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International Humanitarian Law from Agincourt to Rome

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OVER THE PAST HALF-MILLENNIUM, the relationship between war and law has been the subject of much change. Two issues have remained central, even in modern international humanitarian law (IHL): the first is “quarter,” that is, the obligation to spare the life of a combatant who has laid down his arms and surrendered, and, second, the protection of women from the ravages of war and, especially, rape. Both issues arose during Henry V’s Agincourt campaign, a phase of the Hundred Years’ War that started in 1415 with the landing of Henry’s Army near Harfleur, the siege and capture of Harfleur, and its victory in Agincourt, and ended in 1420 with the conclusion of the Treaty of Troyes, which pronounced Henry the heir to the French throne. At Agincourt, the terrain, the tactics, and the longbow helped the lightly armed and mobile English prevail over the several times larger, heavily armoured mounted French knights. The Treaty marked the ascendancy of England until Joan of Arc’s rallying of the French in 1429 sparked a turning point that eventually led to the defeat of England by Charles VII of France.

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This campaign was immortalized in Shakespeare's epic play, on which I shall draw. I draw on Shakespeare because his anatomy of war is a close reflection of the sixteenth century chronicles, Raphael Holinshed and Edward Hall, and thus an excellent vehicle to illustrate the law's evolution. This apt point of departure in assessing the current state of humanitarian law evidences an approach to the issue that may well prove instructive in implementing present day IHL. Therefore, it is at Agincourt that the journey to Rome begins.

Medieval Law of War

I will start by describing briefly the law of war as it existed during the Agincourt campaign. In the Middle Ages, chivalry was the principal normative system providing a code of behaviour for knights, nobility, and the entire warring class in the endemic wars in which they were involved. The humane and noble ideals of chivalry included justice, loyalty, courage, honour, and mercy, obligations of not killing or otherwise taking advantage of a vanquished enemy, and keeping one's word, and duties of protecting the weak, especially women, and helping people in distress. Seldom if ever realized in full, chivalry was a mix of reality, poetry, and legend. Despite humanizing warfare, chivalry also contributed to the legitimization of war and, through ransom and pillage, provided economic incentives for resorting to war.

The rules of chivalry were customary. However, various royal ordinances, including Henry V's famous ordinances of war, codified some of these rules, including those protecting women from rape and persons belonging to the Church from capture and robbery. In addition, writers on chivalry compiled treatises and manuals explaining the rules of chivalry, such as the duties to grant quarter on the battlefield in exchange for ransom and to treat prisoners humanely.

Chivalry's norms were fully applicable, regardless of nationality, between knights and nobility but did not protect commoners and peasants and were not applicable to non-Christians. Gentlemen were careful to avoid surrendering to commoners and commoners to gentlemen. Rules were international but were not class or religion neutral. They were enforced by courts of chivalry and military courts, but—in contrast to our own modern system of detailed Hague and Geneva conventions—honour and shame played a critical role in enforcement; the sanction of dishonour for the knight who violated his knightly duties was quite effective. Although our generation has lost the sense of shame—consider the slaughter and rape in Algeria—at least we have gained in universality:

all men and women, of whatever class, religion or colour, are entitled to the full protection of international humanitarian law.

Let me situate briefly chivalry in the medieval law of nations. Chivalry was the *jus armorum*, or the law of arms, the special law of the knightly class paralleling such special laws as the law merchant or the law of the sea. It was a part of the law of nations, or *jus gentium*, although the law of nations addressed also additional subjects such as the privileges of ambassadors and the law of treaties.

Agincourt

From history, literature, and the films of Laurence Olivier and Kenneth Branagh, most know the story of Agincourt, one of the rare great medieval battles during a period when wars were won or lost mostly by besieging fortresses and cities. The massacre of the French prisoners of war in Agincourt, the flower of French nobility and chivalry, is comprehensible only if we consider how outnumbered the English forces were and how great their fear must have been. As the battle wore on, the outnumbered English appeared to have the upper hand. The fear that another French charge was about to begin, the presence on the battlefield of a very large number of French prisoners who, though disarmed, could have risen against their English captors, and the French attack on the English rear camp possibly involving loss of life among the young boys guarding the camp, all combined to trigger an unexpected order by the King. Shakespeare's Henry cries out:

But hark, what new alarm is this same?
The French have reinforced their scattered men.
Then every soldier kill his prisoners.

