Remarks

RIGHTS AND RESPONSIBILITIES: PROTECTING THE VICTIMS OF ARMED CONFLICT

JUSTICE KENNETH J. KEITH†

TABLE OF CONTENTS

† Judge of the New Zealand Court of Appeal, Professor Emeritus, Victoria University of Wellington, Associé de l'Institut International. These Remarks are based on the Brainerd Currie Memorial Lecture given at Duke University School of Law on February 4, 1997, although I have also made some references to developments over the last two years. I was honoured to be asked to give the Currie Lecture. I am very grateful to my hosts at Duke, notably Dean Pamela Gann, Professor Donald Horowitz, Professor Benedict Kingsbury, Judy Horowitz and Bradley Bodager. Allan Bracegirdle, Tim Brewer, Roger Howard, Frits Kalshoven, Tim McCormack and Janet McLean provided me with useful comments on drafts of the paper. Zephyr Teachout, Trey Wichmann, and their colleagues did excellent work in preparing these Remarks for publication.

INTRODUCTION

These Remarks focus on the law's balance between rights and responsibilities. In particular, they center on the law designed to protect the victims of armed conflict, known by various titles over the centuries, including the law of arms, the law of war, the law of armed conflict, and international humanitarian law.

The president of the International Committee of the Red Cross (ICRC) introduced the organization's 1995 annual report by highlighting a few facts which indicate the huge challenges that this area of law and those responsible for it face: in the 120 conflicts since the end of World War II, twenty-two million people have been killed.[1] An overwhelming percentage of the deaths are of noncombatants and occurred in non-international armed conflicts. Thirty such conflicts continue to rage, with tragic consequences for their countless victims.[2] The figures from the world wars in the first part of the century are even worse. Professor Paul Kennedy, in his acclaimed *The Rise and Fall of the Great Powers*, estimates the final casualty toll for the extended period of World War I at sixty million.[3] World War II resulted in 13.6 million German military casualties and between twenty and twenty-five million Soviet deaths (including civilians).[4]

These dreadful figures highlight one consequence of the breach of the basic rule that disputes should be settled by peaceful means. Of course, the very existence of the body of law considered in this paper reflects the unhappy but realistic expectation that this basic rule will be breached. The figures also suggest breaches of that body of law regulating the use of deadly force—although they are not conclusive since by its very nature the waging of war involves lawful killing.

---

1. *See* ICRC, ANNUAL REPORT 4 (1995) [hereinafter 1995 ICRC ANNUAL REPORT].

2. *See id.* The 1998 Chart of Armed Conflict included in THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, THE MILITARY BALANCE 1998/99 (1998), provides the information in striking graphic form.

The vital, central role of the ICRC in this area of law is brilliantly captured in CAROLINE MOOREHEAD, DUNANT'S DREAM: WAR, SWITZERLAND AND THE HISTORY OF THE RED CROSS (1998), the first major history based on the newly available archives of the ICRC.

3. *See* PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 278 (1987). Kennedy's extended period includes fighting and massacres in post-war border conflicts that occurred in Eastern European countries such as Armenia and Poland, and the influenza epidemic that raged from 1918 to 1919. *See id.*

4. *See id.* at 361-62.

These Remarks use as their starting point some actual situations from a battle long ago. I then identify some enduring issues, especially legal issues, that arise from these situations. The various issues relate, among other things, to four primary themes:

- the roles of the executive government, the military, the legislature, the courts, and educational bodies (notably the universities) in developing the law of war
- the processes for the making, development, and implementation of the law
- the relationships between the law, moral and ethical principles, and military necessity
- the jurisprudential analysis of rights and duties

THE BATTLE OF AGINCOURT

We begin in 1415, in a forest in northern France on the day before the famous battle at Agincourt between the forces of the English King Henry V and those of the French King Charles VI. My principal source will be William Shakespeare's *Henry the Fifth*.[5]

Bardolph, an English soldier who had been a drinking mate of the young Prince Henry, had been apprehended for stealing a pax from a church. King Henry confirmed that Bardolph should be hanged. According to Raphael Holinshed's *Chronicle*, on which Shakespeare drew very heavily, the King had

> caused proclamation to be made, that no person should be so hardie, on paine of death, either to take anie thing out of anie church that belonged to the same; or to hurt or doo anie violence either to priests, women, or anie such as should be found without weapon or armor, and not readie to make resistance.

5. WILLIAM SHAKESPEARE, HENRY THE FIFTH (1599), *in* 3 THE COMPLETE WORKS OF WILLIAM SHAKESPEARE (David Bevington ed., Bantam Books 1998). I am greatly indebted to Theodor Meron's pioneering works. *See* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS (1993); Theodor Meron, *Shakespeare's* Henry the Fifth *and the Law of War*, 86 AM. J. INT'L L. 1 (1992); *see also* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 17-20 (2d ed. 1992).

> Yet in this great necessitie, the poore people of the countrie were not spoiled, nor anie thing taken of them without paiment.[6]

Shakespeare makes the point forcefully and elegantly:

> King Henry:
>
> What men have you lost, Fluellen?
>
> Fluellen:
>
> . . . I think the Duke hath lost never a man, but one that is like to be executed for robbing a church, one Bardolph, if your Majesty know the man. His face is all bubukles, and whelks, and knobs, and flames o' fire, and his lips blows at his nose, and it is like a coal of fire, sometimes plue and sometimes red; but his nose is executed, and his fire's out.
>
> King Henry:
>
> We would have all such offenders so cut off. And we give express charge that, in our marches through the country, there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language; for when lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner.[7]

That rule—and the punishment of its breach by execution—concerned the duties of the individual soldier and the corresponding rights of the noncombatant not to be the subject of armed force.

But what about the responsibilities of the leader, both for waging the war and for the actions of his men? Early on the morning before the battle, a disguised King Henry discussed those matters with some of his men:

> King Henry:
>
> . . . Methinks I could not die anywhere so contented as in the King's company, his cause being just and his quarrel honorable.

---

6. HOLINSHED'S CHRONICLE AS USED IN SHAKESPEARE'S PLAYS 79 (Allardyce Nicoll & Josephine Nicoll eds., 1927) [hereinafter HOLINSHED'S CHRONICLE]. The language of the King's proclamation closely follows The Statutes and Ordinaunces to Be Keped in Time of Werre, § 3 (c. 1419), *reprinted in* THE BLACK BOOK OF THE ADMIRALTY 282, 283 (Travers Twiss ed., London, Longman & Co. 1871). In an even earlier case, a marshal of the army imposed a judgment of the loss of a hand for theft of a cow from a churchyard. *See* ROLLS OF THE JUSTICES IN EYRE FOR YORKSHIRE 1218–19 para. 851, at 310-11 (Doris Mary Stenton ed., 1937).

7. SHAKESPEARE, *supra* note 5, act 3, sc. 6, ll. 97-113.

Williams:

> That's more than we know.

Bates:

> Ay, or more than we should seek after; for we know enough if we know we are the King's subjects. If his cause be wrong, our obedience to the King wipes the crime of it out of us.

Williams:

> But if the cause be not good, the King himself hath a heavy reckoning to make, when all those legs and arms and heads, chopped off in a battle, shall join together at the Latter Day and cry all, "We died at such a place"—some swearing, some crying for a surgeon, some upon their wives left poor behind them, some upon the debts they owe, some upon their children rawly left. I am afeard there are few die well that die in a battle; for how can they charitably dispose of anything, when blood is their argument? Now, if these men do not die well, it will be a black matter for the King that led them to it . . . .

King Henry:

> So, if a son that is by his father sent about merchandise do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon his father that sent him . . . . But this is not so. The King is not bound to answer the particular endings of his soldiers, [nor] the father of his son . . . ; for they purpose not their deaths when they propose their services. Besides, there is no king, be his cause never so spotless . . . can try it out with all unspotted soldiers. . . . Every subject's duty is the King's; but every subject's soul is his own. . . .

Williams:

> 'Tis certain, every man that dies ill, the ill upon his own head, the King is not to answer it.

Bates:

> I do not desire he should answer for me, and yet I determine to fight lustily for him.[8]

The next event occurs near the end of the battle. In contrast to the incident of the pax, it concerns rules applicable *during* the battle and the sanctions that might be available to respond to breaches of the rules. Some French horsemen, hearing that the English tents were some way from their army and were not sufficiently guarded, robbed

8. *Id.* act 4, sc. 1, ll. 126-89.

the tents, carried away caskets, and killed the boys who were in charge of them. In Shakespeare's version, it is the redoubtable Welsh soldier, Fluellen, who states the legal proposition which had been breached: "Kill the poys and the luggage! 'Tis expressly against the law of arms. 'Tis as arrant a piece of knavery, mark you now, as can be offert; in your conscience, now, is it not?"[9]

In response, Henry orders reprisals against the French prisoners who had been taken in the course of the day. According to Gower (in Shakespeare's version):

> Gower:
>
> > 'Tis certain there's not a boy left alive; and the cowardly rascals that ran from the battle ha' done this slaughter. Besides, they have burned and carried away all that was in the King's tent, wherefore the King most worthily hath caused every soldier to cut his prisoner's throat. O 'tis a gallant king![10]

This version of events follows Holinshed:

> But when the outcrie of the lackies and boies, which ran awaie for feare of the Frenchmen thus spoiling the campe, came to the kings eares, he, (doubting least his enimies should gather togither againe, and begin a new field; and mistrusting further that the prisoners would be an aid to his enimies, or the verie enimies to their takers in deed if they were suffered to liue,) contrarie to his accustomed gentlenes, commanded by sound of trumpet, that euerie man (vpon paine of death) should incontinentlie slaie his prisoner.[11]

Shakespeare is perhaps somewhat equivocal about what really happened:

> King Henry:
>
> > I was not angry since I came to France
> > Until this instant. Take a trumpet, herald;
> > Ride thou unto the horsemen on yond hill.
> > If they will fight with us, bid them come down,
> > Or void the field. They do offend our sight.
> > If they'll do neither, we will come to them,
> > And make them skirr away as swift as stones
> > Enforcèd from the old Assyrian slings.
> > Besides, we'll cut the throats of those we have,

9. *Id.* act 4, sc. 7, ll. 1-4.
10. *Id.* act 4, sc. 7, ll. 5-10.
11. HOLINSHED'S CHRONICLE, *supra* note 6, at 82-83.

> And not a man of them that we shall take
> Shall taste our mercy. Go and tell them so.[12]

In the Branagh film version the reprisal order is completely omitted.[13] Rather, the film moves directly to the King confronting the French herald, Mountjoy, in the final event from the battle to which I wish to call attention. The English archers had achieved an overwhelming victory over the heavily armored French in a very cramped and flooded battle field. According to Holinshed, the French side lost 10,000 men, while the English side lost fewer than thirty.[14] Mountjoy asks for assistance in clearing the battlefield. The King agrees:

> Exeter:
> Here comes the herald of the French, my Liege.
>
> Gloucester:
> His eyes are humbler than they used to be.
>
> King Henry:
> How now, what means this, herald? Know'st thou not
> That I have fined these bones of mine for ransom?
> Com'st thou again for ransom?
>
> Mountjoy:
> No, great King.
> I come to thee for charitable license,
> That we may wander o'er this bloody field
> To book our dead and then to bury them,
> To sort our nobles from our common men.
> For many of our princes—woe the while!—
> Lie drowned and soaked in mercenary blood . . . .
> O give us leave, great King,
> To view the field in safety, and dispose
> Of their dead bodies!
>
> King Henry:
> I tell thee truly, herald,
> I know not if the day be ours or no . . . .
>
> Mountjoy:
> The day is yours.

12. SHAKESPEARE, *supra* note 5, act 4, sc. 7, ll. 54-64.

13. *See* HENRY V (Samuel Goldwyn Co. 1989).

14. HOLINSHED'S CHRONICLE, *supra* note 6, at 84-85.

King Henry:

Praised be God, and not our strength, for it![15]

The events of that very distant war present at least six matters that are of continuing importance: (1) the substantive rules that are recognized in statements or actions, including breaches of the rules; (2) the importance of rules which protect the means of communication—that is the importance of procedural rules, in addition to substantive ones; (3) the different levels of responsibility; (4) the legal character of the rules; (5) the existence of both positive and negative obligations; and (6) the sanctions that are available to enforce compliance with the rules.

