The Development and Principles of International Humanitarian Law

Edited by
Michael N. Schmitt and
Wolff Heintschel von Heinegg

The Library of Essays in International Humanitarian Law

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Series Editors: Michael N. Schmitt and Wolff Heintschel von Heinegg

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2012 by Ashgate Publishing

Published 2016 by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN
711 Third Avenue, New York, NY 10017, USA

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
The development and principles of international humanitarian law. – (The library of essays in international humanitarian law)
1. Humanitarian law – Interpretation and construction.
2. Humanitarian law – History.
I. Series II. Schmitt, Michael N. III. Heintschel von Heinegg, Wolff.
341.6'7–dc23

Library of Congress Control Number: 2011946287

ISBN 9780754629344 (hbk)

Contents

PART II PRINCIPLES

Acknowledgements

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Cambridge University Press for the essays: Jean-Marie Henckaerts (2005), 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', *International Review of the Red Cross*, **87**, pp. 175–97. Copyright © 2005 International Committee of the Red Cross; Yves Sandoz (2003), 'International Humanitarian Law in the Twenty-First Century', *Yearbook of International Humanitarian Law*, **6**, pp. 3–40. Copyright © 2003 Y. Sandoz; Frits Kalshoven (1999), 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit', *Yearbook of International Humanitarian Law*, **2**, pp. 3–61. Copyright © 1999 TMC Asser Press and F. Kalshoven.

Copyright Clearance Center for the essays: Dietrich Schindler (2003), 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation', *Journal of the History of International Law*, **5**, pp. 165–88. Copyright © 2003 Kluwer Academic Publishers; Theodor Meron (2000), 'The Humanization of Humanitarian Law', *American Journal of International Law*, **94**, pp. 239–78. Copyright © 2000 American Society of International Law; Burrus M. Carnahan (1998), 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity', *American Journal of International Law*, **92**, pp. 213–31. Copyright © 1998 American Society of International Law; George H. Aldrich (1986), 'Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I', *Virginia Journal of International Law*, **26**, pp. 693–720. Copyright © 1986 Virginia Journal of International Law; Josef L. Kunz (1951), 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision', *American Journal of International Law*, **45**, pp. 37–61. Copyright © 1951 American Society of International Law; Jean S. Pictet (1951), 'The New Geneva Conventions for the Protection of War Victims', *American Journal of International Law*, **45**, pp. 462–75. Copyright © 1951 American Society of International Law; Theodor Meron (1992), 'Shakespeare's Henry the Fifth and the Law of War', *American Journal of International Law*, **86**, pp. 1–45. Copyright © 1992 American Society of International Law; Chris af Jochnick and Roger Normand (1994), 'The Legitimation of Violence: A Critical History of the Laws of War', *Harvard International Law Journal*, **35**, pp. 49–95. Copyright © 1994 Harvard University Law School; William Gerald Downey, Jr (1953), 'The Law of War and Military Necessity', *American Journal of International Law*, **47**, pp. 251–62. Copyright © 1953 American Society of International Law; James W. Garner (1915), 'Some Questions of International Law in the European War', *American Journal of International Law*, **9**, pp. 72–112. Copyright © 1915 American Society of International Law; Theodor Meron (2000), 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', *American Journal of International Law*, **94**, pp. 78–89. Copyright

Series Preface

Over half a century ago, Sir Hersch Lauterpacht, then Whewell Professor of International Law at the University of Cambridge, observed that 'if international law is the vanishing point of law, the law of war is at the vanishing point of international law'. He was wrong. While it is true that the law of war, or international humanitarian law as it has become known, is particularly vulnerable to the vagaries of political, social and economic influences, it has nevertheless proven itself a robust normative regime that positively shapes man's most destructive undertaking – warfare. No other body of law can be credited with saving more lives or alleviating as much suffering.

These six volumes comprise a collection of particularly significant works on humanitarian law. They are intended for use by scholars, practitioners and students who seek to better understand the topics addressed herein, together with their lineage. Just as importantly, they allow users to begin to separate the wheat from the chaff. The proliferation of publications in the field, in part a sad reflection of the fact that armed conflict remains so horribly pervasive, as well as the digitization that facilitates access to journals that would not otherwise be readily available, often results in information overload. A Ministry of Defence legal adviser looking for background material to address a situation involving belligerent occupation will, for instance, uncover scores of articles. The student writing a dissertation on the law of targeting or a scholar penning an article on detention will find him- or herself buried in material. Unfortunately, some of what they unearth will prove misguided, out of context or simply wrong. This collection will not break down these obstacles in their entirety. But it does afford a useful starting-point by offering topically arranged humanitarian law journal essays that have been thoroughly vetted by many of the top experts in the field.

In this regard, a few words on the process used to choose the essays are helpful. It began with the selection of those subjects that we believed comprised the *sine qua non* of international humanitarian law – development, principles, scope, application, conduct of hostilities, detention, occupation, implementation and enforcement. We then contacted over 60 recognized humanitarian law experts, both academics and seasoned legal advisers. They were provided the topics and asked in a very open-ended fashion to identify pieces they considered 'classics', believed to be 'essential' in a compilation of this nature, have found to be especially influential, used regularly in their work or deserved greater attention on the basis of their quality and insights. The experts were asked to pay particular attention to those essays that may have been 'forgotten' over time, but merited 'rediscovery'. Many of them responded in depth. We also benefited from the work of a five-member team from Emory Law School's International Humanitarian Law Clinic which conducted an exhaustive literature review to locate essays relied on regularly by writers – the 'usual suspects', if you will. Finally, as editors we took the liberty of adding a few pieces to the pool *sua sponte*.

Armed with a daunting inventory of candidates for inclusion, we began the difficult task of whittling it down. Many essays proved to be consensus choices among the experts; often the Emory team had also identified them. These provided the skeleton for the project. We then fleshed out the collection based on two key factors: quality assessments by the experts and topic coverage. The latter criterion proved particularly central to the process, for our objective was to produce a collection that not only contained thoughtful and influential works, but also addressed most key humanitarian law topics.

Beyond esteem factors and topical relevance, some essays were selected on account of their temporal significance, that is, having been written at key junctures in the development of international humanitarian law. As an example, the collection includes pieces written in the immediate aftermath of the First and Second World Wars and the attacks of 11 September 2001. Others were published soon after adoption of the 1949 Geneva Conventions or the 1977 Additional Protocols. We hope they both afford insight into the perspectives at play as humanitarian law was evolving and provide a context for understanding the genesis of contemporary norms.

In the end, we were unable to include many insightful and influential works. Exclusion was frequently a mere matter of being cursed with too many good choices on a particular topic. Although no reader is likely to be entirely satisfied with the essays included, or comfortable with the omission of others, we hope the rigorous selection process has resulted in a collection that is both useful and enlightening.