But Shakespeare's Gower then responds to Fluellen's comment that it was against the law of arms to kill the boys and explains the King's order as generated by the pillage of his treasures from the rear camp. He sarcastically adds that the King ordered cutting the throat of prisoners, "O'tis a gallant king." Shakespeare thus explains Henry's cruel order on two grounds: necessity, as the French appeared to be regrouping to attack; and reprisal for the unlawful attack on the servants guarding the rear camp and for its plunder.

The defence of reprisal was doubtful even at the time. The rear camp constituted a lawful military objective. It is far from certain that the pages guarding the camp were entitled to the immunity of children. At least some medieval jurists regarded non-combatant servants of an army, even when not involved in

any fighting, as legitimate military objectives. What made the massacre even more reprehensible, was that it was directed against prisoners. Yet some great Renaissance jurists, such as Gentili, still justified reprisals against a collectivity. Grotius dissented, "nature does not sanction retaliation except against those who have done wrong. It is not sufficient that by a sort of fiction the enemy may be conceived as forming a single body."

If the massacre of the prisoners was not justified as a reprisal, could it have been justified on grounds of necessity? It may well be that the heavily outnumbered English would have had difficulty repelling another attack while guarding their numerous prisoners. But this explanation is undercut by the fact that the King decided to spare the highest ranking prisoners, whose ransom would belong to him. Indeed, captors who were knights refused to carry out the order and the King had to use 200 of his archers to carry out the gruesome task of throat cutting.

Nevertheless, the eminent medieval jurist Giovanni da Legnano recognized the captor's right to kill prisoners where there was fear of disturbance of the peace; even the Renaissance scholar Vitoria prohibited killing of prisoners only after victory had been won and all danger was over. Gentili, however, harshly criticized the killing. Notwithstanding Gentili's condemnation, it cannot be concluded that Henry clearly violated contemporary standards. Killing prisoners in an emergency was not unprecedented. While quarter was normally granted in Anglo-French wars, the virtual absence of contemporary criticism of Henry's action suggests that cruel as it was, his order did not violate the accepted norms of behaviour.

Even before the treaty of Rome, certainly under the jurisprudence of Nuremberg, killing of prisoners of war, whether in the guise of reprisals or on grounds of military necessity would be an absolute war crime. Yet, as recently as during World War II, reprisal killing of innocent civilians in occupied territories was, in some circumstances, lawful. The Nuremberg tribunals ruled that killing of civilian hostages in reprisal for hostile acts against the occupying power was not a war crime provided that certain conditions were complied with. Today, it would be a war crime under the Geneva Conventions and Protocols, and certainly under the Treaty of Rome with its explicit criminalization of refusal to grant quarter.

But what about the killing of prisoners of war on grounds of necessity in modern humanitarian law? Medieval chivalry, medieval ordinances of war and humanist writings of Renaissance writers were followed by about two lean centuries of humanitarian law. Two major challenges, one military, the other religious, forced a decline of chivalry without providing an effective substitute.

Wars fought by large groups using long-range artillery were not conducive to the pursuit and taking of prisoners or the once customary grant of quarter in exchange for ransom. And the emergence of Protestantism triggered an increasing dehumanization of members of an adversary branch of Christianity, and thus a fertile environment for the destruction of those regarded as subhuman. Remember the massacre of Saint Bartholomew's Day or the outright killing by the English of Spanish Armada sailors shipwrecked in Western Ireland.

