Denver Journal of International Law & Policy

Volume 24
Number 2 *Spring*

Article 3

January 1996

Enforcement of the Law in International and Non-International Conflicts - The Way Ahead

L. C. Green

Enforcement of the Law in International and Non-International Conflicts - The Way Ahead

Keywords
War, Humanitarian Law

Enforcement of the Law in International and Non-International Conflicts — The Way Ahead

L. C. GREEN*

In his great work on war, Quincy Wright says comparatively little on the law of war and virtually nothing on its breaches or enforcement.[1] More concerned with problems of prevention and alternatives to war, in fact no reference to war crimes or crimes against humanity appears anywhere in his index. Under the rubric of "law of war," the index indicates a fairly lengthy chapter on the "theory of modern war," yet the mention of *jus in bello* offers no discussion. A reference to Nuremberg in the index under "Nurnberg charter, and aggression, 1540," leads nowhere. Despite the finding by the Nuremberg Tribunal that Hague Convention IV[2] constituted customary international law,[3] Wright seems more concerned with the fact that the 1899 and 1907 conferences dealt with arbitration, although he does concede that "they contributed to the codification of the law of war."[4]

In Appendix XV, Wright draws attention to the "military characteristics of the historic civilizations," beginning with ancient Egypt and pursuing the subject through to the nineteenth century. Still, nowhere does he refer to the means by which these civilizations regulated the conduct of their forces. However, after commenting upon the intense enmity that usually accompanies ideological conflict (reverberating for the contemporary reader in Bosnia) he points out that:

> the law of war, particularly that part dealing with the conduct of war (the *jus in bello)*, has sought to counteract this tendency by setting limits to the methods which may be used in order to reduce destructiveness and to make future reconciliation possible. When war is fought for broad, ideological objectives, such rules have tended to break down because the end is thought to justify all means and war has tended to become absolute. Though the development of civilization has tended to the emphasis upon such objectives in war, it has also tended to the development of sentiments of humanity

---

* C.M., LL.B., LL.D., F.R.S.C., University Professor Emeritus, Honorary Professor of Law, University of Alberta; Visiting Professor, University of Denver College of Law

1. QUINCY WRIGHT, A STUDY OF WAR (1965).

2. Convention respecting the Laws and Customs of War on Land, *reprinted in* SCHINDLER AND TOMAN, THE LAWS OF ARMED CONFLICTS 63 (1988).

3. *Nuremberg Judgment*, 41 AM. J. INT'L L. 172, 249 (1946).

4. WRIGHT, *supra* note 1, at 339.

> and more longsighted expediency. Consequently, the rise of a civilization has meant more legal regulation of war, but also more appeal to military necessity as a ground for evading such rules in practice.[5]

This reference to "civilization" and the "sentiments of humanity," especially the current tendency to refer to the laws of armed conflict as "international humanitarian law,"[6] cause one to recall the comment of Clausewitz:

> War is an act of force, there is no logical limit to the application of force . . . . Attached to force are certain self-imposed imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. . . . [In fact,] kind-hearted people might . . . think there was some ingenious way to disarm or defeat an enemy without bloodshed, and might imagine that is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst. . . . [However,] if civilizations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare [than was the case among savages] and has taught them, more effective ways of using force than the crude expression of instinct.[7]

In fact, history indicates that some of the peoples that Clausewitz would undoubtedly have described as "savages" were aware of the need to limit the horrors of conflict and, in many instances, were prepared to threaten punishment of those in breach of the law, even if that law was only regarded as the law of the gods. Already in the Old Testament we find clear references to the obligation to treat both wounded and prisoners with humanity. Thus, the Israelites were instructed, "rejoice not when thine enemy falleth, and let not thine heart be glad when he stumbleth; Lest the Lord see it, and it displeases Him, and he turn His wrath away from him."[8] Again, "if thine enemy be hungry, give him bread to eat; and if he be thirsty, give him water to drink."[9] But perhaps the most significant comment is to be found in the answer given by the prophet Elisha when asked by the king whether he should slay his prisoners: "Thou shalt not smite them: wouldest 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

---

5. *Id.* at 160-161.

6. BEST, WAR AND LAW SINCE 1945 vii (1994): "The parts of international law supposed to control and moderate [war], the Laws of War as they were formerly known, have become, in our age, more highly developed than ever before and popularly known as International Humanitarian Law."

7. VON CLAUSEWITZ, ON WAR bk. I, ch.1, ¶¶ 2, 3, 75, 76 (Howard and Paret eds., 1976).

8. *Proverbs*, 24, 21.

9. *Proverbs*, 25, 21.

drink and go to their master. And he prepared great provision for them: and when they had eaten and drunk, he sent them away and they went to their master."[10]

The sacred writings of ancient India also seek to introduce some measure of humanitarianism. Both the *Ramayana*[11] and *Mahabharata*[12] lay down a series of principles which have only recently become recognized as part of the modern law of armed conflict:[13]

> When he fights with his foes in battle, let him not strike with weapons concealed in wood, nor with such as are barbed, poisoned, or the points of which are blazing with fire. Neither poisoned nor barbed arrows should be used. These are weapons of the wicked. A car warrior should fight a car warrior. One on horse should fight one on horse. Elephant riders must fight with elephant riders, as one on foot fights a foot soldier. When the antagonist has fallen into distress he should not be struck; brave warriors do not shoot at one whose arrows are exhausted.[14] No one should strike another that is retreating . . . let him remember the duty of honourable warriors; do not kill a man when he is down; even a wicked enemy, if he seeks shelter, should not be slain. . . . Car-drivers, men engaged in the transport of weapons . . . should never be slain. No one should slay him who goes out to procure forage or fodder, camp followers or those that do menial service.[15] No one should kill him that is skilled in a special art. He is no son of the Vishni race who slayeth a woman, a boy or an old man. Let him not strike one who has been grievously wounded. A wounded opponent shall either be sent to his own home, or if brought to the victor's quarters, have his wounds attended to, and when cured he shall be set at liberty. This is eternal duty. Night slaughter [is] horrible and infamous. With death our enmity has terminated . . . Customs, laws and family usages which obtain in a country should be preserved when

---

10. *Kings*, 6, 22-23.

11. Sanskrit epic composed in 3rd century B.C.

12. Epic Sanskrit poem based on Hindu ideals, probably composed between 200 B.C. and 200 A.D.

13. The examples given are taken from Armour, *Customs of Warfare in Ancient India*, 8 TRANSACTIONS OF THE GROTIUS SOCIETY 71, 73-77, 81 (1922).

14. This should be compared with the argument put forward by Kapitanleutnant (Ing) Lenz for his part in firing upon survivors after the sinking of *The Peleus*, 1 U.N. War Crimes Commission, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 3-4 (1947). A full report of the trial will be found in CAMERON, THE PELEUS TRIAL (1948).

15. This should be compared with the statement by Fluellen at Agincourt in 1415, as reported by WILLIAM SHAKESPEARE, HENRY V, act 4, scene 7, 11.5-20: "kill the boys and take the luggage! 'Tis expressly against the law of arms: 'tis as arrant a piece of knavery as can be offer'd" This statement was made in connection with Henry's order to kill the French prisoners as a reprisal for the slaughter of the "boys." It would seem that Shakespeare based his account on Holinshed's CHRONICLES, but a somewhat different version is given by VATTEL, DROIT DES GENS, liv. III, ch. VIII, §.152 (1758).

> the country has been acquired. Having conquered the country of his foe, let him not abolish or disregard the laws of that country. A king should never do such an injury to his foe as would rankle in the latter's heart.

Perhaps the leading commentator on the international law of classical times is Coleman Phillipson.[16] He tells us,[17] in both Hellas and Rome, the rules of war applied only to "civilized sovereign States, properly organized and enjoying a regular constitution; . . . . [H]ence barbarians, savage tribes, bands of robbers and pirates, and the like were debarred from the benefits and relaxations established by international law and custom." War in general practice in Hellas, recorded in the narratives of Greek writers, wavered between brutal cruelty and generosity:[18]

> 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, such as, for example, the use of poisoned weapons, was condemned.

The conduct of war, Phillipson continues, was affected by the size of these States:[19]

> Hostility against the State, in the eyes of the individual living in such a small State, provided the glue to tie individual with country more closely, whose subjects were to an extraordinary degree animated by patriotism and devotion to their mother-country, that every individual was 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 States as his personal enemy. . . . [Nevertheless,] temples, and priests, and embassies were considered inviolable. The right of sanctuary was universally recognized. Mercy was shown to suppliants and 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. Solemn oaths were fulfilled. Burial of dead was permitted,

---

16. PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME (1911).

17. *Id.* at vol. 2, ¶¶ 195, 207-209, 210, 221-3; *See also*, THUCYDIDES, THE PELEPPONESIAN WAR 79 *et seq.* (Hobbes trans., 1676).

18. *See, e.g.*, HOMER, THE ODYSSEY 34, bk. I, 11. 260-63, 221-3 (Lattimore ed., 1965).

19. PHILLIPSON, *supra* note 16, at 17.

> and graves were unmolested. It was considered wrong and impious to cut off or poison the enemy's water supply, or to make use of poisoned weapons. Treacherous stratagems were condemned as being contrary to civilized warfare. And . . . it is essential to emphasize that the non-existence of the law and universally accepted custom relating to them is not necessarily proved when we point here and there to conduct of a contrary nature. . . . [The Roman practice] varied 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. . . . Undoubtedly, the 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. They did not as a rule degenerate into indiscriminate slaughter and unrestrained devastation. The ius belli imposed restrictions on barbarism an condemned all acts of treachery . . . . [Livy tells us][20] 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][21] refuse to countenance a criminal attempt made on the life of even a foreign aggressor . . . ."