I. SUBSTANTIVE LEGAL LIMITS ON WARFARE

We begin with the essential proposition of military strategy and tactics (and of law and ethics) that wars are limited. Sir Michael Howard, one of the great military historians of our time, distinguishes "between 'war' on the one hand and riot, piracy, brigandage, generalized insurrection and random violence on the other. The wars of which we speak consist of the purposive and instrumental use of force by legitimized authorities."[16]

A basic rule divides combatants from non-combatants. A central proposition, reflected in the rule breached by Bardolph, is that members of the armed forces shall not take action directed against non-combatants.[17] Between 1974 and 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts [hereinafter Diplomatic Conference], attended by representatives from over 100 countries, was convened to update the 1949 Geneva Conventions. The Diplomatic Con-

15. SHAKESPEARE, *supra* note 5, act 4, sc. 7, ll. 65-87.

16. Michael Howard, Temperamenta Belli*: Can War be Controlled?*, *in* RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT 1-2 (Michael Howard ed., 1979). Similarly, Protocol II to the Geneva Conventions of 1949 (concerned with non-international armed conflicts) excludes from its scope, "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 1, 1125 U.N.T.S. 609, 611 [hereinafter Protocol II].

17. *See* ICRC, *1978 Red Cross Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts*, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 469 (Adam Roberts & Richard Guelff eds., 2d ed. 1989). These fundamental rules are reprinted in the Appendix to these Remarks.

ference resulted in the drafting of two Additional Protocols to the Geneva Conventions: Protocol I, which covers international armed conflicts,[18] and Protocol II, which covers non-international armed conflicts.[19] Both protocols establish the following basic standard for any military conflict: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[20] One hundred fifty-two states are now formally bound by that provision.[21] A few years before the protocols were introduced, the Second Vatican Council, emphasizing that inherent limits on warfare were not a mere legal quibble, made this memorable declaration: "Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation."[22]

Agincourt was a war between two states, and the 1977 basic rule applies to such international armed conflicts. But as noted previously, an overwhelming percentage of the armed conflicts that have occurred over the last fifty years have been internal.[23] Internal armed conflicts are, of course, not new—take the U.S. Civil War, for example. During that war, the need to establish rules for the behavior of Union soldiers toward the soldiers and civilians of the Confederate States prompted Francis Lieber to draft General Orders No. 100,[24] which President Lincoln promulgated on April 24, 1863.

---

18. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

19. Protocol II, *supra* note 16.

20. Protocol I, *supra* note 18, art. 48, at 25; *see also id.* art. 51, at 26 (prescribing rules for the protection of civilians); Protocol II, *supra* note 16, art. 13, at 615 (same).

21. *See Accession to the Additional Protocols by Grenada*, 325 INT'L REV. RED CROSS 742, 742 (1998). One hundred forty-four states are parties to Protocol II. *See id.*

22. Second Vatican Council, Gaudium et Spes*: Pastoral Constitution on the Church in the Modern World*, para. 80 (1965), *in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 222 (David J. O'Brien & Thomas A. Shannon eds., 1992).

23. This information can be found in the 1998 Chart of Armed Conflict, *supra* note 2.

24. Adjutant General's Office, General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field (1863) (U.S. Gov't Printing Office 1898), *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiří Toman eds., 1988) [hereinafter General Orders No. 100].

One of Lieber's admirers was General Henry W. Halleck, a notable author in the field of international law.[25] Halleck first sought assistance from Lieber in defining the role of guerrillas in warfare. In late 1862, Lieber persuaded General Halleck and other authorities in the Lincoln administration that there should be a set of rules promulgated for the armies of the United States.[26] He reminded Halleck when he was preparing General Orders No. 100 that nothing of the kind existed in any language. He claimed to have no guide, no groundwork, no textbook. "Usage, history, reason, and conscientiousness, a sincere love of truth, justice and civilization," he said, had been his guides.[27] The rules stated in General Orders No. 100 have had a significant impact on the later development of both United States and international law.[28]

Lieber was a man of extraordinary talent and energy. At the time he prepared General Orders No. 100, he was Professor of Modern History and Political Science, as well as of International, Civil, and Common Law at Columbia College in New York and had earlier been a Professor at South Carolina College. Professor Paul Carrington, in a notable study of Lieber's work, states that "[i]t is unjust that few contemporary American law teachers are familiar with [Lieber's] work."[29]

General Orders No. 100 dealt with both international and internal armed conflicts. Of the former, it stated:

---

25. *See, e.g.*, H.W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR (1866); HENRY W. HALLECK, INTERNATIONAL LAW (1861).

26. Lieber had a special and general interest in the law of war—as a young man he had fought against Napoleon's forces; two of his three sons were members of the Union army; and his other son was a member of the Confederate army and had been killed. *See* RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 6-7 (1983).

27. *Id.* at 10 (quoting Letter from Francis Lieber to General Henry W. Halleck (Feb. 20, 1863), *in* The Lieber Papers, The Huntington Collection).

28. This impact is reflected, for instance, in a memorandum showing the close relationship between General Orders No. 100 and the Hague Convention with respect to the law and customs of war on land, which U.S. Secretary of State Elihu Root appended to a most laudatory address about Lieber that he gave on the 50th Anniversary of the U.S. government's adoption of General Orders No. 100. *See* Elihu Root, *Francis Lieber*, 7 AM. J. INT'L L. 453, 466-67 (1913).

29. Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339, 356 (1992) [hereinafter Carrington, *Political Ethics*] ("When he died in 1872, . . . he was the most renowned American law teacher. He was honored in many other nations."); *see also* Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 CARDOZO L. REV. 2135, 2152 (1995) (concluding that "it is indeed time for another Lieber revival").

> The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.
>
> This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and churches, for temporary and military uses.[30]

The proposition about the immunity of strictly private property is qualified to some extent by the following proposition in Article 38:

> Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.
>
> If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.[31]

In addition, Article 22 stated that "[t]he principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[32]

General William T. Sherman, in one of his wartime letters, indicated further limits on the immunity of non-combatants in internal armed conflicts, but he emphasized that the law of war in some form continued to apply:

> In Europe, whence we derive our principles of war, wars are between kings or rulers through hired armies, and not between peoples. These remain, as it were, neutral, and sell their produce to whatever army is in possession. . . .
>
> [T]he general rule was and is that war is confined to the armies engaged, and should not visit the houses of families or private interests. . . .
>
> [But t]he war which now prevails in our land is essentially a war of races [with consequences for the rules which apply:] . . . .
>
> When men take up arms to resist a rightful authority, we are compelled to use like force, because all reason and argument cease when arms are resorted to. When the provisions, forage, horses,

30. General Orders No. 100, *supra* note 24, art. 37, at 9.

31. *Id.*, art. 38, at 9.

32. *Id.*, art. 22, at 7.

> mules, wagons, etc., are used by our enemy, it is clearly our duty and right to take them also, because otherwise they might be used against us. In like manner all houses left vacant by an inimical people are clearly our right, and as such are needed as storehouses, hospitals, and quarters.
>
> But the question arises as to dwellings used by women, children, and non-combatants. So long as non-combatants remain in their houses and keep to their accustomed peaceful business, their opinions and prejudices can in no wise influence the war, and therefore should not be noticed; but if any one comes out into the public streets and creates disorder, he or she should be punished, restrained, or banished to the rear or front, as the officer in command adjudges. If the people, or any of them, keep up a correspondence with parties in hostility, they are spies, and can be punished according to law with death or minor punishment.
>
> These are well-established principles of war, and the people of the South having appealed to *war*, are barred from appealing for protection to our constitution, which they have practically and publicly defied. They have appealed to war, and must abide *its* rules and laws.[33]

The final section of General Orders No. 100, which addresses situations of insurrection, civil war, and rebellion, also reflects the lessened protections accorded to non-combatants in non-international armed conflicts.[34] While Article 155 makes the clear distinction in "regular war" between the two general classes of "combatants and noncombatants, or unarmed citizens of the hostile government,"[35] that provision and Article 156 go on to distinguish in the case of a "war of rebellion" between loyal and disloyal citizens "in revolted territories."[36] Common justice and expediency require that the former be protected, but the commander, as much as it lies in his power, will throw the burden of the war on disloyal citizens. Similarly, the modern law draws an important line between the two types of conflict.[37] That distinction was dramatically manifested at the

---

33. Letter from Gen. William Tecumseh Sherman to Maj. R.M. Sawyer (Jan. 31, 1864), *in* SIR BASIL LIDDELL HART, THE SWORD AND THE PEN: SELECTIONS FROM THE WORLD'S GREATEST MILITARY WRITINGS 164-66 (Adrian Liddell Hart ed., 1976).

34. *See* General Orders No. 100, *supra* note 24, arts. 155-56, at 22.

35. *Id.* art. 155, at 22.

36. *Id.* arts. 155-56, at 22.

37. This distinction is found for example in common Article 3 of the 1949 Geneva Conventions for the Protection of War Victims, Aug. 12, 1949 [hereinafter Geneva Conventions of 1949]. *See* Convention for the Amelioration of the Condition of the Wounded and the Sick in

final session of the Diplomatic Conference which prepared the 1977 Additional Protocols when the Conference voted to remove large parts of the protective provisions included in the draft of Protocol II.[38]

Some modern developments are perhaps more positive. For example, in a notable recent judgment, the Appeals Chamber of the International Tribunal on Yugoslavia affirmed that customary rules (in addition to treaty-based ones) govern internal strife:

> These rules . . . cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[39]

Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32 [hereinafter Geneva Convention No. I] (stating that the article applies only to "armed conflict not of an international character occurring [with]in [a] . . . territory"); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 3220, 75 U.N.T.S. 85, 86 [hereinafter Geneva Convention No. II] (same); Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 [hereinafter Geneva Convention No. III] (same); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 [hereinafter Geneva Convention No. IV] (same). This distinction is then reiterated in the particular subject matter of each of those Conventions. *See* Geneva Convention No. I, *supra*, art. 14, 6 U.S.T. at 3124, 75 U.N.T.S. at 40 (stating that "the wounded and sick of a belligerent who fall into enemy hands" are to be treated just as any other prisoner of war); Geneva Convention No. II, *supra*, art. 16, 6 U.S.T. at 3230, 75 U.N.T.S. at 96 ("[T]he wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them."); Geneva Convention No. III, *supra*, arts. 4-5, 6 U.S.T. at 3322-23, 75 U.N.T.S. at 138-43 (drawing distinctions between belligerents and nonbelligerents); Geneva Convention No. IV, *supra*, arts. 4-5, 6 U.S.T. at 3520, 75 U.N.T.S. at 290-93 (same).

38. *Compare* Protocol I, *supra* note 18, art. 1, at 7 (expressly including within its protection "armed conflicts in which peoples are fighting against colonial domination and alien occupation"), *with* Protocol II, *supra* note 16, art. 3, at 611 (expressly excluding applicability to situations where a government seeks "to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State"). Brief accounts of the history behind Protocol II may be found in THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS, at x-xi, 3-10 (Howard S. Levie ed., 1987) [hereinafter LAW OF NON-INTERNATIONAL ARMED CONFLICT]; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 604-17, 667-74 (1982). The diplomatic record of this session is found in 7 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 59-251 (1974-77).

39. Prosecutor v. Tadić, U.N. Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former

More importantly, the chamber ruled that individuals could be found criminally responsible for the breach of such rules, as is of course the case with international armed conflicts.[40] In support of that conclusion, the chamber quoted New Zealand[41] and American military manuals.[42]

Similarly, those responsible for preparing the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which came into force on March 1, 1999, refused to draw the distinction.[43] The Convention applies in absolute terms, without regard to the character of the armed conflict.[44]

I return to Professor Lieber and to one critical aspect of his treatment of civil wars. General Orders No. 100 makes explicit what would have been implicit from the very situation in which it was issued: humanity requires the adoption of at least some of the law of war towards rebels. The Union's application of the law to the rebels, however, in no way meant that the Union was recognizing—either partly or completely—the Confederate government as an independent and sovereign power:

> Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.
>
> Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming Martial Law in their territory, or levying war-taxes or

---

Yugoslavia since 1991, Case No. IT-94-1-AR72 (App. Chamber, Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 69-70 (1996).

40. *See id.* at 70.

41. *See id.* ("[T]he . . . New Zealand [manual] . . . provides that 'while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for "war crimes," trials would be held under national criminal law, since no "war" would be in existence . . . .'") (quoting NEW ZEALAND DEFENCE FORCE DIRECTORATE OF LEGAL SERVICES, LAW OF ARMED CONFLICT MANUAL (1992)).