This project would not have been possible without the help of many supporters. We are, of course, deeply indebted to the many international experts who took time from their busy schedules to offer recommendations and comments over the course of the three-year effort. Although we cannot possibly name them all, particular appreciation is due to Ken Anderson, Yutaka Arai, Louise Arimatsu, Laurie Blank, Gabriella Blum, Bill Boothby, Ove Bring, Claude Bruderlein, Knut Dörmann, Alison Duxbury, William Fenrick, Dieter Fleck, Steven Haines, Agnieszka Jachec-Neale, Dick Jackson, Marie Jacobsson, Claus Kress, William Lietzau, Noam Lubell, Lindsay Moir, John Murphy, Sean Murphy, Mary Ellen O'Connell, Bruce Oswald, Hays Parks, Stephen Pomper, Jean-Francois Queguiner, Noelle Quenivet, Adam Roberts, A.P.V. Rogers, Peter Rowe, Joseph Rutigliano, Robert Sloane, Dale Stephens, Ken Watkin and Sean Watts.

We are equally indebted to the brilliant group of young scholars at Emory Law School, whom we dubbed our 'IHL Detectives' – Flora Manship, Carmel Mushin, Jeannine Privat, Nandini Rao and, in particular, Benjamin Farley. Their ability to identify and locate 'lost treasures' of humanitarian law was awe-inspiring. All have since graduated, and we wish them the very best in their professional careers.

Three people deserve special mention and gratitude. Laurie Blank, Director of the Emory's International Humanitarian Law Clinic, ably and tirelessly supervised her team. Beyond supervision, she also devoted an enormous amount of her own time to the substance and administration of the project. At European University Viadrina, Kaya Kowalski took on the task of collating materials and later working with us as we made the final selections for the collection. She was unflappable in the face of our long and sometimes contentious deliberations and always exceptionally good-natured and professional. Finally, we thank our editor at Ashgate, Valerie Saunders, who showed the patience of Job throughout.

We hope this collection proves valuable in the years to come. For our part, it was a fascinating endeavour.

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Introduction

Development

Part I of this volume is devoted to the development of international humanitarian law. The term 'development' is not to be understood as synonymous with the history of that body of law, for the volume's purpose is not to provide a comprehensive historic overview of legal rules and principles applicable in armed conflict from its roots – European and non-European. Although the 'fathers' of modern international law, including Vitoria, Gentili, Suárez, Grotius and other eminent scholars such as Bijnkershoek, Vattel, Pufendorf and Wolff laid the foundations of modern international humanitarian law, an adequate examination of the different (and very diverse) phases marking the historic development of this body of law would exceed available space and likely fail to capture the full complexity and scope of their work. Therefore, we have decided to approach the development of international humanitarian law from the perspective of the 'modern' law of war – that is, as it has developed since the middle of the nineteenth century.

'International humanitarian law' was traditionally understood as comprising the rules governing the protection of victims of armed hostilities ('Geneva' Law), whereas the conduct of hostilities was subject of the law of war ('Hague' Law), a distinction the 1977 Additional Protocol I to the 1949 Geneva Conventions overcame. The terms 'law of war', used in some of the essays contained in this volume, and international humanitarian law are synonymous. Neutrality law is the exception; although it has remained a distinct part of the 'laws of war', it is not, *strictu sensu*, a component of 'international humanitarian law'. That said, the volume includes one essay dealing with the law of neutrality because its rationale and its essentials are of continuing relevance to the relationship between belligerents and states not parties to a conflict, including their respective nationals.

In 'Shakespeare's Henry the Fifth and the Law of War' (Chapter 1), Theodor Meron approaches the law of war from an unusual perspective – Shakespeare's play *The Life of Henry the Fifth*. For Meron, the work offers 'an ideal vehicle for consideration of the late medieval practice and rules of warfare' (p. 3). It is important to note that the practice and rules referred to in the play are not those of the 'fathers' of international law, as no evidence exists that Shakespeare was familiar with their works. Rather, Shakespeare relied on Henry V's proclamations, with which he became familiar through Holinshed's and Hall's *Chronicles*. Meron assesses Shakespeare's text in the light of both fifteenth-century law and the writings of fifteenth- and sixteenth-century scholars (including Vitoria and Gentili). He employs these foils to examine the law's evolution since Shakespeare's times. This unconventional approach produces a rich contribution to the understanding of international humanitarian law's history and development.

Having identified the law applicable at the time of Henry V and of Shakespeare, Meron scrutinizes the 'just cause' (a requirement for waging war and causing death) of the 1415 invasion of France. The effect of a 'just cause' on the legality of the conduct of hostilities was

quite remarkable at the time, but later declined in importance (as evidenced by the works of Vitoria, Gentili, Suárez and Ayala). Today, as Meron notes, the lawfulness of resort to armed force has no bearing on the equal application of the *jus in bello*, although there have been some notable endeavours to interpret and apply the *jus in bello* in the light of the *jus ad bellum*. This subject is dealt with in *The Scope and Applicability of International Humanitarian Law* in this series.

As regards the *jus in bello* (international humanitarian law), Meron first examines the rules applicable in the fifteenth and sixteenth centuries to a declaration of war; they were later prominently codified in Article 1 of the 1907 Hague Convention Relative to the Opening of Hostilities. Despite the fact that a declaration of war is no longer a precondition to the application of international humanitarian law, by Common Article 2 of the 1949 Geneva Convention such law still continues to apply to situations of 'declared wars'.

Meron then turns to the issues of responsibility and liability. In the late medieval feudal structure, the king was not responsible for his soldiers' improper acts, but a commanding officer could be held criminally responsible for them. The individual criminal responsibility of military commanders is therefore not a twentieth-century concept (*Yamashita* case). With the emergence of absolutist structures at the end of the Middle Ages, the rules regarding responsibility and liability evolved. For instance, Gentili and Grotius recognized liability for neglect if the king had knowledge of a wrong. In 1907 states accepted the imposition of state responsibility for violations of international humanitarian law in Article 3 of Hague Convention IV.

Also noteworthy are Meron's discussions of siege, occupied territory, prisoners of war and the legal status of heralds and ambassadors. They offer readers a unique insight into the state of the *jus in bello* during the late Middle Ages, the writings of the 'fathers' of international law and the manner in which international humanitarian law has developed since the days of Henry V.

'The Legitimation of Violence: A Critical History of the Laws of War' by Chris af Jochnick and Roger Normand (Chapter 2) is the first of their two-part legal analysis of the 1991 Gulf War. A rather sceptical examination of the historical development of international humanitarian law, it 'challenges the notion that the laws of war serve to restrain or "humanize" war' (p. 50). In particular, the authors reject the common perception of international humanitarian law as a well-balanced compromise between military necessity and humanity. For them, the 'laws of war have been formulated deliberately to privilege military necessity at the cost of humanitarian values' (ibid.). They 'have facilitated rather than restrained wartime violence' (ibid.).

Jochnick and Normand argue that the principle of distinction and rule of proportionality do not limit the conduct of hostilities for reasons of humanity, but simply derive from the principle of war known as 'economy of force'. In other words, they are merely 'inherent restraints dictated by military self-interest' (p. 54). Similarly, they suggest that, although the seminal codifications of international humanitarian law that followed major wars may have been prompted by 'noble sentiments', eventually 'military concerns have dictated the substantive content of the laws of war' (p. 56). Thus, international humanitarian law serves as a humanitarian veil that influences the discourse regarding the legitimacy of armed hostilities and is designed to secure public support for war.