In classical times the only sanction for breaches of the law of war appears to have been condemnation by the gods, although Justinian informs us that "any person who in war commits any act forbidden by his commander shall suffer death, even if his mission be successfully accomplished."[22] A similar situation existed in Islam: the ninth century *Siyar* by Shaybani[23] bans the killing of women, children, the old, the blind, the crippled, and the helpless insane. Muslims were under legal obligations to respect the rights of nonMuslims, both combatants and civilians; prisoners of war were not to be killed, but ransomed or set free as an act of grace, although, if it were advantageous to Muslims, non-Muslim prisoners could be killed unless they converted.[24] Apparently, the presumption was that true believers in Islam would comply with the teachings of the Prophet. However, Shaybani considered that if the governor of a city or province entered "the territory of war" he was competent to impose religious penalties or retaliation in cases of theft, adultery or fornication. However, the fact that the drinking of wine was also condemned suggests that these punishments were not directed to the protection of victims but to the punishment of Mus-

---

20. LIVY, 27 HISTORY OF ROME.

21. CICERO, DE OFFICIIS i, 11.

22. *De re militari*, DIGEST XLIX, title 16.

23. THE ISLAMIC LAW OF NATIONS §§ 29-32, 47, 81, 110-111 (Khadduri trans., 1966).

24. *Id.* at 13, §§ 44, 55, 95-109.

lims breaking the laws of the faith.[25]

The medieval Christian church too relied on divine punishment. As early as 1096-7 Urban II had condemned the action of crossbowmen and archers against Christians. In 1139, the Second Lateran Council anathematized all those using the crossbow and arc,[26] a view which coincided with the concepts of chivalry as understood by the orders of knighthood: such weapons could be used from a distance by an unseen foe, including villeins, enabling a man to strike without risk of himself being struck. As such, they were considered disgraceful.[27] The use of darts and catapults was similarly anathematized by the *Corpus juris canonici*, 1500, "in order to reduce as far as possible the engines of destruction and death," although by 1563 these and other weapons capable of sending "men . . . to perdition by the hundreds" were in common use.[28] Forces of Bologna in 1439, using a new handgun, shot down a number of plate-armoured Venetians, provoking such feelings among the Venetians as to their opponents' disregard for the game of war that the Venetians slaughtered all prisoners "who had stooped so low as to use this crude and cowardly innovation," i.e., gunpowder. "It would, if unchecked, they said, make fighting a positively DANGEROUS profession."[29]

While the church may have relied on divine punishment, the feudal knights were aware of the "law of chivalry," a customary code of conduct controlling their affairs and enforced either by arbitrators especially appointed or, in the case of England and France, by Courts of Chivalry.[30] In 1307, special military courts were trying allegations of breach of parole.[31] The rules of chivalry only applied among the knights, but they could be enforced by commanders of any nationality. They were sufficiently widely known by 1370 that at the siege of Limoges, three captured French knights appealed to John of Gaunt and the Earl of Cambridge after the English commander issued orders that no quarter was to be given: "My Lords we are yours, you have vanquished us. Act therefore to the law of arms."[32] Their lives were

---

25. *Id.* §§ 126-130.

26. CONTAMAINE, WAR IN THE MIDDLE AGES 71 (Jones trans., 1984).

27. Draper,*The Interaction of Christiantity and Chivalry in the Historical Development of the Law of War*, 5 INT'L REV. RED X. 3, 19 (1965).

28. BELLI, DE RE MILITARI ET BELLI ¶ III, cap. 29, 186 (Carnegie trans., 1936) (1563).

29. TREECE AND OAKESHOTT, FIGHTING MEN — HOW MEN HAVE FOUGHT THROUGH THE AGES 207-8 (1963).

30. *See, e.g.*, KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 27 (1965); *see also* CONTAMINE, *supra* note 25 at 270-7; WARD, "Of the Influence of Chivalry," 2 THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE ch.XIV (1795); and Gardot, *Le Doit de la Guerre dans l'Oeuvre des Capitaines François du XVI Siècle*, 72 HAGUE RECEUIL 397 (1948).

31. Keen, *supra* note 29, at 34.

32. *Id.* at 1.

spared and they were treated as prisoners.

As has already been pointed out, by the time of Elizabeth I the principles of the "law of arms" were so well established that Shakespeare could refer to them in his *Henry V*. Moreover, as early as 1391 Merigot Marches was tried at Paris for continuing to commit acts of war after the entrance of a truce.[33] Both Edward III of England and Charles VII of France issued ordinances for the trial of *ecorcheurs*[34] accused of conducting warlike acts without royal authority.[35] Perhaps more important than these instances, however, was the trial at Breisach in 1474 of Peter of Hagenbach. Before a tribunal made up of representatives of the Hanseatic cities, Hagenbach was tried for having administered occupied territory in a manner contrary to "the laws of God and of man," and was executed regardless of his plea of obedience to the orders of his lord.[36]

It was not only in international wars between, for example, England and France, that attempts were made to regulate the behavior of the troops. Since, however, the laws of chivalry did not apply to common soldiers, their conduct could only be defined by way of national codes which condemned particular activities against the inhabitants of their own country, giving commanders "rights of justice" as laid down in such codes. Among the earliest of these was that of Richard II of England, 1385,[37] which forbade, among other things, pillage of the church, victuals, provisions, or forage and provided for parole of prisoners regarded as the private property not of their captors but of the king. This system of national regulation was facilitated by the early fifteenth century. All men-at-arms had to be included in an official muster, subject to a disciplinary code, including rules concerning the taking and distribution of booty, as well as forbidding pillage and destruction of private property — particularly goods essential for husbandry. Most of such national codes postulated respect for priests, women, children, the infirm, and the like.[38] French knights were adamant in protecting the modesty of women found in surrendered cities,[39] whether in internal wars or not. By ordinance, Coligny, during the sixteenth century Wars of Religion in France, made violence against women punishable by death.[40] Respect for women was so well established throughout Europe that, writing in 1612, Gentili could

33. *Id.* at 97-100; further examples are given at 100, n.1.

34. Literally, "skinners," armed bands of free companies.

35. *Id.* at 97-100.

36. SCHWARZENBERGER, *The Law of Armed Conflict*, 2 INTERNATIONAL LAW ch. 39 (1968).

37. WINTHROP, MILITARY LAW AND PRECEDENTS app. II (1886).

38. *See, e.g.*, Code of Gustavus Aldolphus of Sweden, 1621, Articles and Military Lawes to be Observed in the Warres, WINTHROP *supra* note 37, at app. III, art.97.

39. Gardot, *supra* note 29, at 452-3.

40. *Id.* at 469.

state that "to violate the honour of women will always be held to be unjust," and then quoted as evidence the view of Alexander: "I am not in the habit of warring with prisoners and women."[41]

By the seventeenth century, England had a full system of Articles of War, a set of regulations on the behavior of the armed forces which forbade and rendered liable to trial and punishment, among other things, the marauding of the countryside, individual acts against the enemy without authorization from a superior, the private taking or keeping of booty, or the private detention of an enemy prisoner.[42] Similar codes in Switzerland and Germany,[43] it has been said, combined with the rules of international law, to form *"le meilleur frein pratique pour imposer aux armies le respect d'un* modus legitimus *de mener les guerres."*[44]

Regulations for the conduct of war, in some instances together with acknowledgment of the right of trial, are not only found in the customs of the knights or the national military codes. Reference must be made to views of at least some of the classical writers on international law,[45] for to the extent that they expressed commonly held views of the time, their writings constitute evidence of customary law. Gentili, for example, wrote:

> [I]n war . . . victory is sought in no prescribed fashion. . . . Our only precaution must be not to allow every kind of cunning device; for evil is not lawful, but an enemy should be dealt with according to law. . . . In dealing with a just and lawful enemy [as distinct from pirates and brigands] we have the whole fetial law and many other laws in common. . . . Necessity does not oblige us to violate the rights of our adversaries . . . [but t]he laws of war are not observed toward one who does not observe them.[46]

Nevertheless, he forbids the killing of those who surrender, for it is "only when we cannot overcome their resistance and bring them to terms by less severe means, [that] we are justified in taking away their lives."[47] He condemns the denial of quarter, reprisals against prisoners, and violence against women, children, the aged and the sick, ecclesiastics and men of letters, husbandman, and generally all un-

---

41. 2 DE JURE BELLI cap. xxi, at 257, 251 (Carnegie trans., 1933).

42. Laws and Ordinances of Warre, *reprinted in* 1 CLODE, MILITARY FORCES OF THE CROWN app. VI (1639).

43. Gardot, *supra* note 29, at 467-68.

44. de Taube, *L'apport de Byzance au developpement du droit international occidental*, 67 HAGUE RECUEIL 237 (1939).

45. This is the term usually given to the European writers of the fifteenth to seventeenth century, especially those published in the series of the Carnegie Foundation known as THE CLASSICS OF INTERNATIONAL LAW.

46. *See generally*, 3 DE JURE BELLI cap. XVII, XVIII 216-40 (Carnegie trans.) (1612).