42. *See id.* ("The relevant provisions of the manual of the United States . . . may also lend themselves to the interpretation that 'war crimes', *i.e.*, 'every violation of the law of war', include infringement of common Article 3.") (quoting UNITED STATES DEP'T OF DEFENSE, THE LAW OF LAND WARFARE, DEPARTMENT OF THE ARMY FIELD MANUAL (1956)).

43. *See* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997).

44. *See id.*, art. 9, at 1515 ("Each State Party shall take all appropriate . . . measures . . . to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.").

> forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.[45]

In the context of the treatment of prisoners of war, General Orders No. 100 also made it clear that no connection was to be made between the justness of the cause and the application of the law:

> The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.[46]

Thus, President Lincoln and his government made the fundamental distinction, in exact conformity with the law and practice of the world community both before (as King Henry's discussion with his men shows[47]) and since, between the *ius ad bellum*, the law governing the right to use armed force, and the *ius in bello*, the law governing the conduct of an armed conflict once it has begun.[48] It is unfortunate that President Reagan and his advisers did not recognize this important distinction as well, when, in 1987, they rejected the possibility that the United States would ratify Protocol I to the 1949 Geneva convention.[49] Others have clearly demonstrated that Protocol

---

45. General Orders No. 100, *supra* note 24, arts. 152-53, at 22.

46. *Id.*, art. 67, at 12.

47. *See supra* note 8 and accompanying text.

48. *Cf.* H. Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 239 (1953) (stating that an aggressor can invoke for its benefit the rules of warfare applying to the actual conduct of the hostilities); Krysztof Skubiszewski, *Use of Force by States, Collective Security, Law of War and Neutrality*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW 739, 808-12 (Max Sørensen ed., 1968) (describing the differing applications of the law to lawful and unlawful belligerents); *infra* text accompanying note 75.

49. The formal rejection process began with President Reagan's letter to the Senate on January 29, 1987, *reprinted in* 81 AM. J. INT'L L. 910, 911 (1987) ("Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war."). Some of the signs that the United States would ultimately reject Protocol I had already appeared in the earlier writings of Reagan administration officials. For example, Lt. Col. Burrus M. Carnahan of the Office of the Joint Chiefs of Staff published *Ad-*

I was not a carte blanche for rebels and terrorists;[50] this was not an instance of "*la trahison des clercs*" (the treachery of the intellectuals) as some of the more inflamed rhetoric suggested. That rhetoric perhaps once endangered the sensible interpretation of the Protocol's text, but it since has been outweighed by the ratification of the Protocol by 152 states—including all but two of the western alliance—and by the statements of interpretation which many states have made. In addition, by 1987, the "wars of national liberation" in Southern Africa and in the wider Portuguese empire, with which the Diplomatic Conference had been concerned, had ended.[51] Even by 1977, when the

---

ditional Protocol I: A Military View, 19 AKRON L. REV. 543 (1986). Lt. Col. Carnahan argued that Protocol I should not be adopted by the United States because its rules could not be implemented practically. *See id.* at 549. Douglas J. Feith, Reagan's Deputy Assistant Secretary of Defense, wrote *Law in the Service of Terror—The Strange Case of the Additional Protocol*, 1 NAT'L INTEREST 36 (1985) and *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531, 534 (1986) (arguing that "the upshot of the . . . Conference was a pro-terrorist treaty that calls itself humanitarian law."). Maj. Guy B. Roberts, Assistant Staff Judge Advocate, published *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109 (1985). Maj. Roberts stated that "the major provisions of Protocol I are not only unacceptable politically, militarily and practically, but they may be described as 'advancing progressively backwards' in affording protections for non-combatants." *Id.* at 166 (quoting F.R. Ribeiro, *International Humanitarian Law: Advancing Progressively Backwards*, 97 S. AFRICAN L.J. 42, 42 (1980)). Judge Abraham D. Sofaer, Legal Adviser to the Department of State, wrote about Protocol I in his article *Terrorism and the Law*, 64 FOREIGN AFF. 901 (1986). Judge Sofaer alleged that Protocol I "placed [law] very much at the service of those who embrace political violence." *Id.* at 922.

50. *See, e.g.*, George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693, 719 (1986) (arguing that Protocol I is "consistent with the interests of the United States"); George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 1 (1991) ("It is apparent that President Reagan's decision [not to ratify] resulted from misguided advice that . . . misconstrued a humanitarian and antiterrorist instrument as one that could give aid and comfort to 'terrorists.'"); George H. Aldrich, *Some Reflections on the Origins of the 1977 Geneva Protocols*, *in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 129, 137 (Christophe Swinarski ed., 1984) [hereinafter Aldrich, *Some Reflections*] ("*Protocol I* is a major accomplishment for international law and for human rights, and it should be ratified universally."); Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912, 913 (1987) ("Protocol I neither recognizes terrorist groups nor legitimizes terrorist acts."); Theodor Meron, Editorial Comment, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 686 (1994) ("Protocol I is undoubtedly a prime humanitarian instrument that may have a significant humanizing influence on warfare."); Waldemar A. Solf, *A Response to Douglas J. Feith's* Law in the Service of Terror—The Strange Case of the Additional Protocol, 20 AKRON L. REV. 261, 289 (1986) (arguing that Feith overemphasized, and overreacted to, one provision of Protocol I).

51. According to Ambassador George Aldrich, the leader of the United States delegation to the Diplomatic Conference which prepared the 1977 Protocols, several factors led to the calling of the Conference, including disputes about the applicability of the Geneva and Hague Conventions to internal armed conflicts and wars of national liberation, the position of guerrilla

conference concluded, this great concern was no longer a real one. It is encouraging, however, that, notwithstanding the 1987 position, U.S. authorities have since recognized the force of parts of the Protocol as declaratory of customary international law—in the Gulf War, for instance.[52]

The final exchange between King Henry and the French herald concerning the removal of bodies makes the point that the obligations recognized at Agincourt extended after the battle. Those obligations now also include obligations relating to information, which are discussed in the next Part of these Remarks.

II. RULES FACILITATING COMMUNICATION

The heralds on the two sides at Agincourt watched the battle together from a hilltop but took no direct part in it. The Laws of Arms made it quite clear that they were to be protected and to have complete immunity.[53] It was in everybody's interests that the heralds be able to pass freely to carry messages from one side to the other. The rules and practice governing communications now have very extensive application in warfare. For instance, in 1995 alone, the ICRC forwarded 3,450,519 messages (mainly in connection with the conflicts in Rwanda and the former Yugoslavia), reunited 11,217 families, traced 14,687 people, and received 93,428 new tracing requests.[54]

---

warfare, the protection of prisoners of war, restraints on the use of weaponry, and the related matter of the protection of civilians. *See* Aldrich, *Some Reflections*, *supra* note 50, at 132-36.

52. *See, e.g.*, *United States Department of Defense Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of War*, 31 I.L.M. 612, 617, 624-25, 631-32 (1992) [hereinafter *Report to Congress*] (referring to and agreeing with aspects of Protocol I and regarding those aspects as codification of the customary practice of nations). For a British view, see Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, *in* THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 63, 88 (Peter Rowe ed., 1993) [hereinafter GULF WAR] (concluding that the practice of states in the Gulf War suggests that various provisions of Protocol I, such as the definition of a military objective, are regarded as binding in customary law by those states).

53. *See, e.g.*, M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 195 (1965). Modern examples of this type of immunity include the "flags of truce" rules set forth in the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, arts. 32-34, 36 Stat. 2277, 2304. These rules state that a person bearing a white flag has a right to inviolability unless it is proved that he has taken advantage of his position to commit a treacherous act. *See id.* at 2304. Likewise, Protocol I excepts inviolability for persons committing perfidious acts. The Protocol defines "perfidious acts" as those acts which invite "the confidence of an adversary and lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." Protocol I, *supra* note 18, art. 37, at 21.

54. *See* 1995 ICRC ANNUAL REPORT, *supra* note 1, at 25.

The ICRC established a Central Tracing Agency within the first decade of its existence during the Franco-Prussian War.

On the initiative of the U.S. delegation, and by referencing its very recent experience in Vietnam, major improvements were made to the law governing communications in 1977, in Protocol I. An entire new section, entitled "Missing and Dead Persons," was added to the draft protocol prepared for the Diplomatic Conference. The section begins with the principle that "the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives."[55]

Obviously, the communicative role is not limited to armed conflict; it is inherent in the general law of diplomatic relations and has an essential role during crises. For example, an ICRC update relating to the hostage taking at the Japanese embassy in Lima, Peru, after first mentioning the relief assistance and medical and psychological support being provided by the ICRC, reported the following under the heading "Facilitating Dialogue":

> In this highly sensitive situation, the ICRC continues, at the request of both the Peruvian government and MRTA [the group which had taken the hostages], to act as a neutral intermediary to facilitate the establishment of a dialogue between the parties, in the hope that this will allow them to find a peaceful solution. The delegation therefore actively maintains contact with both sides. In playing this role of facilitator, the ICRC assumes no responsibility for any proposals passed on, decisions made or action taken by either of the two parties. However, it has requested the parties to guarantee that they would not resort to force or take any steps that may harm the hostages or hamper ICRC delegates' freedom of movement.[56]

The delegate at the center of the Lima crisis has recently published a fascinating account of the role of the ICRC as a neutral intermediary, testing the action taken in Lima against the stated policy

---

55. *See* Protocol I, *supra* note 18, art. 32, at 19. For additional background concerning this provision, see BOTHE ET AL., *supra* note 38, at 168-81, and ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 339-79 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC, ADDITIONAL PROTOCOL COMMENTARY].

56. ICRC, Update No. 1 on ICRC Activities Related to the Hostage Crisis in Lima (Jan. 10, 1997).

of the ICRC.[57] Of course, technology now greatly facilitates communication between parties in times of crisis or danger. At the height of the Cold War, for example, President Kennedy and Premier Khrushchev agreed to establish a direct communications link between the two governments.[58] These developments can be seen in a wider context of the developing obligation of states in whose territories or under whose control dangerous activity is to occur to inform and warn others who might be affected and, as appropriate, to negotiate.[59]

III. THE LEVELS OF RESPONSIBILITY

As the fate of Bardolph indicates, the individual soldier is responsible for breaches of the rules—a responsibility that can be enforced in a most extreme manner. The position of the commander, however, is more complex. In the exchanges between the disguised Henry and his men, it was ultimately agreed that a commander is not responsible for the actions of his men.[60] At the end of the war in the Pacific, the United State Supreme Court's decision in *In re Yamashita*,[61] established, in part, the contrary position. In addition, the U.S. delegation to the Diplomatic Conference—following the U.S. experience in the My Lai incident—actively worked to insert the following parallel provision into Article 86(2) of Protocol I:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from pe-

---

57. *See* Michel Minnig, *The Lima Hostage Crisis: Some Comments on the ICRC's Role as "Neutral Intermediary"*, 323 INT'L REV. RED CROSS 293, 302 (1998) (concluding that the ultimate act of the humanitarian intermediary is to go as far as it possibly can, "to the point where it borders on the political sphere, while affirming more strongly than ever how different it is from the latter").

58. *See* Memorandum of Understanding Regarding the Establishment of a Direct Communications Link, June 20, 1963, U.S.-U.S.S.R., 14 U.S.T. 825.

59. *See, e.g.*, *International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law*, [1989] 2 Y.B. INT'L L. COMM'N 131, 141-42, U.N. Doc. A/CN.4/423. The subsequent development of that text and related state practice (including treaty making) in the environmental context is very helpfully reviewed in Phoebe N. Okowa, *Procedural Obligations in International Environmental Agreements*, 67 BRIT. Y.B. INT'L L. 275 (1996).

60. *See supra* note 8.

61. 327 U.S. 1, 16 (1946) (holding that various provisions of the Annex to the Fourth Hague Convention of 1907, the Tenth Hague Convention, and the Geneva Red Cross Convention of 1929, "plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population").