By the mid-19th Century, the technology which precipitated the demise of chivalry ultimately generated the need for international rules of war to humanize the conduct of hostilities, limit the killing and maiming, and ensure the humane care of prisoners, the sick and the wounded. The very scale of casualties and of suffering required that this need be recognized. The American Civil War generated the Lieber Code promulgated in 1863. The Lieber Code ultimately spawned that branch of international humanitarian law commonly known as the Hague law, which governs the conduct of hostilities. The Battle of Solferino, along with Henry Dunant's moving portrayal of the suffering and bloodshed at the battle in *A Memory of Solferino* (1862) inspired the conclusion of the First Geneva Convention (1864) as well as Geneva law more generally, the other branch of IHL which emphasizes the protection of victims of war, the sick, the wounded, prisoners, and civilians. Since the mid-19th Century, we have been engaged in a period of intensive multilateral treaty making.

Both prongs of IHL—Hague and Geneva—drew their guiding principles from chivalry. The obligations to use fairness and restraint, mercy and compassion, in both offensive and defensive situations, have their origin in chivalric honour.

In matters pertinent to military necessity, progress was nevertheless slow. Those of us who consider Henry's order in Agincourt to be medieval and barbaric, should note that even the essentially humanitarian Lieber Code allowed the denial of quarter to the enemy, that is, Confederate prisoners, on grounds of necessity: "A commander is permitted to direct his troops to give no quarter . . . when his own salvation makes it impossible to cumber himself with prisoners." This rule, which was law for the United States Army as recently as mid-19th Century, appears almost designed to legitimate the massacre Henry V ordered at Agincourt.

Compare the modern U.S. Army Field Manual of 1956. It unequivocally prohibits killing prisoners on grounds of self-preservation, in whatever circumstances.

However, certain related questions of international humanitarian law are less clear, especially whether in all circumstances there is a duty on a military

unit to accept surrender and thus, in effect, grant quarter. In the abstract and as a general principle, the obligation for a Party to a conflict to accept the surrender of enemy personnel and thereafter to treat them in accordance with the Hague and the Geneva Conventions is categorical. In reality, problems continue to arise. A recent study states that the *opinio juris* of the United States is that quarter may not be refused to an enemy who communicates an offer to surrender under circumstances permitting that offer to be understood and acted upon by U.S. forces. A combatant who appears merely incapable or unwilling to fight because he has lost his weapons or is retreating, but who has not communicated an offer to surrender is still subject to attack. And the 1992 U.S. DOD report to Congress on the Conduct of the Persian Gulf War states:

There is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon—an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

The problem is thus not so much with the concept itself but with the nitty gritty of the situational ability of the attacking force to accept surrender. Whatever the black letter of the law, soldiers will not want to risk their own lives in granting quarter. Hopefully, the ICRC study of customary rules of humanitarian law will be able to advance the proposition that quarter must be given even when the safety of the captor is endangered by the presence of the captured combatants. But this is an area where a return to a culture of values, and especially honour, is necessary if we want better compliance with the rules. Only when it is realized that killing a surrendering enemy is shameful will we see progress.

Protection of Women

I turn to my second theme, protection of women. License to rape was considered a major incentive for the soldier involved in medieval siege warfare. While urging generals to forbid and prevent rape during the sacking of a city, Vitoria reluctantly admitted the lawfulness of allowing soldiers to sack a city if the “necessities of war” required it or “as a spur to the courage of troops,” even when this involved rape. These cruel rules were, however, rejected by Gentili. Anticipating international criminal tribunals, Gentili wrote that if the enemy

who allows rape is not punished by God, he will have to render an account to other sovereigns.

Henry V's ordinances of war prohibited rape and imposed capital punishment on offenders. Enforcing compliance was a major problem, however. In his famous speech at the walls of Harfleur, Shakespeare's Henry enumerates the dreadful abuses—including rape, denying quarter, killing non-combatants, children and women—that his troops will commit in the city if it refuses to surrender. How could these dire threats be reconciled with the existing and emerging norms protecting women from the ravages of war? The distinction in medieval law between the treatment of both combatants and civilians in captured territory or on the battlefield, on the one hand, and their treatment in a besieged city or fortress that was taken by assault, on the other, suggests an explanation. Unmitigated brutality was reserved for the population of a city that refused to surrender.