47. *Id.*

armed persons. Equally to be condemned are assassination, the use of poison and poisoned weapons, and the poisoning of streams, springs, and wells.[48]

Gentili's comments should be compared with those of Grotius, commonly — but wrongly — described as "the father of international law," who tends to be somewhat self-contradictory: "[B]y the Law of Nations any Thing done against an Enemy is lawful; . . . . It is lawful for an Enemy to hurt another both in Person and Goods . . . [a]nd for both sides without Distinction [including killing women, infants and even prisoners], but it is restrained more or less in some Places by the particular Law of each State."[49] Use of poison is unlawful, including the poisoning of rivers and springs, though not their pollution. Later, when discussing Moderation concerning the Right of Killing Men in a Just War,[50] he quotes Cicero's view that "there are certain Duties to be observed even to those who have wronged us,"[51] so that women, children, old men, priests, and other religious should be spared. "[T]o these we may justly add those who apply themselves to the Study of Sciences and Arts beneficial to mankind," as well as farmers, prisoners, and those who surrender.[52] Finally, he calls for avoidance of useless fighting, as a show of strength rather than a true warlike action is "wholly repugnant to the Duty of a Christian, and Humanity itself. Therefore all Magistrates ought strictly to forbid these Things, for they must render an account for the unnecessary shedding of Blood to him, whose Viceregents they are."[53]

Of particular importance, the man in the field, as a participant in a public matter, was banned from acting as if the conflict were a private affair. For example, he may not keep captured property for himself, nor commit warlike acts after a retreat or armistice.[54] Moreover,

> [I]t is not enough that we do nothing against the Rules of rigorous Justice, properly, so called; we must also take Care that we offend not against Charity, especially Christian Charity. Now this may happen sometimes; when, for Instance, it appears that such a plundering doth not so much hurt the State, or the King, or those who are culpable themselves, but rather the Innocent, whom it may render so extremely miserable. . . . But, further, if the taking of this Booty neither contributes to the finishing of the War, nor considerably weaken the Enemy, the Gain arising to himself only from the Unhappiness of the Times, would be highly unbecoming an

48. *Id.* §§ 139, 140, 142, 145-7, 155-7, 280-3, 287, 289.

49. 3 DE JURE BELLI AC PACIS cap IV, §§. xviii, ix, x, xv, xvi, xix (Carnegie trans., 654, 648, 649, 651, 657) (1625).

50. *Id.* at cap. XI.

51. DE OFFICIIS, cap. XI, §§ ix-xv (trans., at 630, 720).

52. *Id.* at lib. III, cap. XI, §§. ix-xv (trans., at 640-6; 736-40).

53. *Id.* § xix (trans., at 649; 673).

54. *Id.* at cap. XVIII, § i (trans., at 684-5; 788-9).

> honest Man, much more a Christian. . . . Yet, if a Soldier, or any other Person, even in a just War, shall burn the Enemy's House, lay waste their fields, and commit such other Acts of Hostility, without any Command, and besides when there is no Necessity, or just Cause, in the Opinion of the Divines he stands obliged to make Satisfaction for those Damages. I have with Reason added . . . if there be not a just Cause, for if there be, he may perhaps be answerable for it to his own State, whose orders he hath transgressed, but not to his Enemy, to whom he hath done no wrong.[55]

Writing a century later, and with greater knowledge of actual state practice, Vattel comments:

> Since the object of a just war is to overcome injustice and violence, and to use force upon who is deaf to the voice of reason, a sovereign has the right to do to his enemy whatever is necessary to weaken him and disable him from maintaining his unjust position; and the sovereign may choose the most efficacious and appropriate means to accomplish this object, provided those means be not essentially unlawful, and consequently forbidden by the Law of Nations. A lawful end confers a right only to those means which are necessary to attain that end. Whatever is done in excess of such measures is contrary to the natural law, and must be condemned as evil before the tribunal of conscience. . . . [A]lso it is very difficult sometimes to form a just estimate of what the actual situation demands, and, moreover, as it is for each Nation to determine what its particular circumstances warrant it in doing, it becomes absolutely necessary that Nations should mutually conform to certain rules on this subject. Thus, when it is clear and well recognized that such a measure, such an act of hostility, is, in general, necessary for overcoming the resistance of the enemy and attaining the object of a lawful war, that measure, viewed thus in the abstract, is regarded by the Law of Nations as lawful and proper in war, although the belligerent who would make use of it without necessity, when less severe measures would have answered his purpose, would not be guiltless before God and in his own conscience. This is what constitutes the difference between what is just, proper, and irreprehensible in war, and what is merely permissible and may be done by Nations with impunity.[56]

It is Vattel who of the classical writers, most directly seeks to restrain the horrors of war. Necessity, providing the only justification for war, also prescribes the limits on it. Unnecessary acts of hostility are unjustifiable violations of natural law. Thus, Vattel advocates the elaboration of a set of general rules, "independent of circumstances and of certain and easy application," limiting acts to those necessary to successful prosecution of war:

---

55. *Id.* §§ iv, v (trans., at 686; 790-1).

56. 3 LE DROIT DES GENS ch. VIII, §§ 138, 137 (Carnegie trans., 180, 179) (1758); *see also*, RUDDY, INTERNATIONAL LAWS IN THE ENLIGHTENMENT 245-56 (1975).

> Thus, it is not, generally speaking, contrary to the laws of war to plunder and lay waste to a country. But if an enemy of greater superior forces should treat in this way a town or province which he might easily have held possession of, as a means of obtaining just and advantageous terms of peace, he would be universally accused of waging war in a barbarous and uncontrolled manner. The deliberate destruction of public monuments, temples, tombs, statues, pictures, etc., is, therefore, absolutely condemned even by the voluntary Law of Nations, as being under no circumstances conducive to the lawful object of war. The pillage and destruction of towns, the devastation of the open country by fire and sword, are acts no less to be abhorred and condemned on all occasions when they are committed without evident necessity or urgent reasons. But as an attempt might be made to excuse these excesses, as being a punishment merited by the enemy, let us add that by the natural and voluntary Law of Nations only the most serious offenses against the Law of Nations may be punished in this manner.[57]

It is interesting to note that while Vattel condemns a variety of acts as contrary to the law of nations and refers to punishment for such acts, he does not indicate how such punishment is to be meted out. However, he does record one instance when even death may be imposed as a punishment:

> [*W*]*hen the enemy have rendered themselves guilty of some grave violation of the Law of Nations, and especially when they have violated the laws of war. Such a refusal to spare their lives is not a natural consequence of the war, but a punishment for their crime, punishment which the injured party has a right to inflict.* But in order that the punishment may be just, it must fall upon those who are guilty. When a sovereign is at war with a savage nation which observes no rules and never thinks of giving quarter he may punish the Nation in the person of those whom he captures (for they are among the guilty), and by such severity endeavor to make them observe the laws of humanity; but in all cases where severity is not absolutely necessary mercy should be shown.[58]

Not until the nineteenth century was a code of field army conduct promulgated, specifying the nature of offenses and providing for trial and punishment. Formally this code was directed at conduct during a non-international conflict; however, its provisions were considered to be of general application, whatever the form of armed conflict involving forces of the issuing state, and it rapidly became a model for the armed forces of a variety of other countries, serving as the inspiration for a series of international instruments. The Code in question was prepared by Professor Francis Lieber of Columbia University and was promulgated as law by President Lincoln in 1863 during the American

---

57. *Id.* at ch. VIII, § 156, ch. IX, §§ 172-3 (trans., at 289, 294-5).
58. *Id.* at §§ 140-1 (trans., at 280) (emphasis added).

Civil War.[59] According to the Code:

> [M]ilitary necessity does not admit of cruelty — that is, the infliction of suffering for the sake of suffering or for revenge. . . . [T]he unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit . . . . [P]rotection of the inoffensive citizen of the hostile country is the rule. The United States acknowledge and protect, in hostile country 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 the 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, assaults, highrobbery, 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 penalty shall be preferred.*"[60]

Regulations were laid down regarding the rights of prisoners of war as well as the rights of protected persons, such as medical and religious personnel. There was even some recognition of the right to punish prisoners for what are now generally regarded as war crimes.[61]

The rules proposed by Lieber were so consistent with what was generally accepted as the code of conduct that similar instruments were soon issued by Prussia, 1870; The Netherlands, 1871; France 1877; Russia, 1877 and 1904; Servia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893.[62] However, there was no internationally accepted document setting out the rules governing warfare acceptable to the European states, the United States, or the newly independent states of Latin America. Nevertheless, to the extent that they express agreement, the rules to be found in these and later national codes or in the writings of acknowledged international authorities constitute the customary international law of armed conflict. To the extent that they have not been overruled by treaty or expressly rejected by a state — especially a significant military power — they are as obligatory as any other rules of international law.

The nineteenth century saw a few attempts at regulating warlike

---

59. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 Apr. (1863); SCHINDLER AND TOMAN, *supra* note 2, at 3 (1988); *see also*, Baxter, *The First Modern Codification of the Law of War*, 3 INT'L REV. RED X. 171 (1963).

60. Instructions for the Government of Armies of the United States in the Field, arts. 16, 2, 37, 44, 47 (emphasis added).

61. *Id.* art. 59.