> nal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[62]

Technological developments over the last two decades have enhanced the ability not just of senior military commanders but also of political leaders to be in close contact with those in the field. Those developments may highlight the failures of subordinates to comply with the obligations of international citizenship and may bring with them the prospect of the greater responsibility (including criminal responsibility) of the political leadership.[63]

Another complex and controversial issue is the position of subordinates who commit atrocities while acting under superior orders. At times the British and American manuals of military law have stated that superior orders provided a defense.[64] But the contrary position has generally been adopted. For instance, following the American Civil War, Henry Wirz, the commandant of the Confederacy Prison Camp at Andersonville, Georgia, was charged with maltreating prisoners of war. During the trial, the Judge Advocate admitted that the accused acted under orders but responded that "'[a] superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it.'"[65] Wirz was convicted and executed. One scholar, discussing Wirz's case at the end of World War I, commented that the unqualified acceptance of the principle that a subordinate is not responsible for what he does under orders of his superiors would make it practically impossible to

---

62. Protocol I, *supra* note 18, art. 86(2), at 43.

63. *See Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind Adopted by the International Law Commission on its Forty-Eighth Session* [hereinafter ILC Draft Code], art. 6, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), *revised by* U.N. Doc. A/CN.4L.532/Corr. 1 *and* U.N. Doc. A/CN.4L.532/Corr.3; *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court*, Rome Statute of the International Criminal Court, July 17, 1998, art. 28, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999, 1017 (1998) [hereinafter Rome Statute].

64. *See, e.g.*, GEORG SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 16 (1965).

65. George A. Finch, Editorial Comment, *Superior Orders and War Crimes*, 15 AM. J. INT'L L. 440, 444 (1921).

enforce proper penalties for violations of the laws of war designed to humanize, if such be possible, that grim recourse.[66]

Later practice—notably the Charter establishing the Nuremberg tribunal[67] and the judgments of that tribunal—has established that superior orders do not free a person from responsibility, although such orders might be relevant, if justice so requires, in deciding on the proper penalty.[68] The tribunal noted that the provisions in its Charter

> are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality . . . . The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[69]

The tribunal had earlier emphasized that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[70]

In 1998, as I discuss later, the British House of Lords applied essentially the same principle in ruling that General Pinochet, the former President of Chile, could not claim immunity against charges of torture and hostage taking.[71]

---

66. *See id.* at 444-45.

67. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Annex, art. 8, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 284.

68. The matter is of some complexity and dispute. *Compare* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 143-48 (1996) (discussing military discipline and the virtual demise of the superior orders defense during the Nuremberg trial) *with* YORAM DINSTEIN, THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW (1965). Dinstein writes:

> Though theoretically and logically, the solution of the problems raised by this subject [of obedience to superior orders] seems to be clear and simple—that is, the fact of obedience to orders should be excluded as a defense *per se*, but permitted to be taken into account, among other circumstances of the case, for the purpose of establishing a defence based on lack of *mens rea*—yet in practice, in the spheres of the cases and of international legislation, international law seems still to be haunted by the spectre of obedience to orders.

Id. at 253.

69. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945 - 1 OCTOBER 1946, at 224 (1947) [hereinafter NUREMBERG TRIAL].

70. *Id.* at 223.

71. *See infra* note 157 and accompanying text.

IV. THE LEGAL CHARACTER OF THE RULES

It is a commonplace that rules within a legal system vary in their strength and legal significance. Newspaper headlines and television screens declare that the law of armed conflict is constantly breached; that it is a feeble thing; or even that it is nonexistent. As Cicero once noted while serving as defense counsel in a criminal trial, "*silent enim leges inter arma*," or "[w]hen arms speak, the laws are silent."[72] There is a great deal of truth in the impression given by the media. Dreadful breaches of the rules are committed. To balance that, at least to some extent, I now consider aspects of the legal character of the rules, and I conclude by discussing the means of implementing them and ways to enforce compliance.

A. The Autonomy of the Rules

The law applicable during a battle applies completely independently of the lawfulness or justness of the resort to armed force. Accordingly, one party to a conflict cannot claim to be excused from the obligations imposed by this law on the basis that the other party is the aggressor or in some other respect has breached the prohibitions on the use of armed force that are found in the Charter of the United Nations.[73] As common Article 1 of the Geneva Conventions of 1949 makes clear: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*."[74] Protocol I, in addition to repeating that obligation in its Article 1, makes explicit what is implicit in the italicized phrase just quoted. In the preamble, the parties reaffirm that the provisions of the 1949 Conventions and the protocol "must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."[75]

The distinct existence and autonomous operation of this body of law are further emphasized in the text of Protocol I:

---

72. 14 CICERO, PRO T. ANNIO MILONE ORATIO [THE SPEECH ON BEHALF OF TITUS ANNIUS MILO] 11 (G.P. Goold ed. & N.H. Watts trans., Harvard Univ. Press 1992). Cicero's client, Milo, was accused of murder. He was convicted and exiled. There is some doubt about what, exactly, Cicero said at the trial.

73. *See* U.N. CHARTER art. 2, para 4.

74. Geneva Conventions of 1949, *supra* note 37, common art. 1 (emphasis added).

75. Protocol I, *supra* note 18, preamble, para. 5, at 7.

> The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.[76]

Those provisions clearly reflect the proposition stated by Francis Lieber and elaborated in the exchange between King Henry and his men: disputes between princes and the rights or wrongs of the princely positions do not affect the existence and application of the laws governing armed conflict and protecting the victims of war.

Edmund Wilson, in his marvelous study of the literature of the American Civil War, records a related exchange between General Sherman, "confident and towering" after the taking of Atlanta, and General John B. Hood, commander of the Confederate Army of Tennessee.[77] Sherman "deemed it to [be in] the interest of the United States" to banish the entire population of Atlanta from their city.[78] Hood replied that he could not refuse to comply:

> And now, sir, permit me to say that the unprecedented measure you propose transcends, in studied and ingenious cruelty, all history of war. In the name of God and humanity, I protest, believing that you will find that you are expelling from their homes and firesides the wives and children of a brave people.[79]

In Edmund Wilson's words, "an extraordinary polemic" then arose.[80] Sherman plunged into a political indictment:

> In the name of common-sense, I ask you not to appeal to a just God in such a sacrilegious manner. You who, in the midst of peace and prosperity, have plunged a nation into war, dark and cruel war—who dared and badgered us to battle, insulted our flag, seized our arsenals and forts that were left in the honorable custody of peaceful ordnance-sergeants, seized and made 'prisoners of war' the very garrisons sent to protect your people against negroes and Indians, long before any overt act was committed by the (to you) hated Lincoln Government; tried to force Kentucky and Missouri into rebellion, spite of themselves; falsified the vote of Louisiana; turned loose your privateers to plunder unarmed ships; expelled Union families by the

---

76. *Id.* art. 4, at 8.

77. EDMUND WILSON, PATRIOTIC GORE 188 (1966).

78. *Id.*

79. *Id.*

80. *Id.*

> thousands, burned their houses, and declared, by an act of your Congress, the confiscation of all debts due Northern men for goods had and received![81]

Hood's reply related first to the usages followed in war by civilized nations. He then indicated that the political issues were not for him—or indeed for Sherman—to pursue:

> The residue of your letter is rather discussion. It opens a wide field for the discussion of questions which I do not feel are committed to me. I am only a general of one of the armies of the Confederate States, charged with military operations in the field, under the direction of my superior officers, and I am not called upon to discuss with you the causes of the present war, or the political questions which led to or resulted from it. These grave and important questions have been committed to far abler hands than mine, and I shall only refer to them so far as to repel any unjust conclusion which might be drawn from my silence.[82]

In response, Sherman did agree that "this discussion by two soldiers is out of place, and profitless."[83]

The soldiers were, of course, right. To reiterate, it has long been established that the rightness or lawfulness of the war or of its cause has nothing to do with the law which governs the rights and duties of the parties to the conflict, the combatants, and others caught up in the conflict. It is troubling, therefore, to see some possible suggestion in the opinion of the International Court of Justice (ICJ) in the 1996 *Nuclear Weapons* cases that the wall between the two areas of law may be permeable. Two paragraphs of the opinion may be read as indicating that the lawfulness of the resort to self-defense may be relevant to the lawfulness of using nuclear weapons "in an extreme circumstance of self-defense, in which [a state's] very survival would be at stake."[84]

---

81. *Id.* at 189.

82. *Id.* at 190.

83. *Id.* at 192.

84. Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 97, at 263 (July 8); *id.* ¶ 95, at 262-63 (stating that although the "unique characteristics of nuclear weapons . . . seem[s] scarcely reconcilable" with the law applicable in armed conflict, the use of nuclear weapons would not "necessarily be at variance" with those laws in extreme circumstances); *see also id.* ¶ 105(2)(E), at 266 ("[T]he threat or use of nuclear weapons would generally be contrary to . . . the principles and rules of humanitarian law; [h]owever, . . . the court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense.").

B. The Stability of the Rules

The parties to the Geneva Conventions deny themselves the freedom to vary their obligations by mutual agreement in so far as any agreement would adversely affect the rights of those protected by the Convention or Protocol.[85] The stability of the rules in this context is in stark contrast with the general ability of parties to vary their obligations under international law by mutual agreement.[86] Like the Geneva Conventions, the Vienna Convention on the Law of Treaties, in a provision included on the initiative of the Swiss Government, constrains the power of parties. It prohibits a state from terminating or suspending, by reason of a material breach by another party, the operation of those treaty provisions "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[87]

While the 1949 Geneva Conventions do reserve to parties the power to withdraw from them, two significant limits reduce much of the effect of that power. First, if the withdrawing state is involved in an armed conflict, the withdrawal does not take effect until peace has been concluded and operations relating to the protected persons have been completed.[88] And, second, the withdrawal has effect only in respect to the withdrawing state, and it:

> [S]hall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law

---

85. *See* Geneva Conventions of 1949, *supra* note 37, common art. 6 (appearing as art. 7 in Geneva Convention No. IV) ("No special agreement shall adversely . . . restrict the rights which it confers upon [the protected individuals].").

86. *See, e.g.*, Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 41, 1155 U.N.T.S. 331, 342 [hereinafter Vienna Convention] (permitting, with some restriction, "[t]wo or more of the parties to a multilateral treaty [to] conclude an agreement to modify the treaty as between themselves alone").

87. *See id.* art. 60(5), 1155 U.N.T.S. at 346; *see also* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 190 (2d ed. 1984) (stating that these types of provisions are intended to benefit individuals and not states and therefore are not dependent on performance by other parties).

88. This is found in an article common to each of the Geneva Conventions of 1949, *supra* note 37. *See* Geneva Convention No. I, *supra* note 37, art. 63 ("[A] denunciation [of the present Convention] . . . shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated"); Geneva Convention No. II, *supra* note 37, art. 62 (same); Geneva Convention No. III, *supra* note 37, art. 142 (same); Geneva Convention No. IV, *supra* note 37, art. 158 (same).

> of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.[89]

Not only are the parties constrained in their freedom to reduce the protection by agreement, responses to breach, and withdrawal, but the individuals who are protected by the Conventions similarly cannot themselves waive their rights.[90]

C. The Universality of the Rules

The legal strength of the obligations accepted by the parties to the Conventions and Protocol I is emphasized in a further respect by common Article 1, quoted above.[91] Under that provision, the 188 parties[92] undertake not only that they will respect the obligations themselves, but also that they will "*ensure respect*" for the obligations.[93] Those additional words, according to the commentary on the Conventions and Protocol prepared by the ICRC, have real significance:

> [I]n the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) *should endeavour* to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.[94]

Based on this interpretation, "the ICRC has taken a number of steps, confidentially or publicly" to encourage all the states parties

---

89. This is found in an article common to each of the Geneva Conventions of 1949, *supra* note 37. *See* Geneva Convention No. I, *supra* note 37, art. 63; Geneva Convention No. II, *supra* note 37, art. 62; Geneva Convention No. III, *supra* note 37, art. 142; Geneva Convention No. IV, *supra* note 37, art. 158.

90. *See* Geneva Conventions of 1949, *supra* note 37, common art. 7 (appearing as art. 8 in Geneva Convention No. IV) ("[Protected individuals] may in no circumstances renounce in part or in entirety the rights secured to them . . . .").

91. *See supra* text accompanying note 74.

92. *See* ICRC, *Geneva Conventions for the Protection of War Victims of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions as at 31 December 1997*, 322 INT'L REV. RED CROSS 178, 181 (1998).