Jochnick's and Normand's critique may not be as relevant as they believe. The fact that international law in general, and international humanitarian law in particular, are the product of a congruence of self-interests on the part of states does not, as such, justify the conclusion that the principles underlying it are of negligible import. Recent practice has aptly demonstrated the continuing, and growing, relevance of the principle of humanity. The attention afforded to application of the principle of distinction and rule of proportionality is illustrative.

Although the authors retain a critical perspective throughout the essay, their discussion of the development of the 'modern' *jus in bello* is useful. They quickly dispense with the persistent misperception that wars were fought without legal constraint prior to the codifications of the nineteenth century. Yet, they suggest that the more or less sophisticated rules in place neither abolished atrocities nor served genuinely humanitarian objectives. Rather, they protected the interests of 'privileged knights and nobles' (p. 61). Consistent with their overriding theme, Jochnick and Normand maintain that the early laws of war, especially those identified in the writings of the 'fathers' of international law, were nothing but lip service paid to the just war doctrine and had no lasting impact on the conduct of hostilities.

The discussion of the historical phase preceding the codifications of the nineteenth and twentieth centuries begins with an analysis of the concept of *Kriegsraison.* According to the authors, it has not been replaced by *Kriegsmanier* – that is, the laws of war. Instead, it survives in the form of the principle of military necessity, thereby enabling belligerents to cloak atrocities in purported legal legitimacy.

Jochnick and Normand illustrate their position by reference to the Lieber Code, the humanitarian provisions of which are subject to derogation 'based on an open-ended definition of military necessity' (p. 65), as well as the 1868 St Petersburg Declaration, the 1874 Brussels Declaration and the 1907 Hague Conventions. The latter are adjudged to be 'humanitarian failures' that did little to deter the atrocities of the First World War (p. 68). Indeed, for the authors, the late nineteenth- and early twentieth-century codifications merely contain rules on 'obsolete methods or means of warfare whose limitation did not put one or more states at a disadvantage' (p. 77). Unsurprisingly, Jochnick and Normand arrive at similarly negative conclusions vis-à-vis the inter-war codification efforts and the broader relevance of international humanitarian law during the First World War. The findings of the Nuremberg Tribunal are even said to have 'actually bolstered the rights of belligerents to engage in "normal" wartime atrocities' (p. 95).

The authors conclude by claiming that the 'fact that nations have adopted a legal framework that allows them to conduct wars relatively uninhibited by humanitarian constraints does not preclude the development of alternative legal frameworks that effectuate different values and yield different results' (p. 95). Whether or not one shares their critical assessment, the essay is worth reading because it approaches international humanitarian law from a perspective that deviates from accepted views.

In 'Some Questions of International Law in the European War' (Chapter 3), written as the First World War was underway, James Garner assesses four legal issues raised by that conflict: (1) neutrality, (2) use of naval mines, (3) aerial bombardment of undefended towns, and (4) destruction of protected objects 'as punitive measures'.

He first addresses the violation of Belgian neutrality in 1914. Garner's analysis is more complex than simply finding that Germany violated the law of neutrality laid down in the 1907 Hague Convention V (which he seems to accept as reflective of customary international

law) and the Treaty of 1839. On the contrary, he accepts the premise of a right of self-preservation as a justification for transit across Belgian territory (although he concludes that the justification was a mere pretext).

The acknowledgement by Garner and other contemporary writers of the concept of self-preservation in cases where the violation of neutrality is necessary 'and not merely a simple utility' (p. 105) is particularly interesting. His reference to, inter alia, the *Caroline* case suggests that Garner is in fact making use of the right of self-defence as a justification for the violation of neutral status.

In view of the German offer to simply transit Belgium and compensate the Belgians for the act after the war, Garner asks whether Belgium would have been entitled to take a 'benevolent' position by allowing the transit. Until the first half of the nineteenth century, most scholars (including Grotius, Vattel and Wheaton) shared the view that a neutral state may permit the right of passage if it is granted impartiality. Writers of the second half of the century took the opposite view. Garner agrees with the latter, concluding that '[i]f any doubt existed ..., it has been removed by the Hague Convention' – that is, by Articles 2 and 5 of Hague Convention V. It should also be noted that Garner affirms a right and duty on the part of Great Britain to intervene in order to prevent violation of the Treaty of 1839, by which the neutrality of Belgium had been established.

The second section of the essay deals with the German practice of 'scattering mines indiscriminately' in the open sea (p. 111). Garner begins with an overview of the drafting history of the 1907 Hague Convention VIII. Despite observing that 'its provisions for the security of neutral shipping are inadequate', he correctly concludes that 'the statement sometimes made that the convention prohibits the laying of mines in the open sea is quite without foundation' (p. 115). Nevertheless, Garner considers the German practice as being in violation of the laws of war based on the International Law Association's 1906 finding that the use of naval mines in the open seas is absolutely prohibited. This interesting conclusion is at odds with the provisions of Hague Convention VIII.

Garner next turns to aerial warfare, a novel method of warfare that, in 1915, was unregulated by treaty law. States participating in the Second Hague Peace Conference had been unwilling to 'surrender the advantages of a mode of warfare the possibilities of which had been fully demonstrated' (p. 121). However, Article 25 of the 1907 Hague Regulations, amended upon motion by the French delegation, covers aerial bombardments if and to the extent that the places concerned are undefended. As to the term 'undefended', Garner argues that it is not synonymous with either 'unfortified' or 'open'. Accordingly, a place is not 'undefended' when occupied. Although Garner characterizes the German bombardment of Paris and Antwerp as being 'within the letter of the law' (p. 125), he qualifies this conclusion by noting that the 'indiscriminate dropping of bombs on hospitals, churches, art galleries, and private houses, and the killing of innocent non-combatants' (pp. 125–6) is contrary to the spirit of Hague Convention IV – that is, in violation of the principle of humanity.

A similar approach is taken with regard to the destruction of protected objects and the killing of hostages as punitive measures, especially in Louvain and Aerschot. It must be emphasized that Garner does not rely solely on British and Belgian reports because 'simple justice to the military commanders of a great civilized state against whom the charges are made requires that whenever the evidence is doubtful, judgment should be suspended until the facts are fully known' (p. 127). Hence, he starts from the premise that the German explanations of the

situations in question were valid. Reminding the reader that similar atrocities occurred during numerous wars of the nineteenth century, he recognizes the right of an occupying power to inflict collective punishment for acts of violent resistance, albeit subject to proportionality with the offence. Accordingly, the destruction of cultural objects in Louvain that had not been used for military purposes and the killing of hostages, both justified as belligerent reprisals or 'punitive measures', were, for Garner, violations of the law because they were disproportionate to the alleged offences committed by Belgian citizens. Interestingly, for this determination Garner also relies on the basic principle that the rights of belligerents are not unlimited and on the Martens Clause. He concludes by stating that '[t]he old idea that it is permissible to a belligerent to resort to any measures which in his judgment may induce an enemy to sue for peace is, happily, no longer recognized' (p. 134). This is a correct statement as to the law in force in 1915, which had been affirmed only seven years prior to the outbreak of the First World War.

