

# THE RIDDLE OF ESTABLISHING CLEAR AND WORKABLE RULES TO GOVERN ARMED CONFLICTS

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When I took my first class in international law in the spring of 1966, the instructor said we were going to skip the law of armed conflict because he hoped there would be no more wars and he was skeptical about the value of those laws anyway. He said that the laws of armed conflict have never played a dominant role in reducing the scourge of war. They have focused on the fringes of battle, providing some protection to those who are not combatants, but very little to those who find themselves in the midst of the conflict. Many of the rules of warfare are by now venerable, he said, but they are by the same token largely irrelevant because they are out of date. When the laws of armed conflict prohibit the use of a strategy that a warring faction wants to use, these laws are simply ignored.

In the years since then, the world has seen too many armed conflicts to permit any optimism about being able to prevent future struggles. And the human suffering that has occurred since then eliminates for most of us the option of ignoring this problem or shrugging our collective shoulders at the enormity of it all.

The purpose of meetings such as this one is to examine the existing norms governing the conduct of armed conflicts, to determine whether they are realistic for modern warfare, and to ask how they can be improved, modernized, and effectively enforced. But it is hard not to see these problems as an enigmatic series of riddles, especially in light of the wide variety of recent conflicts.

How can we establish rules to protect civilians, especially in an era of guerrilla warfare and terrorism, when the ability to slip silently into the civilian community is an essential weapon of the guerrilla warrior? Every effort to protect the civilian by separating civilians from combatants interferes with the ability of the guerrilla to achieve his military objective. Is the new definition of a lawful

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combatant in the 1977 Protocols an adequate response to this problem?

How can we limit aerial warfare, which is so attractive to military strategists and can be so destructive to innocent civilians, as we have seen all over the world? The 1977 Protocols use much more precise language about what targets are permissible and put the burden on the military planner to limit damage to the civilian population. Attacks are permissible only if the military importance of the target clearly outweighs the damage to the civilians that will result. Is it realistic to ask military strategists to engage in this weighing process?

How can we expect military leaders to give serious attention to the laws of armed conflict when sanctions are imposed upon those that violate these laws so infrequently?

How can we regulate weapons in an era of rapid technological change with new and ever more destructive weapons being produced each year? Even the weapons that seemed to have been abolished, like gas warfare and dum-dum bullets, are now coming back into vogue in more dreadful forms than ever.

Perhaps the most puzzling riddle involved in this inquiry is what to do with nuclear weapons.

During the next several days, Honolulu will be transformed into the Geneva of the Pacific and we will examine the language of the treaties governing international humanitarian law to seek consensus on their meaning and applicability.

Many of us will agree that the 1977 Geneva Protocols assist greatly in clarifying the law and that they should be ratified soon by as many nations as possible. We will also discuss how best to disseminate these rules so all will know what is expected of them and all can help to enforce these standards.

It is highly appropriate that this effort take place in the Pacific, even though most of the law we will be talking about has been codified at distant meetings in the international capitals of Europe. The Pacific is the fastest developing region of the world at present, and it has certainly seen its share of armed conflicts in recent years. It is time this region played a leadership role in refining and developing these rules. Perhaps some new insights can be learned from the ancient traditions of the Asian and Pacific nations.

### CAN THE LAWS OF ARMED CONFLICT REGULATE WARTIME BEHAVIOR?

Many observers suggest that it is naive to think that laws can reduce the level of violence or protect those outside the field of bat-

tle.<sup>1</sup> They argue that nations or groups who are fighting for goals they view as essential to their survival will not be influenced by the existence of laws.

Laws cannot of course turn people into angels. Laws cannot coerce people or nations to behave in a certain way unless a general consensus exists that such behavior is the appropriate standard to conform to.<sup>2</sup> But laws can assist in turning a vague consensus or general feeling into a precise norm that can be used to guide and judge behavior. Nations need clear and precise rules and a mechanism for evaluating conduct in relation to established world norms. They are much more likely to adhere to a legal principle if it is clear, sensible, and generally respected by others.

Our mission at this meeting is to examine the international humanitarian laws which have evolved, and continue to develop, through a combination of practical considerations and considerations of public conscience.

