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The Law of War in Historical Perspective

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I FIRST GOT TO KNOW JACK GRUNAWALT when I participated in some of the symposia he organized at the Naval War College. I soon realised that he was a great organizer, full of enthusiasm, and possessed of a warm personality. In my two years as Stockton Professor of International Law at the College, I have come to value him as a colleague and friend—and almost as the father of a small family of fellow workers.

As a former British Army officer with a somewhat restricted knowledge of maritime law, I had some fears associated with being in an Oceans Law and Policy Department. But Jack made me welcome and integrated me into his team. It did not take me long to realise that here was a man with catholic interests willing to listen to another's views, even though they might be radical and perhaps even "revolutionary." Discussing one's views with him would often result in a modification of one's radicalism, and certainly a clarification of doubt. It soon became clear that Jack's views and interests were wide in the extreme, and he was obviously prepared to share them.

Having heard Jack lecture and seen his rapport with a class of officers from a variety of commands and countries, I soon recognised that he is a born teacher.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

Jack is also very modest. Soon after I joined the College, he told me that he did not consider himself a true professor since he had never held an academic appointment. I reminded him that he held a professorial appointment at a recognized and highly respected institute of specialized and higher learning and that having watched him in action, I know that he is more than adequately entitled to be addressed as Professor.

It is with great delight that I find myself among those of his *amici* contributing to this *Liber Amicorum* in honour of Jack Grunawalt.

It has often been claimed that modern international law is Eurocentric in character. This somewhat chauvinistic attitude is frequently based on comments in the works of the "fathers" of international law, many of whom were Christian monks.[1] It is a view strengthened by pointing out that "[t]he era of the independent territorial State began in earnest with the Treaty of Westphalia in 1648, which ended the Thirty Years' War and the political hegemony asserted by the Roman Catholic Church."[2] Such an attitude, however, tends to minimize the significance of the system that prevailed in ancient and medieval times. From earliest times it had been recognized that some restraints were necessary during armed conflict. Thus, we find numerous references in the Old Testament wherein God imposes limitations on the warlike activities of the Israelites. It is true that the Israelites were frequently enjoined to slaughter all the inhabitants of the cities they captured,[3] but this was only when the war was waged at the direct instruction of God and normally against heathens who rejected Him; to show mercy to the enemy would constitute a sin against the Lord.[4] The Prophets tell us that in other wars the victorious Israelites made the inhabitants of conquered territories slaves unless they paid tribute.[5] If peace was not accepted upon defeat, the males were to be slain, while women and children were to be spared, but made slaves. The rabbis modified this so that their status became that of servants rather than slaves.

Prisoners of war were to be treated humanely and not slain, as Elisha informed his king when asked if he might kill them.[6] In the days of the kingdom, this was the common practice, for "if thine enemy be hungry, give him bread to eat; and if he be thirsty, give him water to drink."[7] Not only were the innocent to be protected, but precautions were also to be taken not to harm the local fauna and flora, subject to the needs of military necessity. Thus, soldiers were told not to destroy trees or fruit, other than that which was required for food or the building of defenses.[8] Josephus[9] interpreted this to mean that the land was not to be set on fire nor beasts of burden slaughtered.[10] In fact, commenting on

Jewish behavior during conflict in biblical times, one commentator has remarked:

> The rabbis[11] softened the impact of much of the old law through reinterpretation or imaginative explanation. Due to this it seems that the Israelites were indeed a "merciful" people when compared with their neighbours, such as the Assyrians. Although, as in any case, exceptions and violations to regulations occurred, on the whole, the Israelite warriors conducted themselves in a disciplined, restricted manner in accordance with rules and regulations derived from divine inspiration.[12]

It must be borne in mind, however, that, for the main part, the penalty for disregarding the imprecations concerning conduct in combat were punishable only by religious, that is to say divine, sanction.

The Israelites were not the only ancient people to consider it necessary to impose some measure of control on their warlike activities. Sun Tzu maintained that in war one should only attack the enemy armies, for "the worst policy is to attack cities. Attack cities only when there is no alternative."[13] As early as the seventeenth century B.C., the Chinese, when resorting to war, limited their activities by a conscious application of principles of chivalry.[14] This may be seen in the refusal of the Duke of Sung's minister of war to attack an unready enemy, while it was "deemed unchivalrous among Chinese chariot aristocrats [to take] advantage of a fleeing enemy who was having trouble with his chariot (he might even be assisted), [to] injure a ruler, [or to] attack an enemy state when it was mourning a ruler or was divided by internal troubles."

The sacred writings of ancient India equally sought to introduce some measure of humanitarianism. The *Mahabharata*[15] states that "a king should never do such an injury to his foe as would rankle the latter's heart, no sleeping enemy should be attacked, and with death our enmity is terminated."[16] The Laws of Manu, promulgated at approximately the same period, postulate that:

> when the king fights his foes in battle, let him not strike with weapons concealed, nor with barbed, poisoned, or the points of which are blazed with fire. . . . These are the weapons of the wicked.[17]

Moreover, it was generally recognized that proportionality between the combatants was a requirement, so that elephants should be used only against elephants, in the same way as foot soldiers would fight against foot soldiers.[18] Similarly, the *Ramayana*[19] condemned weapons which could "destroy the entire race of the enemy, including those which could not bear arms . . . because such

destruction *en masse* was forbidden by the ancient laws of war, even though [the enemy] was fighting an unjust war with an unrighteous objective."[20] The *Mahabharata*, too, forbade the use of "hyperdestructive" weapons, since these were "not even moral, let alone in conformity with religion or the recognized rules of warfare."[21]

In ancient Greece, among the city States:

> [T]emples and priests and embassies were considered inviolable. . . . Mercy . . . was shown to helpless captives. Prisoners were ransomed and exchanged. Safe-conducts were granted and respected. Truces and armistices were established and, for the most part, faithfully observed. . . . Burial of the dead was permitted; and graves were unmolested. It was considered wrong and impious to cut off the enemy's water supply, or to make use of poisoned weapons.[22] Treacherous stratagems of every description were condemned as being contrary to civilized warfare.[23]

In so far as Rome was concerned, practices:

> [V]aried according as their wars were commenced to exact vengeance for gross violations of international law, or for deliberate acts of treachery. Their warlike usages varied also according as their adversaries were regular enemies . . . or uncivilized barbarians and bands of pirates and marauders. . . . [T]he belligerent operations of Rome, from the point of view of introducing various mitigations in the field, and adopting a milder policy after victory, are distinctly of a progressive character. They were more regular and disciplined than those of any other ancient nation. . . . The *ius belli* imposed restrictions on barbarism, and condemned all acts of treachery. . . . [Livy tells us] there were laws of war as well as peace, and the Romans had learnt to put them into practice not less justly than bravely. . . . The Romans [says Cicero[24]] refuse to countenance a criminal attempt made on the life of even a foreign aggressor.[25]

The rules of war in both Greece and Rome were, indeed:

> [A]pplicable only to civilized sovereign States, properly organized, and enjoying a regular constitution; and not to conglomerations of individuals living together in an irregular and precarious association. Rome did not regard as being within the comity of nations such fortuitous gatherings of people, but only those who were organized on a civilized basis, and governed with a view to the general good, by a properly constructed system of law. . . . Hence barbarians, savage tribes, bands of robbers and pirates, and the like were debarred from the benefits and relaxations established by international law and custom. . . . [A]s to the general practice of war in Hellas, we find remarkable oscillations of warlike policy. Brutal

> treatment and noble generous conduct are manifested at the same epoch, in the same war, and apparently under similar circumstances. At times we hear of proceedings which testify to the intellectual and artistic temperament of the Greeks; at other times, we read narratives which emphasize the fundamental cruelty and disregard of human claims prevalent among the ancient races when at war with each other. In Homer . . . hostilities for the most part assumed the form of indiscriminate brigandage, and were but rarely conducted with a view to achieving regular conquests, and extending the territory of the victorious community. Extermination rather than subjection of the enemy was the usual practice. . . . Sometimes prisoners were sacrificed to the gods, corpses mutilated, and mercy refused to children, and to the old and sickly. On the other hand, acts of mercy and nobility were frequent. . . . The adoption of certain, cowardly, inhuman practices . . . was condemned. . . . In reference to the conduct of war in Greece, it is important to remember that it was between small States, whose subjects were to an extraordinary degree animated by patriotism and devotion to their mother-country, that each individual was much more affected by hostilities than are the cities of the large modern States, that every individual was a soldier-politician who saw his home, his life, his family, his gods at stake, and, finally, that he regarded each and every subject of the opposing State as his personal adversary.[26]

It has been pointed out that the situation in ancient Greece appears to have changed somewhat after Homer's time and that by the fifth century B.C., both Euripides[27] and Thucydides[28] were able to write of the "common customs *(koina nomima)* of the Hellenes," which, in regard to the law of war, may be summarized as follows:

1. The state of war should be officially declared before commencing hostilities against an appropriate foe; sworn treaties and alliances should be regarded as binding.

2. Hostilities are sometimes inappropriate; sacred truces, especially those declared for the celebration of the Olympic games, should be observed.

3. Hostilities against certain persons and in certain places are inappropriate; the inviolability of sacred places and persons under protection of the gods, especially heralds and suppliants, should be respected.

4. Erecting a battlefield trophy indicates victory; such trophies should be respected.

5. After a battle it is right to return enemy dead when asked; to request the return of one's dead is tantamount to admitting defeat.