Jean Pictet's 'The New Geneva Conventions for the Protection of War Victims' (Chapter 4) illustrates the remarkable developments in international humanitarian law since the codifications that occurred between the nineteenth century and the end of the Second World War. The inter-war years were witness to impressive efforts to progressively develop the law by setting forth further constraints on belligerent measures. Notable in this regard were the 1923 Draft Hague Rules on Aerial Warfare, the 1925 Geneva Gas Protocol and the 1936 Submarine Protocol. Since these instruments concern specific methods or means of warfare, they are examined in *The Conduct of Hostilities in International Humanitarian Law*, Volumes I and II, of this series.

Pictet provides an excellent overview of the *travaux préparatoires* of the four Geneva Conventions and highlights the main achievements brought about by their adoption. He rightly points at their applicability to armed conflicts that have not been formally declared and to 'civil wars'. With regard to the latter, he concedes the difficulty of applying the provisions to non-state actors, but emphasizes the minimum safeguards of common Article 3 and the possibility of ICRC involvement. Further achievements relate to the protection of prisoners of war and medical and religious personnel, and to the rules on grave breaches.

Pictet reminds us, in conclusion, that:

> The Geneva Conventions start from the hypothesis that law is a primordial element of civilization. Their struggle is against war, which now threatens to annihilate entire peoples. Their aim is to safeguard respect for the human person, the fundamental rights of man and his dignity as a human being. (p. 152)

In his essay 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision' (Chapter 5), Josef Kunz acknowledges the 'great achievement' of the 1949 Geneva Conventions, but urges further efforts to improve the international humanitarian law. This essay remains highly topical because the situation in 1951 to a certain extent mirrors that which exists today.

Kunz begins by comparing the inter-war period with that after the Second World War. He asserts that the general refusal to deal with issues of international humanitarian law derives from 'the ideology of extreme pacifists, well intentioned, good, but utterly utopian' (p. 155). He reminds us that 'total war is the result of the combination of technological progress in arms with a changed manner of waging war, [and] of the combination of unlimited use of highly

destructive weapons for unlimited war aims' (p. 156). Kunz sees an unremitting trend towards 'mechanized warfare', warning us that '[p]ilotless planes, directed by remote control, radar-controlled glide-bombs, [and] "guided missiles" open the way for a new phase of total war: from mechanized to automatic warfare' (p. 157). But he also emphasizes that, since weapons are only objects, 'everything depends on the heart of men who use them' (bid.).

International humanitarian law, in view of such development, is no longer sufficient to regulate the conduct of hostilities; it is, according to Kunz, in a 'chaotic status [*sic*]' (p. 158). With regard to land warfare, he identifies numerous problematic issues: 'new' methods and means of warfare, occupation law, guerrilla warfare, resistance movements and espionage. In the naval arena, he singles out the distinction between warships and merchant vessels, the use of naval mines, 'war zones', prize law and booty of war, submarine warfare and blockade. Observing that the UN Charter has not 'abolished' war, he argues that there is, at a minimum, a need for regulating '[m]ilitary action under the direction of the Security Council' and civil wars (p. 170).

Kunz concludes by pleading for a revision of the laws of war. He stresses that:

> Rules of war, including rules of combat, ... are essential to protect soldiers and civilians ...; they are essential ... not [as] a matter of sentiment, but of military necessity. An army, as distinguished from a savage horde, must know what to expect, must know under what rules fighting is to be carried on' (p. 175).

Such arguments are as valid today as they were in 1951.

The essays by George Aldrich and Michael Matheson are of continuing relevance in view of the persistent refusal of the United States to ratify the 1977 Additional Protocols. Aldrich headed the US delegation to the Conference that adopted the Protocols. Michael Matheson was the Deputy Legal Adviser of the US Department of State in 1987. Aldrich argues in favour of Additional Protocol I by responding to the criticism of its various provisions. Matheson explains the US position concerning the relation of customary international law to the 1977 Additional Protocols. Although there are good reasons to assume that Matheson's remarks were not purely personal in character, the contention that they reflect the official US position vis-à-vis the Additional Protocols has been questioned.

In 'Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I' (Chapter 7), Aldrich rejects the contention that Additional Protocol I fundamentally alters customary law, constitutes a backward step in the effort to protect non-combatants and limit the destruction of warfare, and is unacceptable 'politically, militarily and practically' (p. 205). He reminds the reader that the US delegation was in constant contact with the Secretary of Defense and the Joint Chiefs of Staff and that at the time of signing there was a general consensus that Protocol I was both a 'major accomplishment' and in the national interest of the United States (p. 207).

Aldrich explains the positive features of various Protocol provisions that had been criticized, including those regarding medical aircraft, missing and dead military personnel, protecting powers, indiscriminate attacks, attacks against civilians, prohibition of starvation, objects containing dangerous forces, proportionality and 'collateral damage'. As regards the still contentious Article 1(4), Aldrich rejects the suggestion that it 'affords international status to liberation movements and thereby legitimizes foreign intervention in wars of national liberation' (p. 212) He notes that the applicability of the Protocol is 'irrelevant to the legality

of the conflict or participation in it by any Party' and contends that the Preamble and Article 96(3) are sufficient safeguards against 'just war' arguments or unlimited application of the Protocol to wars of national liberation (p. 213). Hence, for Aldrich, Article 1(4) 'poses no threat to the United States and needs no reservation' (p. 215).

With regard to Articles 43 and 44, Aldrich admits that they 'substantially change the law with respect to the rights and obligations of members of irregular armed forces' (p. 215). He stresses, however, that the provisions are meant to provide an incentive for the irregular combatant to comply with the law. It is interesting that Aldrich does not refer to the fact that there was, and is, a widely held view that Article 44(3) only applies to armed conflicts in the sense of Article 1(4).

Aldrich also defends the Protocol's provisions on mercenaries, reprisals, the natural environment, the use of national emblems, the definition of civilians and the rule of doubt, indiscriminate attacks, objects containing dangerous forces, and precautions in attack. After emphasizing that Additional Protocol I does not apply to nuclear weapons, he concludes by characterizing Additional Protocol I as a 'valuable and long overdue addition to ... international humanitarian law' (p. 231).

'The United States Position on the Relation of Customary International Law to the 1977 Additional Protocols Additional to the 1949 Geneva Conventions' (Chapter 8) is Matheson's contribution to the 1987 American Red Cross–Washington College of Law Conference. Despite common perceptions to the contrary, Matheson does not explicitly delineate those Additional Protocol I provisions that the United States believed reflected customary international law. In view of the difficulties in determining the existence of customary rules, as well as the likelihood of disagreement as to the precise statement of a recognized rule, he only identifies those 'principles' which are in the interest of the United States and its allies and which 'should be observed and in due course recognized as customary law, whether they are presently part of that law or not' (p. 236).