93. Geneva Conventions of 1949, *supra* note 37, common art. 1 (emphasis added).

94. JEAN DE PREUX ET AL., GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, *in* 3 THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 18 (Jean S. Pictet ed. & A.P. de Heney trans., International Committee of the Red Cross 1960) (emphasis added).

and certain particular states "to use their influence or offer their co-operation to ensure respect for humanitarian law."[95] As the commentary indicates, the obligations are obligations owed to the whole world and are of multilateral concern.[96]

This interpretation can, of course, be challenged. The ICRC has no specific authority to interpret the Geneva texts—although it may well exercise real practical authority. Furthermore, the suggested duties of other states parties are so general as to have little practical bite, as opposed to the more specific duties discussed in Part V of these Remarks. And yet the cries of humanity might well be seen as requiring some actions by other parties to the Conventions to help ensure respect. As a great British international lawyer has noted, the Conventions are not simply expedient arrangements dependent on the will of the two parties to the conflict and operating exclusively between them.[97]

D. The Underlying and Competing Moral and Military Considerations

Particular protective provisions are sometimes qualified by military necessity—a fact that appears, for instance, in some of the Lieber provisions quoted earlier.[98] In addition, under the Geneva Conventions, the grave breach of extensive destruction and appropriation of property[99]—a crime subject to universal criminal jurisdiction[100]—is subject to a limit of military necessity.[101] There is authority, however,

---

95. ICRC, ADDITIONAL PROTOCOL COMMENTARY, *supra* note 55, at 36.

96. *See id.*

97. *See* Gerald Fitzmaurice, *The General Principles of International Law: Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 1, 125-26 (1957) ("Such conventions involve obligations of an absolute and . . . self-existent kind, the duty to perform which, once assumed, is not . . . dependent on a reciprocal or corresponding performance by other parties.").

98. *See supra* notes 30-32 and accompanying text.

99. *See, e.g.*, Geneva Convention No. I, *supra* note 37, art. 50 (specifying this offense as a grave breach).

100. *See, e.g., id.* art. 49 (stating that a party may bring persons alleged to have committed grave breaches before that party's courts "regardless of [the accused's] nationality").

101. This limit is expressed in an article common to three of the Geneva Conventions of 1949. *See* Geneva Convention No. I, *supra* note 37, art. 50 (grave breaches are specified acts "not justified by military necessity and carried out unlawfully and wantonly"); Geneva Convention No. II, *supra* note 37, art. 51 (same); Geneva Convention No. IV, *supra* note 37, art. 147 (same).

for the proposition that this limit is available only when the treaty itself expresses it.[102]

By contrast, the moral or humanitarian element does have a general role, even if a residual one, in the operation of the law. Thus, Article 1(2) of Protocol I repeats wording which appears in the withdrawal provisions from the Geneva Conventions quoted earlier: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[103]

The preamble to Protocol II, which applies to non-international armed conflict, similarly recalls that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience."[104]

This wording finds its origins in the work of a remarkable Russian diplomat and scholar, Fyodor Martens, who played a central role in the work of the two Peace Conferences called by Czar Nicholas II and held in The Hague in 1899 and 1907. It was he who proposed the generous humanitarian wording to resolve an impasse in the drafting of the Hague Convention on the laws and customs of war.[105]

E. The Balance of Rights and Obligations

At least since Wesley Hohfeld's work[106]—New Zealanders and some others would say since John Salmond's[107]—the correlation be-

---

102. *See, e.g.*, G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 95-97 (1958).

103. Protocol I, *supra* note 18, art. 1(2).

104. Protocol II, *supra* note 16, preamble, 1125 U.N.T.S. at 611.

105. *See, e.g.*, Vladimir Pustogarov, *Fyodor Fyodorovich Martens (1845-1909): A Humanist of Modern Times*, *in* 312 INT'L REV. RED CROSS 300, 311 (May/June 1996); Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT'L REV. RED CROSS 125 (Mar./Apr. 1997).

106. *See, e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (examining judicial application of rights and duties); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (a continuation of the earlier work).

107. JOHN W. SALMOND, JURISPRUDENCE: OR THE THEORY OF THE LAW (1st ed. 1902), *discussed in* ALEX FRAME, SALMOND, SOUTHERN JURIST 61-64 (1995). For a valuable contribution to this area of study by a former member of Duke's faculty, see *The Case of the Interrupted Whambler*, *in* LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE: A SELECTION OF READINGS SUPPLEMENTED BY COMMENTS PREPARED BY THE EDITOR 628-38 (temp. ed. 1949). Fuller's volume also reprints related papers. *See* Arthur L. Corbin, *Legal Analysis and*

tween rights and duties and between other jural postulates has become an accepted part of legal analysis. This correlation and some of the resulting complications are found at the heart of a controversial provision of Protocol I, Article 44(3):

> In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.[108]

The controversy about this provision mainly revolves around the interpretation and application of the phrase "the nature of the hostilities," and the identification of the point at which arms are to be carried openly. For instance, the United Kingdom, in ratifying the Protocol stated its understanding that

- [T]he situation in the second sentence . . . can only exist in an occupied territory or in armed conflicts covered by paragraph (4) of Article (1) [wars of national liberation].

- "[D]eployment" in paragraph 3(b) means any movement towards a place from which an attack is to be launched.[109]

My interest in the provision is the link it makes between rights and responsibilities. Combatants have certain powers (especially to use force) and certain rights (especially to status as a prisoner of war if captured), and they have certain obligations, including those imposed by Article 44(3). In general, if a combatant breaches his obligations and as a result becomes subject to prosecution for a war crime, he loses neither his combatant status nor, if captured, his prisoner of war status. Article 44(4) creates an exception, however. If a combat-

---

Terminology, 29 Yale L.J. 163 (1919), *reprinted in* Fuller, *supra*, at 639; Walter Wheeler Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, *reprinted in* Fuller, *supra*, at 653.

108. Protocol I, *supra* note 18, art. 44(3).

109. ICRC, *Ratification of the Additional Protocols by the United Kingdom of Great Britain and Northern Ireland*, 322 INT'L REV. RED CROSS 186, 188 (Mar. 1998).

ant is captured while failing to comply with the second sentence of Article 44(3) quoted above, he forfeits his right to be a prisoner of war. He must, however, be given protections equivalent in all respects to those accorded to a prisoner of war including those available in a trial for any offenses. Accordingly, the implied sanction—the loss of prisoner of war status—is only chimerical. The complexities of these provisions highlight the extreme difficulty of getting agreement in this area.[110]

Lieber prepared his draft of General Orders No. 100 against a strongly developed philosophical position that rights and obligations are "inter-complementing":

> [R]ight and obligation are twins[,] . . . [they are] each other's complements, and cannot be severed without undermining the ethical ground on which we stand—that ground on which alone civilization, justice, virtue, and real progress can build enduring monuments. Right and obligation are the warp and the woof of the tissue of man's moral, and therefore, likewise, of man's civil life. Take out the one, and the other is in worthless confusion.[111]

In a nutshell "Right alone, despotism—duty alone, slavery."[112] In Professor Carrington's summation, Lieber's conception "pairs duty with right and elevates the values of process as the means by which the nation can achieve relativist justice and thereby unite its diverse and other conflicting interests to save the whole."[113] That conception is not limited by national borders.

V. POSITIVE OBLIGATIONS

As the experience at Agincourt indicates, many of the obligations in war are negative: non-combatants are *not* to be attacked; private property is *not* to be seized; heralds are *not* to be prevented from carrying out their responsibilities. But as the cooperative clearing of

---

110. For valuable commentaries on "one of the most bitterly disputed articles" at the Diplomatic Conference, see ICRC, ADDITIONAL PROTOCOL COMMENTARY, *supra* note 55, at 521, 519-42; BOTHE ET AL., *supra* note 38, at 241-58.

111. James F. Childress, *Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34, 47 (1976) (quoting FRANCIS LIEBER, 1 MISCELLANEOUS WRITINGS 264 (1881)).

112. *Id.* at 48. For a recent important development of the duty/right connection by a public philosopher, see DAVID SELBOURNE, THE PRINCIPLE OF DUTY: AN ESSAY ON THE FOUNDATIONS OF THE CIVIC ORDER (1994).

113. Carrington, *Political Ethics*, *supra* note 29, at 396.

the battlefield and the related exchange of information reflect, some of the obligations are positive. Henry Wirz was condemned in part for failing to provide necessities to the prisoners of war in his charge at Andersonville. At about the same time, the Maori order of the day for a battle in New Zealand between Maori and British forces began with a verse from the New Testament: "If thine enemy hunger, feed him, if he thirst, give him drink."[114]

But it was not in the United States or New Zealand that the Good Samaritan principle took major operational form on the battlefield. Rather it was at Solferino, near Mantua, in Northern Italy in 1859.

Henry Dunant, a young Swiss banker who had already had the central part in founding the worldwide Young Men's Christian Association, was expecting to discuss plans for major agricultural developments in Algeria with Napoleon III. In late June of 1859, he journeyed to the area of Solferino in northern Italy to meet the Emperor. Instead, he came upon the dreadful carnage of a battle that had just ended there between Napoleon's troops, supported by the Sardinians, and the Austrians led by the young Emperor Franz Joseph. After just one day there were more than 40,000 casualties—more than the total New Zealand figure for World War II. It was the most destructive day of battle since Waterloo.

Henry Dunant's response was both immediate and long-term. He organized the relief of the injured, and for several days he was wholly immersed in that effort himself. Later, through constant effort including his writing (particularly the haunting *A Memory of Solferino*), and much travel, he promoted three key developments: (1) the establishment in 1863 of the aid organization which became the International Committee of the Red Cross, as well as other re-

---

114. GILBERT MAIR, THE STORY OF GATE PA 30 (1937) (quoting Romans 12:20). The solemn rules for pursuing the fighting, sent to the British Commanding Officer, were as follows:

> Rule 1. If wounded or (captured) whole, and butt of the musket or hilt of the sword be turned to me (he) will be saved.
>
> Rule 2. If any Pakeha being a soldier by name, shall be travelling unarmed and meet me, he will be captured, and handed over to the direction of the law.
>
> Rule 3. The soldier who flees, being carried away by his fears, and goes to the house of the priest with his gun (even though carrying arms) will be saved; I will not go there.
>
> Rule 4. The unarmed Pakehas, women and children will be spared.
>
> The end. These are binding laws for Tauranga.

Id. at 10.

lated voluntary national organizations; (2) the preparation of a statement of legal commitment, incorporated into the first Geneva Convention of 1864, binding on belligerent states; and (3) the promotion of the application of that law and the use of those organizations in practice on the battlefield.

A fundamental proposition of the Geneva Conventions since the first one was signed on August 22, 1864, is that the wounded and sick of whatever nation "shall be collected and cared for."[115] This set of positive obligations continues, in much more extensive form, both in the books and in practice. The ICRC's 1995 annual report records, for instance, the actions of that body in supporting people deprived of their freedom; in protecting civilian populations; in restoring family links; in providing health care (for instance to amputees); in providing water supplies; and in delivering material assistance.[116] In 1995, that assistance included visits to 2,282 places of detention and to 146,585 detainees in fifty-eight countries;[117] the sending of health teams to twenty countries to provide drinking water or repair water treatment and distribution facilities in regions affected by conflict;[118] and the distribution of 115,228 tons of material aid (down from 206,800 tons in 1994), with more than half of the total value of assistance going to central and eastern Europe.[119] There was also ICRC activity in the Americas: in Colombia, Mexico, Ecuador, Peru, and Haiti.[120]

That is part of the positive response to tragic situations around the world. Further assistance is provided through the International Federation of Red Cross and Red Crescent Societies and through national societies. The efforts of these societies are reported in *World Disasters Report*, published annually by the Federation. In addition, many other governmental and nongovernmental agencies provide assistance to areas ravaged by conflicts.[121]

---

115. Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, art. 6 (1864).

116. *See* 1995 ICRC ANNUAL REPORT, *supra* note 1, at 22-30.

117. *Id.* at 22.

118. *Id.* at 26.

119. *Id.* at 31.

120. *See id.* at 32.