6. A battle is properly prefaced by a ritual challenge and acceptance of the challenge.

7. Prisoners of war should be offered for ransom rather than being summarily executed or mutilated.
8. Punishment of surrendered opponents should be restrained.
9. War is an affair of warriors, thus noncombatants should not be primary targets of attack.
10. Battles should be fought during the usual (summer) campaigning season.
11. Use of nonhoplite[29] arms should be limited.
12. Pursuit of defeated and retreating opponents should be limited in duration.[30]

By the time of the wars with Persia, the Peloponnesian War, and the changes in the nature of Greek life, these rules were no longer of general validity.[31]

As to the situation in Rome, and as a commentary upon the effects of its practices, it has been suggested that

> [T]he conduct of war [in Rome] was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants. Classical Latin, indeed, lacked even a word for a civilian. The merciless savagery of Roman war in this sense carried on into the invasion period of the fifth and sixth centuries. . . . In practice [,however,] Roman war was not always so savage. But such was the understanding of Roman war with which medieval theorists of war worked, and they erected *bellum Romanum* in this sense into a category of warfare which permitted the indiscriminate slaughter or enslavement of entire populations without distinction between combatant and noncombatant status. This was a style of warfare appropriate only against a non-Roman enemy, and in the Middle Ages this came to mean that Christians ought only employ it against pagans. . . ."[32]

In line with the practices described in the Old Testament, similar principles applied in the Islamic world. The Caliph Abu Bakr commanded his forces "let there be no perfidy, no falsehood in your treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly."[33] Similarly, the leading Islamic statement on the law of nations written in the ninth century forbids the killing of women, children and the old or blind, the crippled and the helplessly insane.[34] Moreover, during combat, "Muslims were under legal obligations to respect the rights of non-Muslims, both combatants and civilians. . . . [T]he prisoner of war should not be killed, but he may be ransomed or set free by grace."[35] However, if it was considered that his death would be advantageous to the Muslims, he might be killed, unless he converted to Islam. Unlike the Old Testament ban on destruction of

the land and its products, Islam permitted the inundation or burning of a city, even though protected persons, including Muslims, might thus be killed.[36]

During the Middle Ages, rules of chivalry applied as between the orders of knighthood, although these did not operate to protect the foot soldiers or the yeomenry. By the middle of the fifteenth century, a sufficient number of works were being written on the rules of chivalry as to make it possible to say that:

> [B]y the 14th century, medieval Christendom had developed a law of arms, *the jus militare*, well understood and applied by the military and feudal jurisdictions of Western Europe. The theoretical bases of that law followed the medieval legal and theological theories of the hierarchy of legal systems, namely, the Law of God, the eternal law; the law of nature; the *jus* gentium, its more practical counterpart; and human positive law. . . . The *jus militare* which governed the conduct of the members of the honourable profession of arms was considered a part of the *jus gentium*, being part of the customs of those who were professional men-at-arms and members of the Orders of chivalry where the standards of Christian and military behaviour were meant to meet. . . . The *jus militare* being seen as a part of the *jus gentium*, the practical legal consequences followed that it was a body of rules understood and applied throughout the length and breadth of Christendom, then subject to the divided régimes of *sacerdotium* and *imperium*, of papacy and emperor. The heralds and older knights were considered *periti* in the law of arms, while writers such as . . . Christine de Pisan, a woman writer whose work *Livre des Fays d'Armes et de Chivalerie* (1407) . . . [were] regarded as authorities and cited in the jurisdictions where the law of arms was applied.[37] In the Councils of Princes, in military and feudal courts, learned canonists argued with erudition and skill the complex matters arising out of warfare before the experienced knights who composed the military jurisdictions. In cases of difficulty, the heralds were consulted as the repositories of learning on the law of arms.
>
> These cases were often concerned with claims to ransom, to booty and spoils, rather than with the enforcement of honourable conduct in warfare. . . . So far as trials of soldiers in enemy allegiance were concerned, we see a universality of jurisdiction which is not easy to explain. Doubtless the close nexus of the law of arms with the *jus gentium* went part of the way to explain this. . . . The military calling is seen as a jealous and exclusive one, intimately associated with the concept of honour. . . . The bearing of arms is so much a matter of honour that those who do not bear arms are without honour; it is a matter of honour to be allowed to bear arms. . . . [W]hat we would today call criminal conduct in warfare was seen as a violation of that honour upon which the right to bear arms was based. A medieval war crime is a breach of the law of arms,[38] it is more specifically an act *contra fidem et jus gentium*. . . . Honour is the root of the law of arms. Those who commit acts of dishonour act contrary to the faith and honour of a knight.

> The law of arms controls and regulates acts of warfare by the professional and chivalric military classes. We can also discern a universality of jurisdiction to entertain such allegations of dishonourable acts in warfare. The law of arms being the measure of such honour binds all those who follow the profession of arms in Christendom and at all places where Christians perform feats of arms. The *jus gentium* of which the law of arms formed part has given us the legacy of universal jurisdiction over war criminality.[39]

As with ancient India, the orders of knighthood condemned the use of certain weapons, especially those which were not employed in hand-to-hand encounters between the knights themselves, but which enabled a man not of noble birth to strike a knight from a distance. In condemnation of such weapons, the knights found support from the Church. The second Lateran Council in 1139 condemned[40] the use of the arc and crossbow[41] as hateful to God, a view coinciding with the concepts of chivalry,[42] which regarded weapons that could be fired from a distance by a person not a member of the profession of arms and out of the potential reach of the intended victim as a disgraceful and improper act. The third Lateran Council reiterated its anathemization of these weapons, and in 1500 the *Corpus Juris Canonici*[43] forbade the use of arrows, darts, or catapults, leading Belli to comment that this was done "in order to reduce as far as possible the number of engines of destruction and death." However, "regard is so far lacking for this rule that firearms of a thousand kinds are the most common and popular implements of war; as if too few avenues of death had been discovered in the course of centuries, had not the generation of our fathers, rivaling God with his lightning, invented this means whereby, even at a single discharge, men are sent to perdition by the hundreds."[44]

Both Belli's comment and the ideas underlying the approach of the canonists, as well as the concepts of the Peace and Truce of God, have much in common with the condemnation by Erasmus of the manner in which the medieval knight decked himself for war:

> Do you think Nature would recognize the work of her own hand—the image of God? And if any one were to assure her that it were so, would she not break out in execrations at the flagitious actions of her favourite creature? Would she not say when she saw man thus armed against man, "What new sight do I behold? Hell itself must have produced this portentous spectacle. . . . I would bid this wretched creature behold himself in a mirror, if his eyes were capable of seeing himself when his mind is no more. Nevertheless, thou depraved animal, look at thyself, if thou canst; reflect on thyself, thou frantic warrior, if by any means thou mayest recover thy lost reason, and be restored to thy pristine nature. Take the looking

glass, and inspect it. How come that threatening crest of plumes upon thy head? Did I give thee feathers! Whence that shining helmet? Whence those sharp points, which appear like horns of steel? Whence are thy hands and feet furnished with sharp prickles? Whence those scales, like the scales of fish, upon thy body? Whence those brazen teeth? Whence those plates of brass all over thee? Whence those deadly weapons of offence? Whence that voice, uttering sounds of rage more horrible than the inarticulate noise of the wild beasts? Whence the whole form of thy countenance and person distorted by furious passions, more than brutal? Whence that thunder and lightning which I perceive around thee, at once more frightful than the thunder of heaven, and more destructive to man? I formed thee an animal a little lower than the angels, a partaker of divinity; how camest thou to think of transforming thyself into a beast so savage, that no beast hereafter can be deemed a beast, if it be compared with man, originally the image of God, the Lord of Creation?"[45]

As to the role of the canonists in the development of the law of armed conflict, reference should be made to the Peace of God and Truce of God movements. It was apparently the violence of the *milites* raised by feudal lords which:

[F]irst experienced the impetus to restrain violence in the Middle Ages. That impetus was the Peace of God movement, whose initial target was precisely the bullying *milites* and those bands of armed men who lived on the edges of civilization, preying on settled areas. The Peace of God idea originally appeared late in the tenth century; about a generation later came the first appearance of a concept generally attached to it in historical interpretation, the Truce of God, and a century after that, in 1139, following the ban on crossbows, bows and arrows and siege weapons issued by the Second Lateran Council. This last was directed principally at mercenaries, who often were organized into fighting units around one or the other of these highly specialized and destructive weapons.... The beginnings of the Peace of God can be identified at the time of the Council of Le Puy in 975 . . . imposing on the *milites* an oath 'to respect the Church's possessions and those of the peasants'—provisions that were ultimately to become the core of the idea of noncombatant immunity in late-medieval just war tradition.... The subsequent idea of the Peace of God... gradually diminished the protection extended to peasants and their property while making more explicit the immunity of ecclesiastical persons and property. . . . In the next landmark statement of canon law on this subject, that in the thirteenth century *De Treuga et Pace*, peasants, their goods, and their lands had returned to the category of those who did not participate in war and thus should not have war made against them. Gradually, other non-Churchly categories of persons were added to the list of noncombatants, until by the time of Honore Bonet's *L'Arbre des Batailles* in the fourteenth century the listing had come to include all sorts of

secular persons who were noncombatants by virtue of not being knights . . . or not being physically able to bear arms. . . . Peasants and clergy alike were defined in the former way, while such noncombatant groups as women, children, the aged, and the infirm belonged to the latter category. . . . In the shorter run, the effect of the Peace of God was not so much to protect peaceful noncombatants . . ., but to mark off who might legitimately resort to arms and for what end. . . . [I]n the long run, the idea of noncombatant immunity contained within the Peace of God developed into a much more universal concept with far-reaching implications. This is one of the . . . core ideas around which the *jus in bello* of just war tradition developed, and modern humanitarian law of war and moral argument centering on the concept of discrimination are legacies of this slender tenth-century beginning. . . . While the Peace of God aimed at protecting certain kinds of person and their property . . . the Truce of God [beginning with the Council of Toulouges in 1027] aimed instead to eradicate the use of arms entirely during certain periods [—namely the Sabbath, and such holy days as Christmas and Lent—]. . . . Still, the Truce of God applied only among Christians, and this meant that violence could still be employed by Christians against non-Christians during truce periods. In practice this meant that violence could be directed against two main groups: infidels, as in the Crusades; and heretics, as in religious persecution. . . . How did the ban on crossbows, bows and arrows, and siege weapons contribute to [limiting violence]? . . . By the twelfth century the typical mercenary belonged to a well-organized band whose leader sold or bartered their services as a group and then paid his followers.[46] This was the *condottori* pattern, which reached its zenith in the fifteenth and sixteenth centuries. . . . In the Middle Ages, what held these bands together . . . was expertise in one or another weapon that could be especially telling in the prevailing kind of warfare. Specifically mercenary companies were formed around the possession and skilled use of bows and arrows and crossbows, neither of which were employed by knights but which could be devastating when used against knights, and siege machines, these being so expensive and difficult to transport and requiring so much skill to use properly that wealthy nobles preferred not to own their own but hire mercenary companies specializing in their use. From this it follows easily that the new-style mercenaries could be controlled by constraints placed on the use of their weapons. The knightly class in particular had good reason to favor such restraints, since there was no glory in falling in battle to an arrow shot by a commoner and since siege weapons represented the only significant threat to a nobleman seeking security from attack in his castle. . . ."[47]

The feudal knights were fully aware of the existence of what they knew as the "law of chivalry" or of arms,[48] which regulated their affairs and which was enforced by a variety of Courts of Chivalry[49] or specially appointed tribunals. Thus, in 1474, representatives of the Hanseatic cities tried Peter of Hagenbach at Breisach[50] for administering occupied territories in a fashion "contrary to the

laws of God and of man." His plea that he was only carrying out the orders of his prince was rejected and he was executed.

