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Article abstract

Cet article traite de la situation du simple soldat qui reçoit un ordre qui pourrait ne pas respecter les règles du droit international en matière de conflit armé. On y fait l'analyse des divers documents qui régissent les conflits armés, plus particulièrement en ce qui concerne les exigences relatives à la diffusion de leur contenu. On y étudie également dans quelle mesure le droit international vient limiter le devoir d'obéissance aux ordres et on s'interroge quant aux moyens par lesquels les règles du droit international sont - ou plus généralement ne sont pas - portées à la connaissance du soldat. L'article fait part de l'obligation d'informer que comporte le Protocole de 1977 venant compléter la Convention de Genève de 1949 et souligne que dans la mesure où cette obligation sera remplie, il ne sera plus possible pour un soldat de plaider qu'il ignorait l'existence des règles du droit international ou qu'il n'en a pas saisi la portée ou leurs effets.

THE MAN IN THE FIELD AND THE MAXIM IGNORANTIA JURIS NON EXCUSAT

par L.C. GREEN*

Cet article traite de la situation du simple soldat qui reçoit un ordre qui pourrait ne pas respecter les règles du droit international en matière de conflit armé. On y fait l'analyse des divers documents qui régissent les conflits armés, plus particulièrement en ce qui concerne les exigences relatives à la diffusion de leur contenu. On y étudie également dans quelle mesure le droit international vient limiter le devoir d'obéissance aux ordres et on s'interroge quant aux moyens par lesquels les règles du droit international sont — ou plus généralement ne sont pas — portées à la connaissance du soldat. L'article fait part de l'obligation d'informer que comporte le Protocole de 1977 venant compléter la Convention de Genève de 1949 et souligne que dans la mesure où cette obligation sera remplie, il ne sera plus possible pour un soldat de plaider qu'il ignorait l'existence des règles du droit international ou qu'il n'en a pas saisi la portée ou leurs effets.

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War crimes trials, whether conducted by tribunals established under international agreement, like that at Nuremberg[1], or under municipal law, like that which rendered the decision regarding the *Llandovery Castle*[2], as well as trials under national military law, like that of Lieutenant Calley[3], inevitably raise a multitude of legal problems. Among the most important of these is the knowledge of the accused. Too often, insufficient attention is paid to this, even though the inevitable defence of superior orders and the reaction to it of the tribunal concerned[4] to a very great extent are based on this factor, since success or otherwise of the plea depends on whether or not the act ordered was palpably or manifestly illegal, which obviously depends on the accused's knowledge of what is in fact lawful. If the writer's experience on joining the British Army during the Second World War is anything to go by, the extent of the knowledge of the law of the ordinary soldier stems rather from his own resources than those of the military establishment. While he was told that, as a prisoner of war, the Geneva Convention of 1929[5] merely required him to give his name, number and rank, he was never given any instruction as to the rights of enemy personnel, his duties towards them or the nature of illegal weapons or acts of war. Moreover, it would appear that in some armies the situation has probably not changed too radically. Thus, in one of the courts martial arising out of the operations of United States personnel during the Vietnam War it was held that even though the acts perpetrated by the accused were in keeping with the training received during basic training, this would not provide a defence if the order concerned was palpably illegal on its face.[6]

It is difficult to expect the ordinary soldier to know what orders he is permitted and required to obey, or the officer what orders he is allowed to give, without in either case running the risk of trial for breach of the law of war, if he does not know what that law is. While

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1. The London Charter, 8 Aug. 1945, 82 UNTS 280 (Schindler & Toman, *The Laws of Armed Conflicts* (1973), 689).
2. (1921) HMSO Cmd. 450 (Cameron, *The Peleus Trial* (1948), App. IX).
3. *U.S.* v. *Calley* (1973) 46 C.M.R. 1131, 48 C.M.R. 19; *Calley* v. *Callaway* (1974) 382F Supp. 650, (1975) 519 Fed. Rep. (2d) 184 (Goldstein and others, *The My Lai Massacre and its Cover-Up: Beyond the Reach of Law?* (1976), 475-573).
4. See, e.g., Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (1965); Green, *Superior Orders in National and International Law* (1976).
5. Art. 5, 118 LNTS 343 (Schindler/Toman, 261).
6. *U.S.* v. *Keenan* (1969) 39 C.M.R. 108.

it may be true that most systems of criminal law postulate the maxim *ignorantia juris quod quisque tenetur scire, neminem excusat*[7], it must not be forgotten that those who live within a national system of law may be presumed to accept the national ethic and to be aware of the nature and basic principles of their country's criminal code, or at least know where to find them. This is hardly the case in so far as international law is concerned. This is a highly sophisticated system parts of which are controversial, and this is particularly true of that part of it which relates to the law of war. After all, the soldier understands that his task is to kill his enemy, that the aim of his country is to subdue that enemy, and it may seem somewhat strange to him that while his act and the purpose for which it is done are both lawful, nevertheless he is only allowed to carry out this act in a particular way and in accordance with certain rules, which rules are often abstruse, complex in form and certainly difficult to find. However, if Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977[8], receives general acceptance both the man and the officer may be a little better off from this point of view in any future war. By Article 82 legal advisers are supposed to be attached to service units[9], while Article 83 imposes duties of teaching and dissemination upon the Contracting Parties, and this service is supposed to extend to the civilian population as well as the armed forces.