121. For a valuable account of some of the problems for humanitarian action arising from collapsed states, see ADAM ROBERTS, HUMANITARIAN ACTION IN WAR: AID, PROTECTION AND IMPARTIALITY IN A POLICY VACUUM (Adelphi Paper No. 305, 1996). One tragic demonstration was the killing of members of an International Red Cross mission in Chechnya in De-

Positive duties to assist may arise not only from the law of the land but also from professional ethical obligations. As the case of Dr. Samuel A. Mudd, the man who treated John Wilkes Booth, shows, these duties might be seen as conflicting with duties under national law, such as the duty to report certain suspicious events to public authorities. Such a clash gave rise to a most interesting debate in the course of the preparation of a provision in Protocol II on the general protection of medical duties. The draft provision would have given extensive protection both to the carrying out of the duties and to the related confidences:

> 1. In no circumstances shall any person be punished for carrying out medical activities compatible with professional ethics, regardless of the person benefiting therefrom.
> . . .
> 3. No persons engaged in medical activities may be compelled to give to any authority information concerning the sick and the wounded under his care should such information be likely to prove harmful to the persons concerned or their families. Compulsory medical regulations for the notification of communicable diseases shall however be respected.[122]

The first substantive provision emerged unscathed from the Diplomatic Conference. The protection given by the other, however, was narrowed in a most significant way:

> 3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, *subject to national law*, be respected.
> 4. *Subject to national law*, no person engaged in medical activities may be penalised in any way by any party to the conflict for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.[123]

The inclusion of the overriding references to national law demonstrates the success of those in the Diplomatic Conference who were emphasizing sovereignty over humanity. The Canadian delegation, for instance, believed that the proposed paragraph three "could

---

cember 1996. *See* ICRC, *17 December 1996: Six Red Cross Staff Assassinated in Chechnya*, 317 INT'L REV. RED CROSS 135 (Mar./Apr. 1997).

122. LAW OF NON-INTERNATIONAL ARMED CONFLICT, *supra* note 38, at 361.

123. CDDH/II/295; XIII, 196, *reprinted in* LAW OF NON-INTERNATIONAL ARMED CONFLICT, *supra* note 38, at 399 (emphases added); *see also* Protocol II, *supra* note 16, art. 10.

be regarded as an infringement of sovereignty and should be deleted."[124] Following the unanimous adoption of the text of the new paragraphs, the head of the Norwegian delegation in a formal declaration took exactly the opposite position:

> His Government deeply regretted the inclusion in . . . paragraphs [3 and 4] of the words "subject to national law." It was unacceptable to his Government that an international legal norm of the importance of the Protocol should be made subject to the national law of any country. In its view such a provision was contrary to the very essence of the international law and would be extremely dangerous for the whole body of humanitarian law. When the matter came up in plenary, the Norwegian delegation would propose the deletion of those words. To emphasize the importance that his delegation attached to the matter, he wished to state that it was unlikely that Norway would ratify Protocol II if the words "subject to national law" were maintained.[125]

The words were maintained, and, ironically, Norway was among the first twenty states to ratify the Protocol.

The international law obligation to help others in peril extends beyond the battlefield to perilous peacetime activity at sea and in outer space. The obligation of seafarers to go to the aid of those in distress at sea has been traced back to statutes enacted as early as the fourteenth century.[126] In 1566, Pope Pius V added an express economic incentive to support the demands of humanity, calling on fishing vessels to come to the aid of ships in peril, and providing payment to those who took that action.[127] In modern statements of the law, in international treaties, and in national legislation, seafarers' obligations are more extensive,[128] reflecting the development of

---

124. CDDH/II/SR.28; XI, 281, reprinted in LAW OF NON-INTERNATIONAL ARMED CONFLICT, supra note 38, at 399.

125. CDDH/II SR.46; XI, 513, reprinted in LAW OF NON-INTERNATIONAL ARMED CONFLICT, supra note 38, at 399; see also Waldemar A. Solf, Development of the Protection of the Wounded, Sick, and Shipwrecked Under the Protocols Additional to the 1949 Geneva Conventions, in ESSAYS IN HONOUR OF JEAN PICTET, supra note 50, at 237, 245 (stating that this "deference to national law has been the subject of severe criticism").

126. See 1 GILBERT CHARLES GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 369 n.2 (1932).

127. See id.

128. See, e.g., Geneva Convention on the High Seas, art. 12, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; United Nations Convention on the Law of the Sea, art. 98, Dec. 10, 1982, U.N. Doc. No. A/CONF.62/122, reprinted in 21 I.L.M. 1261 (1982); Safety of Life at Sea Convention (SOLAS), Nov. 1, 1974, 32 U.S.T. 47, 164 U.N.T.S. 113; Convention for the Unification of Cer-

better communications. In addition, coastal states are now obliged to promote the establishment and maintenance of an adequate and effective search and rescue service to promote safety on and over the sea. Meeting that obligation may also require regional arrangements.

The existence in international law of these positive duties to aid those in peril can be contrasted with the reluctance of Anglo-American law to impose such duties. A leading American textbook on torts, for instance, states that "the law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life."[129] Similarly, a major figure in the development of criminal law throughout the Commonwealth denies criminal liability in such cases: "A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt, shameful cowards, but they can hardly be said to have killed the child."[130]

In 1989, the United States Supreme Court adopted a parallel reading for the Fourteenth Amendment's due process guarantee when it held that Wisconsin state authorities were not obliged to take positive action to protect the life and liberty of five-year-old Joshua DeShaney, who had been subject to a series of beatings by his father, even though the authorities had been notified about his very serious plight.[131] According to Chief Justice Rehnquist, speaking for the majority:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limita-

---

tain Rules of Law Relating to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658; International Convention on Salvage, 1989, Apr. 28, 1989, Sen. Treaty Doc. 12, 102d Cong., 1st Sess. (1991).

The law of outer space contains similar obligations. *See, e.g.*, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205, *reprinted in* 6 I.L.M. 386 (1967); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599.

129. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375 (5th ed. 1984).

130. 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 10 (1883).

131. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

> tion on the State's power to act, not as a guarantee of certain minimal levels of safety and security.[132]

Justice Brennan, with Justices Marshall and Blackmun, dissented, contending that the majority had taken the wrong perspective. Brennan was not arguing for a general duty. Rather, in his view, Wisconsin *had* taken action with respect to Joshua and children like him by setting up a system whereby all reports of child abuse were channeled to the Department of Social Services.[133] In doing so, "Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services . . . to protect children from abuse."[134] That action, in Brennan's mind, triggered related duties.[135] As Justice Blackmun stated in a separate dissent, "the facts here involve not mere passivity, but *active* state intervention in the life of Joshua DeShaney—*intervention that triggered a fundamental duty* to aid the boy once the State learned of the severe danger to which he was exposed."[136] Justice Blackmun rejected the drawing of "a sharp and rigid line between action and inaction,"[137] stating that "such formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment."[138]

The willingness of the international legislator to impose positive obligations to assist those in peril should at least give us pause as we consider the common law traditions—at least as indicated in the above three items from private law, criminal law, and constitutional law. Is our moral sense so weak that the parable of the Good Samaritan is to apply in our law—if it applies at all—only in negative ways?[139]

---

132. *Id.* at 195.

133. *See id.* at 208 (Brennan, J., dissenting).

134. *Id.* (Brennan, J., dissenting).

135. *See id.* at 208-12 (Brennan, J., dissenting).

136. *Id.* at 212 (Blackmun, J., dissenting) (emphases added).

137. *Id.* (Blackmun, J., dissenting).

138. *Id.* (Blackmun, J., dissenting). Professor Lawrence Tribe has developed this perspective issue, drawing on his formidable scientific knowledge. *See* Lawrence H. Tribe, *The Curvature of the Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 8-14 (1989); *see also The Supreme Court 1988 Term: Leading Cases, Affirmative Constitutional Obligations of Government Officials*, 103 HARV. L. REV. 167 (1989).

139. For a more general discussion, see THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID (Michael A. Menlow & Alexander McCall Smith eds., 1993); *see also* Kenneth Keith, *Policy and Law: Politicians and Judges (and Poets)*, *in* COURTS AND POLICY: CHECKING THE BALANCE 117 (B.D. Gray & R.B. McClintock eds., 1995).

VI. SANCTIONS AND FORCES FOR COMPLIANCE

The foregoing account establishes the existence of an extensive body of law designed to govern international and internal armed conflict, and especially to protect the victims of that conflict. No doubt there are flaws in that law, as current efforts to get wider ratification of the conventions banning antipersonnel mines, which kill about 200 people a week, demonstrate. But to quote Professor Meron, "In Henry's time, as still today, disrespect for the *existing* rules, rather than the absence of rules, was the principal problem."[140] Major international conferences held in 1993 and 1995 confirmed the shocking facts, deplored the gross and persistent violations of the law, and made strong calls for compliance with the existing law and for use of the existing methods of implementation.[141]

The fate of Bardolph—like that of Henry Wirz and that of those being tried in Arusha and The Hague by the tribunals for Rwanda and the former Yugoslavia—dramatically illustrates the sanctions of the law of armed conflict in operation. Individuals can be tried either by their own authorities or by those of the other party to the conflict for their own breaches of the rules, as well as for breaches committed by those for whom they are responsible. Reprisals—threatened or actual—such as those following the killing of the boys at the back of the English position, have also had a long-standing role in warfare.

But such sanctions are necessarily taken after the event. Initial compliance is preferable. One important—probably essential—step towards that goal is the clear statement and understanding of the rules in advance of conflicts. Holinshed's *Chronicle* indicates that the rule Bardolph breached was stated before the event.[142] Lieber and Halleck were also motivated by that preventive purpose when they prepared General Orders No. 100. So, too, were those responsible for the Geneva and Hague Conventions first negotiated in the latter half of the nineteenth century.

---

140. Meron, *supra* note 5, at 45 (emphasis added).

141. *See, e.g.*, ICRC, *Final Declaration of the International Conference for the Protection of War Victims*, 310 INT'L REV. RED CROSS 79 (Jan./Feb. 1996) [hereinafter ICRC, *Final Declaration 1996*]; ICRC, *Resolutions of the 26th International Conference of the Red Cross and Red Crescent: Resolution 1—International Humanitarian Law: From Law to Action Report on the Follow-up to the International Conference for the Protection of War Victims*, 310 INT'L REV. RED CROSS 55 (Jan./Feb. 1996); ICRC, *Resolutions of the 26th International Conference of the Red Cross and Red Crescent: Resolution 2—Protection of the Civilian Population in Period of Armed Conflict*, 310 INT'L REV. RED CROSS 55 (Jan./Feb. 1996).

142. *See supra* text accompanying note 6.

Compliance may also be promoted by greater appreciation of the humanitarian, moral, religious, military, or political values and purposes underlying the law. Shakespeare captured that truth in his marvelous line: "[W]hen Lenity and Cruelty play for a Kingdom, the gentler gamester is the soonest winner."[143]

Five hundred and fifty years later, United States rules of engagement in Vietnam essentially repeated Henry's rule and its justification, although hardly with the same force and elegance:

> a. The use of unnecessary force resulting in non-combatant casualties and property loss will embitter the population and make the long term goal of pacification more difficult and costly.
> b. The VC/NVA exploit incidents of non-combatant casualties and destruction of property . . . to foster resentment and to alienate the people against the Government.[144]

Those fragments indicate aspects of the answer to the question: what are the forces for compliance with the law and in particular the institutions and methods promoting compliance?

The answers could fill a book and have in fact filled several.[145] The answers incorporate several variables. A first variable concerns timing. The methods may operate before, during, or after the conflict. The Conventions and the Protocol place specific obligations on states to disseminate knowledge of the law, notably to their armed forces but also generally to the public. The international and national Red Cross and Red Crescent movements can, and often do, play a notable educational role, particularly in non-international armed conflict.

Some of that educational effort can emphasize the general principles underlying the law, particularly the protection of those who are not or who are no longer involved in the combat, the protection of medical and other humanitarian efforts, and the prohibition on methods and means of warfare which cause unnecessary suffering. The 1978 statement prepared under the auspices of the ICRC and appended to these Remarks captures their essence in seven propositions set out on a single page. The role for general principle is seen, for instance, in debates about the legality of the use of nuclear weap-

---

143. SHAKESPEARE, *supra* note 5, at act 3, sc. 6, ll. 119-20.

144. RULES OF ENGAGEMENT FOR THE EMPLOYMENT OF FIREPOWER IN THE REPUBLIC OF VIETNAM, Rule 4 (Combat Operations), *reprinted in* 121 CONG. REC. 17,551, 17,556 (1975).