62. HOLLAND, THE LAW OF WAR ON LAND 72-3 (1908).

activities by way of international treaty,[63] but none of these contained clauses relating to breaches nor made provision for their punishment. The first document to move in this direction was the Project of an International Declaration Concerning the Laws and Customs of War, drawn up at the Brussels Conference called by the Czar in 1874.[64] Although this Project was never adopted as a binding statement of law, it served as an inspiration for later developments and as a model for the Preambular ideals ultimately embodied in binding documents. From the point of view of law enforcement, it merely declared in Articles 12 and 13 that belligerents did not possess an unlimited power in their choice of methods of warfare and especially forbade acts which had already been condemned in sources such as Vattel and the Lieber Code. The Brussels Declaration inspired the Institute of International Law to produce the Oxford Manual on the Laws of War clarifying the rationale behind the propagation of a code of law for armed conflict. Its Preface merits reproduction:

> War holds a great place in history, and it is not to be supposed that men will soon give it up — in spite of the protests which it arouses and the horror which it inspires — because it appears to be the only possible issue of disputes which threatens the existence of States, their liberty, their vital interests. But the gradual improvement in customs should be reflected in the method of conducting war. It is worthy of civilized nations to seek "to restrain the destructive force of war, while recognizing its inevitable necessities." The problem is not easy of solution; however, some points have already been solved, and very recently the draft Declaration of Brussels has been a solemn pronouncement of good intentions of governments in this connection. It may be said that independently of the international law existing on this subject, there are today 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. . . . The Institute does not propose an international treaty, which it might perhaps be premature or at least very difficult to obtain; but it believes it is fulfilling a duty in offering to the governments a Manual suitable as the basis for national legislation in each State, and in accordance with the provisions of juridical science and the needs of civilized armies. Rash and extreme rules will not be found therein. The Institute 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. By so doing, it believes it is rendering a service to military men themselves. In fact so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and to end-

63. *See, e.g.* Declaration of Paris, 1856, re maritime warfare; Geneva Convention, 1864, re wounded in armies in the field, 1864; Declaration of St. Petersburg, 1868, re lightweight explosive bullets, etc.

64. SCHINDLER AND TOMAN, *supra* note 2, at 25.

> less accusations. A positive set of rules . . . if they are judicious, serves the interest of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts-which battle always awakens, as much as it awakens courage and manly virtue -it strengthens the discipline which is the strength of armies; it also ennobles that patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity. But in order to attain this end, it is not sufficient for sov-ereigns to promulgate new laws. It is essential, too, that they make these laws known among all people, so that when a war is declared, the men called upon to take up arms to defend the causes of the belligerent States, may be thoroughly impregnated with the special rights and duties attached to the execution of such a command . . . .[65]

The *Manual* spelled out a series of specific rules, some of which are relevant to the problem of enforcing the law: acts of violence are limited to the forces of belligerent states, who are bound by the laws of war. As such, states must refrain from unnecessarily cruel and severe acts, such as punishment of nonbelligerent populations or vanquished or disabled belligerents, use of arms to cause "superfuous suffering," the advance prohibition of quarter, theft, or mutilatation of the dead on the field of battle, and bombardment of undefended territory. Occupiers were bound to respect laws in force during peacetime. Prisoners of war were considered as being in the hands of the occupying state rather than the capturing corps of soldiers and as such had the right of humane treatment under the laws of the capturing army. Punishment of prisoners was recognized in the case of escape or of offenses against the laws of war.[66]

From the point of view of the development of the history of attempts to deal with breaches, Part III of the *Manual* is significant:

> Part III Penal Sanction: If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are Therefore: Art. 84. Offenders against the laws of war are liable to the punishment specified in the penal law. This mode of repression, however, is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless . . . and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no clearer recourse than a resort to reprisal remains . . . . Art. 86. In grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the law of war committed by the enemy.

The penal law indicated would be the national law, for no provi-

---

65. *Id.* at 35 (emphasis added).
66. *Id.* arts. 1, 3, 4, 7, 9, 19, 44, 61-3, 68, 70 (emphasis added).

sion was made for any trial by any international tribunal — in fact at that time no such tribunal was even considered as a realistic probability, nor was any obligation created for a national force to hand an accused offender to the enemy alleging an offense so that he could stand trial before an enemy tribunal.

Although the *Oxford Manual* has no binding legal force, many of its principles found their way into national military manuals. The latest editions of such instruments warrant some mention insofar as they reflect these principles, regardless of the fact that some of the matters raised have now been embodied in treaty form. Thus, the British *Manual of Military Law* states in its Part III on *The Law of War on Land*:

> The laws of war are the rules which govern the conduct of war. . . . They are binding not only upon States as such but also upon their nationals and, in particular, upon the individual members of the armed forces. . . . The present laws of war are the result of a slow growth. Isolated milder practices became in the course of time usages, which at first were not accompanied by a sense of legal obligation, but which by custom *(i.e.,* constant practice accepted as law) and by treaties, gradually developed into legal rules. . . . The laws of war consist, therefore, partly of customary rules which have grown up in practice, and partly of written rules, that is to say, rules which have been expressly agreed upon by governments in international treaties and conventions . . . . The development of the law of war has been determined by three principles: first, the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realization of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources, and money; secondly, the principle of humanity, according to which kinds and degrees of violence which are not necessary for the purpose of war are not permitted to a belligerent; and, thirdly, the principle of chivalry, which demands a certain amount of fairness in offence and defence, and a certain mutual respect between the opposing forces.[67]

The United States Manual on *The Law of Land Warfare*[68] is, however, somewhat more specific in its statement of basic principles:

> (a) *Prohibitory* Effect. The law of war places limits on the exercise of a belligerent's power . . . and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard to the principles of humanity and chivalry. The prohibitive effect of the law of war is not minimized by "military necessity" which has been defined as that principle which

67. H.M.S.O. 1958, 1-3.
68. Dept of the Army, Field Mannual 27-10 (1956).

> justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.
>
> (b) *Binding on States and Individuals.* The law of war is binding not only upon States as such but also upon individuals and, in particular, the members of their armed forces.[69]

Like the British *Manual*, this too emphasises that the law is to be found in both treaties and custom — the "body of unwritten . . . law [which] is firmly established by the custom of nations and well defined by recognized authorities on international law."[70]

The *German War Book*, too, after listing forbidden practices in warfare, states that "[h]e who offends against any of these prohibitions is to be held responsible therefor by the State. If he is captured he is subject to the penalties of military law."[71]

The references to "humanity" and "chivalry" find their source in the Preamble to the first international agreement attempting to lay down laws for the conduct of warfare on land. In 1899, Czar Nicholas invited the major powers to a conference at The Hague, producing Convention II respecting the Laws and Customs of War on Land, elaborated further by Convention IV of the Second Hague Conference in 1907.[72] While this instrument deals with land warfare, its principles are generally accepted as having general application, regardless of the theatre involved. The Preamble makes clear what the purpose of the law of war is and emphasizes that its provisions are not exclusive:

> Seeing that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert; Animated by the desire to serve, even in the extreme case, the interests of humanity and the ever progressive needs of civilization; Thinking it important, wit this object, to revise the general laws and customs of war, either with a view to defining them with greater recision or to confining them within such limits as would mitigate their severity as far as possible; . . . these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their

---

69. *Id.* ¶ 3.

70. *Id.* ¶ 4(b).

71. 1902 THE GERMAN WAR BOOK 66 (Morgan trans., 1915); DE ZAYAS, THE WEHRMACHT WAR CRIMES BUREAU, 1939-1945 91 (1989); de Zayas translates this ". . . If he is taken prisoner, he is subject to punishment by [foreign] court-martial."

72. SCHINDLER AND TOMAN, *supra* note 2, at 69.

> relations with the inhabitants [of occupied territory]. It has not, however, been found possible at present to concert regulations covering all circumstances which arise in practice; On the other hand the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders. Until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them [and annexed to the Convention and generally known as the Hague 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* . . . .

This latter portion of the Preamble is known as the "Martens Clause" after the Russian Foreign Minister credited with elaborating it.

A direct obligation was imposed upon the contracting powers to "issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention."[73] Moreover, and perhaps more ground-breaking from the standpoint of law, Article 3 provides that "[a] belligerent party which violates the said Regulations shall, if the case demands, be liable to pay compensation for all acts committed by persons forming part of its armed forces."[74] There was no provision in the Convention or Regulations for personal liability. This merely confirmed the general principle that a party to a treaty might be obliged to pay compensation in the event of its breach. Also consistent with general treaty practice, the Convention included an all-participation clause whereby the provisions of the Convention and the Regulations would only apply as "between Contracting Powers, and then only if all the belligerents are parties to the Convention."[75] By the time of the outbreak of the Second World War, however, it was generally accepted that the Convention and Regulations had become part of customary law and were binding in any international armed conflict regardless of whether all the belligerents were parties thereto or not.[76]

Despite the absence of any treaty provision for personal liability, a series of war crimes trials was held after the termination of hostilities. Moreover, while the text indicates that the offenders would be mem-

---

73. *Id.* art. 1.

74. *Id.*

75. *Id.* art. 2.