Accordingly, he cites the administration's 'support' of a number of 'principles' underlying certain provisions of Additional Protocol I without styling them as reflecting customary international law. Other principles and rules are characterized as having, in whole or in part, the potential for being recognized as customary. Still others are highlighted as 'new rules' that either do not reflect customary international law or are not supported by the United States (those regarding the natural environment, use of enemy emblems and uniforms, mercenaries, reprisals and objects containing dangerous forces). Thus, Matheson's remarks only amount to a definitive statement of what the United States rejects as customary law, not what it accepts. Interestingly, Matheson does state that the United States 'in particular' supports the fundamental guarantees contained in Article 75. The Obama administration has recently confirmed US acceptance of the article as reflective of customary law.

The remarks on the customary status of Additional Protocol II are less explicit. It is noteworthy, however, that in 1987 the US administration intended to submit Protocol II to the Senate for advice and consent to ratification and that Matheson characterizes it as 'a common baseline defining the minimum standards of conduct' and a 'clear indication of the minimum rules that United States forces expect to observe and to be observed by our opponents' (p. 243).

In 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation' (Chapter 9), Dietrich Schindler endeavours to identify the reasons why international

humanitarian law, despite its 'remarkable development' since the mid-nineteenth century, has been increasingly violated in recent armed conflicts.

Schindler begins by reviewing the development of international humanitarian law from the 1860s until the present. He identifies phases of progress, neglect, stagnation and, since the end of the Cold War, renewed international interest. Five developments mark the period following the fall of the 'iron curtain': (1) the UN Security Council's determination that large-scale violations of human rights and international humanitarian law constitute threats to international peace and security in the sense of Chapter VII of the UN Charter; (2) the progressive assimilation of the law of non-international armed conflicts to the law of international armed conflicts; (3) the growing importance of customary international law; (4) the increasing influence of human rights law; and (5) the International Court of Justice's qualification of the fundamental principles of international humanitarian law as 'intransgressible principles of international customary law' in its Advisory Opinion on Nuclear Weapons. Whether or not one shares Schindler's positive attitude towards these developments, it must be acknowledged that they have had a significant impact on international humanitarian law.

Schindler is not satisfied with simply deploring the increasing violations of international humanitarian law in recent armed conflicts but, instead, endeavours to identify their causes. In that context, he is correct in observing that there has always been a close link between violations and the progressive development of international humanitarian law because the major codifications have been responses to the experiences of the armed conflicts that preceded them.

Schindler believes that the disregard of international humanitarian law has been caused by a number of factors: (1) an increase of internal armed conflicts, which are fought by non-state actors who lack command structures and disregard the principle of distinction; (2) the declining relevance of reciprocity that, according to Schindler, has become particularly evident in asymmetric warfare; (3) a growing inclination of parties to 'consider their war as *a just war*' (p. 264, emphasis in original); (4) the inability or unwillingness of governments and the UN to adequately respond to humanitarian disasters or the collapse of governmental structures; and (5) insufficient knowledge and awareness of humanitarian law. While one may not fully concur with these propositions, they certainly merit consideration.

Schindler reminds us that the Geneva Conventions and the Additional Protocols contain provisions on measures that can contribute to an improvement in compliance with international humanitarian law, but which have unfortunately not been afforded sufficient attention. He argues for better implementation and suggests that states and international organizations should not only help prevent situations that underpin the increasing violations, but also apply continuous pressure to respect international humanitarian law.

Yves Sandoz, in 'International Humanitarian Law in the Twenty-First Century (Chapter 10), shares Schindler's concerns about the challenges faced by international humanitarian law. Like Schindler, he takes a conservative approach insofar as he is unwilling to question the achievements of the past century and a half. But Sandoz contends that the rejection of international humanitarian law norms on political and military grounds further complicates matters.

Sandoz points to a number of shortcomings in the existing law and offers several options for improvement. First, he pleads for clarification of the existing law and strengthening its implementation. Second, he suggests uniform standards in respect of the scope of applicability.

Finally, he demands that military operations be subject to absolute limitations in order to preserve 'planet-wide interests' (p. 297). In that regard, he focuses on nuclear weapons, other weapons of mass destruction, the natural environment and combined military operations with or without authorization by the United Nations Security Council.

In his concluding remarks, Sandoz does not advocate a new 'global legislative effort' (p. 304). For him, any such effort would prove counterproductive. Yet, he cautions against ignoring either the causes of international humanitarian law violations or common values and interests of global significance. Thus, despite his concern about the partial inadequacy of the law in the face of contemporary challenges, Sandoz proves himself a committed and convincing advocate of humanitarian values set forth therein.

In 2005, the ICRC published *Customary International Humanitarian Law*, edited by Jean-Marie Henckaerts and Louise Doswald-Beck. Many, at least by tacit consent, welcomed the 'ICRC Study' as a major contribution to the clarification of the state of customary international humanitarian law. Others, however, have heavily criticized it. Perhaps both groups missed the Foreword by Jakob Kellenberger, President of the ICRC, in which he explains that:

> The ICRC believes that the study does indeed present an accurate assessment of the current state of customary international humanitarian law. It will therefore duly take the outcome of this study into account in its daily work, while being aware that the formation of customary international law is an ongoing process. The study should also serve as a basis for discussion with respect to the implementation, clarification and development of humanitarian law. [1]

Against this background, an understanding of the study's rationale and process is essential. In 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (Chapter 11), Jean-Marie Henckaerts endeavours to explain its necessity, methodology and organization. It goes without saying that the methodology will, in particular, continue to be criticized, for the study's application of the concept of state practice and the relevance of treaties is questionable. Scholars and practitioners of public international law are therefore well advised to thoroughly consider such matters before accepting the normative premises set forth. Nevertheless, Henckaert's essay is a useful tool in better understanding the scope and applicability of the study's conclusions.

Principles

The development of international humanitarian law is closely linked to its basic principles, which are the subject of Part II of this volume. International humanitarian law aims at balancing considerations of military necessity and of humanity. There can be no doubt that humanity is the cardinal principle of modern international humanitarian law. Humanitarian considerations clearly inspired the First Geneva Convention and the ensuing international instruments that aimed at 'alleviating as much as possible the calamities of war' (1868 St Petersburg Declaration).

Despite its impressive development, international humanitarian law remains silent on certain issues. The states party to the 1907 Hague Convention IV were well aware that a

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[1] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Law*, 2 vols, Cambridge: Cambridge University Press, Vol. I, p. xi.

codification of the law of armed conflict would never be fully comprehensive because it could not possibly address 'all the circumstances which arise in practice'. The lack of specific rules, however, did not mean that 'unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders'. Rather, they were to be governed by the Martens Clause, which provides for the continued applicability of the 'principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. Although regularly referred to in the literature and state practice, very few authors, the most important of whom are represented here, have shouldered the task of thoroughly analysing the provision's scope and meaning.