145. *See, e.g.*, IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW (Frits Kalshoven & Yves Sandoz eds., 1989); ICRC, ADDITIONAL PROTOCOL COMMENTARY, *supra* note 55; BOTHE ET AL., *supra* note 38.

ons, which was the subject of a fascinating advisory opinion of the ICJ concerning the use of nuclear weapons given in July 1996.[146]

The process leading up to that opinion illustrates another point: the ability of nongovernmental bodies, such as the International Physicians for the Prevention of Nuclear War, to develop world public opinion and the potential effects of such opinion on governmental actors. Governments were forced, in some cases against their inclination, to debate the legality of the use of nuclear weapons before the International Court by reference to "principles and rules of international humanitarian law applicable in armed conflict."[147] Members of the universities, of course, can and do play a significant role in such processes. For example, Roger Clark, a compatriot and former colleague at the Victoria University of Wellington appeared in the ICJ nuclear weapons case as counsel for Samoa and one of a team representing small Pacific island countries. He has since published a valuable collection of relevant documents from that proceeding.[148]

Countries' obligation to disseminate knowledge of the law of war, which of course applies both before and during an armed conflict, is strengthened by the obligation that Protocol I places on parties to "ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of [the Geneva Conventions and Protocol I] and on the appropriate instruction to be given to the armed forces."[149] A notable instance of a country fulfilling these obligations is the United States use of over 200 lawyers during the course of the Gulf War.[150] General Colin Powell, the Chairman of the Joint Chiefs of Staff, stated that "[d]ecisions were impacted by legal considerations at every level, [and the law of war] proved invaluable in the decision-making process."[151] The Pentagon report records that the Secretary of Defense

146. Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8).

147. *Id.* ¶ 74, at 256; *see also id.* ¶¶ 51, 89, 90, at 247, 261 (referring to general principles of neutrality and humanitarian law).

148. *See* THE CASE AGAINST THE BOMB: MARSHALL ISLANDS, SAMOA AND SOLOMON ISLANDS BEFORE THE INTERNATIONAL COURT OF JUSTICE IN ADVISORY PROCEEDINGS ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS (Roger S. Clark & Madeleine Sann eds., 1996).

149. Protocol I, *supra* note 18, art. 82, at 41.

150. *See* Steven Keeva, *Lawyers in the War Room*, A.B.A. J., Dec. 1991, at 52, 54. For the British position, see David Garratt, *The Role of Legal Advisers in the Armed Forces*, *in* GULF WAR, *supra* note 52, at 55.

151. *Report to Congress*, *supra* note 52, at 615.

asked the General Counsel to give opinions on Department of Defense targeting policies, the rules of engagement, the rules governing maritime interception operations, and issues relating to prisoners of war.[152] Advice was also given at every level of command to ensure that the targets selected for attack were consistent with United States law of war obligations.[153]

Methods of enforcing the law of war that operate after the event include criminal prosecutions by national courts of the parties, third countries, military tribunals, and international tribunals; disciplinary processes; national or international inquiries; mediation processes; and civil proceedings in national or international courts. The War Crimes Act of 1996,[154] signed by President Clinton on August 21, 1996, gives U.S. courts extensive jurisdiction over war crimes in accordance with the 1949 Conventions.[155] Nonetheless, further steps remain to be taken.

As the above list indicates, the second variable is whether to use national or international processes. For example, criminal prosecutions resulting from the tragedy in Rwanda are taking place both in national courts and in the international criminal tribunal established by the U.N. Security Council. That tribunal, however, like those established at Nuremberg and Tokyo and for the former Yugoslavia, is merely ad hoc; proposals for a permanent International Criminal Court—first made over a century ago—have finally borne fruit, and in July 1998 a diplomatic conference adopted the Statute of the International Criminal Court (ICC).[156]

Provisions of that statute played an important part in the recent judgment by the House of Lords, acting in its role as the highest court in the United Kingdom, in ruling that General Pinochet, the former President of Chile, could not defeat his extradition to Spain by claiming "head of state" immunity or asserting the "act of state" de-

---

152. *See id.* at 617.

153. *See id.*

154. Pub. L. No. 104-192, 110 Stat. 2104 (codified at 18 U.S.C. § 2441 (Supp. II 1996)); *see also* William Jefferson Clinton, Statement on Signing the War Crimes Act of 1996, 2 PUB. PAPERS 1323 (Aug. 21, 1996) (stating that the War Crimes Act "provides the United States with clearer authority to prosecute violations of the laws of war").

155. 18 U.S.C. § 2441 (Supp. II 1996). The War Crimes Act was amended in 1997 such that it now punishes commission of a "war crime," which is more broadly defined than its predecessor offense: "grave breach of the Geneva Conventions." Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 105-118, § 583, 111 Stat. 2386, 2436 (codified at 18 U.S.C. § 2441 (Supp. III 1997)).

156. Rome Statute, *supra* note 63.

fense.[157] Also playing an important role were broader doctrines of individual responsibility for gross breaches of human rights, including torture, hostage taking, and genocide.[158] As the provisions of the ICC statute and the Pinochet judgment indicate, there is now considerable overlap between the responsibilities of individuals (and states) under national and international human rights law.[159] One of the judges in the majority in the Pinochet case, Lord Nicholls, in rejecting the claim of immunity, affirmed that "international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone."[160] He emphasized that this principle applies at least as much to heads of state as to everyone else: "the contrary conclusion would make a mockery of international law."[161] In support of this proposition, he quoted the following passage from the Nuremberg judgment: "'The principle of international law which, under certain circumstance, protects the representatives of a state cannot be applied to acts condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position to be freed from punishment.'"[162]

Such court processes are essentially backward looking: they determine guilt or innocence by reference to past events. They can, of course, provide a critical basis for future understanding by establishing an authoritative historical record through the due process of law. But such processes can also be given a more explicitly forward looking role. For instance, the International Humanitarian Fact Finding Commission set up under Protocol I has the dual role of inquiring into serious breaches of the Conventions and the Protocol and "facilitat[ing], through its good offices, the restoration of an attitude

157. *See* The Queen v. Bow Street Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte, [1998] 3 W.L.R. 1456, 1472 (H.L.) (citing Article 27 of the Rome Statute, which states that heads of state are not exempt from criminal prosecution).

158. *See id.* at 1471-72 (pointing to provisions on individual responsibility in several international conventions).

159. *See 50th Anniversary of the Universal Declaration of Human Rights: Human Rights and International Humanitarian Law*, 324 INT'L REV. RED CROSS 1 (Sept. 1998); R. Quentin-Baxter, *Human Rights and Humanitarian Law—Confluence or Conflict?*, 1985 AUSTL. Y.B. INT'L L. 94, 96-97.

160. Ex parte *Pinochet*, [1998] 3 W.L.R. at 1500 (per Lord Nicholls).

161. *Id.*

162. *Id.*; *see also supra* notes 67-70 and accompanying text (discussing the role of individual responsibility in the Nuremberg trials).

of respect" for them.[163] This dual function is also found in the South African Truth and Reconciliation Commission, presided over by Archbishop Desmond Tutu.

A third variable to consider is whether the processes will be concerned with determining the responsibility of individuals or of states. Article 91 of Protocol I, based on the 1899 Hague Convention, emphasizes state responsibility: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[164]

A process which focuses on individual responsibility and which may result in a person's conviction and sentencing must comply with principles of due process. Such a defendant must have the opportunity to present his own evidence and to test the prosecution's evidence on an equal footing.[165] Processes with other goals, however, may be more inquisitorial and less formal.

A related variable concerns whether the process is public or private. The ICRC, for instance, relies heavily on confidentiality as a means of facilitating access, assistance, and influence. As Caroline Moorehead noted in relation to the refusal to condemn the bombardment of Sonderborg in 1864, "[n]o one could be both Good Samaritan and arbiter at once."[166] In general, the International Humani-

---

163. Protocol I, *supra* note 18, art. 90(2)(c); *see also* Note, *Compliance with International Humanitarian Law: The International Humanitarian Fact-Finding Commission*, 7 CRIM. L.F. 485 (1996). The first president of the Commission, Erich Kussbach, provides valuable background information in *The International Humanitarian Fact-Finding Commission*, 43 INT'L & COMP. L.Q. 174 (1994). Further information is now available on the Commission's web site, <http://www.ihffc.org>.

164. Protocol I, *supra* note 18, art. 91, at 45.

165. Monroe Leigh and Christine Chinkin had a fascinating exchange concerning a procedural ruling allowing anonymous witnesses by the former Yugoslav tribunal. *See* Monroe Leigh, Editorial Comment, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996) (concluding that the use of anonymous witnesses cannot be reconciled with the right to a fair trial in international law); Christine M. Chinkin, Editorial Comment, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997) (arguing that the need to protect victims of armed conflict must be considered); Monroe Leigh, Editorial Comment, *Witness Anonymity is Inconsistent with Due Process*, 91 AM. J. INT'L L. 80 (1997) (replying to Chinkin's objections). This exchange was referred to in a judgment of my court. *See* R. v. Hines [1997] 3 N.Z.L.R. 529, 548 (holding that witnesses could not give evidence anonymously).

166. MOOREHEAD, *supra* note 2, at 43. For conflicting practices and statements, see *id.* at xxv-xxx (describing the ICRC's 1942 decision not to speak out publicly against the Holocaust); *id.* at 255-56 (praising the ICRC's "courage and vision" in condemning gas warfare in World War I); *id.* at 310-14 (noting the ICRC's unsuccessful attempt to halt Italian use of gas warfare

tarian Fact Finding Commission acts privately and does not publish its reports unless the parties agree otherwise.

In addition to the immediate parties to the conflict, third parties may also be involved in the process. One should recall that all states parties to the Geneva Conventions and Protocol I have the broad obligation to ensure respect for their provisions.[167] One should also remember the largely neglected provisions for "protecting powers"—states, neutral in the conflict, that protect the interests of one or the other party to a given conflict. The ICRC, the U.N. High Commissioner for Refugees, and the U.N., through its various bodies and permanent and ad hoc courts, tribunals, and commissions, can also become involved—either at a party's initiative or even unilaterally. Protocol I also provides for meetings of all the parties to the treaties "to consider general problems concerning [their] application"[168] and requires the parties "in situations of serious violations of the Conventions or . . . Protocol . . . to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."[169]

The methods might be employed on or off the battlefield. A notable, but controversial, battlefield method is the taking of reprisals.[170] Recall, for example, King Henry's order on discovering the slaughter of the boys.[171] Steps have been taken, especially in Protocol I,[172] to limit a party's power to take reprisals, but some critics have con-

---

in Ethiopia); *id.* at 561 (describing a 1947 article by Max Huber arguing that the ICRC should not resort to public protests); *id.* at 689-90 (describing the ICRC's 1994 public warning that Rwanda and the surrounding region were "slid[ing] inexorably towards chaos"). According to Georges Willemin and Roger Heacock, "[s]olemn appeals are . . . only the tip of the iceberg. They are only issued in case of extreme necessity and usually out of despair." GEORGES WILLEMIN & ROGER HEACOCK, THE INTERNATIONAL COMMITTEE OF THE RED CROSS 70 (1984). The practice continues to evolve, as appears from a recent talk by the head of the ICRC's Media Services, *see* Urs Boegli, *A Few Thoughts on the Relationship Between Humanitarian Agencies and the Media*, 325 INT'L REV. RED CROSS 627 (Dec. 1998) (discussing the complexities of gathering and conveying information on humanitarian emergencies), and a statement by the ICRC on September 15, 1998, concerning the situation in Kosovo, *see* ICRC, *Public Statement by the ICRC on the Situation in Kosovo*, 325 INT'L REV. RED CROSS 725 (Dec. 1998) (providing an example of a public statement on humanitarian issues).

167. *See supra* note 74 and accompanying text.

168. Protocol I, *supra* note 18, art. 7, at 9.

169. *Id.*, art. 89, at 43.

170. *See generally* FRITS KALSHOVEN, BELLIGERENT REPRISALS (1971) (discussing the history and law of wartime reprisals).

171. *See supra* note 12 and accompanying text.

172. *See* Protocol I, *supra* note 18, art. 51(6), at 26 ("Attacks against the civilian population or civilians by way of reprisals are prohibited.").

tended that humanity cannot be realistically preferred to military and political necessity in this way. Francis Lieber, while permitting protective retribution to be used "cautiously and unavoidably," recognized that "[u]njust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages."[173]

In 1983, the United States Catholic Conference, in its *Pastoral Letter on War and Peace*, came out in an absolute way against reprisals when discussing the possibility of nuclear reprisals:

> Retaliatory action whether nuclear or conventional which would indiscriminately take many wholly innocent lives, lives of people who are in no way responsible for reckless actions of their government, must also be condemned. This condemnation, in our judgment, applies even to the retaliatory use of weapons striking enemy cities after our own have already been struck. No Christian can rightfully carry out orders or policies deliberately aimed at killing non-combatants.
>
> We make this judgment at the beginning of our treatment of nuclear strategy precisely because the defense of the principle of noncombatant immunity is so important for an ethic of war and because the nuclear age has posed such extreme problems for the principle.[174]

In summary, the world community has established a set of institutions and methods for both implementing and writing the substantive law of war. But still there are tragic erosions of the law and dreadful violations of human values. The world community recognized this unfortunate fact in the 1993 International Conference for the Protection of War Victims[175] and the 1995 International Conference of the Red Cross and Red Crescent.[176] Both conferences called for the more extensive and effective use of the methods of implementation which already exist. And yet the carnage continues; the methods of implementation are often ignored. For instance, criminal

---

173. General Orders No. 100, *supra* note 24, art. 28, at 7.

174. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE 47 (1983).