Since foot soldiers were not regarded as members of the honorable profession of arms, the rules of chivalry did not apply to them. However, even they were not free to pursue their own fashion of fighting, for this was regulated by national codes of arms which could be enforced by commanders exercising "rights of justice." Among the earliest of such codes was the "Articles of War" promulgated by Richard II in 1385. This forbade, on pain of death, any robbery or pillage of a church or an attack on a churchman, as well as "forcing" any woman. It also recognized the right of a captor to take his prisoner's parole, although:

> [I]f any one shall take a prisoner, as soon as he comes to the army, he shall bring him to his captain or master on pain of losing his part [of the captive's property] . . .; and that his said captain or master shall bring him to our lord the King, constable or marschall, as soon as he well can, . . . in order that they may examine him concerning news and intelligence of the enemy. . . ."[51]

This indicates that war was no longer construed as a conflict between individual and individual, but between organized forces with prisoners no longer in a master-and-servant relationship with their captors, but instead, considered as the "property" of the ruler under whose auspices the captor was fighting.

Perhaps more significant from our point of view, and foretelling much of the present law, were the "Articles and Military Lawes to be Observed in the Warres" promulgated by Gustavus Adolphus of Sweden in 1621.

> Art. 85. He that forceth any woman to abuse her, and the matter bee proved, he shall die for it.
>
> Art. 88. No souldier shall set fire upon any Towne or Village in the enemies' Land, without he be commanded by his Captain: neither shall any Captain give any such command unless he hath first received it from us or our General: who so doth the contrary, he shall answer it in the Generals Councell of Warre. . . .
>
> Art. 92. They that pillage or steal either in our Land or in the enemies, . . . without leave, shall be punish'd as for other theft.
>
> Art. 94. If any man give himselfe to fall upon the pillage before leave be given him so to doe, then may any of his Officers kill him. . . .

Art. 96. No man shall presume to pillage any Church or Hospitall, although the Strength be taken by assault; except he be first commanded, or that the Souldiers and Burgers be fled thereinto and doe harm, from thence; who dares the contrary, shall be punished. . . .

Art. 97. No man shall set fire upon any Hospitall, Church, Schoole, or Mill, or spoyle them in any way, except he be commanded; neither shall any tyrannize any Churchman, or aged people, men or women, maides or children, unless they first take up arms against them, under paine of punishment. . . .

Art. 98. No souldier shall abuse any Churches, Colledges, Schooles or Hospitalls; . . . no souldier shall give any disturbance to any person exercising his sacred function or Ministery, upon paine of death.

Art. 113. Our Commanders shall defend the countrey-people and Ploughmen that follow their husbandry, and shall suffer none to hinder them in it.

Art. 116. Whatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent countrey may against all right and reason be burdened withall, whatsoever offence finally shall be committed against these orders, that shall the severall Commanders make good, or see severally punished unlesse themselves will stand bound to give further satisfaction.[52]

In 1639 England had a full system of Laws and Ordinances of Warre[53] regulating the behavior of forces in the field, forbidding, among other things, marauding of the countryside, individual acts against the enemy unauthorized by a superior, private taking or keeping of booty, or private detention of an enemy prisoner. Similar codes existed in Germany and Switzerland.[54] To some extent, these codes reflected the principles to be found in various writings on military matters and the law of war, including, for example, those of Ayala, *De Jure et Officiis et Disciplina Militari*, 1582; Belli, *De Re Militari et Bello Tractatus*, 1663; Gentili, *De Jure Belli*, 1612; Legnano, *De Bello, De Represaliis et De Duello*, 1447; and even Grotius, whose seminal work, *De Jure ac Pacis*, 1625, is frequently treated as if it were the fountainhead of all knowledge on the then-existing international law. In the latter work, Grotius emphasizes that war was the normal order of the day. All these to some extent reflected earlier works devoted to the *Loi des Batailles*, and nearly all claimed to be declaring the law that armies were obliged to follow. In many cases, they were mere abstractions based on existing practice, and it is noticeable how much agreement there is across the whole spectrum. These principles drawn from

practice and doctrine are expressive of the customs of war and, to a great extent, constitute what are now known as the customary law of armed conflict. Of the codes it has been said that, combined with the customary rules, they form "le meilleur frein pratique pour imposer aux armées le respect d'un *modus legitimus* de mener les guerres."[55]

As has been mentioned, the principles of chivalry were of universal application and they frequently confirmed the immunity from attack or capture of hospital staff, chaplains, doctors, surgeons or apothecaries. However, while Belli, basing himself on the writings of Bartolus in the fourteenth century, asserted that during war the "persons of doctors may not be seized, and they may not be haled to court or otherwise harassed, [and] attendants may not search them for the carrying of arms,"[56] there was no general recognition of this. To a large extent it depended on the discretion of a commander whether medical personnel accompanied his forces and often the only one would be his personal physician. However, Gustavus Adolphus had four surgeons attached to his regiments and the Armada too carried medical personnel, but these only looked after their own. By a decree of Louis XIV of 1708, a permanent medical service was established "à la suite des armées et dans les places de guerre."[57] Even before this, during the siege of Metz in 1552-3, François de Guise had summoned the French surgeon Pará "to succour the abandoned wounded soldiers of the enemy and to make arrangements for their transport back to their army."[58]

By the end of the seventeenth century, occasional agreements were being drawn up between rival commanders for mutual respect towards the wounded and hospitals. A fairly sophisticated agreement of this kind was entered into between the French and English at L'Ecluse in 1759, whereby:

> [H]ospital staff, chaplains, doctors, surgeons and apothecaries were not . . . to be taken prisoners; and, if they should happen to be apprehended within the lines of the enemy, they were to be sent back immediately. The wounded of the enemy who should fall into the hands of the opponents were to be cared for. . . . They were not to be made prisoner and might stay in hospital safely under guard. Surgeons and servants might be sent to them under the general's passport. . . ."[59]

Some twenty years later, in 1780, Péyrilhe proposed international recognition of the principle that the wounded should not be made prisoners of war nor enter into the balance of exchanges.[60] However, it was not until after the experiences of Florence Nightingale in the Crimea and the publication of Henri Dunant's *Souvenir de Solferino* in 1862, reporting on the horrors he had witnessed at that battle, that Péyrilhe's proposal came to fruition, with the

establishment of the International Committee of the Red Cross in 1863[61] and the adoption in 1864 of the first Geneva Convention for the Amelioration of the Condition of the Wounded of Armies in the Field.[62]

Apart from arrangements and developments of this kind, other customs were evolving. During the Hundred Years War, *guerre mortale*, war to the death, was distinguished from *bellum hostile*, a war between Christian princes when prisoners could still ransom themselves, *guerre guerriable*, fought in accordance with the feudal rules of chivalry, and the truce, which included a temporary cessation of hostilities during which the wounded and dead might be collected, with the resumption of hostilities following a truce considered a continuation of an ongoing conflict, rather than the opening of a new one. Each had its own rules, but they were rules of honor.

In medieval and later European wars, the capture of cities was of major importance and could be effected by surrender or siege and assault. If by agreement, the inhabitants were treated in accordance with its terms, but if by assault, there were no legal restrictions, although churchmen, women and children were frequently spared. Siege required peculiar weapons, both offensive and defensive,[63] but as sieges became less frequent and these weapons of less value, they tended to fall into desuetude and came to be considered illegal,[64] only to be replaced by weapons more suited to the newer methods of warfare.

These developments were in line with others which had ensued by the time of the 1648 Treaty of Westphalia terminating the Thirty Years War. Members of fighting units were now mustered in national armies and war was no longer a matter of personal relations between princely commanders, with the individual soldier entering into a personal contract with his commander—although there are still vestiges within national armies of troops being raised by a particular nobleman[65]—and the individual captor no longer had any rights over his captive. War was now a matter between sovereigns, and for a legally recognized armed conflict to exist there had to be a hostile contention between States by means of organized armed forces under a proper disciplinary system.[66] At the same time, the old distinction between just and unjust wars[67] had disappeared, and it had become accepted that any war conducted by a Christian prince was clearly just,[68] although both Suarez and Vitoria had reservations concerning Spanish claims to the colonization of the new world.[69]

It was not until the American Civil War that there was the first attempt to produce a modern code for the conduct of armed forces in the field. Professor Francis Lieber of Columbia College drew up what became, by order of President Lincoln, Instructions for the Government of Armies of the US in the

Field.[70] These were so consistent with what were generally accepted practices that they formed the basis for similar codes in Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893.[71] By the Instructions:

> [M]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or revenge . . . the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit . . . protection of the inoffensive citizen of the hostile state is the rule. . . . 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. . . . All wanton violence committed against persons in the invaded country . . . all robbery . . . or sacking, even after taking a place by main force, all rape, wounding, maiming or killing of such inhabitants are prohibited under the penalty of death. . . . Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred."[72]

Despite the number of countries adopting similar codes, no agreed international document acknowledging this existed, although it was generally accepted that these postulates constituted principles amounting to international customary law and, to the extent that they were not expressly rejected by any State, especially a major military power, nor overruled by any treaty, they are as obligatory as any other rules of international law.