Henry, the commander, tells Harfleur that he will no longer be able to control his forces if it does not surrender, and that the leaders of Harfleur will bear the responsibility for the resulting brutality. Of course, Shakespeare emphasizes rape and its sheer horror. But in a speech which attracted feminist censure, his Henry clearly places the responsibility on Harfleur should it resist his ultimatum. In terms of *realpolitik*, Henry tells Harfleur: "If you do not deal now with me, your one protector able only for a time to maintain discipline among this terrifying force, the force will run amok according to base human nature and I cannot be responsible for the consequences." But such arguments by their very nature are likely to incite illegal conduct by the troops, and these claims of the inevitable breakdown of discipline are thus both an evasion of the moral responsibility that should continue even into battle, and affirmative encouragement to unrestrained war.

In modern international law, despite the prohibition of rape in the Lieber Code, the protection of women's rights to physical and mental integrity does not appear to have been a priority. The Hague Regulations provide only indirect protection against rape. The 1929 Geneva POW Convention contained a general provision too vague to afford effective protection to women prisoners. During the Second World War, rape was tolerated and even utilized in some instances as an instrument of policy. In occupied Europe and in the occupied Far East, tens of thousands of women were subjected to rape and forced to enter brothels for Nazi and Japanese troops. Rape was not prosecuted in Nuremberg, though it was in the Far East. Only in the Fourth Geneva Convention of 1949 was an unequivocal prohibition of rape established. Even so, violation of this prohibition was not listed among the grave breaches of the

Convention which require prosecution or extradition. Finally, it took the mass rape in the former Yugoslavia, so well publicized by the media, followed by widespread rape in Rwanda, to generate rapid changes.

International humanitarian law does not develop in a rational and gradual way. It develops spasmodically in response to atrocities. It is a pity that calamitous events are needed to shock the public conscience into focusing on neglected areas of the law. The more offensive the occurrence, the greater the pressure for rapid adjustment. Nazi atrocities, for example, led to the establishment of the Nuremberg tribunals, the evolution of the concepts of crimes against peace, crimes against humanity and the crime of genocide, the shaping of the Fourth Geneva Convention, and the birth of the human rights movement. The starvation of Somali children prompted the Security Council to apply Chapter VII of the Charter to an essentially internal situation, bringing about a revolutionary change in our conception of the role of the Security Council to enforce peace in such situations.

The Hague and Rwanda Tribunals

Instant reporting from the field has resulted in rapid sensitization of public opinion, greatly reducing the time lapse between the perpetration of such tragedies and responses to them. It took the repeated and massive atrocities in the former Yugoslavia and then in Rwanda to persuade the Security Council to establish the two ad hoc criminal tribunals and to start the momentum towards the establishment of a standing international criminal court. The statutes of the ad hoc tribunals criminalized rape as a crime against humanity. At the same time, both the ICRC and the United States started interpreting the grave breaches provisions of the Geneva Conventions as encompassing rape.

The Hague Tribunal has issued several important decisions that clarify and give judicial imprimatur to some rules of international humanitarian law. It has made a real contribution to the elucidation of crimes against humanity and to establishing that customary law war crimes apply also to non-international armed conflicts. Let us remember that as recently as 1949, the Geneva Conventions contained only one article—common Article 3—which addressed non-international armed conflicts. Until the mid-90's, its violation was considered not to involve individual criminal responsibility.

The Rwanda tribunal has issued important decisions on its competence and on genocide. The work of both tribunals demonstrates that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible. These developments have created a

positive environment for the establishment of the standing international criminal court.