76. *Nuremberg Judgment*, *supra* note 3. "[S]everal of the belligerents in the recent war were not parties to this Convention ¼ [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. 6064 65(1946); 41 AM. J. INT'L L. 172, 248-9 (1947).

bers of the enemy forces, it is open to any belligerent to try members of its own forces charged with offenses against the law of war, but in such cases the trial would be held in accordance with the terms of the national criminal or military law. Thus, during the Boer — South African — war, in two significant instances British courts tried members of their own forces for offenses against enemy personnel. Three members of an Australian unit serving under Kitchener were charged with the murder of Boer civilians, one of whom was a priest. The accused pleaded compliance with orders issued after one of their officers had been perfidiously killed. This defense was rejected and two of the three charged were executed.[77] Better known, since the comments by Solomon J.P. have proven the basis for the English law on superior orders, is *R. v. Smith*.[78] Smith, acting on orders from his superior, had opened fire on interned civilian Boers. The references to superior orders merit reproduction:

> It is monstrous to suppose that a soldier would be protected where the order was grossly illegal. [But that he] is responsible if he obeys an order that is not strictly legal is an extreme proposition which the court cannot accept . . . . Especially in time of war immediate obedience . . . is required. . . . I think it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal, that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior.[79]

Garner[80] cites a number of cases during World War I in which French tribunals tried Germans for breaches of the law of war, but he is primarily concerned with discussing the problem of superior orders. Each of the cases concerned was decided in accordance with French and not with international law. Once this defense is raised, the issue of the liability of the superior issuing the order becomes significant. Insofar as the superior is also head of state, his traditional immunity from trial by an alien tribunal is involved. As early as 1815 it was suggested that Napoleon should be brought to trial for having violated the 1814 agreement exiling him to Elba. After his escape and return to France where he again raised an army, he was declared by the Congress of Vienna

---

77. *See* WITTEN, SCAPEGOATS OF THE EMPIRE (1907); This is a personal account written by the third accused. This incident and trial are the subject of the film BREAKER MORANT.

78. 17 S.C. 561, 567-8 (Cape of Good Hope).

79. *Id. See also* Comments of Israeli court in Chief Military Prosecutor v. Malinki et al. (The Kafr Quassem case) (1958), per Halevy J., c. in A.G. Isreal v. Eichmann (1961) 36 I.L.R. 5, 256; a full report will be found in 2 PALESTINE Y.B.INT'L L. 69, 108 (1985).

80. GARNER, 2 INTERNATIONAL LAW AND THE WORLD WAR 438-39 (1920).

> to have destroyed the sole legal title upon which his existence depended . . . placed himself outside the protection of the law, and manifested to the world that it can neither have peace nor truce with him . . . [and placed himself] outside the civil and social relations, [so] that, as Enemy and Pertubator of the World, he has incurred liability to public vengeance.[81]

While Blücher would have had him shot as an "outlaw," Napoleon was regarded "by the Powers as their Prisoner" and placed in the custody of the British who exiled him to St. Helena.[82]

At the end of World War I, the Allied and Associated Powers sought to use this as a precedent to try the Emperor of Germany. By Article 227 of the Treaty of Versailles, 1919:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed . . . .[83]

However, the Kaiser had sought asylum in The Netherlands, which refused to surrender him, and this provision never came to fruition. However, certain of its features require comment. First, the Kaiser was not accused of any war crimes of which the Germans might have been responsible, nor for which evidence might have been available of his direct responsibility for having ordered their commission. Instead, he was to be charged with "a supreme offense against international morality and the sanctity of treaties," an offense which would be difficult to define, although today it might be considered a crime against peace in the sense of the Nuremberg Charter. Further, there was no suggestion that the tribunal would be bound by any legal principles other than that of recognizing his right to a defense. Instead, the tribunal was to be "guided by the highest motives of international policy," implying that the whole process was in the nature of a political rather than a judicial operation.

As to other alleged German war criminals, the Treaty sought their

---

81. *Id.*

82. *See*, U.N. WCC, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 242 (1948).

83. 112 B.F.S.P. 1; 2 Israel, MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967 1265 (1967).

trial in accordance with strict judicial and legal principles:

> Article 228. The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of committing acts in violation of the laws and customs of war. Such persons shall, if found guilty, be subject to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her Allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war . . . .
>
> Article 229. Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel.[84]

The German Government refused to hand over any person so accused, and instead brought some of them to trial before the *Reichsgericht* sitting at Leipzig. However, very few trials were held and the penalties were often little more than nominal. The *Reichsgericht* dealt with such matters as the treatment of prisoners of war[85] and, more importantly, the sinking of hospital ships,[86] of which the most significant was the *Llandovery Castle*[87] which also involved unlawful attacks upon survivors and stands as a landmark on the law relating to the defense of superior orders.

When World War I broke out, the Prussian authorities established a Military Bureau of Investigation of Violations of the Laws of War "to determine violations of the laws and customs of war which enemy military and civilian persons have committed against the Prussian troops, [as well as] to investigate whatever accusations of this nature are made by the enemy against members of the Prussian Army."[88] During the War, Germany did in fact try some Allied personnel for alleged breaches of the law. The Allied Powers maintained that these trials were themselves war crimes, although none of the persons involved in the trials or in the subsequent executions were brought before the Leipzig or any other tribunal. This, despite the fact that the British authorities had described the trial and execution of Captain

---

84. *Id.*

85. *E.g.*, Heynen's Caase 2 Ann.Dig. 431 (1921); the full text of this and similar cases will be found in H.M.S.O Cmd. 1422.

86. *Id.* at 429 (The Dover Case); The Llandovery Case at 436.

87. The full text of this judgment is reproduced in Cameron, *The Peleus Trial*, app. IX (1948).

88. DE ZAYAS, THE WEHRMACHT WAR CRIMES BUREAU, 1939-1945 5 (1989).

Fryatt — charged while in command of a merchant ship with unlawfully refusing to surrender to, and trying to ram, a German U-boat — as an act of "judicial murder . . . an atrocious crime against the law of nations and the usages of war . . . . "[89] Similarly, no action was taken against those involved in the execution of Nursing Sister Edith Cavell though this was also condemned as "judicial murder."[90]

Between the wars various steps were taken to forbid recourse to war, such as the League Covenant,[91] which introduced the possibility of recourse to sanctions against an aggressor, and the Pact of Paris[92] — or the Briand-Kellogg Pact — by which the parties renounced war as an instrument of national policy, but no attempt was made to suggest that resort to war would result in criminal responsibility. Likewise, neither of the Geneva Conventions drawn up in 1929 relating to the treatment of the wounded and sick and of prisoners of war made provision for international penal action against breaches.[93] However, Article 29 of the Convention on the Wounded stated that: "The Governments of the High Contracting Parties shall propose to their legislatures should their penal laws be inadequate, the necessary measures for the suppression in time of war of any act contrary to the provisions of the present Convention;" Article 30 obligated them to inform the Swiss government as depository of the measures taken to this end. There is no similar provision in the Prisoners of War Convention, although the Parties "recognize that a guarantee of the regular application of the present Convention will be found in the possibility of collaboration between the protecting Powers charged with the protection of the interests of the belligerents" who would be authorized to visit any places in which prisoners were detained.[94]

The problem of war crimes and their punishment, *per se*, did not come up again until World War II. No sooner did war begin than both the British and the Germans established war crimes bureaus for the collection of evidence, as did the United States in October 1944.[95] However, "it seems that during the war, Germans refrained from trying British and American prisoners for war crimes, and neither Great Britain nor the United States tried any German prisoners for war crimes prior to the German unconditional surrender. Evidently, neither side wanted to give the other a reason to retaliate. However, Germany

89. GARNER, *supra, note 80,* at 407-13.

90. *Id.* at vol. 2, 97-102, 104-5. She was charged while a sister in a military hospital with having assisted Allied personnel to escape to their own lines, clearly an offence going beyond her protected status as a nurse.

91. Treaty of Versailles, ch. I, art. 16.

92. 1928, 94 L.N.T.S. 57; 4 HUDSON, INTERNATIONAL LEGISLATION, 2522.

93. SCHINDLER AND TOMAN, *supra* note 2, at 325, 339.

94. Art. 86.

95. DE ZAYAS, *supra* note 83, at 10-12.

did not hesitate to try prisoners of war of other nationalities,[96] including Polish, French, and Russian.[97]

During the war, the United Nations[98] declared their intention to bring offenders against the laws and customs of war to trial,[99] including those responsible for ordering such atrocities, regardless of their rank or governmental position. In 1945, they adopted the London Charter for the establishment of an International Military Tribunal.[100] This was the first attempt since Breisach in 1474 to set up an international criminal tribunal for any purpose. Composed of judges from France, the Soviet Union, the United Kingdom, and the United States, it was granted jurisdiction over crimes against peace, namely: the planning or waging of aggressive war; war crimes in the traditional sense of that term; and crimes against humanity committed against *any* civilian population, including nationals of the offending power, whether committed before or during the war, so long as such offenses were "in execution of or in connection with any crimes within the jurisdiction of the Tribunal." This radically reduced the scope of the concept, even though the Charter provided that crimes against humanity included "persecution on political or religious grounds."[101] The Charter also made clear that the status of the accused would not grant him any immunity, even though this might have been his right under ordinary customary law. Finally, since the easiest defense that may be put forward by one accused of war crimes is compliance with orders, the Charter specified that this would constitute no defense, although it might serve to mitigate punishment.