The first international agreement to be generally accepted came at the end of the Crimean War with the adoption of the Declaration of Paris, 1856.[73] This was confined to maritime warfare, forbidding the issue of letters of marque, stating that a blockade was only legal if effective, and granting immunity from capture to enemy goods on neutral ships and neutral goods on enemy ships, unless they constituted contraband. Of more general significance was the 1864 Geneva Convention on wounded in the field, already mentioned, which recognized the distinctiveness and immunity of the Red Cross and of personnel wearing this insignia. This Convention was amended and revised in a series of Geneva Conferences extending from 1886 to 1977, with the Conventions of 1949, as added to by the 1977 Protocols, constituting the current body of humanitarian law governing the treatment and protection of those *hors de*

combat, civilians and other noncombatants. This body of law is known as the Geneva Law.[74]

In addition to the work done on behalf of those *hors de combat*, efforts were taking place to control the means of conducting warfare. The Russians had invented a bullet which exploded on contact, and in 1867 called a conference resulting in the Declaration of St. Petersburg. This forbade the use of projectiles weighing less than 400 grammes that were explosive or charged with fulminating or inflammable substances. The Declaration was of general application, applying equally to land and sea warfare. However, its impact was limited since it contained an all-participation clause, rendering it inapplicable in any war in which any belligerent was not a party.

Perhaps more significant than the Declaration, was the accompanying Preamble, which is important to the present day:

> [T]he progress of civilization should have the effect of alleviating as much as possible the calamities of war; the only legitimate objective which states should endeavour to accomplish during war is to weaken the military forces of the enemy; for this purpose it is sufficient to disable the greatest possible number of men; this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; the employment of such arms would, therefore, be contrary to the laws of humanity.[75]

This document may be considered the precursor of what is now known as the Hague Law, concerned with the means and methods of conducting operations during armed conflict, which had its origin in a conference called by the Czar in 1874. The Brussels Protocol aimed at revising "the general usages of war, whether with the object of defining them with greater precision, or with the view of laying down, by a common agreement, certain limits which will restrain, as far as possible, the severities of war." To this end a Project of an International Declaration concerning the Laws and Customs of War was drafted in the hope that "war being thus regulated would involve less suffering, would be less liable to those aggravations produced by uncertainty, unforeseen events, and the passions created by the struggle; it would tend more surely to that which should be its final object, *viz.*, the re-establishment of good relations, and a more solid and lasting peace between the belligerent States."[76]

The Project failed for lack of ratifications, but it formed the basis on which L'Institut de Droit International drew up its Oxford *Manual of the Laws of War on Land*. According to the Preface:

> [I]ndependently of the international laws existing on this subject, there are certain principles of justice which guide the public conscience, which are manifested even by general customs, but which it would be well to fix and make obligatory... [but since it] might be premature or at least very difficult [to obtain a treaty, the Manual could serve as the basis for national legislation, as being] in accord with both the progress of juridical science and the needs of civilized armies. Rash and extreme rules will not be found therein.[77] The Institut has not sought innovations in drawing up the Manual; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable."[78]

Appreciating the pressures imposed upon the fighting man and the civilian when there is an actual combat, the Institute called upon States to disseminate the rules among its entire population.

The Brussels Project and the Oxford Manual, served to inspire the Czar to call a Peace Conference at The Hague in 1899. This conference adopted a number of Declarations together with a Convention (which was amended in 1907) that still constitute the basic law *in bello*. Recognizing the arrival of a potentially new means of attack, the Conference adopted a Declaration against the launching of projectiles and explosives from balloons or other similar methods. This was replaced in 1907 and remains the only existing international agreement on aerial warfare. Further Declarations ban projectiles, the only use of which is the diffusion of asphyxiating or deleterious gases, as well as the use of bullets which expand or flatten easily in the human body.[79]

Most important of the instruments adopted at The Hague is Convention II of 1899, now IV of 1907, to which is attached a set of Regulations still constituting the basic statement of the law of warfare on land—although its principles are now regarded as so fundamental as to amount to customary law relevant in all theaters. It is, of course, impossible to cover all eventualities or provide for unforeseen developments. For this reason, the parties adopted the Martens Clause:

> Until a more complete code of the laws of war has been issued [- and it never has-], the High Contracting Parties deem it expedient to declare that, in cases not included in the [annexed] Regulations, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[80]

This, in somewhat slightly amended form, appears in virtually every subsequent agreement concerning humanitarian law in armed conflict.

At the 1907 Conference, further Conventions, covering the opening of hostilities, naval warfare, and the rights and duties of neutrals, were adopted.[81] Since each of these contains an all-participation clause, the Martens Clause, with its clear references to chivalry, humanitarianism and accepted usages, assumes increased importance. In addition, to the extent that any of the provisions in the Regulations, Conventions or Declarations are now considered to be declaratory of,[82] or having developed into, customary law, they will be applicable universally and the wording of the Convention will be treated as expressing that law.[83]

Hague Convention IV makes no provision for personal liability in the event of its breach, but Article 3 provides that "a belligerent party which violates the provisions of the Regulations 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." While this is the first "black letter" acknowledgment of the enforceability of any of the laws of war, it is merely an affirmation of the general principle relating to the liability of a State for breach of treaty or for its tortious wrongs or acts of its subordinates. Prior to the establishment of the Nuremberg International Military Tribunal in 1945,[84] the only way of proceeding against individual offenders was by national tribunals[85] applying customary law,[86] the Regulations,[87] or, in the case of their own personnel, the national military or criminal code.[88] Since Nuremberg, nearly all trials[89] for offenses against the laws of war have made reference to the principles stemming from the judgment of the Nuremberg Tribunal.[90]

Probably, the most important provision of the 1907 Regulations is Article 1 defining the scope of application of the Regulations—armies, militia units, and volunteer forces, provided they are commanded by a person responsible for his subordinates, have a fixed distinctive emblem recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws and customs of war. This purview of relevant personnel has been widened somewhat by Protocol I of 1977. However, from the point of view of the serving soldier, Articles 22 and 23, limiting the means of waging war and the use of forbidden weapons (although it may well be difficult for him to know whether a particular weapon issued to him is in fact forbidden), as well as forbidding the imposition of unnecessary suffering, are those most likely to result in personal liability. Even since the adoption of the Protocols, this is still largely the case.

While no Conference has been called since 1907 to revise or update the general laws and customs of war, there have been conventions directed to

specific issues, the protection of cultural property in armed conflict,[91] the prohibition of military or other hostile use of environmental modification techniques,[92] the use of conventional weapons,[93] the production, stockpiling and use of chemical weapons,[94] and, most importantly, the conference that led to the adoption of Protocols I and II in 1977.

In so far as maritime warfare is concerned, in addition to the Hague Conventions already mentioned, one of which, Convention XII, sought unsuccessfully to set up an International Prize Court, the Declaration of London of 1909,[95] is important. The Declaration stated that it contained "agreed rules" on blockade, contraband, unneutral service, enemy character, convoy, and resistance to search. Though unratified, its substance was in accord with generally recognized principles and, by and large, was observed during World War I;[96] as recently as 1960, an Egyptian Prize Court, citing the Declaration, condemned cargo from Israel on a Greek ship seeking to traverse the Suez Canal.[97]

Other agreements relating to sea warfare, specifically submarines and noxious gases,[98] were adopted in London in 1922, but never came into force, although the provisions on submarine warfare were confirmed by the London Protocol of 1936. Pursuant to the Protocol, in their operations against merchant ships, submarines are required to conform to the same rules as surface vessels.

> In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.[99]

World War II practice shows that this rule was more observed in the breach than observance.

Although the parties at The Hague dealt with projectiles from balloons, they did not appreciate the potential importance of air warfare. Experience in World War I indicated that this was an area which should not be ignored, and in 1923 a Conference of Experts drew up agreed Rules of Air Warfare.[100] These Rules, however, have never come into force, although they are generally regarded as having had sufficient influence for it to be said that "to a great extent, they correspond to the customary rules and general principles

underlying the conventions on the law of war on land and at sea."[101] This view was accepted by the Tokyo District Court when considering the legality of the dropping of the atomic bombs on Hiroshima and Nagasaki.

> The Draft Rules of Air Warfare cannot directly be called positive law, since they have not become effective as authoritative with regard to air warfare. However, international jurists regard the Draft Rules as authoritative with regard to air warfare. Some countries regard the substance of the Rules as a standard of action by armed forces, and the fundamental provisions of the Draft Rules are consistently in conformity with international law regulations, and customs at that time [1945].[102]

While the United States Department of the Air Force does not recognize the Code as customary law, it does in fact often draw attention to the compatibility of its own rules with those adopted in 1923.[103] Moreover, to the extent that these Rules may be declaratory of general customary law, they apply to air warfare, and by Protocol I the rules concerning the general protection of the civilian population "apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air."[104]

Although the use of poison has been condemned since classical times, poison gas was used during World War I. In 1925 the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was adopted.[105] Many countries contend that this does not extend to non-fatal lachrymose or nerve gases, while others reserve the right to use it, for example, to suppress riots in prisoner-of-war camps. Others state they will only apply it as between themselves and belligerents who have also ratified the Protocol, and yet others claim the right to use gas against a belligerent who has employed it against their forces or those of their allies. While there are reports that gas and other chemical weapons were used by Italy against Ethiopia, by Iraq against Kurdish rebels, and, perhaps during the Gulf War, it is likely that the Protocol would now be regarded as declaratory of customary law, at least so far as first use is concerned. Moreover, as recently as 1993, a further Convention sought to extend the Protocol so as to ban the manufacture, stockpiling, or use of any chemical weapons.[106]

Experience in World War II made it clear that the law as it existed in 1939 was no longer adequate, even though, as pointed out by the Nuremberg

Tribunal, the rules embodied in Hague Convention IV and the annexed Regulations "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war," and as such applicable to all belligerents, whether party to that instrument or not. The same view was taken of the Geneva Convention of 1929 relating to Prisoners of War,[107] a finding that was particularly important since neither the Soviet Union[108] nor Japan was a party thereto, although Japan stated it would abide by its provisions;[109] Germany contended that it did not apply to protect Soviet prisoners.

Perhaps the most significant development in the law of war to result from World War II was the promulgation of the London Charter establishing the International Military Tribunal at Nuremberg,[110] with jurisdiction over crimes against peace, war crimes and crimes against humanity. To the extent that it was merely exercising its jurisdiction in accordance with the Charter, the Tribunal was not itself creating any law. While not directly concerned with regulating the conduct of hostilities, perhaps the major innovation was the holding by the Tribunal that a war of aggression or in breach of treaty was a crime, though criticism may be directed at the manner in which the Tribunal concluded that the Pact of Paris,[111] whereby the parties renounced war as an instrument of national policy, had made resort to "aggressive" war an international crime; for the Tribunal, it was "not only an international crime: it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[112] Surprisingly, however, none of the accused found guilty of this "supreme" crime, but not additional "lesser" war crimes, was sentenced to death.