In the meantime, it is important to examine the extent to which states are already obliged to inform their armed forces of the law of war and to refer, if possible, to the steps and methods which have been or ought to be taken to this end.

In looking at this problem it must be borne in mind that international law is made up of treaties, customary law and, nowadays to an increasing extent, judicial decisions. Also, unlike municipal law, international law is, in theory at least, universally applicable and the law of one country's courts in this field has as much validity as that of any other country. As it was so aptly put by Vattel[10]:

7. "Ignorance of the law, which every man is bound to know, excuses no man" (see Selden, *Table Talk* (1689), "Law"; 4 Blackstone, *Commentaries on the Laws of England*, ch. 2, s. V. (10th ed., 1787, 27).

8. *16 Int'l Legal Materials* (1977), 1391.

9. See Green, 'The Role of Legal Advisers in the Armed Forces', 7 *Israel Yearbook on Human Rights* (1977), 154.

10. *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), Bk. I, Intro., s. 18 (Carnegie tr., 1916, vol. 3, p. 7 — italics added).

> Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. *Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.*

It becomes necessary, therefore, to examine where this equally applicable law is to be found and the extent to which it imposes an obligation upon its subjects to ensure that it is made known to their nationals. With treaties the situation is relatively straightforward. All that is required is to determine which are the relevant documents and then to examine the terms of those treaties. Frequently, to a very great extent these treaties are simply codifications of customary law and, in so far as they are not themselves law-creative, the only obligation that rests upon non-parties is to be derived from that customary law. To the extent that this is so it may be argued that even states which are not parties to any particular treaty will, nevertheless, be bound perhaps even by its very terminology in so far as that treaty is merely a codification of customary law. The members of a non-party's armed forces would be bound by this customary law[11], and it is in their interest that they be informed as to its content.

For the most part, it has been generally said that the law of war is to be found in the Hague Conventions of 1907 as amended by the various Red Cross Geneva Conventions of 1929 and 1949[12]. However, even the Hague Conventions themselves refer to 'the laws and customs of war' and at times do not spell out in excessive detail what even the treaty law entails. Thus, all that Hague Convention IV[13] with respect to the laws and customs of war on land says about penalties for violations of the Regulations attached thereto is to be found in Article 3:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

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11. See, e.g., in relation to the law of maritime warfare comments by Sir Samuel Evans in *The Möwe* (1915) P. 1, 12; see, also, *The Blonde* (1922) 1 A.C. 313; and more generally, the *Nuremberg Judgment* (1946) Cmd. 6964, p. 65 (41 Am. J. Int'l Law (1947), 172, 248-9).

12. See Schindler and Toman, *op. cit.*

13. *Ibid.*, 57.

There is no provision for personal liability or for punishment of the soldier who actually commits the violation. The only basis on which such individuals can therefore be tried is either their own municipal law which would not, of course, extend to any enemy, or customary international law, just as non-military personnel who indulge in warlike acts are similarly liable as war criminals under the same customary law. In the first edition of his *International Law*[14] Oppenheim says

> according to a generally recognized customary rule of International Law hostile acts on the part of private individuals are not acts of legitimate warfare, and the offenders can be treated and punished as war criminals. Even those writers who object to the term "criminals" do not deny that such hostile acts by private individuals, in contradistinction to hostile acts by members of the armed forces, may be severely punished. The controversy whether or not such acts may be styled "crimes" is again only one of terminology; materially the rule is not at all controverted.

Although, in this passage Oppenheim apparently excludes from his concept of war crimes "hostile acts by members of the armed forces", he points out that "belligerents have not an unlimited right as to the means they adopt for injuring the enemy"[15], and comments[16] that

> the roots of the present Laws of War are to be traced back to practices of belligerents which arose and grew gradually during the latter part of the Middle Ages. The unsparing cruelty of the war practices during the greater part of the Middle Ages began gradually to be modified through the influence of Christianity and chivalry.

At this juncture it might be useful to draw attention to the 1474 trial of Peter Hagenbach at Breisach[17]. As Governor for the Duke of Burgundy Hagenbach established a

> regime of arbitrariness and terror (which) extended to murder, rape, illegal taxation and wanton confiscation of private property, and the victims of his depradations included inhabitants of neighbouring territories as well as Swiss merchants on their way to and from the Frankfurt fair.

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14. Vol. 2 (1906), 63.