The International Military Tribunal at Nuremberg was responsible for the trial of the Major German War Criminals — that is to say, those whose offenses were so extensive that their exact geographical location could not be specified with any certainty. A similar tribunal was established for the Far East, while a number of allied countries held trials of their own, in which some of the accused possessed the nationality of the trying authority or of its allies. Although these latter courts were national tribunals, for the main part they did apply the international rules relating to the conduct of hostilities. It is not necessary for our purpose to examine the variety of trials held or the nature of the crimes alleged or defenses put forward. It suffices to refer to the General Assembly's Resolution Affirming the Principles of International Law recognized by the Charter of the Nuremberg Tribunal,[102] the

96. *Id.* at 92.
97. *Id.* at 92-103.
98. Name of the anti-Axis alliance during WWII.
99. *E.g.*, Moscow Declaration, 1943, UNWCC, *supra* note 79, at 107.
100. SCHINDLER AND TOMAN, *supra* note 2, at 911.
101. *See e.g.*, Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B.INT'L LAW 178, 205 (1946).
102. 1946, Res. 95 (I); SCHINDLER AND TOMAN, *supra* note 2, at 921.

subsequent statement of Principles of International Law Recognized in the Charter of the Nuremberg Tribunal, and in the Judgment of the Tribunal adopted by the International Law Commission in 1950.[103] This Statement was to some extent general in character since Principle I stated that "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to Punishment." It also made clear that the fact that internal law did not criminalize a particular act would not excuse liability if that act was criminal under international law. It confirmed the non-immunity of a head of state or government and denied the defense of superior orders "provided a moral choice" was open to the accused. It then guaranteed all accused the right to a fair trial and reproduced the definition of crimes against peace, war crimes, and crimes against humanity detailed in the London Charter, although in the latter case the reference to crimes committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal" was changed to "in execution of or in connection with any crime against peace or any war crime." Finally, it declared that "complicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law." The Commission did not make any provision in this instrument for the establishment of an international criminal tribunal, although it expended a great deal of time and energy seeking to elaborate a code of crimes against peace and security, which did not reach fruition until 1991,[104] followed in 1994 by a Draft Statute for an International Criminal Court.[105]

Apart from these developments arising directly from the Nuremberg Judgment, the field of treaty law has seen certain advances relevant to the enforcement of armed conflict law. First, in 1948, the General Assembly adopted the Genocide Convention[106] which has been ratified or acceded to by the vast majority of states. Article 1 confirms that "genocide, whether committed in time of peace or in time of war, is a crime under international law which [the parties] undertake to prevent and punish." No attempt is made to place offenders under the jurisdiction of an international tribunal, although it is recognized that a competent tribunal, might subsequently be established. In the meantime, "persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed."[107] Since genocide is directed at the destruction "in whole or in part, [of] a national, ethnical, racial or religious group, as such," it is not a crime likely to be committed as a matter of private enter-

103. 2 Y.B.I.L.C. 374 (1950); SCHINDLER AND TOMAN, *supra* note 2, at 923.
104. 30 I.L.M. 1504.
105. 33 I.L.M. 258.
106. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 27; SCHINDLER AND TOMAN, *supra* note 2, at 231.
107. *Id.* art. 6.

prise. There may also be some doubt whether a country in which it has been committed is likely to institute proceedings therefor against its own military or political leadership. In the conflict in Bosnia during 1993 and 1994, there were constant complaints that the various parties involved were indulging in policies of "ethnic cleansing" — apparently a more acceptable term than genocide — with the intention of removing whole groups of people from particular districts. However, the International Court of Justice has held that, though the purpose of such a policy might be to extinguish the presence of a specific group in the territory, the Convention does not include as genocide "the disappearance of a State as a subject of international law or a change in its constitution or its territory."[108]

However, since genocide is a crime that can be committed in peace or war, there is no doubt that if committed in an international armed conflict, genocide would certainly amount to a war crime and probably also to a crime against humanity. If committed in a non-international armed conflict, it would amount to a crime against humanity. True, the absence of any international war crimes or criminal tribunal renders it somewhat unlikely that the offender would be tried or punished by the authority of the state concerned, unless he were a rebel captured by the government or a government representative captured by the rebels. On the other hand, if genocide amounts to a war crime, then, in accordance with the principle of universal jurisdiction over such offenses, the offender could be tried by any country in which he might be found. In the case of the former Yugoslavia this problem has been met by the decision of the Security Council[109] to establish an *ad hoc* tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

More pertinent to the law of armed conflict as such are the 1949 Geneva Conventions[110] and the amending Protocols of 1977.[111] There are two major innovations in the 1949 Conventions that merit comment. First, Article 3 is common to all four instruments. For the first time an international agreement relating to armed conflict law has attempted to extend its purview to "an armed conflict not of an international character occurring in the territory of one of the High

108. Application of the Genocide Convention (Bosnia-Herzegovina v. Yugoslavia [Serbia and Montenegro]), 1993 I.C.J. 325, 345.

109. U.N. SCOR, Res. 827 (1993); 32 I.L.M. 1203-the Statute of the Tribunal, as proposed by the Secretary General, is at 1170.

110. I-Wounded and Sick in the Field; II-Wounded, Sick and Shipwrecked at Sea; III-Prisoners of War; IV-Civilians; SCHINDLER AND TOMAN, *supra* note 2, at 373, 401, 423, 495.

111. I-Protection of Victims in International Armed Conflicts; II-Protection of Victims in Non-International Armed Conflicts; SCHINDLER AND TOMAN, *supra* note 2, at 621, 689.

Contracting Parties."[112] This seeks to limit the scope of the conflict by protecting those who are civilians or *hors de combat* by providing for the collection and care of the wounded and sick and by expressly providing that:

> [T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized persons.

However, the Conventions do not contain any suggestion that a breach of these principles by either the government or the revolutionary forces would amount to a war crime, as the Article makes it clear that "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict." There is, therefore, nothing to stop the authorities from treating captured rebels as traitors and, provided that the normal judicial guarantees are applied, it would still be possible to try such persons before a military tribunal so long as it has been "regularly constituted." It is difficult to determine how members of the government forces in breach of the safeguards laid down in the Article would be rendered liable to prosecution. This would clearly depend on the goodwill of the government concerned and the provisions of the national criminal and military law. It is also difficult to perceive how any international judicial tribunal would find a Party in breach of Article 3 if the complaint were lodged by another Party not party to the conflict and which had suffered no direct damage from the breach in question.

Second, and perhaps far more significant, each of the Conventions contains provisions with regard to the repression of abuses and infractions, for observation and enforcement,[113] as well as for the establishment of an inquiry procedure concerning any alleged violation. Each obligates the Parties:

> . . . to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches committed in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers,

---

112. *Id.*

113. I-Arts. 49-52; II-Arts. 50-53; III-Arts. 129-131; IV-Arts.146-149, and re visits by the Protecting Power, I, II-Art. 8; III-Arts. 8, 126; IV-Arts. 11, 143.

> and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party, provided such High Contracting Party has made out a *prima facie* case. Each High Contracting Party shall take measures necessary for the suppression of acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favorable than those provided by Article 105 and those following in the Geneva Convention relative to the Treatment of Prisoners of War . . . .

The grave breaches listed in the Convention remain war crimes since they are breaches of treaty law relating to the conduct of armed conflict. However, the fact that a traditional war crime has not been included in the list does not mean that such offense — for example, denial of quarter or use of poison — has ceased to be considered a breach of the law of war. Persons accused thereof may still be tried as war criminals. As defined in the most comprehensive list, found under the Civilians Convention, grave breaches:

> shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and expropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

It is important to note that both "inhuman treatment" and "great suffering" are likely to be difficult to define: the victim's view will probably be very different from that of the accused or perhaps even of the tribunal.

Once again the issue of trial and punishment was left to the national court, although universal jurisdiction was now recognized to exist at least among the parties to the Conventions, while it was accepted that for various reasons a holding country might prefer to transfer the accused for trial elsewhere provided the court seeking to try him could present a *prima facie* case. The Conventions are general in character and apply to all personnel participating in a conflict regardless of nationality. Thus, it is open to a holding country to try its own nationals for breaches of the Conventions, although the general practice would be to enact legislation giving statutory effect to the Conventions. This means that in such cases the trial would proceed under national law and might make no reference whatever to the Geneva Conventions. Until the conflicts in Bosnia and Rwanda, no attempt was made

to prosecute any accused for any sort of war crime as defined either in the Conventions or in customary law. However, in Vietnam, the United States did try a number of its own personnel for offenses which the lay person or the media would describe as war crimes although charges were brought under the Code of Service Discipline.[114] Similarly, the charges of murder and torture against Canadian personnel serving as United Nations peace-keepers in Somalia in 1994 were under the National Defence Act and the Criminal Code.[115]

It is not unusual for those accused of war crimes to plead compliance with their own national law. To some extent the Convention provision prevents this by forbidding each party "to absolve itself or any other High Contracting Party of any liability incurred by itself or by any other High Contracting Party in respect of breaches referred to¼. " This indicates that not only is the local law defense excluded, but parties are unable to agree among themselves whether to ignore a breach or to enter into any agreement excusing breaches committed *inter se*.

The next major development in treaty law came in 1977 with the adoption of the Protocols additional to the 1949 Conventions. It is only Protocol I relating to international armed conflict that contains any provisions concerning enforcement of the law. Section II of Protocol I, Articles 85-91, is concerned with Repression of Breaches of the Conventions and of this Protocol.[116] In the first place the Section makes it clear that it relates not only to grave breaches but to other breaches as well. It then proceeds to expand the list of grave breaches found in the Conventions; it specifically states that "without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes."[117] This merely means that while all grave breaches are in fact war crimes, not all war crimes are grave breaches.[118] The additional breaches mentioned in the Protocol are, of course, subject to the penal provisions to be found in the Conventions.