As to war crimes in the traditional sense of that term, the Tribunal added little except to hold that status of the accused, even as head of state or commander in chief, would not provide immunity from prosecution, and confirm that superior orders was not a defense to a war crimes charge, but could be pleaded in mitigation. The other innovation was the concept of crimes against humanity. This offense related to breaches of the law against civilians, even those of the same nationality as the perpetrator. While there has been a tendency to assume that this was a major development of a general character, it should not be forgotten that, as defined in both the Charter and the Judgment, crimes against humanity were committed only if they were part and parcel of the war of aggression or of war crimes. Moreover, strictly speaking, once the Tribunal was *functus officio,* this concept should have become of less significance.[113] However, with the development of the law concerning human rights and humanitarian law, and in an attempt to create a system for prosecuting crimes committed in a noninternational conflict, the application

of the concept was widened. Perhaps the most significant statement to this effect is to be found in the Interim Report of the Commission established to investigate crimes committed during the civil war in Rwanda:

> If the normative content of "crimes against humanity" had remained frozen in its Nuremberg form, then it could not possibly apply to the situation in Rwanda . . . because there was not a "war" in the classic sense of an inter-State or international armed conflict.
>
> However, the normative content of "crimes against humanity"—originally employed by the Nuremberg tribunal for its own specific purposes in connection with the Second World War—has undergone a substantial evolution. . . .
>
> "[C]rimes against humanity" finds its very origins in "principles of humanity" first invoked in the early 1800s by a State to denounce another State's human rights violations of its own citizens. Thus, "crimes against humanity" as a juridical concept was conceived early on to apply to individuals regardless as to whether or not the criminal act was perpetrated during a state of armed conflict or not and regardless of the nationality of the perpetrator or victim. The content and legal status of the norm since Nuremberg has been broadened and expanded through certain international human rights instruments adopted by the United Nations since 1945. . . .
>
> The Commission of Experts on Rwanda considers[114] that "crimes against humanity" are gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victims.[115]

It should be pointed out here that many commentators would today question whether such crimes need to be the consequence of a determined policy based on discrimination.

Just as it would now be considered as part of the law that crimes against humanity are not confined to an international armed conflict, so we find that the 1948 Genocide Convention, which deals with acts directed at the destruction of a defined group *qua* group, expressly states in Article 1 that "genocide, whether committed in time of peace or in time of war, is a crime under international law."[116] There should, therefore, be no difficulty in applying this Convention in any conflict, whether international or noninternational, when the acts condemned are directed at a defined group with the intention of destroying its group characteristics. Since most crimes against humanity, as defined in the London Charter or international

agreements on human rights, do not normally amount to offenses as grave as genocide, it should be possible in the future to charge those responsible for genocide with crimes against humanity, without having to prove "intent" for genocide is clearly the gravest of all crimes against humanity.

The General Assembly adopted a resolution Affirming the Principles of International Law recognized by the Charter of the Nuremberg Tribunal.[117] As a General Assembly resolution, it lacks any strict legal force, although it embodies great political and moral authority. This authority has been enhanced by the International Law Commission's enunciation of Principles of International Law recognized by the Charter and Judgment.[118] Principle I affirmed the personal liability of anyone committing a crime under international law; Principle II provides that the failure of national law to condemn a particular act does not remove personal liability for that act under international law; Principle III prohibits a head of state from claiming immunity from international criminal liability; Principle IV holds that superior orders cannot be pleaded when a moral choice was open to an accused; Principle V entitles war criminals to a fair trial; Principle VI confirms the criminality of the acts condemned in the London Charter; and Principle VII reaffirms the Tribunal's finding that complicity in any of these acts is itself a crime. These Principles have been reaffirmed by the Commission in its Draft Code of Crimes Against the Peace and Security of Mankind.[119]

From the point of view of the law *in bello,* the most important development after 1945 was the adoption of the four Geneva Conventions in 1949. Conventions I, II, and III,[120]—addressing the wounded and sick on land and at sea, as well as prisoners of war—are little more than reaffirmations and extensions of the 1929 Conventions, with amendments directed at filling *lacunae,* which became apparent during World War II. More innovative was Convention IV concerning the protection of civilians in time of war, particularly in occupied territory,[121] an issue which had become of supreme concern in the light of German practice in occupied Europe.

Further, since 1945 it had become obvious that many or most of the conflicts that had occurred or were likely in the foreseeable future were not international conflicts in the normal inter-State sense, but rebellions, revolutions, or struggles for national independence. It is for this reason that the Conventions replace the term "war," with its inter-State connotation, by "armed conflict" and "enemy" by "adverse party"—although the mind boggles at the idea of an infantry sergeant saying, "Hold your fire until you see the white of the adverse party's eyes!" In such conflicts, ideological differences frequently result in atrocities far more outrageous than any of those normally inherent in

an international conflict. In view of this, each of the Conventions has, as its Article 3, what may be regarded as a minimal code of humanitarian law to be followed "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." In addition, each contains a definition of those breaches of the Convention which are considered "grave," and which are declared to be criminally punishable,[122] Parties agree to amend their legal systems to ensure the punishment of such offenses. However, the relevant article never refers to the provisions of Article 3 common to the Conventions. But, if this Article is to have any meaning, it follows that disregard of the provisions therein embodied must be enforceable; thus, offenders must be punishable. Moreover, the offenses listed in the Conventions, regardless of the specific Article concerned, are, for the most part, offenses which would amount to crimes against humanity and be punishable as such. The listing of particular offenses as "grave breaches" does not remove the criminal character from other acts which would amount to war crimes.

Adoption of the Civilians Convention in 1949 was still not regarded as sufficient to satisfy the purpose for which it was promulgated. Therefore, in 1968, the International Conference on Human Rights in Tehran adopted a Resolution calling for Respect for Human Rights in Armed Conflicts,[123] although none of its Resolutions carries legal force. However, they introduced a new idea to the effect that those engaged in "struggles" against "minority racist or colonial régimes" should not be treated as traitors but as prisoners of war or political prisoners. This added to the impact of the General Assembly's resolution[124] confirming the assertion of the 1965 Conference of the Red Cross on the Protection of Civilian Populations against the Dangers of Indiscriminate Warfare:

> (i) the right of parties to a conflict to adopt means of injuring the enemy is not unlimited;
>
> (ii) it is prohibited to launch attacks against the civilian population, as such;
>
> (iii) distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.[125]

Carrying the proposals further, the Institute of International Law, at its Edinburgh Conference of 1969, adopted a Resolution on the distinction between military and nonmilitary objects, particularly the problems associated

with weapons of mass destruction.[126] In view of the status of the Institute, its views cannot be ignored, even though the United States "does not accept them as an accurate statement of international law relating to armed conflict . . . [but] regard[s] as declaratory of existing customary law . . . [the] general principles recognized [and] unanimously adopted by the United Nations General Assembly."[127] However, bearing in mind the importance of *opinio juris*, some reference to the Institute's views must be made.

First, the Institute made reference to the "consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilians and for mankind as a whole . . . [and went on to enunciate] the principles to be observed in armed conflicts by any *de jure* or *de facto* government, or by any other authority responsible for the conduct of hostilities."[128] It emphasized that the distinction between military and nonmilitary objectives, as well as between combatants and civilians, must be constantly preserved; that neither the civilian population nor specially agreed protected establishments may ever be regarded as military objectives, nor "under any circumstances" may the means indispensable for the survival of the civilian population or those which serve primarily humanitarian purposes; that all existing protective principles of international armed conflict law must be preserved and observed; and that

> [E]xisting international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population. . . . [and] prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as "blind" weapons. [It also] prohibits all attacks for whatsoever motives or by whatsoever means for the annihilation of any group, region or urban centre with no possible distinction between armed forces and civilian populations or between military and non-military objectives.[129]

The General Assembly subsequently adopted a Resolution which broadly accepted the principles laid down by the Institute. However, it went somewhat further, in that, while affirming the principles for the protection of civilians, it asserted that "fundamental human rights, as accepted in international law and laid down in international agreements, continue to apply fully in situations of armed conflict."[130] This appears to be a new departure from previous understanding, for it would normally be thought that as *lex specialis* the Hague

and Geneva Law overrode the *lex generalis* of human rights instruments which might be considered applicable in peacetime, especially as these latter instruments usually recognize that most, but not all, of their provisions are derogable in time of emergency, including armed conflict.[131]

Since this Resolution was adopted without any opposition, it might be assumed that the members of the international community thought that the principles therein enunciated amounted to an expression of customary law, which would render the United States reservations concerning the Institute's proposals of less significance than they appear at first glance.

There followed the adoption of a Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction in 1972,[132] but this was silent as to use. Difficulties arose in relation to chemical weapons and a further, as yet unratified, Convention was adopted in 1993 directed against the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction.[133]

All these proposals with regard to the means and methods of warfare led the International Committee of the Red Cross to propose amendments to the 1949 Conventions in an effort to meet some of the concerns now apparent. The Conference that ensued met from 1974 to 1977 and produced two Protocols supplementing, but not in any way replacing, the 1949 Conventions—I on international and II on noninternational armed conflicts.[134]

Apart from bringing the law up to date, Protocol I makes fundamental changes in the existing law regulating international armed conflicts and, while formally concerned with humanitarian law as propounded in the Geneva law, does in fact add to some of the Hague law concerning means and methods. Most importantly, recognizing the principles of political correctness and concerns regarding self-determination, it provides that struggles conducted by national liberation movements in the name of self-determination are to be considered international conflicts and thus subject to the international law of armed conflict.[135] It also changes the definition of combatants on behalf of the members of such movements, even though they are not wearing recognized uniforms nor carrying their arms openly save when actually engaged and visible to the adversary while preparing to engage.[136] The Protocol extends the protection given to civilian and nonmilitary objects and forbids actions likely to have a deleterious effect upon civilians. Thus, it forbids attacks upon narrowly defined "dangerous installations"—dams, dykes and nuclear electrical generating stations. Changing long-recognized law, it defines mercenaries and denies them prisoner of war status. It widens the concept of grave breaches as

defined in the Conventions, and recognizes civil defense as a matter requiring separate acknowledgment. In an effort to make the law clearly understood, it requires legal advisers to be attached to military units, without specifying the level of attachment, and expressly confirms the principle of command responsibility, including the obligation of a commander to ensure compliance with the law by his subordinates by imposing a duty to suppress, repress and punish offenders.