There can be no doubt that, since the adoption of the first international humanitarian law treaties, the claim that military necessity supersedes humanity and the rules of international humanitarian law – *Kriegsräson geht vor Kriegsmanier* – is untenable. Nevertheless, military necessity remains relevant, for international humanitarian law not only recognizes the concept of 'military advantage' and the existence of lawful targets, but also expressly points to the 'legitimate object which States ... endeavour to accomplish during war' – that is, 'to weaken the military forces of the enemy'. Therefore, the readiness of some international scholars to reject military necessity is founded on a less-than-thorough analysis of the concept.

In 'The Humanization of Humanitarian Law' (Chapter 12), Theodor Meron asserts, correctly, that the development of international humanitarian law cannot be separated from the principle of humanity since the 'humanization' of the law is to be understood as the process of a gradual development and modification that has resulted in it 'acquiring a more humane face' (p. 333). But humanization should not be misunderstood in a way that would lead to an 'overregulation' of armed hostilities. For instance, Meron emphasizes the significant differences between the concepts of proportionality resident in international humanitarian law, international human rights law and the *jus ad bellum*.

Meron observes that international humanitarian law has evolved from an inter-state to an individual rights perspective, citing in particular the concept of reciprocity and the practice of reprisals and discussing how human rights law has played a part in its development, applicability and interpretation. He concludes with a discussion of the limitations of the law and offers suggestions for possible future development.

The value of Meron's essay lies in the insights he offers. His legal and historical analysis is comprehensive and topical, unaffected by political agendas or naivety. The essay is of particular importance in light of the growing influence of human rights law on international humanitarian law, an influence that all too often is accepted without questioning whether the growing convergence of the two bodies of law is a positive step forward.

The essays by Antonio Cassese and Theodor Meron on the Martens Clause illustrate differing approaches to the subject that reinforce each other. Together, they offer keen insights into this highly ambiguous and often misunderstood provision.

Cassese's 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (Chapter 13) considers the clause in the light of its drafting history and the practice of states and international courts. Cassese rejects the premise that it merely excludes the *a contrario* argument that unregulated matters leave belligerents free to behave as they please, for it fails to explain why the clause expressly refers to the 'laws of humanity' and the 'dictates of public conscience' (p. 373). By the same token, he is unwilling to accept any contention that the clause has expanded the sources of international law, at least in the area of international humanitarian law.

According to Cassese, the drafting history of the Martens Clause demonstrates that it was conceived of as a 'diplomatic gimmick intended to break a deadlock in the negotiations' in 1899 (p. 373). He suggests that 'mention of the clause [by international courts] has been made primarily to pay lip service to humanitarian demands' (p. 394). Nevertheless, he does not join those who consider the clause redundant. Rather, he finds that it is significant at the level of interpretation and (by conceding a higher relevance to *opinio juris* than to custom) in the process of customary international humanitarian law formation.

In 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (Chapter 14), Meron notes that the clause has 'ancient antecedents rooted in natural law and chivalry' (p. 404). As to modern application, he focuses on the different formulations of the clause between 1907 and 1977, concluding that the language used in Additional Protocol I 'may have deprived the Martens clause of its intrinsic coherence and legal logic' (p. 406).

His interpretation is fascinating. The term 'principles of humanity' is interpreted as synonymous with the term 'elementary considerations of humanity' used by the International Court of Justice (p. 407). 'Public conscience' is considered on the basis of the varying interpretations present in the literature, state practice and international court jurisprudence. Meron acknowledges that the term can be characterized as a reflection of *opinio juris*, but is unwilling to equate it to 'public opinion'. This does not mean that he ignores the possible impact of 'public opinion' on the interpretation and development of international humanitarian law, but he is cautious. On the one hand, both public conscience and public opinion have a 'popular basis'. On the other, 'public opinion' is not a 'force for good ... that ... invariably serves humanitarian causes' (p. 410). In this sense, Meron adopts the approach taken by Myres McDougal, who supported a selective concept of community expectations formed by authoritative decision-makers. Meron's essay concludes with an analysis of the clause's current significance, especially with regard to the ICJ's Advisory Opinion on Nuclear Weapons. He warns against overestimating its significance, for 'references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases' (p. 413).

Like the Martens Clause, Common Article 1 to the 1949 Geneva Conventions is ambiguous. The wording of the provision, as well as its drafting history and interpretations by the ICRC, states, international courts and scholars, have all failed to contribute to a generally accepted understanding of it. 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' by Frits Kalshoven (Chapter 15), is an interesting and methodologically sound legal analysis of Common Article 1 that has had a considerable impact on later work.

To some extent, the provision states the obvious – that is, that states are obliged to 'ensure respect' for the Conventions by those under their jurisdiction and foster respect by other states. These obligations beg the question of whether inactivity in the face of breaches of the Conventions results in a further breach of Common Article 1. Kalshoven can be credited with setting forth an interpretation which, albeit not universally accepted, has certainly contributed to a better understanding of the requirement 'to respect and to ensure respect for the present Convention[s| in all circumstances'. His analysis of the provision's wording, object and purpose, its drafting history and its interpretation in international practice is convincing. Ultimately, he concludes that the significance of Common Article 1 in inter-state relations is primarily moral, not legal.

The essays by Carnahan, Downey and Draper have been included in this volume because they are among the few works that not only analyse the principle of military necessity on its own merits, but also set forth the development of the concept over time. In 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (Chapter 16), Burrus Carnahan draws an impressive picture of the modern genesis of the principle in the Lieber Code. His piece is rich in historical detail, much of which has been forgotten. For instance, Lieber advised that Confederate prisoners be accorded the privileges of belligerents for 'humanitarian reasons' in order to avoid any possible recognition of the legitimacy of their government. This is a point often missed in consideration of the principle.

Carnahan characterizes the Lieber Code's military necessity provision as representing 'an enlightened advance in the laws of war in the nineteenth century' (p. 479), but suggests that the principle was later abused to justify grave violations of international humanitarian law. The key aspect of his analysis is the discussion of President Lincoln's practices regarding military necessity during the American Civil War. Carnahan points out that political objectives were initially considered irrelevant in the determination of military necessity and that private property did not qualify as a lawful target. This reality shifted as the war went on. Hence, 'the scope of destruction authorized by military necessity extended not only to property of direct military use, but ... to any property that "helps us, or hurts the enemy", including the economic infrastructure supporting the enemy war effort' (p. 488). Although he adopts a 'dynamic' interpretation of the principle, Carnahan does not apply it without limitations. He reminds readers that military necessity remains relevant because it 'can limit the destruction of war, beyond serving as a justification for destruction' (p. 493). For Carnahan, this is the 'most important legacy of Lieber's development' (ibid.).

'The Law of War and Military Necessity' by William Downey, Jr (Chapter 17) convincingly demonstrates that the 'laws of war' and 'military necessity' are not mutually incompatible and that 'military necessity' is not a negation of law. The Nuremberg Tribunal decisions demonstrate that the concept of military necessity has not become obsolete since the Lieber Code.