15. *Ibid.*, 114 (citing Art. 22 of Hague Regulations of 1899, Schindler/Toman, 76).

16. *Ibid.*, 74.

17. Schwarzenberger, International Law, vol. 2, *The Law of Armed Conflict* (1968) ch. 39.

After Hagenbach's capture, the Archduke of Austria, as sovereign of Breisach, set up a tribunal of 28 judges from the Allied towns, and at his trial the accused pleaded that everything that he had done had been on the orders of his master, but the prosecution alleged that he had "trampled under foot the laws of God and man". The tribunal was of opinion that to accept such a defence would be contrary to the laws of God and, since the crimes were established beyond doubt, sentenced Hagenbach to death. In many ways the charge with its reference to the laws of God and of man seems like a predecessor of the provision of the Treaty of Versailles aimed at bringing the Kaiser to trial[18]:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties...
> 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.

While the Treaty called for the establishment of a specially established international tribunal, it did not specify the law which this tribunal would apply and by which the offences were to be judged. A somewhat similar hiatus is apparent in the Treaty provision[19] concerning the trial by military tribunals of "persons accused of having committed acts in violation of the laws and customs of war", who if found guilty are to "be sentenced to punishments laid down by law". While the Treaty does not indicate what law it has in mind, the Reichsgericht which delivered the *Llandovery Castle* judgment[20] was clearly aware that it was operating in accordance with international law:

> ... The firing on the boats was an offence against the law of nations.
> ... Any violation of the law of nations in warfare is ... a punishable offence, so far as, in general, a penalty is attached to the deed. The killing of enemies in war is in accordance with the law of the State that makes war..., only in so far as such killing is in accordance with the conditions and limitations imposed by the Law of Nations. The fact that his deed is a violation of International Law must be well known to the doer, apart from acts of carelessness, in which careless ignorance is a sufficient excuse. In examining the existence of this knowledge, the ambiguity of many of the rules of International Law, as well as the actual circumstances of the case,

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18. (1919) Art. 227 (112 B.F.S.P. 1; 13 Am. J. Int'l Law (1919), Supp.).

19. Art. 228.

20. *Loc. cit.*, n. 2 above.

> must be borne in mind, because in wartime decisions of great importance have frequently to be made on very insufficent material. This consideration, however, cannot be applied to the case at present before the Court. The rule of International Law, which is here involved [regarding the sinking of the hospital ship and the firing on the boats of the survivors], is simple and universally known. No possible doubt can exist with regard to the question of its applicability. The Court must in this instance affirm [the commander's] guilt of killing contrary to International Law...

Perhaps the earliest codification of the law of war was that prepared by Professor Lieber of Columbia University, during the American Civil War and promulgated by President Lincoln in 1863[21]. This reflects what was generally understood by the European states as constituting the law at the time and clearly provides for the trial and punishment of a variety of specified offences committed by troops against the inhabitants of invaded territory, but it makes no reference to the need to ensure that members of the United States armed forces are made aware of what they may and what they may not do, although by and large the offences listed are those which would be found in any national penal code. The first call for recognition of the need to inform the armed forces of the rules of war is to be found in the *Oxford Manual* prepared by the Institute of International Law at its Oxford meeting in 1880[22]. In the Preface the Institute states why it has drawn up its statement of the laws of war on land:

> 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 endless accusations. A positive set of rules, on the contrary, if they are judicious, serves the interests 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 virtues — it strengthens the discipline which is the strength of armies; it also ennobles their 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 sovereigns 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

21. U.S. Adjutant General's Office, General Orders No. 100 (Schindler/Toman, 3).

22. Institut de Droit International, *Tableau général des résolutions, 1873-1956* (1957), 180; Scott, *Resolutions of the Institute of Int'l Law* (1916) 26; Schindler/Toman, 35.

> impregnated with the special rights and duties attached to the execution of such a command. The Institute, with a view to assisting the authorities in accomplishing this part of their task, has given its work a popular form, attaching thereto statements of the reasons therefor, from which the text of a law may be easily secured when desired.

While the text of the *Oxford Manual* seems to satisfy the expressed desire of achieving a 'popular form', it must not be overlooked that the ordinary person, civilian or military, was unlikely to seek this document out. Furthermore, while the Institute might have been composed of the most eminent international lawyers of the day, it must be borne in mind that it was, as it is now, an unofficial learned society whose proposals possessed no binding force and could only aim at providing suggestions which, if acceptable to governments, would be enacted into law, either by way of statute or by treaty. It would appear that, despite the expressed desire of the Institute, little was done to make the contents of the *Manual* known to the members of the armed forces. Even when countries started issuing *Manuals of Military Law* with sections devoted to the law of war, these manuals were not issued to the troops or even all officers, and in many cases non-officers were actively discouraged from seeking access to them.