## PRACTICAL CONSIDERATIONS

### Reciprocity

The laws of armed conflict are respected by combatants if they provide reciprocal protection for the soldiers and civilians of each side. Nations want their soldiers to be treated humanely when captured and want their civilians to be spared when they fall into the hands of the enemy. If one warring nation does not provide humane treatment to the soldiers and civilians it captures, the opposing forces will respond with acts of reprisal.<sup>3</sup>

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1. See, e.g., President Dwight Eisenhower, press conference, Jan. 12, 1955: When you resorted to force as the arbiter of human difficulty, you didn't know where you were going. . . . If you got deeper and deeper, there was just no limit except what was imposed by the limitations of force itself.

See also Bayard Rustin in *Civil Disobedience* (Occasional Paper, Center for the Study of Democratic Institutions, 1966):

I have said to these young men that they make too much of American brutality. The Viet Cong is equally brutal. Whether one is among the battling Pakistanis and Indians, or in Watts, or in warfare anywhere, the law of violence is such that each side becomes equally vicious. To try to distinguish which is more vicious is to fail to recognize the logic of war.

Both these quotes are reprinted and discussed in Walzer, *Moral Judgment in Time of War*, in *WAR AND MORALITY* 54 (R. Wasserstrom ed. 1970).

2. See, e.g., Kelson, *The Pure Theory of Law*, 51 L. Q. REV. 517 (1935), reprinted in J. SWEENEY, C. OLIVER & N. LEECH, *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 1206-08 (2d ed. 1981). Kelson argues that the only legal system that is stable is one that corresponds to "a substantial measure of actual behavior." *Id.* at 1208. See also McDougal, *International Law, Power and Policy: A Contemporary Conception*, [1953] 1 *Academie de Droit International, Recueil des Cours* 137, reprinted in J. SWEENEY, C. OLIVER & N. LEECH, *supra*, at 1220-21.

3. In World War II, for instance, the Germans accorded particularly harsh treatment to Russian prisoners of war, and the Russians in return refused to allow open inspection of their prisoner-of-war camps.

A series of events that occurred early in the Vietnam war illustrates how the desire for reciprocity and fear of reprisal works to enforce the laws of war. In 1965, the Saigon government captured a terrorist who had thrown a bomb. After a show trial, they executed him.<sup>4</sup> Their view was that this terrorist did not have to be given the protection of the Geneva Convention on Prisoners of War because he acted in a clandestine fashion without uniform and without carrying arms openly. Before and during the trial, the Vietcong made it quite clear that if the terrorist was executed they would respond by killing prisoners they held. After the execution, the Vietcong announced that they had killed an American prisoner of war as a reprisal.<sup>5</sup> Three months later, three Vietcong terrorists were executed by the Saigon government in Da Nang despite threats of reprisals. This time the Vietcong killed two American prisoners.

Washington denounced the Vietcong action as "senseless murder,"<sup>6</sup> but, after the second execution, the Saigon government—under pressure from the United States—refrained from executing any Vietcong, terrorists or otherwise. The mere hint of reprisals during the 1968 Tet offensive was enough to persuade Saigon's leaders to remove the execution posts set up in the capital's principal market.<sup>7</sup>

### Ineffective Weapons

Weapons have been banned when they cease to provide a clear benefit to either side. Gas—which is hard to control and leads to no clear advantage if both sides use it—is the classic example of a weapon that has been declared illegal because it is not militarily effective. A combatant might be tempted to use gas warfare only if the other side did not have the capacity to reciprocate.<sup>8</sup>

### Discourage Resistance

Another pragmatic reason for obeying the laws of war is to encourage enemy soldiers to surrender in battle rather than fight to the bitter end. Soldiers who feel that they will be killed or tortured when captured are not likely to submit to captivity.

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4. N.Y. Times, June 22, 1965, at 1, col. 7.

5. N.Y. Times, June 25, 1965, at 1, col. 6.

6. N.Y. Times, Sept. 28, 1965, at 1, col. 1, and 2, col. 2. *See also*, 53 DEP'T ST. BULL. 635 (1966); 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 218 (1968).