The Protocol reflects many of the principles adopted by the Institute at its Edinburgh meeting, but ignores completely any reference to weapons of mass destruction other than by implication when forbidding long-term damage to the environment or insisting on the preservation of material essential to the sustenance of the civilian population. The reason put forward for ignoring the problems of the nuclear weapon was that this was essentially an issue of disarmament rather than humanitarian law. Nevertheless, when the General Assembly subsequently asked the World Court for an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons,*[137] the Court found itself unable to give a direct answer, though it had some difficulty in leaving the issue completely open.

> The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict. . . .
>
> [The] two branches of law applicable in armed conflict [—the Hague and Geneva law—] have become so closely interrelated that they are considered to have gradually formed one complex system, known today as international humanitarian law. . . .
>
> Since the turn of the century, the appearance of new means of combat has—without calling into question the long-standing principles and rules of international law—rendered necessary some specific prohibitions of the use of certain weapons. . . .
>
> The cardinal principles constituting the fabric of humanitarian law are [as follows]. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants. States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to

cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. [Accordingly,] States do not have unlimited freedom of choice of means in the weapons they use.

The Court would refer, in relation to these principles, to the Martens Clause . . . which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version . . . is to be found in Additional Protocol I of 1977.[138]

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law. . . . [T]hese fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law [—? *jus cogens*—]. . . .

Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons. . . .

The Court shares th[e] view [that] there can be no doubt as to the applicability of humanitarian law to nuclear weapons. . . . Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflicts had already come into existence; the Conferences of 1949 and 1974-1977 [which drew up the Conventions and Protocols] left these weapons aside, and there is a qualitative as well as a quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. . . .

Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons. . . .

Although the applicability of the principles and rules of humanitarian law . . . to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are . . . controversial. . . .

[N]one of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of nuclear, low yield, tactical nuclear weapons [—which, in view of their radio-activity, would still be likely to cause "unnecessary" suffering to combatant victims—] has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons [—is this comment of legal significance?—]. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

Nor can the Court make a determination upon the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, . . . the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity—make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons . . . the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstances.

Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.[139] Nor can it ignore the practice referred to as the "policy of deterrence" [—a legal issue for a Court?—], to which an appreciable section of the international community adhered for many years. . . .

Accordingly, in view of the present state of international law viewed as a whole . . . and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake. . . .[140]

As if aware of the somewhat unsatisfactory nature of its answers, the Court referred to the varying views that exist at present on this matter and called for an early conference to settle the entire issue of legality, reminding the members of the international community of their obligation to negotiate in good faith.

Having thus seen the Court's comments on the legality of the nuclear weapon and its reference to the absence of mention in the Conventions or Protocol I, it is perhaps in order to consider the significance of this instrument. Although both Protocols constitute an annex to the Conventions, they do not automatically become part thereof and, as such, binding upon Convention parties. Ratification or accession remains necessary, and there is much debate as to the extent to which the provisions in Protocol I are declaratory of customary law relevant to international conflicts and therefore binding regardless of accession. Perhaps it is sufficient in this connection to refer to the Report submitted by General Colin Powell to the Defense Department of the United States in regard to the Gulf War of 1991 in which the Coalition forces were under his overall command. Many of the combatants in this conflict, including both Iraq and the United States, had failed to ratify or accede. Nevertheless, Powell pointed out that to the greatest extent feasible, the limitations imposed by Protocol I were observed and that "decisions were impacted by legal considerations at every level. . . . [T]he law of war proved invaluable in the decision-making process" in regard to action taken.[141] By way of contrast, Protocol II, as the first international effort to regulate such a domestic matter as a noninternational conflict, is clearly innovative.

Even though there has, as yet, been no instrument regulating the legality of the use of nuclear weapons, there has been some progress with regard to conventional weapons, that is to say those not of massive destruction potential, although they may in fact be indiscriminatory. Thus, in 1980, a Convention was adopted on the Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or Have Indiscriminatory Effects.[142] This comprised three Protocols. The first prohibits weapons "the primary purpose of which is to injure by fragments which in the human body escape detection by X-rays," although it is not believed any such exist or are likely to be invented in the foreseeable future. Protocol II is concerned with land mines, booby traps and other similar devices, its main aim being to protect civilians from such weapons, while at the same time preventing their use against troops in a perfidious manner, as would be the case if they were used in connection with protective emblems or, for example, corpses. Finally, Protocol III prohibits or restricts the use of incendiary weapons if fire is the primary rather than incidental or consequential outcome. While

incendiaries have become of less significance with the increased resort to mechanized warfare, particularly when long-distance (as compared with trench or house-to-house combat), incendiaries remain significant when used against armored vehicles or aircraft. Consequently, the Protocol excludes from its purview.

> (i) Munitions which may have incidental incendiary effects, such as luminants, tracers, smoke or signaling systems;
>
> (ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.[143]

This last sub-paragraph leaves one with the impression that the draftsmen were of opinion that "armoured vehicles, aircraft and installations or facilities" exist in themselves, without any human being required to make them militarily effective.

In 1995, a fourth Protocol was added to these three to control the use of Blinding Laser Weapons. As with incendiaries, the ban is only directed at the employment of:

> [L]aser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. . . . Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.[144]

Interestingly, this would seem to remove one of the considerations normally applicable when construing whether an offense has been committed against the law of war amounting to a war crime. In most cases, it is now accepted that if an illegal consequence amounting to a breach was "foreseeable or considered likely," liability would follow. In this case, however, even though it is very likely that in using laser weapons against optical equipment blindness may well ensue, such use is not considered to amount to illegality, even though it is known that this is likely to be the case.

It was pointed out earlier that most of the provisions of the law of war are only applicable in the event of an international armed conflict, including such

conflicts as may be considered to be on behalf of self-determination, and that Article 3 common to the four Geneva Conventions does not really carry this much further, unless one is able to argue that breach of the various provisions in that Article amounts to crimes against humanity. The 1977 Additional Protocol II to the 1949 Conventions sought to provide some measure of humanitarian principles into noninternational conflicts. However, the threshold for this Protocol to come into effect is so high that it would exclude almost every noninternational conflict other than one which amounts to a civil war with the antigovernment forces in effective control of some part of the national territory, a requirement which is not imposed in the case of a war for national liberation:

> Art. 1 (1) This Protocol . . . shall apply to all armed conflicts which are not [elevated by Protocol I into international conflicts] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[145]

As if to emphasize this high threshold and to make it clear that there is no undue interference with national sovereignty and the power of a government to deal with opposition and affirm its right to maintain order, the Article expressly declares that the "Protocol shall not apply to 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,"[146] and, as we have just seen, nor would it apply, even if the armed incidents were far more extensive and serious, if those opposing the government were not in control over part of the national territory. Further limiting the possible impact of the Protocol on the conflict, Article 2 makes clear that the Protocol cannot:

> [B]e invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State... [nor] as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.[147]

While the Protocol makes no attempt to suggest that the decision as to "legitimate" means of restoring order belongs to any authority other than the

government concerned, it cannot, despite the ban on intervention, inhibit the Security Council from deciding, as it has in the case of the former Yugoslavia and of Rwanda, that the situation is so grievous that it amounts to a threat to international peace warranting action under Chapter VII of the Charter, and authorizing action despite the traditional reservations concerning nonintervention in domestic affairs.

The cheapest and most easily accessible weapon available to those involved in a noninternational conflict, especially those confronting the governmental forces, are mines and booby traps, but the 1980 Protocol relevant thereto only applies in an international armed conflict. However, since mines and booby traps are so easily made, are relatively inexpensive, and cause extensive injury to civilians even after the conflict has terminated, when the Convention on Conventional Weapons was amended in 1993, Protocol II on mines was also amended.[148] By virtue of this amendment, the Protocol was extended to situations mentioned in Article 3 common to the four Conventions, that is to say to noninternational conflicts—although the reservation with regard to riots and the like was preserved, leaving it open to both combatants in such a situation to behave as indiscriminately in this regard as might please them. While the ban is applicable to all parties, the reservations with regard to sovereignty are also preserved. In an effort to reduce the dangers to civilians, particularly after the end of hostilities, the amended Protocol contains carefully spelled-out regulations concerning the marking and identification of mined areas as well as provision for their ultimate removal. The Protocol does not ban the use of all mines, but only those which are strictly anti-personnel and which lack self-destructive, self-neutralizing, or self-deactivating mechanisms or are fitted with an anti-handling device. While it seeks to limit the use of these mines, the Protocol does not make the obtaining of such weaponry illegal, nor forbid their manufacture or supply to those seeking them. In fact, those countries which are capable of the mass production of mines tend, at present, to be opposed to any international agreement which will limit their right to manufacture or use, especially in circumstances of self-defense, even though they express willingness not to supply them to those countries seeking them on the international market.

This historical introduction to the law of armed conflict has paid most attention to warfare upon land since this is the region for which most agreements have been designed, while the earliest beginnings of regulation were directed to land warfare. Where it has been considered essential, specific reference has been made to both aerial and naval warfare, especially since the principles underlying the laws and customs of warfare on land are general in

character and equally applicable, to the extent that is practicable, to operations at sea and in the air as well. Equally, nothing has been said about neutrality. This is partly due to the fact that in modern war there are few neutrals, particularly when the States which are neutral are weaker than the belligerents and therefore have difficulty in asserting their rights against those of the latter. Moreover, since virtually all States are members of the United Nations and thus bound to carry out any decisions of the Security Council,[149] and, since no military action is legal without Security Council consent or approval, it may be argued that no State can any longer claim to be entitled to the rights traditionally pertaining to neutrality. This is particularly so when operations are undertaken to give effect to a Security Council decision, a matter that became of some importance during the Gulf War of 1991.[150]

In addition to any international agreements that may be relevant, as pointed out by the World Court in its opinion on *The Threat or Use of Nuclear Weapons*, the law of armed conflict is still governed by those "principles of international law derived from established custom [—going back to feudal times and before—], from the principles of humanity and from the dictates of public conscience,"[151] together with such considerations of proper behavior as amount to general principles of law recognized by civilized nations[152] and, as such, rules of international law in accordance with Article 38 of the Statute of the International Court of Justice. Further, there is nothing to prevent any State from laying down any rules regulating the conduct of its own forces, provided they do not run counter to any established rules and customs of the law of armed conflict, and, as we have seen, breaches of these rules may now be considered as amounting to crimes against humanity, and punishable as such, whether the conflict is one that is international or noninternational in character. Equally, since it is generally accepted that the law concerning armed conflict is of universal interest, there is nothing to stop any individual State, as many have in fact done, from passing legislation granting its courts jurisdiction over breaches of this law regardless of the nationality of the offender or of the victim. Nor is the geographic location of the offense of any significance. Finally, as may be seen with the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, it is open to the Security Council, having decided that a particular conflict, whether international or noninternational, amounts to a potential threat to international peace, to proceed to establish special courts with power to enforce the law and punish offenders.