To some extent the *voeu* of the Institute did have an effect. In Hague Convention II of 1899[23] it was clearly provided in Article 1 that

> The High Contracting Parties shall 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

and the same provision was repeated in the IVth Convention of 1907[24], respecting the law of warfare on land.

The only other Hague Convention to deal with dissemination is No. X of 1907[25] for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864[26] which related to the amelioration of conditions of the wounded and sick of armies in the field. In its form, however, it differed from the wording in Convention IV and appeared to lay more emphasis on the

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23. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1918), 100 (Schindler/Toman, 57).

24. *Ibid.*

25. Art. 20, Scott, *op. cit.*, 163 (Schindler/Toman, 235).

26. I Am. J. Int'l Law (1907), Supp. 90 (Schindler/Toman, 203).

knowledge of those who were to be protected than of those whose conduct was restricted:

> The Signatory Powers shall take the necessary measures for bringing the provisions of the present Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public.

Although other Conventions agreed at the Hague dealt with such issues as the rights of neutrals and naval bombardment, the signatories apparently did not consider it necessary to include a provision seeking to ensure that the rules and prohibitions were made known to the personnel who were most directly affected and upon whose conduct it was necessary to rely to ensure compliance.

Perhaps even more surprising is the silence in this matter of the Rules regarding Air Warfare[27] drafted by the Commission of Jurists called for by the 1922 Conference of Washington. While it is true that these Rules were never adopted and so have no legal significance as such, they cannot be cavalierly ignored, for, "to a great extent, they correspond to the customary rules and general principles underlying the conventions on the law of war on land and at sea"[28]. While the Rules go into great detail as to what may not be done in aerial warfare, the members of the Commission apparently did not consider it necessary for the states which might adopt these Rules to undertake any commitment to make them known to their respective air forces. Equally strange is the silence of the Draft Convention for the Protection of Civilians against New Engines of War drawn up by the International Law Association at Amsterdam in 1938[29].

In what has now come to the described as humanitarian law in armed conflict, the International Committee of the Red Cross has consistently endeavoured to ensure that treaties relating to the wounded and sick or prisoners of war contain provisions obligating the parties to inform their personnel of the commitments involved. Article 27 of the 1929 Convention of the Amelioration of the Condition of the Wounded and Sick in Armies in the Field[30] is reminiscent of Hague Convention X. This reads

> The High Contracting Parties shall take the necessary steps to instruct their troops, and in particular the personnel protected, in

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27. 1923, 17 Am. J. Int'l Law (1923), Supp. 245 (Schindler/Toman, 139).

28. Ibid., 139; see, also, 2 Oppenheim, *International Law* (7th ed., 1952), 519; Spaight, *Air Power and War Rights* (1947) 42-3.

29. I.L.A., *Report of 40th Conference*, 40 (Schindler/Toman, 155).

30. 5 Hudson, *International Legislation* (1936), 1 (Schindler/Toman, 247).

> the provisions of the present Convention, and to bring them to the notice of the civil population.

A somewhat similar concern with the interest of those protected is to be found in the 1929 Prisoners of War Convention[31], for by Article 84 the text of this Convention is to be posted, "whenever possible, in the native language of the prisoners of war, in places where it may be consulted by all the prisoners". It even has to be communicated, when so requested, to prisoners "who are unable to inform themselves of the text posted." Presumably, it is anticipated that those responsible for the prisoners of war will be sufficiently acquainted with the terms of the Convention by such posting — that is, if they can read the language of the prisoners — for there is no obligation on the parties to make the terms known to their own personnel.

A somewhat new departure is to be found in the revised texts of the Geneva Conventions of 1949 which resulted from the desire of the International Committee of the Red Cross to bring the 1929 texts up to date, taking into consideration the experiences learned during the Second World War. Article 47 of the Convention on Wounded and Sick in the Field[32], and Article 48 of that on Wounded, Sick and Shipwrecked Members of Armed Forces at Sea[33] are much wider than their precursors, reflecting recognition of the fact that modern armies are frequently conscript in character and their personnel should, to the extent that that is possible, be aware of their obligations before enlistment, and certainly before the outbreak of hostilities:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

The 1949 Conventions on Prisoners of War[34] and the Treatment of Civilian Persons in Time of War[35] take due account of their specialist character:

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31. 5 ibid., 20 (Schindler/Toman, 261).

32. 75 UNTS 31 (Schindler/Toman, 295).

33. *Ibid.*, 85 (323).

34. *Ibid.*, 135 (345).

35. *Ibid.*, 287 (417).

> Art. 127, Ps W — The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.
>
> Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

The High Contracting Parties are bound to enact any legislation necessary to give penal effect to the Convention and, by Article 128,

> shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

The 1929 provision with regard to the posting of the Convention has been extended so that all regulations and orders must be in a language that the prisoners can understand.