7. N.Y. Times, Feb. 6, 1968, at 14, col. 3; N.Y. Times, Feb. 7, 1968, at 15, col. 2.

8. Iraq, for instance, has apparently used gas warfare in its recent conflict with Iran because Iran has not had the capacity to respond. When Iran develops its own gas warfare capability Iraq will undoubtedly reevaluate this strategy.

## CONSIDERATIONS OF PUBLIC CONSCIENCE.

### Encourage Support at Home

Nations adhere to the laws of war to encourage support for the war on the home front and to preserve the sanity and moral structure of the soldiers fighting the war. Most governments try to persuade their people that their wars are noble, that they are fought to defeat warlike people, to preserve "freedom" and "democracy," and to prevent future wars. But a government proven to be using military tactics that its own people find morally repugnant would find it difficult to sustain that argument.

### Encourage International Support

A related reason why nations find it in their interest to obey the laws of war is that they want to achieve stature in the world community as just and humane powers. Most participants in wars present legal and moral arguments to the world community in order to gain support.<sup>9</sup> Because their arguments are based on legal principles, these nations feel obliged to use military tactics that conform to the laws of war. Indeed it would appear that the United States ceased its military activities in Vietnam and the Israelis ended their bombardment of Beirut in part at least because these activities were no longer morally acceptable to their home populations and to the world at large.

## WHAT DO THE LAWS OF WAR PROHIBIT?

Although most observers now agree that good reasons exist for having laws of armed conflict,<sup>10</sup> people and nations still disagree sharply on what these laws actually prohibit. One view is that as long as a military activity is undertaken for the purpose of limiting destruction, it is justified.<sup>11</sup> Only actions that lead to needless death and serve no military purpose violate the laws of war; if a military action seems reasonable at the time it can be justified in accordance with the laws of war. This interpretation gives great latitude to the military commander in the field. Most military officers intend to limit overall destruction; few, even in the heat of battle, act only to increase pain and suffering. Had this approach been accepted at Nuremberg, many fewer persons would have been convicted be-

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9. See, e.g., U.S. Dep't of State Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Viet Nam*, 54 DEP'T ST. BULL. 474 (1966); *Cong. Rec.* at 5274, (daily ed. March 10, 1966), reprinted in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 583 (R. Falk ed. 1968).

10. See generally, Walzer, *supra* note 1; T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (1970).

11. See generally, M. MCDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 520-31 (1961). See also, 69 *AM. J. INT'L L.* 399 (1975).

cause it would be difficult to prove the criminal intent it demands.<sup>12</sup>

The opposing view is that the laws of war are more than flexible tests of reasonableness; they are firm guidelines regulating military actions and absolutely prohibiting certain tactics, even if in the opinion of the military commander the use of such tactics would minimize destruction. Under this latter view, the laws of war are comparable to the firm proscriptions of the Bill of Rights in the U.S. Constitution. They are fundamental and cannot be balanced against other interests when it is "reasonable" to do so. Under this view, although the laws of war may seem highly unreasonable to military leaders in battle or to political leaders planning strategy, the laws draw lines between permissible and impermissible conduct and stand as international standards that cannot be manipulated because of perceived military necessity.

### DO THE LAWS OF ARMED CONFLICT REGULATE NUCLEAR WEAPONS?

The United States has always insisted that international law does not prohibit the use of nuclear weapons.<sup>13</sup> Others, however, have argued that customary international law does prohibit the use of these weapons of mass destruction.

This topic was examined, for instance, by the District Court of Tokyo in 1963 in the *Shimoda* case brought by five Japanese citizens against the Japanese government to recover damages for injuries sustained from the 1945 bombings of Hiroshima and Nagasaki.<sup>14</sup> The Japanese judge looked at the treaties and customary practices as we will be looking at them in this conference, and concluded that the use of atomic weapons by the United States had violated international law. He concluded that Hiroshima and Nagasaki were "undefended cities" as that term is used in international humanitarian law and thus that such aerial bombardment was "a hostile act contrary to the international law of the day."<sup>15</sup>

"Besides," the court went on to say, "the atomic bombing on

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12. For the most recent case restating the requirement that specific intent must be proved in criminal cases, see *Francis v. Franklin*, U.S. , 105 S. Ct. 1965 (1985).

13. See, e.g., U.S. AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS at 6-5 (APF 110-31, 1976):

The use of explosive nuclear weapons, whether by air, or land forces, cannot be regarded as violative of existing international law in the absence of any international rule of law restricting their employment.