Downey defines military necessity as:

> ... an urgent need, admitting no delay, for the taking by a commander of measures, which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, and which are not forbidden by the laws and customs of war. (p. 498)

Although his four elements of the principle may appear somewhat dated, Downey's interpretation is certainly a highly useful starting-point in understanding the concept and its legal relevance.

In 'Military Necessity and Humanitarian Imperatives' (Chapter 18), Gerald Draper emphasizes that, in light of the development of international humanitarian law, military necessity does not justify derogation from a rule unless it explicitly refers to such considerations. It may only be invoked in the context of a rule's terms. In any event, military necessity must be interpreted in a narrow sense.

Draper is, however, not absolutely satisfied with the principle's application by the Nuremberg Tribunal because it failed to adequately address the relevance of circumstances to a military commander's decision to destroy enemy property. However, he endorses the Tribunal's finding that when determining whether an operation has exceeded what is militarily

necessary, it is the commander's *ex ante* perspective that is decisive. Finally, Draper doubts whether the Martens Clause and Common Article 1 of the four Geneva Conventions are at all helpful in assessing the impact of military necessity because he considers the Conventions rather remote from the conduct of hostilities proper. He argues for taking military necessity into account in the formulation of future international humanitarian law rules so as to narrow the gap between it and the nature of war.

Last, but certainly not least, Horace B. Robertson, Jr, in 'The Principle of the Military Objective in the Law of Armed Conflict' (Chapter 19), affirms the customary character of the principle of distinction and the definition of military objectives. These conclusions are important for two reasons. To begin with, the United States is not party to Additional Protocol I, the first internationally binding instrument defining lawful military objectives. Moreover, the Protocol's definition does not apply to naval warfare *strictu sensu* – that is, to sea-to-sea, air-to-sea or to sea-to air attacks.

Robertson contributes to a clarification of the law that is based on an analysis of Additional Protocol I, the 1923 Hague Rules and various military manuals. His conclusions are convincing. The principle of distinction, as well as the definition of lawful military objectives, are part and parcel of customary international humanitarian law and they apply to all forms of warfare, whether on land, in the air or at sea. Robertson rightly emphasizes that the definition:

> ... gives the commander a great deal more discretion and requires the commander to balance the value of the target against the military advantage to be gained from its destruction or capture, obviously importing the relative question of proportionality into the equation. (p. 550)

Robertson also scrutinizes the relevance of the reference in the US *Commander's Handbook* to the enemy's 'war-fighting or war-sustaining capability' (p. 543). Although some may not be absolutely convinced by his arguments, Robertson suggests that the differences between the US approach and the Additional Protocol I and *San Remo Manual* definitions are less grave than some believe.

WOLFF HEINTSCHEL VON HEINEGG

Part I
Development

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SHAKESPEARE'S HENRY THE FIFTH AND THE LAW OF WAR

*By Theodor Meron**

I. INTRODUCTION

William Shakespeare wrote during the Elizabethan Renaissance, a period of revived and intense interest in history.[1] *The Life of Henry the Fifth*, written in 1599,[2] one of Shakespeare's histories, is a patriotic, epic portrayal of a phase in the bloody Hundred Years' War (1337–1453) between England and France. It describes a medieval campaign led by a chivalrous and virtuous king, who could perhaps do wrong but not a great deal of wrong, and in which the few acting in a just cause defeat the many. In this play, Shakespeare relives past glories.

King Henry V (1387–1422) succeeded to the throne of Henry IV in 1413 and two years later invaded France. The play telescopes the phase of the Hundred Years' War that started in 1415 with the landing of Henry's army near Harfleur and its victory at Agincourt and ended in 1420 with the conclusion of the Treaty of Troyes, which pronounced Henry the heir to the French throne and seemed to mark the ascendancy of England—until Joan of Arc's rallying of the French in 1429 sparked a turning point eventually leading to the defeat of England. The play is an ideal vehicle for consideration of the late medieval practice and rules of warfare: first, because it narrates a wide range of relevant events, including assertion of the just cause of the war, issuance of an ultimatum or declaration of war, episodes showing the conduct of the war and negotiation of the treaty of peace; and second, because it is not an imaginary tale but, on the whole, a rather close reflection of the sixteenth-century chronicles that were its principal sources, those of Raphael Holinshed[3] (1498–ca. 1580) and Edward Hall[4] (or Halle) (ca. 1498–1547).

* Of the Board of Editors. I acknowledge with thanks the helpful comments made on early drafts of this essay by Luigi Condorelli, Gerald Harriss, Graham Hughes, Peter Lewis, Andreas Lowenfeld, David Norbrook, Ashley Roach, Linda Silberman, Donna Sullivan and Malcolm Vale. In addition, for their important help, I thank Philip Uninsky and my research assistants David Berg and Maria Chedid. I am particularly grateful to Maurice Keen and Peter Haggenmacher for their invaluable advice and guidance. I also wish to express my appreciation to the Filomen D'Agostino and Max E. Greenberg Research Fund of New York University Law School, the Fellows and the staff of All Souls College, Oxford, where, as a Visiting Fellow, I completed this essay, and the Graduate Institute of International Studies, Geneva, for their support.

[1] L. CAMPBELL, SHAKESPEARE'S "HISTORIES": MIRRORS OF ELIZABETHAN POLICY 18–20 (1947).

[2] THE COMPLETE WORKS OF SHAKESPEARE 835 (G. Kittredge ed. 1971) [hereinafter Kittredge]. This essay will cite *Henry V* with annotations from the Yale Shakespeare (R. Dorius ed. 1955).

[3] Hosley, *Introduction* to R. HOLINSHED: AN EDITION OF HOLINSHED'S CHRONICLES, at xvii (R. Hosley ed. 1968) (2d ed. 1587) [hereinafter Hosley].

More than any other source, the second edition of Holinshed's *Chronicles* guided and inspired Shakespeare. L. CAMPBELL, *supra* note 1, at 72. This edition will therefore be referred to in this essay. R. HOLINSHED, HOLINSHED'S CHRONICLES (Clarendon Press, eds. R. Wallace & A. Hansen, 1923) (2d ed. 1587), *reprinted by* Greenwood Press (1978). Holinshed's work, however, should not be regarded as the effort of a single historian. It was rather a "group project [of which in 1573] Holinshed became . . . the co-ordinator." L. CAMPBELL, *supra*, at 72.

[4] Richard Grafton posthumously published Hall's *Chronicle* in 1548. L. CAMPBELL, *supra* note 1, at 67. The 1809 edition, which collates the editions of 1548 and 1550, is the version I shall cite. HALL'S

My purposes in this essay are to provide an international lawyer's commentary on the play by examining how Shakespeare used international law for his dramatic ends; to compare his version with its principal sources,[5] the chronicles of Holinshed and Hall, and occasionally with other historians' views as to what transpired during the reign of Henry V; to assess Shakespeare's text in the light of fifteenth- and sixteenth-century norms of *jus gentium,* primarily as reflected in the writings of contemporary jurists and earlier medieval jurists; and, now and then, to show how attitudes toward the law of war have changed since Shakespeare's times, and thus to illustrate the law's evolution.

