conflict.”<sup>27</sup> Reading *Taming Ares* is also a journey into the genesis of this “deeply felt and widespread demand”.

25 Aristotle in 23 Volumes, trans. H. Rackham, Vol. 20, Harvard University Press, Cambridge, MA, and William Heinemann, London, 1952, reproduced, along with the Greek version, in *Taming Ares*, p. 223.

26 The Martens Clause was first introduced in the preamble of Hague Convention (II) on the Laws and Customs of War on Land in 1899. See International Court of Justice (ICJ), *Corfu Channel Case (United Kingdom v. Albania)*, Judgment (Merits), 9 April 1949, *ICJ Reports 1949*, p. 22; ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), 27 June 1986, para. 218; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, paras 78, 84, 87. See also Matthew Zagor, “Elementary Considerations of Humanity”, in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, Routledge, London, 2012.

27 Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, *European Journal of International Law*, Vol. 11, No. 1, 2000, p. 212.