14. The *Shimoda* Case, Decision of the Tokyo District Court, Dec. 7, 1963, Case No. 2,914 of 1955 and Case No. 4,177 of 1957 (Tokyo District Court, Japan, 1963), reprinted in 8 JAP. ANN. INT'L L. 212 (1964); 2 Respect for Human Rights in Armed Conflicts 14, U.N. Doc. A/9215 (1973), digested in 58 AM. J. INT'L L. 1016 (1964). See generally Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks on Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965).

15. See 2 Respect for Human Life in Armed Conflicts, *supra* note 14, at 18.

both cities of Hiroshima and Nagasaki is regarded as contrary to the principle of international law that the means which give unnecessary pain in war and [are] inhumane . . . are prohibited as means of injuring the enemy."<sup>16</sup>

He rejected the argument that in times of "total war" the distinctions between combatants and noncombatants and between military objectives and nonmilitary objectives no longer exist. Total war referred to total mobilization of the home population for war, the court concluded, but it did not, before Hiroshima and Nagasaki, include obliterating the distinction between military and nonmilitary objectives.<sup>17</sup>

Many attorneys in the United States have been arguing during the past few years that the use of nuclear weapons would be illegal. In addition to the arguments made by the Japanese judge, these advocates refer to General Assembly Resolutions passed in 1961, 1978, and 1980 which prohibit the use of nuclear weapons<sup>18</sup> and the 1949 Geneva Convention on the Protection of Civilians<sup>19</sup> and the 1977 Protocol I<sup>20</sup> which provides broad protection for noncombatants in time of war. They also refer to the Martens Clause, from the 1907 Hague Convention, which is designed to cover new weapons that may be developed. This Clause states that combatants are always governed by "the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."<sup>21</sup> Public morality does therefore limit acts of warfare and should prohibit the use of weapons that indiscriminately destroy whole populations.

## CONCLUSION

Although practical military considerations must not be slighted, neither can they be the exclusive guide of military action.

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16. *Id.* at 20.

17. The Nuremberg Tribunal also rejected the "total war" argument, concluding that this "Nazi conception" of total war would destroy the validity of international law altogether. Judgment of the International Military Tribunal, Nuremberg, Germany (1946) in *Nazi Conspiracy and Aggression* (U.S. Gov't Printing Office, 1947); reprinted in J. SWEENEY, C. OLIVER & N. LEECH, *supra* note 2, at 710.

18. U.N. General Assembly Resolution 1653 (XVI) on the Prohibition of Nuclear Warfare (1961), reprinted in R. FALK, G. KOLKO & R. LIFTON, *CRIMES OF WAR* 56 (1971). In Resolution 33/71-B of December 14, 1978 and in Resolution 35/152-D of December 12, 1980, the General Assembly again declared that "the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity."

19. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

20. Protocols Additional to the Geneva Convention (International Committee of the Red Cross, Geneva, 1977). See especially articles 52-58 of Protocol I.

21. 1907 Hague Regulations. See generally Fried, *International Law Prohibits the First Use of Nuclear Weapons*, 2 *REVUE BELGE DE DROIT INTERNATIONAL* (1981).

The notion of military necessity can be used to justify the use of any weapon or tactic. The dictates of public conscience must also determine what is acceptable military conduct. To progress, the laws of war must be based on something more than weighing the pros and cons of a military strategy in terms of its effectiveness.

Just as people once routinely practiced slavery but later rejected this practice and now universally condemn it; and just as people throughout the world routinely discriminated on the basis of race, ethnic origin, social status, or sex, but now struggle to end such discrimination; so, too, must all people now come to condemn the use of nuclear weapons, of military tactics that are aimed at injuring the civilian population, of biological and chemical weapons of all sorts and types, and of torture and other forms of inhumane and degrading treatment. We must work to create an environment in which the slaughter of civilians will be quickly and universally condemned and in which persons who violate the laws of armed conflict are brought to trial and punished. Ultimately, we must work toward a world in which all use of violence as a means of settling disputes is unacceptable. Until we reach that desired consensus, however, we can at least work to reach agreement on how to reduce the means and methods of warfare.