The first paragraph of Article 144 of the Civilians Convention is in the same terms as Article 127 of the Prisoners of War Convention, but it proceeds

> Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions,

and the same requirement respecting intercommunication of legislation appears in Article 145.

At the present time there has been some widening of the concept of non-military objectives and a treaty now exists for the Protection of Cultural Property in the Event of Armed Conflict[36]. It cannot be denied that in the past the military have not been over-scrupulous in respecting cultural property and at times occupying forces have not hesitated to destroy monuments in the territory of their enemy. Moreover, even in peacetime states have on occasion considered that modernization is perhaps more important than the preservation of those national cultural monuments which might constitute

36. 1954, 249 UNTS 240 (Schindler/Toman, 525); see, also, Williams, *The International and National Protection of Movable Cultural Property* (1978), 15-51; and Protocol I, Art. 53.

part of "the cultural heritage of every people." Cultural property is defined as

> a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts; books and other objects of artistic, historical or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositaries of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
>
> c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b) to be known as 'centres containing monuments'.

This definition is so comprehensive and yet so vague that it is clear some measures of dissemination to inform the military and others concerned will be absolutely vital if the Convention is to have any meaning, especially as troops engaged in actual operations are unlikely to view as protected an article regarded by the enemy or a neutral as having significant cultural significance and enjoying immunity, if respect for such an object or group of them might interfere with the success of the operation or involve its cancellation. The draftsmen seem to have been aware of this danger and of the need to inform troops of their obligations. There are two provisions relating to the dessemination which to some extent are repetitive:

> Art. 7 — The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit for the culture and cultural property of all peoples. The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purposes will be to secure respect for cultural property and to co-operate with civilian authorities responsible for safeguarding it.
>
> Art. 25 — The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries. They undertake, in particular, to include the study thereof in their programmes of military

> and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property.

It is obvious that the only way such 'property of great importance to the cultural heritage of every people' can be protected without the items becoming so numerous and trivial as to be ridiculous — for every person's idea of what constitutes such property from the point of view of, for example, art is likely to be highly subjective — will be by the compilation of agreed lists that will be available to the armies in the field. Such lists are envisaged, but later experience suggests that these may perhaps not be available by the time armed conflict begins and, as became clear during debate at the 1976 session of the Diplomatic Conference on Humanitarian Law in Armed Conflict, it can easily happen that one belligerent is so determined not to recognize its adversary, that it will not even agree to the compilation of such lists if it means that co-operation is in any way necessary with what is now known as the 'adverse party' rather than the 'enemy'. Nevertheless, Article 53 of Protocol I prohibits the commission of

> any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples

but it gives no hint as to how the man in the field is to be informed of their identity. Since the Article is prefaced by the statement that it is adopted "without prejudice to the provisions of the (1954) Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", it must be presumed that the draftsmen of the Protocol were satisfied with the identification process embodied in that Convention. Article 6 of the Convention requires cultural property to "bear a distinctive emblem so as to facilitate its recognition", and by Article 16

> the distinctive emblem... shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle). The emblem shall be used alone, or repeated three times in a triangular formation (one shield below)...

Clearly, military personnel will have to receive instruction as to the nature of this emblem, as well as all other emblems now recognized as conferring protection, but neither the Convention nor the Protocol indicates how they are to be made aware of these emblems. Presumably, the general provision for dissemination embodied in

the Protocol is regarded as sufficient. Cynics might be excused if they regard such provisions as somewhat idealist and completely out of tune with the realities of active warfare. Their cynicism will not be reduced by the further provision in Article 17 of the Convention that

> the distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party.

This will necessitate further instruction to the man in the field as to who the 'competent authority' of the enemy for this purpose is — and is it to be expected that operations are to cease while some member of an attacking force examines the immovable cultural object to ascertain whether it has the correct certificate affixed?

In the years since the Second World War most of the armed conflicts which have occured have been non-international, so that generally speaking there have been no rules of international law, with the possible exception of the minimal rules of humanity as outlined in common Article 3 of the 1949 Geneva Conventions, applicable, for states have traditionally relied upon the argument that civil wars and the like are matters of domestic jurisdiction with which the rest of the world has no concern. And this principle is confirmed by Article 2 (7) of the Charter of the United Nations unless there is a threat to international peace[37]. However, an early effort at bringing civil war situations within the purview of international law is to be found in the Nyon Agreement of 1937[38] aimed at suppressing unlawful submarine attacks upon merchant ships trading with ports under the control of, primarily, the Spanish Government. By Article 1

> The participating Powers will instruct their naval forces to take the action indicated in paragraphs II and III below with a view to the protection of all merchant ships not belonging to either of the conflicting Spanish parties.

While it may be argued by the purist that this is not really directed at imparting rules of humanitarian behaviour to the citizens or

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37. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this provision shall not prejudice the application of enforcement measures under Chapter VII [with respect to threats to the peace, breaches of the peace and acts of aggression]."