Rome

One is struck by three aspects of the scope of crimes under international humanitarian law as it has emerged from the work of the diplomatic conference in Rome. First, most governments appeared ready to accept an expansive conception of customary international law without much supporting practice. Second is an increasing readiness to recognize that some rules of IHL once considered to involve only the responsibility of States may also be a basis for individual criminal responsibility. There are lessons to be learned here about the impact of public opinion on the formation of *opinio juris* and customary law. The ICRC study of customary rules of IHL, now in progress, will further reinforce these developments. Third, the inclusion in the ICC Statute of common Article 3 and crimes against humanity, the latter divorced from a war nexus, connotes a certain blurring of IHL with human rights law and thus an incremental criminalization of serious violations of human rights. It goes without saying that the type of offenses encompassed by common Article 3 and crimes against humanity are virtually indistinguishable from ordinary human rights violations. I note that we have witnessed a rapid transition of many principles and rules of IHL from the rhetorical to the normative, and from the merely normative to the effectively criminalized.

These developments could not have taken place without a powerful new coalition driving the criminalization of offenses against the IHL. Much like the earlier coalition that stimulated the development of both a corpus of international human rights law and the mechanisms involved in its enforcement, this new coalition includes scholars who promote and develop legal concepts and give them theoretical credibility, NGO's that provide public and political support and means of pressure, and various governments that spearhead law-making efforts in the United Nations.

The adoption of the Rome Statute of the ICC on July 17, 1998, is an event of major historical importance. Although it is still too early to assess the prospects of the effectiveness of the Court and many aspects of its Statute, this is not the case with regard to the definition of crimes against international humanitarian law contained in Articles 6–8. These articles, now part of treaty law, not only constitute the principal offenses that the ICC will try, but they will take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law. As such, they may become a model for

national laws to be enforced under the principle of universality of jurisdiction. They will thus have great influence on practice and doctrine even before the Statute enters into effect.

Regarding the crime of genocide, the Statute tracks the 1948 Convention. The article defining crimes against humanity is the first multilateral treaty definition of crimes against humanity. It is independent of any nexus with war.

There are many additions to the Nuremberg list of crimes against humanity. Crimes added or developed include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violence of comparable gravity. Rape and other sexual offences against women have been included in all of the sections of war crimes.

For non-international armed conflicts, the Statute declares criminal serious violations of common Article 3 and also contains a significant list of Hague-type war crimes. This recognition of war crimes under customary law as pertinent to non-international armed conflicts represents a significant advance.

The definitions of crimes are now in place. It is up to the States to make them effective, to punish violators and to deter future crimes. Recent atrocities in Kosovo should make us realize that adoption of treaties and statutes is not enough; without effective enforcement, prospects of deterrence will continue to be poor.

Let me conclude with a broad reflection. We now have a system of Geneva Conventions that have obtained the formal assent of virtually all States. The Conventions give us exact language, and clarity, at least for the initiated. We have created a complicated and technical system of humanitarian law that only experts can master. It is true that this system has not prevented the continuing growth of customary rules, to add, to modify, and to fill in the interstices of conventions. The jurisprudence of the Hague tribunal for the former Yugoslavia provides a salutary example of this process. Although the teleological aspects of humanitarian law facilitate the continuing creation of customary law through emphasis on *opinio juris*, nonetheless, international humanitarian law is primarily conventional.

A normative system, like chivalry, based largely on custom and a few rules of relative generality, would not suffice in the face of the frequent disintegration of States, the multiplicity of powerful actors on the domestic and international scene, and the modern weapons and technology. However, through this process of treaty-making, of codification, vital and necessary as it is, we may have lost the sense that rules arise naturally out of societies. We may have lost the flexibility that came from rules of essentially customary character. And finally,

we may have forgotten the value attaching to honour, chivalry and mercy. In conflicts around the world, people not only kill and rape, they are proud of their deeds.

We must revive our ability to feel shame and guilt. We have to create a culture of individual responsibility. Utopian attempts to revive chivalry would have little effect. But, to make international humanitarian law truly effective, we need to reinvigorate chivalry's culture of values, especially the notion of individual honour and dishonour as motivating factors for the conduct of both warriors and citizens. Treaties alone will not ensure respect for fundamental norms.