Having spelled out what constitutes grave breaches, the Protocol indicates the measures necessary to repress them and to suppress all other breaches of the Conventions and Protocol, thus again confirming that all breaches are punishable. For the first time since Hague Convention IV provided for the financial liability of a state whose nationals were in breach of the Regulations, Article 86 of the Protocol

---

114. *See e.g., U.S. v. Keenan*, 39 C.M.R. 108 (1969) ; *U.S. v. Griffin, id.* at 586; *U.S. v. Calley*, 46 C.M.R. 1131. 48 (1969/71, 1973); *id.* at 19; 1 Mil. Law. Reporter 2488; *see also, Calley v. Callaway*, 382 F. Supp. 650 (1974).

115. The reports in these cases have not yet become available, although one soldier was sentenced to five years for manslaughter and an officer was reprimanded.

116. SCHINDLER AND TOMAN, *supra* note 2, at 671-5.

117. *Id.*

118. *See* BOTHE, PARTSCH AND SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 521 (1982).

strengthens the punitive provisions of the Conventions and emphasizes the liability of a "superior" for any breach by a subordinate, if the superior "knew, or had information which should have enabled [him] to conclude in the circumstances at the time, that [the subordinate] was committing or was going to commit such a breach and if [the superior] did not take all feasible measures within [his] power to prevent or repress the breach."

It is unfortunate that the Canadian courts martial arising from the activities of peace-keepers in Somalia did not pay sufficient respect to this provision or realize that its principles were of general application with regard to the ordinary service responsibilities of military superiors, be they senior or non-commissioned officers.

In fact, Article 87 spells out the duty of commanders, obligating all parties to the Conventions, Protocol, or conflict to

> require military commanders to prevent and, where necessary, to suppress and to report to competent authorities breaches [committed by anyone under their command] [and i]n order to prevent and suppress breaches [all parties] shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol . . . [and] any commander who is aware that [any] persons under his control are going to commit or have committed a breach [shall] initiate such steps as are necessary to prevent such violations and, where appropriate, initiate disciplinary or penal sanctions against violators thereof.

The Protocol proceeds to make provision for cooperation in criminal enforcement among the parties, including extradition where apposite. In all cases, however, reserving obligations ensuing from any other treaty concerning criminal cooperation, "the law of the ¼ Party requested shall apply in all cases." Finally, from this point of view, the parties have undertaken to act individually or jointly in the event of serious violations, in cooperation with the United Nations and in conformity with the Charter. This development has acquired practical significance with the establishment of the *ad hoc* tribunals for the prosecution of crimes against international humanitarian law perpetrated in the former Yugoslavia and Rwanda.

Perhaps surprisingly, in view of the emphasis on the responsibility of the commander and the earlier provision for personal liability on the part of the actual offender, no mention exists in the Protocol either of the defense of superior orders or, despite the right of an accused to a fair trial, to his right to employ any of the defenses recognized by international law, including this defense even if only by way of mitigation of sentence.

It remains necessary to mention two other developments signifi-

cant from the point of view of securing observance as distinct from enforcement of the law of armed conflict.

By Article 90 an International Fact-Finding Commission is appointed, whose task is to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation [thereof and] to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol."

Most modern armed forces have legal advisers available at least to the most senior officers. These advisers will probably have access to military manuals. Until 1977 there was no requirement in international law for this to be the case. By Article 82 of Protocol I, parties to the Protocol as well as parties to the conflict "shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject." While it does not state the level of command at which advisers should be available, this provision does mean that in the event a commander should disregard the advice given him, it will be exceedingly difficult for him to argue at any subsequent penal or administrative proceeding that he was unaware of the legal position. This provision has had its effect in practice: during the Gulf War of 1991, many of the vessels involved in patrolling the seas had such personnel attached to them; General Powell, US Army Chairman, Joint Chiefs of Staff, in his Report to Congress stated that "[d]ecisions were impacted by legal considerations at every level, the law of war proved invaluable in the decision-making process."[119]

With the exception of Article 3 common to the four 1949 Conventions, prior to 1977 no international legal regulation relative to the conduct of non-international conflicts existed, nor did any legal — as distinct from moral — process for dealing with atrocities exist. In this regard, in a recognized state of belligerency the international law of armed conflict would apply. In 1977, however, acknowledging that many conflicts previously considered to be non-international were now, for political reasons, regarded as "just" wars, Protocol I raised to the level of international armed conflicts with all laws and regulations relevant thereto, those "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racial regimes in the exercise of their right to self-determination."[120] In practice, this provision has tended to remain somewhat of a dead letter.

The provisions in the Conventions and Protocol clearly relate to a conflict in progress or the trial of those accused of offenses and in the

119. App. O. ¶1, 31 I.L.M. 615.
120. Art. 1 (4).

hands of an adverse party or of a state in which they have sought refuge and asylum. Some countries, including Australia, Canada, and the United Kingdom, have amended their criminal law to give jurisdiction to their courts over persons found within their territory and accused of war crimes or crimes against humanity, particularly when such crimes were alleged to have been committed during WW II. However, the fate of the trials instituted under such legislation has not been promising.[121] In addition, arising from the conflicts in Ethiopia, Somalia, Rwanda, and Bosnia, and those resulting from a variety of *coups* and consequential civil wars, successor governments have begun to try their defeated opponents for offenses which many might regard as treasonable or common crimes, including murder and torture, but which the present authorities tend to condemn as war crimes or crimes against humanity.

Protocol II[122] aimed at supplementing common Article 3 and, for the first time, at introducing by way of treaty some measure of legal restraint into non-international armed conflicts. However, the Protocol may be ignored for our purpose since it contains no provisions relating to offenses, breaches, or punishment. Moreover, the provision relating to dissemination is much weaker and less significant than that found in Protocol I. Article 83 of the latter obligates the parties, in time of peace and of war, to disseminate the Conventions and Protocol as widely as possible, requiring their study in military instruction courses, while encouraging the civilian population to similar study. Further, it provides that civilian and military personnel who may be called upon to administer the Conventions and Protocol in time of conflict should be fully acquainted with their texts, thus decreasing the likelihood of breaches. Article 19 of Protocol II, on the other hand, merely provides that its terms should be disseminated as widely as possible, imposing no obligation of any kind either in regard to the civilian or military personnel of a party.

Although Protocol II lacks any enforcement or punitive procedure, to some extent the Security Council of the United Nations has in recent years sought to fill these *lacunae*. It has done this by way of extensive interpretation of its powers under Chapter VII of the Charter relating to action with respect to threats to the peace, breaches of the peace, and acts of aggression. In its early years, the Council reserved its enforcement procedures for conflicts which could be described as international; as time passed it seemed prepared to act even in instances when such classification could only be termed political rather than legal. Encouragement to operate in this way was, to some extent, based on the human rights provisions in the Charter, the Universal Declaration, and the Covenants on Human Rights. Article 2, para-

121. *See, e.g.*, Canadian Case of R. v. Finta, 112 D.L.R. (4th) 513 (1994).
122. SCHINDLER AND TOMAN, *supra* note 2, at 689.

graph 7, of the Charter precludes the Organization from interfering in any matter essentially within the domestic jurisdiction of a state, unless there is a need to resort to enforcement measures under Chapter VII. It could hardly be said that the policy of *apartheid* pursued by the former Government of South Africa constituted any threat to the peace by that government. Nevertheless, from as early as 1961, complaints against this policy arose in the Council, and in 1977 the Security Council determined, "having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related matériel *constitutes a threat to the maintenance of international peace and security*, [and decided] that all States shall cease forthwith any provision of arms and related matériel of all types."[123] Some countries enacted legislation making it an offense for their citizens to breach this embargo, which was later extended to cover sporting relations and other activities, including the denial of South Africa's right to exercise its rights as a member of the United Nations.

It is difficult other than by way of Orwellian diplomatic doubletalk to envisage how the South African policy of *apartheid*, or the exports of defensive arms to the South African Government, would have threatened any other state. The only manner in which the situation could be brought within the purview of Chapter VII and out of the domestic jurisdiction reservation was by assuming that continuance of *apartheid*, against persons they regarded as ethnically related, would so enrage the newly-independent African neighbors of the Republic that one or other of them might be provoked into launching an armed attack. While, normally, one would expect the attacker to be condemned under Chapter VII, by reason of international political correctness it could be argued that the refusal to abandon *apartheid* itself constituted a threat to the maintenance of international peace since it was likely to provoke an armed attack which the majority of the members of the United Nations would consider just. Eventually, the General Assembly adopted a Convention[124] condemning *apartheid* as an international crime, although no attempt was ever made to indict any politician, South African or otherwise. This offense has now been elevated by the International Law Commission to the level of a crime against international peace and security.[125]

In this case one can find by extensive interpretation that the Council was correct in its assertions. However, in other cases the situation is more difficult. Traditionally, a civil war or a non-international

123. S.C.Res. 418, U.N. SCOR (1977) *reprinted in* 16 I.L.M. 1548 (emphasis added).

124. G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50 (1974).

125. Draft Code of Offenses against the Peace and Security of Mankind, art. 20, 30 I.L.M. 1584.

armed conflict has been considered as essentially domestic. In customary law, intervention by outsiders has been considered improper, although history during the last 150 years or so presents numerous instances of third states putting forward a variety of excuses to justify interference. Nevertheless, in none of these cases has there been any suggestion that the international law of armed conflict was applicable or that those accused of atrocities during the conflict should be brought to trial in accordance with international legal rules or procedures. The only means of punishing such offenses has been by the municipal law of the state involved or in accordance with the new law established by successful revolutionaries.

