Abstract of Stephen C. Neff

Partisans, Prowlers and Guerrillas: Historical Roots of International Law on Unlawful Belligerency

Perhaps the most fundamental principle of the laws of war is the proposition that a sharp distinction must be made at all times between combatants and non-combatants – with the immediate consequence that acts of war may only be committed by, and against, soldiers. This was a practice that evolved European warfare in the Seventeenth and Eighteenth Centuries, before receiving formal codification in the Nineteenth Century.

The Nineteenth Century witnessed some severe challenges to this core principle, first in the Spanish insurgency against France at the start of the Century, and then, with greater effect in international law, in three conflicts in mid-Century: the Mexico-United States war of 1946-48; the American Civil War; and the Franco-Prussian War. These experiences led to heated debates amongst international lawyers and diplomats, concerning the extent to which international law should allow participation in war by persons other than members of the armed forces of states – and what the consequences should be of breaches of those rules. The issues were first aired in detail at the Brussels conference of 1874, which compiled what became the prototype of the Hague Rules on the conduct of war. The issue was not, however, resolved at that stage. The debate was re-opened, with high levels of passion, at the First Hague Peace Conference of 1899, where it was, to a large extent, covered over by general agreement on what has come to be called the "Martens Clause." The issue continues to be a vigorously contested one to the present day – while the Martens Clause, ironically, has been harnessed for rather different goals than was originally intended.