38. 181 LNTS 137 (Schindler/Toman, 667).

military personnel of any contracting party, in the sense that they may need to know the law in order to defend themselves, it is nevertheless an instance of an international obligation that requires states parties to the agreement to inform their personnel of the new law that has been created and which they would be required to observe and carry through.

It became clear in Korea and Vietnam that the law of war as it had been drawn up at the Hague and Geneva was now out of date. For one thing, there was no provision with regard, for example, to environment protection, and when the International Committee of the Red Cross drew up its draft proposals for amendments to the 1949 law to be presented to a diplomatic conference on humanitarian law in armed conflict, it decided to take the opportunity, in so far as it could, to bring the traditional law up to date, as well as to attempt to extend at least the basic principles of humanitarian law to non international conflicts too. This is not the place to discuss the proposals embodied in the two Protocols intended to be additions to the Geneva Conventions and aimed at achieving this end.[39] We are concerned solely with the problem of dissemination and enlightenment of those likely to be called upon to give effect to the new rules, whether they be described as part of the law of war or as rules of humanitarian law. Before looking at the provisions of the Protocols it should be pointed out that it matters little what conventions say or require, if the states which are parties to them do not ensure that their military personnel are in fact sufficiently aware of their provisions and understand what is required of them as not to be likely to breach their provisions.

The operations in Korea and Vietnam and the United States courts martial arising therefrom[40] indicate that there was something gravely lacking in the education being given to United States armed forces, and perhaps indicating that not enough emphasis was being imparted to officers to indicate that the United States accepted the view expressed in Article 22 of the Hague Regulations that "the right of belligerents to adopt means of injuring the enemy is not unlimited", even though this article is reprinted in the United States Department of the Army Field

39. See, e.g., Green, 'The New Law of Armed Conflict', 15 Canadian Y.B. of Int'l Law (1977), 3.

40. See, e.g., Green, 'Superior Orders and the Reasonable Man', 8 Can. Y.B. Int'l Law (1970), 61, 96 *et seqq.*; *Superior Orders in National and International Law* (1976), 126 *et seqq.*

Manual on the Law of Land Warfare[41], accompanied by the comment

> The means employed [in injuring the enemy] are definitely restricted by international declarations and conventions and by the laws and usages of war.

It is perhaps because of what happened in these two theatres that the United States military authorities thereafter issued a variety of pamphlets on the teaching of the law of war to the armed forces[42]. However inadequate these might be,[43] they show a determination to make some effort to ensure that American troops have at least some knowledge of what they may and may not do during armed conflict. As a result, where they are concerned there may now be some validity in upholding the authority of the *ignorantia juris* maxim.

Among the new departures in Protocol I is a provision concerning the protection of journalists[44]. This aims at giving journalists who are not accredited war correspondents some protection by means of an identity card to ensure that when captured they are treated as civilians. Obviously, members of the armed forces will have to be aware of the nature of this card and know that any attempt by them to use such an identity certificate would amount to a breach of the law of war. In fact the British Government has now ceased the practice in Northern Ireland of having soldiers in civilian clothing passing themselves off as regular journalists, thus indulging in a form of 'perfidy', while at the same time endangering true journalists entitled to such cards and the civilian status concomitant therewith[45].

Similar measures of instruction will be necessary in view of the new provisions concerning the protection of civil defence personnel[46], who are now protected by a distinctive emblem comprising a blue equilateral triangle on an orange background. Moreover civilian defence personnel, like journalists, and medical and

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41. Dept. of the Army, FM27-10 (1956), para. 33.

42. Dept. of the Army, 27-200, 'The Law of Land Warfare — A Self-Instructional Text' (1972); ASubjScd 27-1 (1970), 'The Geneva Conventions of 1949 and Hague Convention No. IV of 1907' (2-hour lecture course).

43. For criticisms see Green, 'Aftermath of Vietnam: War Law and the Soldier', 4 Falk, *The Vietnam War and International Law — The Concluding Phase* (1976), 147, 168 *et seqq.*).

44. Art. 79.

45. See Green, letter on 'Journalists in Battle Areas', *The Times* (London), 1 Mar. 1976; see, for action likely to endanger such journalists, report by Robert Fisk, "Times correspondent riding shotgun with Soviet Army", *The Times*, 21 Jan. 1980.

46. Ch. VI.

religious personnel, are required to carry a distinctive identity card. The truly educated soldier anxious not to deny immunity to any protected person or object will have to carry a booklet of his own listing all the distinctive emblems and reproducing the relevant identity cards. Failure to do this may well lead to a charge of breaches of the law of war, to which it will now be impossible for him to plead ignorance of the law. While the national authorities may have carried out their obligations to teach the new law, it can hardly be expected that the ordinary man in the field will be able to remember the shape and colour of every distinctive emblem, or the particulars which he would find on a properly issued identity card.