175. *See* ICRC, *Final Declaration of the International Conference for the Protection of War Victims*, 296 INT'L REV. RED CROSS 401 (Sept./Oct. 1993). The participants at the conference solemnly decried the fact that war, violence and hatred spread throughout the world; that fundamental rights of persons are violated in an increasingly grave and systematic fashion; and that obligations under international humanitarian law are constantly violated. *See id.*

176. *See* ICRC, *Final Declaration 1996*, *supra* note 141.

prosecutions are rare, even taking account of current national and international practice; protecting powers are almost never appointed; the International Humanitarian Fact Finding Commission, established in 1991, has yet (in 1998) to receive its first complaint; and too many combatants are ignorant of the basic restraints on their powers to use deadly force.

What can be done? I emphasize two matters. The first relates to the more positive reasons for compliance—"the gentler gamester is the soonest winner."[177] The second relates to the role of universities, law schools, and scholars.

Humanitarianism and political advantage may often dictate the same result. So, too, may strategic and economic considerations. King Henry's words,[178] the related American rules for Vietnam,[179] and many other statements emphasize the political advantage to be gained from compliance with the law. Five incidents over the last two centuries show the possible linkages. They involve a writer, a soldier-politician, a naval officer, a scientist, and a wartime prime minister.

The first incident demonstrates that humanitarianism might alone operate as a constraint. George Orwell, fighting in the Spanish Civil War, refrained from shooting a man who jumped from a trench:

> He was half-dressed and was holding up his trousers with both hands as he ran . . . . I did not shoot partly because of that detail about the trousers. I had come here to shoot at "Fascists;" but a man who is holding up his trousers isn't a "Fascist," he is visibly a fellow-creature, similar to yourself, and you don't feel like shooting at him.[180]

In this instance, Orwell was going further than the law required. To paraphrase Grotius, one of the founders of international law, this was perhaps a case of a sense of shame forbidding what the law permits.[181]

---

177. SHAKESPEARE, *supra* note 5, at act 3, sc. 6, ll. 112-13.

178. *See id.*

179. *See supra* note 144 and accompanying text.

180. WALZER, *supra* note 5, at 140 (quoting 2 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 254 (Sonia Orwell & Ian Angus eds., 1968)).

181. *See* 3 HUGO GROTIUS, DE JURE BELLI AC PACIS, ch X, pt. I(2) (1646), *reprinted in* 2 CLASSICS OF INTERNATIONAL LAW (NO. 3) 716 (James B. Scott ed. & Francis W. Kelsey trans., William S. Hein & Co. 1995) (quoting the character of Agamemnon from Seneca's play *The Trojan Women*: "What law permits, this sense of shame forbids to do.").

But more often, especially for the commanders, other reasons, including military discipline, will support any humanitarian imperative. Napoleon, reflecting Henry's reasoning from centuries earlier, once remarked that nothing would "disorganise an army more or ruin it more completely than pillaging."[182] One of his biographers, writing of his brilliantly successful Italian campaign, assessed the qualities contributing to that success:

> The first quality was discipline. Napoleon with his legal forbears was a great person for law and order. He insisted that officers issue a receipt for everything requisitioned, be it a box of candles or a sack of flour. If his soldiers stole or damaged, he arranged compensation. He forbade looting and he ordered a grenadier who stole a chalice in the Papal States to be shot in front of the army.[183]

Another reason for observing a minimum of humanitarian conduct is military tradition. It was tradition that weighed with Admiral Canaris of the German Navy when, in September 1941, he protested against the regulations for the treatment of Soviet prisoners of war. For him the fact that the USSR had not ratified the 1929 Convention was not decisive:

> [T]he principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people . . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different view-point.[184]

According to the Nuremberg Tribunal, "[t]his protest, which correctly stated the legal position, was ignored. The defendant, [Wilhelm] Keitel made a note on this memorandum: 'The objections arise from the military concept of chivalrous warfare. This is the de-

---

182. Panel Discussion, *Compliance During Hostilities*, 1964 PROC. AM. SOC. INT'L L. 82, 91-92 (comments of Gordon B. Baldwin).

183. VINCENT CRONIN, NAPOLEON BONAPARTE: AN INTIMATE BIOGRAPHY 127 (1971); *see also* R. R. Baxter, *Forces for Compliance with the Law of War*, 1964 PROC. AM. SOC. INT'L L. 85-86 (considering the connection between military discipline and compliance with international law).

184. NUREMBERG TRIAL, *supra* note 69, at 232 (alteration in original).

struction of an ideology. Therefore I approve and back the measures.'"[185] The tribunal ultimately found Keitel guilty.[186]

Compliance with the law might also promote military advantage. Limited personnel, equipment, and munitions are better directed at military objectives. Lord Blackett, a leading British physicist, made this comment on area bombing in World War II: "The area bombing, which was originally adopted just because of the inability to do precision bombing, did little to help win the war and greatly increased our difficulties afterwards."[187]

Winston Churchill, near the end of World War II, made Blackett's point very forcibly and added an economic consideration. In a minute prepared just after the bombing of Dresden that was directed to the Chiefs of Staff Committee and the Chief of Air Staff and which, in its first form, had referred to the "bombing of German cities simply for the sake of increasing the terror,"[188] he declared:

> It seems to me that the moment has come when the question of so called "area bombing" of German cities should be reviewed from the point of view of our own interests. If we come into control of an entirely ruined land, there will be a great shortage of accommodation for ourselves and our Allies: and we shall be unable to get housing materials out of Germany for our own needs because some temporary provision would have to be made for the Germans themselves. We must see to it that our attacks do not do more harm to ourselves in the long run than they do to the enemy's immediate war effort.[189]

The broad point—in a sense an obvious one—is that we should not depend solely on formal means of enforcing law. Compliance must in essence be based on the understanding and acceptance of the values underlying the law. The too ready acceptance of the proposition that law disappears in the face of war must be confronted and

---

185. *Id.* at 232.

186. *See id.* at 291.

187. P.M.S. BLACKETT, MILITARY AND POLITICAL CONSEQUENCES OF ATOMIC ENERGY 26 (1948), *quoted in* Hans Blix, *Area Bombardment: Rules and Reasons*, 49 BRIT. Y.B. INT'L L. 31, 60-61 (1978).

188. Winston Churchill, Memorandum to the Chiefs of Staff (Mar. 28, 1945) (first form), *in* 3 SIR CHARLES WEBSTER & NOBLE FRANKLAND, THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939-1945, at 112 (1961).

189. Winston Churchill, Memorandum to the Chiefs of Staff (Apr. 1, 1945) (second form), *in* 3 WEBSTER & FRANKLAND, *supra* note 188, at 117.

defeated by emphasizing the essential values on which the law is based.

Finally, I come to the role of the universities and of scholars, and especially of legal scholars. This role is to be seen in the context of the obligations of the states parties to the various treaties to make them better known. The law schools have a central part in that disseminating process. Their role is to be seen in the broader context of the place of international law in law schools, in legal practice and in national law.[190]

Law professors share that responsibility with colleagues in many other disciplines. The various collections of papers I have consulted in preparing these Remarks have a strikingly diverse authorship—historians, geographers, philosophers, economists, theologians, social scientists, sociologists, political scientists, war studies experts, and international relations experts, as well as politicians, military officers, journalists, and poets. Lawyers should be concerned that, with some notable exceptions, they are not better represented, and that scholars in other areas do not make better use of legal material. The outstanding *Just and Unjust Wars*,[191] on which I have drawn heavily, helps make the point: when Michael Walzer was writing the first edition of that book, he had as a colleague in the law school at his university an outstanding scholar in the law of armed conflict who at the time was a senior member of the U.S. delegation to the Diplomatic Conference that drew up Protocols I and II.[192] The book would have benefited from a closer understanding of the existing law and of the very processes then underway. Those processes and the new law itself might well also have benefited.

The broader understanding that comes from an interdisciplinary endeavor is also critical for the role of scholar as lawmaker—or at least as the adviser or persuader of lawmakers. Francis Lieber, to return to that notable scholar, was not only the primary drafter of Gen-

190. The Institut de Droit International adopted an important resolution on this subject in 1997. *See* Draft Resolution, *The Teaching of International Law*, 67 ANNUAIRE 121 (1997). In the resolution, the Institut emphasizes that international law increasingly affects the content of municipal law and that a knowledge of international law is necessary to discharge both a wide range of professional responsibilities at the national level and the responsibilities of individuals in an increasingly cohesive international society. Accordingly it recommends that no law student should graduate or enter law practice without having had a foundation course or courses on public and private international law. *See id.* at 201-02.

191. WALZER, *supra* note 5.

192. That colleague was Richard Baxter of the Harvard Law School.

eral Orders No. 100. According to Professor Blumtschli, an original member of the Institut de Droit International, Lieber also had great influence in the founding of that very important nongovernmental body.[193] Lieber was not enthusiastic about settling disputed issues of international law through permanent international congresses consisting of governmental representatives. Rather, adopting arguments which preceded by some generations those which led to the setting up of the American Law Institute,[194] he looked to the contribution of scholars without any special connection with the cases in question, appealing to reason, justice and equity alone. He anticipated that uniting the most prominent jurists of the law of nations in their private capacities should settle unresolved issues, like Hugo Grotius did—by the strength of the great arguments of justice.

The cynics will deny the objectivity which Lieber sought. Their view has gained recent support from reviews of the work of the American Law Institute.[195] But Lieber's opinion, like his own work, does raise enduring questions about the sources of the law and the role of independent scholars. I leave you with a possible project arising out of the ICJ's advisory opinion on the legality of nuclear weapons. While sharply divided on the central substantive issue, the Court made an important unanimous ruling on a matter of process: "There exists an obligation to pursue in good faith and *bring to a conclusion* negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[196]

In December 1996, the General Assembly of the United Nations took note of the Court's opinion, underlined that unanimous conclu-

193. *See* Root, *supra* note 28, at 464.

194. *See, e.g.*, John W. Salmond, *The Literature of Law*, 22 COLUM. L REV. 197, 201-02 (1922). Salmond's work was used a short time later by a most distinguished committee—headed by Elihu Root, and including Benjamin N. Cardozo, Arthur L. Corbin, John W. Davis, Learned Hand, Roscoe Pound, Harlan F. Stone, Henry W. Taft, John H. Wigmore, and Samuel Williston—in support of its recommendation for the establishment of an American Law Institute. The report is reprinted in AMERICAN LAW INSTITUTE, THE AMERICAN LAW INSTITUTE SEVENTY-FIFTH ANNIVERSARY 1923-1998, at 173, 230 (1998). Salmond is referred to in the report as an Australian. While he was born in England and taught briefly in Australia, he is often acknowledged as New Zealand's greatest lawyer. *See* FRAME, *supra* note 107, at 11 (referring to Salmond as "New Zealand's most influential and renowned jurist").

195. *See, e.g.*, Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rule Making Process of Private Legislatures*, 29 GA. L. REV. 909 (1995); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

196. Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 267 (July 8) (emphasis added).

sion, and called upon all states to fulfil that obligation immediately.[197] It urged the states to commence multilateral negotiations in 1997 that would lead to the early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.[198]

Scholars around the world will see this call as extending to them and not as being limited to governments. They will not be deterred by the opposition of major states to that call. They will emphasize the principle of good faith, as the ICJ did when it ruled on nuclear testing over twenty years ago: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."[199]

197. *See General and Complete Disarmament,* U.N. GAOR First Comm., 51st Sess., Supp. No. 51, at 79, U.N. Doc. A/51/45 (1996).

198. *See id.*

199. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 473 (Dec. 20).

APPENDIX

FUNDAMENTAL RULES OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS[200]

1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.

2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.

3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *matérial*. The emblem of the red cross (red crescent, red lion, and sun) is the sign of such protection and must be respected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

---

200. International Committee of the Red Cross, *1978 Red Cross Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts*, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 469, 470 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).