However, world public opinion has become revolted by the atrocities committed during non-international conflicts in such places as Kampuchea (Cambodia), Somalia, Ethiopia, Haiti, and Bosnia, among others. Responding to this opinion, the Security Council has been prepared to authorize some measure of interference, usually through the medium of groups of "peace-keepers" specially contributed by member states. In two instances, the Security Council has gone so far as to take positive punitive action against those involved in such outrageous behavior, hoping that the institution of criminal proceedings, especially while the conflict is in progress, will inhibit the commission of further atrocities and vindicate the rule of armed conflict law. To this end, the Council has not been over-scrupulous in identifying the conflict as international or non-international. However, by authorizing action against crimes against international humanitarian law, it avoids this complex legal issue: it is not difficult to argue that any such crime, regardless of the applicability of the Geneva law commonly described as international humanitarian law,[126] is in itself a crime against humanity, while offenses which amount to war crimes — particularly those of a serious character — equally fall into such a classification.

From 1991 on, reports surfaced of atrocities and other breaches of international humanitarian law, including "ethnic cleansing" committed in the conflicts raging in the former Yugoslavia and particularly in Bosnia-Herzegovina. In this territory there was, at least in the early days, both an international conflict involving Bosnia, Serbia and Croatia, together with a series of internal conflicts affecting the various ethnic groups within Bosnia. More recently this seems to have become exclusively a non-international conflict waged by Croatian and Bosnian Serbs, together with some dissident Muslims against the Government of Bosnia-Herzegovina, which was primarily Muslim in char-

126. *See, e.g.*, PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 1, (1985): "It is the object of international humanitarian law to regulate hostilities in order to attentuate their hardships"; *see also* his LE DROIT HUMANITAIRE ET LA PROTECTION DES VICTIMES DE LA GUERRE 15 (1973): "Le droit de Genève, ou droit humanitaire proprement dit, tend a sauvegarder les militaires mis hors de combat, ainsi que les personnes qui ne participent pas aux hostilité."

acter. As a result of these reports, the Security Council adopted a series of resolutions condemning these activities, imposing an arms embargo upon all parties and authorizing the dispatch of "peace-keepers" whose mission was to be humanitarian in character and would include the establishment of United Nations safe areas for the protection of civilians. As a result of continuing reports of breaches of international humanitarian law, in 1992 the Security Council appointed an International Commission of Experts "to examine and analyze" all information concerning such incidents, as well as conducting its own investigations, "with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia."[127] Finally, acting on the recommendation of the Secretary General[128] that, in the light of continuing reports of widespread and flagrant violations of international humanitarian law, the situation in the former Yugoslavia constituted a threat to international peace and security, the Council, acting under Chapter VII of the Charter, established an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in that territory.[129]

The Tribunal was given competence to deal with such violations as might have occurred since the beginning of the conflicts in 1991, and its jurisdiction extended over "grave breaches of the Geneva Conventions of 1949; violations of the laws and customs of war; genocide and crimes against humanity." The persons amenable to its jurisdiction were those planning, ordering, committing, or aiding and abetting the planning, preparation, or execution of such crimes, whose personal liability therefore was reaffirmed, with official status not providing any immunity. Further, the responsibility of a commander and the nonapplicability of the defense of superior orders were confirmed. It is clear, therefore, that insofar as jurisdiction and competence are concerned, the Statute reflects the developments since the end of World War II, based on the provisions in the 1949 Conventions, Protocol I, and the Nuremberg Principles. However, unlike the Nuremberg Tribunal, this Tribunal does not possess competence to try an accused in absentia. While the principle *non-bis-in-idem* is confirmed, the International Tribunal enjoys concurrent jurisdiction with national courts, but possesses primacy so that it may "formally request national courts to defer to [its] competence," as it has successfully done with regard to an accused found in Germany, where he was indicted before a local court.

When similar evidence was made available as to events occurring during the civil war in Rwanda, the Council decided to establish a

127. U.N. SCOR Res. 780 (1992), *reprinted in* 31 I.L.M. 1476.
128. 32 I.L.M. 1163.
129. U.N. SCOR Res. 827 (1993), 32 I.L.M. 1203.

separate tribunal for those charged in connection therewith, although the personnel constituting this latter Tribunal would be drawn from the members of the International Tribunal for Yugoslavia.

If the various groups and governments involved in the hostilities in the former Yugoslavia and Rwanda would agree to transfer those accused to stand trial before these Tribunals, their activities might well rank with those of the Nuremberg Judgment. In fact, their jurisprudence might even stand higher since they have been established not by a group of victors consequent upon the defeat of an enemy but by authority of the United Nations without the groups or states involved having any part in the decision. However, it soon became evident that, for example, the Serb elements in Bosnia would not be willing to hand over any of their supporters regardless of the evidence against them, despite reports that some of the groups involved in the conflict have on occasion brought alleged offenders to trial before their own tribunals. Similarly, in the case of Rwanda the newly established government announced its intention to institute its own war crimes trials even though an International Tribunal for this territory exists. A similar situation has arisen in Ethiopia, where the successful revolutionary government has instituted against supporters of the overthrown revolutionary or legitimate regime a series of trials described as being for war crimes or crimes against humanity. Such national processes raise the question whether the trials in issue are directed more at political vengeance than at the punishment of war crimes or crimes against humanity, having occurred during a non-international conflict. At the same time, and more significantly, some European countries, having found alleged offenders among refugees from Yugoslavia, have prosecuted them before their own courts, apparently for crimes against humanity or for breaches of the Geneva Conventions.

Trials by either the International Tribunals created for Yugoslavia and Rwanda or by national tribunal appear to ignore a major legal problem, namely that of classification of the conflict. In accordance with black letter law, war crimes can only be committed during an international armed conflict. The tribunal established by the United Nations for offenses in the former Yugoslavia may well be faced with offenses committed both during an international and a non-international conflict. It is true that the competence of the Tribunal expressly includes grave breaches of the Conventions — this also embraces Protocol I, since this is now annexed to the Conventions — as well as offenses against the laws and customs of war. However, the Statute does not refer to war crimes *per se*; as indicated above, the grave breaches are in fact offenses against international humanitarian law, while "serious" war crimes would almost certainly amount to crimes against humanity. It would be wise, therefore, for the Tribunal to avoid using the term "war crime" except when judging an accused from the forces of an independent state such as Bosnia, Serbia, or Croatia fighting against one or other of these entities. When the accused is, for

example, a Bosnian or Croatian Serb involved in an attempt to overthrow the government of Bosnia, this term should be scrupulously avoided. What is true of the International Tribunal is equally true of national tribunals charging persons with similar offences. As to the Rwanda tribunal, no basis exists to consider the conflict therein as anything but a non-international conflict, regardless of the language used to describe the offenses of any person charged. As regards trials instituted in Rwanda or Ethiopia by local courts, these do not relate to war crimes (though they may be crimes against humanity) even if they are really primarily concerned with wreaking vengeance upon political opponents.

Despite the legal problems herein outlined, the major significance of the establishment of the International Tribunals and the institution of proceedings by "neutral" countries is the development in the name of humanity extending to non-international armed conflicts the same sort of preventive protection — for the aim of such trials is to warn potential offenders and thus hopefully to prevent breaches — which has long existed with regard to international armed conflicts. Since it is important to avoid criticism of such developments on the basis of specious or even substantial legal arguments, it would be preferable if, in any of these doubtful conflicts, the procedure is based on the provisions of international humanitarian law and recognition of the fact that breaches of this law amount to crimes against humanity. Should the International Law Commission's proposals for the establishment of a permanent International Criminal Court come to fruition, many of these problems will disappear, especially as the listing of crimes includes grave breaches, crimes against humanity, and serious war crimes. Moreover, a permanent court will be in existence with a permanent panel of judges, with the jurisprudence of the Yugoslav and Rwanda tribunals to assist it.

To return to Wright — if we are to seek to prevent war (especially of the non-international kind) in which ideological or ethnic hatreds are responsible for atrocities usually more grievous than those in an international conflict, perhaps it is time to find some way of avoiding debate as to the legality of Council action in dealing with this type of situation. It might be apt, during the fiftieth anniversary celebrations of the United Nations, for some middle power to propose in the General Assembly some resolution along such lines as the following:

> When a state, whether a member of the United Nations or not, because of internal disturbance or complete breakdown of the administration, is no longer able to govern the state by maintaining peace and good order, with the result that it is unable or unwilling to protect the basic human rights of identifiable groups among the population, or itself threatens those rights in a gross and inhumane manner, the United Nations should then recognize that fact and assume to itself the power to take over the administration of that state until such time as a new indigenous administrative authority

is able to undertake the task of government in a peaceful and humane fashion. The persons chosen to constitute the interim administration should be selected from groups trained for this task in a United Nation institution specially established for this purpose, and, to the greatest extent possible, should not be drawn from among nationals of any of the permanent members of the Security Council. In their training, care should be taken to ensure that they are made fully aware of the history, customs, culture, ethic, and prejudices of the inhabitants of the state in question.