In fine, perhaps it might be suggested that the time is now ripe for a further effort to be made, perhaps under the auspices of the International Committee of the Red Cross or the International Law Commission, to draw up a revised

and up-to-date statement of what the laws, as distinct from the customs of war, are.[153] If this should be considered impossible or impracticable, perhaps those States which are of like mind, as for example is the case with the members of the North Atlantic Treaty Organization or those of the European Community with the addition of the United States, would work together to draw up an agreed upon code which will be applicable to their forces and which might serve as an example to be adopted by others.

Notes

1. *See, e.g.*, comments on Vitoria, *in* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 12 (1996).
2. *Id.* at 13, *citing* Leo Gross, *The Peace of Westphalia, 1648–1948*, *in* INTERNATIONAL LAW IN THE TWENTIETH CENTURY 25, 33–46 (Leo Gross ed., 1969).
3. *Deuteronomy* 20:10–18.
4. *See, e.g.*, 1 *Samuel* 15, wherein the prophet himself kills Agag.
5. *Judges* 1:28-32.
6. "Thou shalt not smite them: wouldst thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread and water before them, that they may eat and drink and go to their master. And he [the king] prepared great provision for them: and when they had eaten and drunk, he sent them away and they went to their master." 2 *Kings* 6:22–23.
7. *Proverbs* 25:21.
8. *Deuteronomy* 20:19–20; *see also* Exodus 23:29.
9. FLAVIUS JOSEPHUS, CONTRA APION 29 (c. A.D. 93) (William Whiston trans., 1912).
10. Guy B. Roberts, *Judaic Sources of and Views on the Laws of War*, 37 NAVAL L. REV. 221, 231 (1988).
11. *See, e.g.*, JULIUS STONE, HUMAN LAW AND HUMAN JUSTICE 26–29 (1965).
12. Roberts, *supra* note 10, at 233.
13. SUN TZU, THE ART OF WAR 78 (c. fourth century B.C.) (Samuel B. Griffiths trans., 1971).
14. JOHN KEEGAN, A HISTORY OF WARFARE 173 (1994), *citing* HERRLEE G. CREEL, THE ORIGIN OF STATECRAFT IN CHINA 257, 265 (1970).
15. Epic Sanskrit poem, based on Hindu ideals, probably composed between A.D. 200 and 300.
16. *Cited in* W.S. Armour, *Customs of Warfare in Ancient India*, 7 GROTIUS TRANSACTIONS 71, 77, 81, (1921).
17. Tit. VII (Georg Buhler trans., 1886) (1976 reprint).
18. Armour, *supra* note 16, at 74.
19. Sanskrit epic of the third century B.C.
20. Cited by Judge Weeramantry in his dissent in the World Court's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, General List No. 95, at 34, 35 I.L.M. 809, 897 (1996).
21. Cited in Nagendra Singh, *The Distinguishable Characteristics of the Concept of Law as it Developed in Ancient India*, *in* LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 93 (Maarten Bos & Ian Brownlie eds., 1987).
22. *See* HOMER, THE ODYSSEY, bk. I, lines 260-3 (Richmond Lattimore trans., 1965).

23. 2 COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 221–3 (1911).

24. DE OFFICIIS, III, xxii.

25. PHILLIPSON, *supra* note 23, at 227, 228–9.

26. PHILLIPSON, *supra* note 23, at 195, 207–9, 210; *see also* 212 (*re* the Peloponnesian war).

27. HERACLIDES 1010.

28. HISTORY OF THE PELEPPONESIAN WAR, I.1, I.23, 1–3.

29. "[A]n adult free male could be a hoplite if he could afford the capital investment in the appropriate arms and armor, and could afford to spend a good part of the summer marching about the countryside and fighting when called upon to do so. The typical hoplite was an independent subsistence farmer. . . ." Josiah Ober, *Classical Greek Times*, *in* THE LAWS OF WAR: CONSTRAINTS IN WARFARE IN THE WESTERN WORLD 12, 14 (Michael Howard *et al.* eds., 1994).

30. *Id.* at 13.

31. *Id.* at 18.

32. Robert C. Stacey, *The Age of Chivalry*, *in* Howard, *supra* note 29, at 27, 27–8.

33. ALIB HASAN AL MUTTAQUI, 4 BOOK OF KANZUL'UMAN 472 (c. A.D. 634) (1979 trans. and ed.) *see also* SHAYBANI SIYAR, THE ISLAMIC LAW OF NATIONS, s. 1711 (c. early ninth century A.D.) (Majid Khadduri trans., 1966).

34. SIYAR, *supra* note 33, secs. 29–31, 47, 81, 110–11.

35. *Id.*, secs. 1, 15, 18, 44.

36. *Id.*, secs. 55, 95–109.

37. Concerning the activities of the Courts of Chivalry and other military courts, see MAURICE H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 27, 34 (1965); *see also* PHILIPPE CONTAMINE, WAR IN THE MIDDLE AGES 270–7, (Michael Jones trans., 1984), and, generally, 2 ROBERT P. WARD, AN ENQUIRY IN TO THE FOUNDATIONS AND HISTORY OF THE LAW OF NATIONS IN EUROPE, ch. XIV (Of the Influence of Chivalry) (1795).

38. See, e.g., the conduct of Henry V at Agincourt in 1415, as commented upon by Shakespeare, Henry V, Act 4, Scene 5, lines 5–10, based upon Holinshed's CHRONICLES, and compare with account given by EMERICH VATTEL, LE DROIT DES GENS, liv. III, ch.VIII, s. 151 (1758) (Charles G. Fenwick trans., 1916).

39. G.I.A.D. Draper, *The Modern Pattern of War Criminality*, *in* WAR CRIMES IN INTERNATIONAL LAW 141, 142–4 (Yoram Dinstein & Mala Tabory eds., 1996).

40. G.I.A.D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 5 INT'L REV. RED CROSS 3, 19 (1965).

41. See E.R.A. SEWTER, THE ALEXIAD OF ANNA COMMENA 316–7 (1969) ("The crossbow is a weapon of the barbarians . . . a truly diabolical machine.").

42. *See, e.g.*, WARD, supra note 37, ch. XIV.

43. Decretal V, *cited in* PIERINO BELLI, DE RE MILITARI ET BELLO TRACTATUS, pt. VII, chap. III, 29 (1563) (Herbert C. Nutting trans., 1936).

44. *Id.*

45. DESIDERIUS ERASMUS, BELLUM 17 (1545) (Imprint Soc. ed., 1972).

46. For a discussion on "The Status of Mercenaries in International Law," see LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR, ch. IX (1985).

47. JAMES T. JOHNSON, THE QUEST FOR PEACE 78–91 (1987).

48. *See, e.g.*, SHAKESPEARE, HENRY V, act 4, scene 7, lines 5-10 (commenting on the reason for Henry's order at Agincourt to slaughter all the French prisoners, as a reprisal for the

killing of camp followers); *see also, generally*, THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS, 1993.

49. *See, e.g..*, KEEN, *supra* note 37, at 27; *see also*, CONTAMINE, *supra* note 37, at 270-7.

50. *See* GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW (THE LAW OF ARMED CONFLICT), ch. 39 (1968).

51. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, app. II, 1412 (1896), *citing* FRANCIS GROSE, 1 ANTIQUITIES OF ENGLAND AND WALES 34 (1773). Similar codes were issued by Henry V and Henry VIII.

52. *Id.* at app. III, 1416, *citing* ANIMADVERSIONS OF WARRE (Ward trans., 1639).

53. CHARLES M. CLODE, 1 MILITARY FORCES OF THE CROWN, app. VI (1869).

54. *See* Andre Gardot, *Le Droit de la Guerre dans l'Oeuvre des Capitaines Français du XVIe Siècle*, 72 HAGUE RECUEIL 397, 467–8 (1948).

55. Baron de Taube, *cited in id.* at 467.

56. Belli, *supra* note 43, pt. VII, ch. III, 34.

57. GEOFFREY BUTLER & SIMON MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 134 (1928).

58. *Id.* at 187, n.28.

59. *Id.* at 149–50.

60. *Id. at* 150–1.

61. THE LAWS OF ARMED CONFLICTS 275 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

62. *Reprinted in id.* at 279.

63. *See, e.g.*, CONTAMINE, *supra* note 37, at 102–6, 193–207, 211–2.

64. *See, e.g.*, THE GERMAN WAR BOOK 66 (J.H. Morgan ed., 1915). Both the British MANUAL OF MILITARY LAW, pt. III (The Law of Land Warfare), para. 110 (1985), and the U.S. LAW OF LAND WARFARE (FM–27), para. 34 (1956), refer to lances with barbed heads, which were extremely useful against mounted knights in armor, as unlawful.

65. See, e.g., the Lovet Scouts attached to the British Army.

66. *See, e.g.*, BORDWELL, THE LAW OF WARFARE BETWEEN BELLIGERENTS, ch. IV (1908). Bordwell takes the Dutch Wars of Louis XIV, 1672–8, as the *dies a quo*. *See also* Leslie C. Green, *Armed Conflict, War and Self-Defence*, 6 ARCHIV DES VÖLKERRECHTS 387, 394–408 (1957).

67. *See, e.g.*, P.P. SHAFIROV, A DISCOURSE CONCERNING THE JUST CAUSES OF THE WAR BETWEEN SWEDEN AND RUSSIA (1717) (William E. Butler trans., 1973).