Protocol I imposes an obligation to disseminate the Geneva law as amended. By article 83

> the High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and the Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Since it may well happen that this has been inadequately done, or since issues may arise which lead the troops to question whether particular orders or activities comply with the Geneva law, and as in time of total war there may be insufficient time to impart such instruction before conscripts are sent into action, Article 82 attempts to fill this potential hiatus:

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed 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.

A number of points arise in connection with these proposals. In the first place, Article 82 implies that some of the officers attached to the judge advocate division of a military force should be knowledgeable in at least that part of the law of war that may be described as humanitarian law. Such a requirement would almost certainly necessitate a revision of the training afforded by the relevant military services and perhaps also the placing of a greater emphasis on the international law of war with particular reference to the principles of humanitarian law in armed conflict. The reason that

states are only required to 'encourage' civilian study of these principles is to be found in the constitutional difficulties confronting some federal states where education is not within the central government's competence, and also to preserve the position in those countries where independence is demanded by such educational authorities as universities in so far as their curricula and teaching programmes are concerned. There can be little doubt that, even if these provisions are conscientiously carried out, military commanders will have to recognize that, while their function may be to conduct hostilities with a view to the early defeat of the enemy, regulation of the conduct of the men in their command so as to ensure compliance with the law and its restrictions is a fundamental obligation, as well as a policy matter of importance to national dignity. If this occurs, there are likely to be less transgressions of the law and certainly fewer opportunities for those accused of breaches to plead ignorance in their defence. However, there is inherent in the provisions the assumption that proper educational programmes, at least of the military, conducted by properly qualified persons will be instituted. This draws attention to activities already commenced in cooperation with the International Committee of the Red Cross by the Institut Henri Dunant in Geneva. Under the direction of Professor Pictet, who is also Vice President of the International Committee of the Red Cross, the Institut has introduced a number of courses in humanitarian law in armed conflict which have already been attended by members of the armed forces from various countries, as well as by graduate students. In addition, the Institut is anxious to organize seminars for interested parties and on a regional basis, and is receiving encouragement and cooperation particularly from some of the developing countries. Where developed countries are concerned, difficulties are encountered in view of historical backgrounds and a desire to follow their own tradition. The International Institute of Humanitarian Law at San Remo also runs such courses. It is to be hoped that in both cases care is taken that idealism and belief in the principles of humanitarian law do not prejudice the awareness of the instructors as to the realities of war. If they ignore these and elevate the principles of Geneva to too high a level, rather than achieving their object of instruction to ensure respect for the law, they may induce an attitude of disbelief and cynicism.

Problems of a somewhat different kind arise concerning Protocol II[47] which deals with non international armed conflicts. In

47. 16 Int'l Legal Materials (1977), 1442.

so far as the regular armed forces are concerned, their position is already governed by the provisions in Protocol I just referred to, although it could easily be argued that since Protocol I only deals with international conflicts, any education in relation thereto is completely irrelevant for non international conflicts. Specific steps must therefore be taken to ensure that no such escape from the obligation to observe humanitarian law is possible. In the event of a non international conflict, however, one of the contestants is likely to be recruited primarily from civilians, as well as dissident members of the armed forces. If the Protocol is to have any meaning and come into operation immediately upon the conflict becoming sufficiently serious to be considered an armed conflict rather than a riot or a minor insurrection, it will be necessary for the civilian population to be educated in the basic principles of humanitarian law as part of the country's ordinary educational programme and regardless of the likelihood of any conflict arising. However, any attempt to postulate an international obligation requiring states to educate their subjects as to their rights and duties in time of civil war or other non international armed conflict may easily be construed as an attempt to interfere in the domestic jurisdiction of a state. Further, it smacks of encouragement to dissidents to resort to armed conflict, secure in the knowledge that the government is subject to restrictions on its freedom in restoring order and re-establishing its authority, having already taught those who are now opposed to the government exactly what rights they will be entitled to, and which might limit the normal operation of the criminal law, should they decide to resort to armed force. In fact, at Geneva this proposal met with opposition from some Latin American countries, where it might be thought that their past history suggests a real likelihood of non international conflict breaking out with the resultant creation of a Protocol II situation. A further objection was raised by the Soviet Union which contended that any obligation to educate its civilian population along such lines would be contrary to the prohibition contained in the Law on the Defence of Peace[48] which forbids war propaganda in whatever form it is carried out, arguing further that such education would also be contrary to the Soviet commitment to educate for peaceful purposes. In view of these reservations, it is perhaps not surprising that although instruction of the civilian population as to the law regulating civil conflict is of prime importance, all that appears in Protocol II is the simple statement

48. 21 Mar. 1951, c. Tunkin, *Theory of International Law* (1974), 85-6.