68. According to NICCOLO MACHIAVELLI, 2 THOUGHTS OF A STATESMAN (A. Gilbert trans., 1989), "that war is just that is necessary."

69. *See, e.g.*, JAMES B. SCOTT, THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW (1934); *see also* LESLIE C. GREEN & OLIVE P. DICKASON, THE LAW OF NATIONS AND THE NEW WORLD 39–47, 50–4, 192–8 (1989), and ANAYA, *supra* note 1, ch.1.

70. General Orders No. 100, Apr. 24, 1863, *reprinted in* Schindler & Toman, *supra* note 61, at 3; *see also* Richard R. Baxter, *The First Modern Codification of the Laws of Armed Conflict*, 29 INT'L REV. RED CROSS 171 (1963).

71. THOMAS E. HOLLAND, THE LAWS OF WAR ON LAND 72 (1908).

72. Arts. 16, 37, 44 & 47.

73. *Reprinted in* Schindler & Toman, *supra* note 61, at 787.

74. Convention I (wounded and sick in the field); II (wounded, sick and shipwrecked); III (prisoners of war); IV (civilians); Additional Protocol I (international armed conflict);

Additional Protocol II (noninternational armed conflict), *reprinted in* Schindler & Toman, *supra* note 61, at 373, 401, 423, 495, 621 & 689 respectively.

75. *Reprinted in id.* at 101.

76. *Reprinted in id.* at 25.

77. This reflects a problem facing every effort to enact rules to modify the rigor of war—the need to compromise between the ideals of the humanitarian and the needs of the military.

78. *Reprinted in* Schindler & Toman, *supra* note 61, at 101, 105 & 109 respectively.

79. (1880). *Reprinted in id.* at 35.

80. *Reprinted in id.* at 63.

81. Hague Conventions III, VI–XII, V and XIII. *Reprinted in id.* at 57, 791–940, 941 & 951 respectively.

82. *E.g.*, art. 7, affirming that a detaining government is obliged to maintain prisoners; art. 12, providing that prisoners breaking parole may be punished; art. 22, stating that the means of injuring the enemy is not unlimited; art. 23, banning the use of poison and of denying quarter; art. 32, protecting one carrying a flag of truce; etc.

83. *See, e.g.*, the *Nuremberg Judgment*: "Several of the belligerents in the recent war were not parties to this Convention [IV]. . . . [B]y 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war." H.M.S.O., Cmd. 6964 (1946), at 65; 41 AM. J. INT'L L. 172, 248–9 (1947).

84. London Charter, *reprinted in* Schindler & Toman, *supra* note 61, at 911.

85. *See, e.g.*, U.N.W.C.C., LAW REPORTS OF TRIALS OF WAR CRIMINALS (1947–9).

86. E.g., The Llandovery Castle (1921) in which officers of a U-boat were sentenced by a German tribunal for, "contrary to international law," firing upon and killing survivors of an unlawfully torpedoed hospital ship. CAMERON, THE PELEUS TRIAL, app. IX, (1945).

87. *E.g.*, Drierwalde Case (1946), 1 U.N.W.C.C., *supra* note 85, at 81 [killing captured RAF personnel contrary to art. 23(c)].

88. See *Mueller* and *Neumann* (1921) for cases tried by a German tribunal involving ill treatment of prisoners of war contrary to the German Penal and Military Penal Codes. H.M.S.O., Cmd. 1422, at 26, 36.

89. *See, e.g.*, Buhler Trial, Polish Supreme National Tribunal, 14 U.N.W.C.C., *supra* note 85, at 23 (1948).

90. *See* UNGA Res. 95(I), Dec. 11, 1946, and Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950 Int'l Law Comm., *reprinted in* Schindler & Toman, *supra* note 61, at 921, 923.

91. Schindler & Toman, *supra* note 61, at 745.

92. (1976). *Reprinted in id.* at 163.

93. (1980). *Reprinted in id.* at 179, 35 I.L.M. 1209, 1217 (1996).

94. (1993). 31 I.L.M. 800 (1993).

95. *Reprinted in* Schindler & Toman, *supra* note 61, at 843. *See* Frits Kalshoven, *Commentary on the Declaration of London*, in NATALINO RONZITTI, THE LAW OF NAVAL WARFARE 257 (1988).

96. *See* C. JOHN COLOMBOS, THE LAW OF PRIZE 25–8 (1949); *see also* Kalshoven, *supra* note 95, at 271.

97. The *Astypalia*, 31 I.L.R. 519 (1966).

98. *Reprinted in* Schindler & Toman, *supra* note 61, at 113.

99. *Reprinted in id.* at 883.

100. *Reprinted in id.* at 207.

101. *Id. See also* JAMES M. SPAIGHT, AIR POWER AND WAR RIGHTS 42–3 (1947); HOWARD LEVIE, 1 THE CODE OF INTERNATIONAL ARMED CONFLICT 207–26 (1985).

102. Shimoda v. Japan, 8 JAP. ANN. INT'L L. 212, 237-8 (1963); 32 I.L.R. 626, 631 (1966).

103. UNITED STATES AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (AFP 110–31), para. 5-3(c), (1976).

104. Art. 49(3).

105. *Reprinted in* Schindler & Toman, *supra* note 61, at 115.

106. *See* n. 94 *supra.*

107. *Reprinted in* Schindler & Toman, *supra* note 61, at 339.

108. For Germany's attitude to Soviet prisoners, see *Nuremberg Judgment, supra* note 83, at 46–8, 91–2; 41 AM. J. INT'L L. 226–9, 282–3 (1947).

109. *See* HOWARD LEVIE, DOCUMENTS ON PRISONERS OF WAR doc. 191 (1979). For an account of Japan's treatment of prisoners of war, see, e.g., TOSHIYUKI TANAKA, HIDDEN HORRORS (1996).

110 *Reprinted in* Schindler & Toman, *supra* note 61, at 911.

111. Kellogg-Briand Pact, 1928, 94 L.N.T.S. 57.

112 *Nuremberg Judgment, supra* note 83, at (H.M.S.O.) 13, 39–41; 41 AM. J. INT'L L. 218–20, 486–8 (1947).

113 See, e.g., Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1945).

114. Here the Commission is reproducing words adopted by Commission of Experts on the Former Yugoslavia, U.N. Doc. S/1994/674 (1994) at paras. 84-6.

115. U.N. Doc. S/1994/125 (1994) at paras. 113-8.

116. *Reprinted in* Schindler & Toman, *supra* note 61, at 231.

117. Res. 95(I), (U.N. GAOR, 5th Sess., Supp. No. 12, Doc A/1316 (1950), *reprinted in id.* at 921.

118. *Reprinted in id.* at 923.

119. (1991). 30 I.L.M. 1584 (1991).

120. *Supra* note 74.

121. *Id.*

122. I - Arts. 49, 50; II -Arts. 50, 51; III - Arts. 129, 130; IV - Arts. 146, 147.

123. *Reprinted in* Schindler & Toman, *supra* note 61, at 261.

124. *Reprinted in id.* at 263.

125. *Reprinted in id.* at 251.

126. The Distinction Between Military Objectives and Non-Military Objectives, Resolution adopted by the Institute of International Law, Edinburgh, Sept. 9, 1969, 2 ANNUAIRE L'INSTITUT DE DROIT INTERNATIONAL 375 (1969), *reprinted in* Schindler and Toman, *supra* note 61, at 265.

127. Letter from General Counsel, Dep't of Defense, to Sen. Edward Kennedy, Chairman, Subcommittee on Refugees, Committee of Judiciary, Sept. 22, 1972, 67 AM. J. INT'L L. 122 (1973).

128. *Supra* note 126.

129. *Id.*

130. G.A. Res. 2675 (XXV), *reprinted in* Schindler & Toman, *supra* note 61 ,at 267.

131. *See, e.g.,* Leslie C. Green, *Derogation of Human Rights in Emergency Situations*, 16 CAN. Y.B. INT'L L. 92 (1978).

132. *Reprinted in* Schindler & Toman, *supra* note 61, at 137.

133. 32 I.L.M. 800 (1993).

134. *Reprinted in* Schindler & Toman, *supra* note 61, at 621 & 689.

135. Art. 1(4).

136. Art. 44(3).

137. General List No. 95, July 8, 1996, 35 I.L.M. 809 (1996).

138. "In cases not covered by this Protocol or other international agreements, civilians and combatants remain under the protection and authority of the principles of humanity and from the dictates of public conscience." Art. 1, para. 2.

139. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. . . ."

140. At paras. 74, 75, 76, 78, 79, 85-7, 90, 94 & 95-7.

141. U.S. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR App. O (THE ROLE OF THE LAW OF WAR), 31 I.L.M. 615 (1992).

142 *Reprinted in* Schindler & Toman, *supra* note 61, at 179 (Protocol I at 185; II at 185; III at 190). *See* William Fenrick, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 19 CAN. Y.B. INT'L L. 229 (1981).

143. Art. 1(b).

144. 35 I.L.M. 1217 (1996).

145. Additional Protocol II, *supra* note 74, art. 1(1).

146. *Id.*

147. *Id.*, Art. 2.

148. 35 I.L.M. 1209 (1996).

149. U.N. CHARTER Art. 25.

150. *See, e.g.*, Leslie C. Green, *The Gulf "War," the UN and the Law of Armed Conflict*, 28 ARCHIV DES VÖLKERRECHTS 369 (1991).

151. Protocol I, *supra* note 74, Art. 1(2) (paraphrasing the Martens Clause).

152. *See, e.g.*, charges in the *Einsatzgruppen Case* (US v. Ohlendorf, 1947). Charge 10 of the Indictment alleged "acts and conduct . . . which constitute violations of the general principles of criminal law as derived from the criminal law of all civilized nations." 4 U.N.W.C.C., *supra* note 85, at 21.

153. *See, e.g.* ICRC statements: *The Soldiers' Rules*, INT'L REV. RED CROSS 27 (Jan.-Feb. 1978); *Fundamental Rules of International Humanitarian Law Applicable to Armed Conflicts, in* Schindler & Toman, *supra* note 61, at 734; *Non-International Conflicts*, INT'L REV. RED CROSS 278 (Sept.- Oct. 1989). All three are reproduced in LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 335–7 (1993).