> The Protocol shall be disseminated as widely as possible[49].

leaving it to each state to decide on the identification of those to whom the dissemination should be directed and the manner in which this should be done.

As originally drafted, and in fact accepted in Committee, the commitments for dissemination were somewhat more effective, and included an obligation[50]

> to disseminate the present Protocol as widely as possible in time of peace, so that it may become known to the armed forces and to the civilian population.
>
> In time of armed conflict, the Parties to the conflict shall take appropriate measures to bring the provisions of the present Protocol to the knowledge of their military and civilian agents and persons subject to their control.

While one may sympathize with a government which finds it objectionable to accept an obligation to educate its people as to their rights against the government should they decide to resort to armed force to overthrow that government, this unaccepted provision appears reasonable. The anti-government forces will not be a party to the Protocol which is only open for signature or accession by parties to the Geneva Conventions, and is thus only available to states. It would seem, therefore, that unless this anti-government contestant makes a statement accepting the obligations of the Protocol, there would have been imposed upon the government a unilateral obligation as to its operations for re-establishing its authority and, moreover, a requirement to inform the military and the civilians supporting if of their duties to observe the provisions of the Protocol, even though their opponents were not so doing. On the other hand, it might be argued that by becoming a party a state accepts the obligations for all its citizens, so that during a non international conflict even its opponents would be, in law at least, still bound by the state's international undertakings. This one-sidedness of burdens might have proved in practice, therefore, more apparent than real. What is perhaps of more significance than the rather narrow obligation that the Protocol imposes upon parties is the absence of any provision like that in Protocol I relating to the teaching of Protocol II in military curricula. The reason for this lacuna lies in the fact that some countries were unwilling, in relation to a non international conflict, to accept directions as to the precise method by which their armed forces were to be informed of their

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49. Art. 19.

50. I.C.R.C. Doc., D/1388/1 b (1976).

obligations under Protocol II, especially as this Protocol is intended to limit the freedom of action of the contestants in such a conflict, including the rights normally accruing to state forces in upholding state authority during an armed confrontation.

There can be little doubt that if the states parties to the Geneva Conventions and the two amending Protocols, particularly Protocol I, take their obligations regarding dissemination seriously, and in fact introduce proper educational programmes[51], there would be more realization by both the armed forces and the civilian population that there is in fact a real law of war carrying as much risk of punishment in the event of its breach, as is the case with national criminal law. At the same time, no member of the field forces would be able to contend, if charged with a breach of the law, that not only was he unaware of the existence of any particular rule, but that no attempt had ever been made to enlighten him. Moreover, military commanders would have to rethink their attitudes to the whole conspectus of the law of war and give it its due and proper place in military training. In so far as the civilian population is concerned, if the obligations are to be fully carried out, both as regards Protocol I and in any real sense for Protocol II, there would be a need for governments to rethink the nature of their educational programmes, despite the possibility that schools and pacifists among the teaching staffs might offer real objections. In fact, in spite of tradition, there would have to be some measure of cooperation between civilian education authorities and the military. Since this would almost certainly be rejected in many countries, use might have to be made of the personnel of the national Red Cross Society. But this too would often mean a rethinking of the entire approach and philosophy of such Society. For the main part, the members of the national Society are concerned with internal medical auxiliary aid programmes and the offer of assistance in the event of national and sometimes international catastrophes, but they are hardly concerned with problems of armed conflict or the law relating thereto. Perhaps, if they were able to enlist qualified persons, and this again raises the problem of cooperation with the military or at least of the legal branch, this would be reasonable. Otherwise, it must be remembered that the international law of peace and war, as well as the principles of humanitarian law, is highly technical and the terms of treaties are often ambiguous if not actually obtuse. For unqualified persons to attempt to educate others as to their meaning may be just as dangerous as the absence of any education at all.

51. This is already being done in the Canadian forces.

While in the past it might have been possible for any state to argue that while common sense dictated that it should educate its troops in the law of war, the legal obligation so to do was somewhat nebulous and rather in the nature of a pious hope. Now, however, the obligation is clearly laid down. What may still be necessary is the establishment of some observation centre or clearing house which might be able to oversee and advise whether this is being carried into effect in a reasonable manner such that ordinary soldiers may understand, while a bare minimum may be presumed as equally accepted by all services regardless of arm or nationality. To some extent this is being attempted by the Henri Dunant Institut, while the International Committee of the Red Cross may be expected to continue to issue pamphlets outlining the basic minima of obligations in the field of humanitarian law. These educational activities, combined with the obligation in the Conventions to report to the International Committee which, presumably, is entitled to comment on such reports, may be the beginning of a new era of education of both the military and the civilian populations in that part of international criminal law which is concerned with breaches of the principles of international humanitarian law in time of armed conflict. Should this be the case, we would see the dawn of an era in which it was true of the man in the field during combat, as it is for the civilian charged with a criminal offence, that *ignorantia juris non excusat.*