My tasks were made easier by the works of modern writers on medieval and Renaissance law such as Maurice Keen, on whom I often draw.

II. THE LEGAL ENVIRONMENT

Medieval Kings of England, including Henry V, occasionally promulgated ordinances governing the conduct of war and severely punishing violators. Through Holinshed's *Chronicles,* Shakespeare learned about Henry V's proclamations of rules of war. Holinshed explicitly mentions these proclamations and they are reflected in the play. Thus, when told about the likely execution of a soldier for having robbed a church, Shakespeare's Henry declares: "We would have all such offenders so cut off. And we give express charge that in our marches through the country there be nothing compell'd from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language" (3, 6, 111–15).

This proclamation, which anticipated the modern law of war, is explained by Shakespeare on grounds of effectiveness rather than abstract humanity, in much

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CHRONICLE; CONTAINING THE HISTORY OF ENGLAND, DURING THE REIGN OF HENRY THE FOURTH, AND THE SUCCEEDING MONARCHS, TO THE END OF THE REIGN OF HENRY THE EIGHTH (1809), *reprinted by* AMS Press (1965) [hereinafter E. HALL]. The original title (1548) was "The Union of the Two Noble and Illustre Famelies of Lancastre & Yorke."

The playwright's close attention to these chroniclers gives his play a solid historical basis, but it also means that Shakespeare probably did not know about some of the events they did not mention. Consequently, at times, events of great dramatic potential were overlooked; for example, the real Henry's challenge to the Dauphin, after the conquest of Harfleur, to decide the conflict by single combat (a similar opportunity, the trial by combat between Mowbray and Bolingbroke in *Richard II,* act 1, scene 3, was provided by Holinshed's account of that monarch's reign).

[5] For a comprehensive discussion of the sources Shakespeare used in writing *Henry V,* see 4 NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE 347–75 (G. Bullough ed. 1962). Shakespeare may have been somewhat influenced by an anonymous play, *The Famous Victories of Henry the Fifth. Id.* at 348, 299.

Shakespeare's histories actually "reproduc[e] thousands upon thousands of [Holinshed's] words." Hosley, *supra* note 3, at xviii. Richard Posner observes that the notion of plagiarism in the Renaissance was limited: "the imitator was free to borrow as long as he added to what he borrowed." R. POSNER, LAW AND LITERATURE 346 (1988); *see also* Meron, *Common Rights of Mankind in Gentili, Grotius and Suárez,* 85 AJIL 110, 112 n.18 (1991). Plagiarism was also common among medieval writers. The important author and compiler of the laws of war and customs of chivalry, Christine de Pisan, vigorously defended liberal use of others' writings. C. DE PISAN, THE BOOK OF FAYTTES OF ARMES AND OF CHYVALRYE 190 (W. Caxton trans. 1489, A. Byles ed. 1932) (written 1408–09).

Both Holinshed and Hall were writing "to show the significance of the facts and to establish by them general moral and more especially general political laws." L. CAMPBELL, *supra* note 1, at 75. As a result, Holinshed's account emphasizes the morals of the Tudor era (*id.* at 74) rather than those of the Middle Ages, and Hall's work has even been described as a work of propaganda (*id.* at 68, citing W. Gordon Zeeveld). Holinshed and Hall wrote some 100 years after the real events, describing them often in the light of sixteenth-century attitudes and assumptions that were not always quite those of Henry's own time.

the same way as is taught by modern academies of military law: "For when lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner" (*id.*, 116–17).

A glance at the titles of the principal works of jurists of Henry's time—such as *Tractatus de bello, de represaliis et de duello* by Giovanni da Legnano (completed in 1360 and first published in 1477), *The Tree of Battles* (published ca. 1387) by Honoré Bonet (or Bouvet, as he is now known) and *Book of Fayttes of Armes and of Chyvalrye* by Christine de Pisan (written in 1408–1409)—suffices to demonstrate that at the time of Henry V, the bulk of *jus gentium* was the law relating to war, i.e., the law of arms or *jus armorum*, though there were also rules of canon and civil law pertaining to soldiers.[6] The customary rules of *jus armorum*, or *jus militare*, regulated the conduct of soldiers within Christendom,[7] but not between Christians and Muslims or other non-Christians. *Jus armorum* was not, it must be stressed, a body of law governing the relations between contending nations, but a body of norms governing the conduct of warring men.[8] The law of arms was in fact the law of chivalry applicable to knights and to nobility, that is, to those who had the right to bear arms and to make war,[9] regardless of their nationality.

The law of chivalry could be enforced by courts of chivalry, which routinely handled disputes between knights of different nationality, the *curia militaris* or the court of knights (e.g., the courts held by such *magistri militum* as the Constable and the Marshal in England, the courts of the Constable and the Marshal of France, and, with broader jurisdiction, the French Parlement de Paris). The most effective sanction ensuring compliance with the rules of *jus armorum* was the knight's fear of dishonor and public reprobation, feelings associated with the reversal (placing upside down) of a knight's coat of arms (*subversio armorum*), a measure frequently imposed for breach of promise to pay ransom.[10] Holinshed's *Chronicles* of the reigns of medieval English monarchs—which informed Shakespeare's histories—contain many references to such chivalric practices as trial by combat and letters of defiance (a medieval form of declarations of war) and they are occasionally reflected in those histories. On the basis of Holinshed, Shakespeare's French King Charles VI commands his herald, Montjoy, to "greet England with our sharp defiance" (3, 5, 37) and Montjoy accordingly tells Henry: "Thus says my King: . . . To this add defiance, and tell [Henry], for conclusion, he hath betrayed his followers, whose condemnation is pronounc'd" (3, 6, 123–41).

In *Henry V*, Shakespeare wrote of a late medieval war fought between Catholic kings who were committed, at least in principle, to the medieval chivalric law of

[6] On the nature of the medieval law of war, see Haggenmacher, *La Place de Francisco de Vitoria parmi les fondateurs du Droit International*, in ACTUALITÉ DE LA PENSÉE JURIDIQUE DE FRANCISCO DE VITORIA 27, 77–80 (1988); P. HAGGENMACHER, GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE 626 (1983).

[7] M. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 17 (1965).

[8] *Id.* at 133. Haggenmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 133, 159 (H. Bull, B. Kingsbury & A. Roberts eds. 1990).

[9] M. KEEN, *supra* note 7, at 19. Keen points out that a peasant could not claim rights to ransom in an enemy prisoner under the law of arms, because that law did not apply to him. *Id.*

[10] *Id.* at 20. Regarding the Ordinances of War attributed to Henry V, see *infra* note 89. Regarding courts of chivalry, see M. KEEN, *supra* note 7, at 23–59; G. SQUIBB, THE HIGH COURT OF CHIVALRY 1–28 (1959); P.-C. TIMBAL, LA GUERRE DE CENT ANS VUE À TRAVERS LES REGISTRES DU PARLEMENT (1337–69); C. ALLMAND & C. ARMSTRONG, ENGLISH SUITS BEFORE THE PARLEMENT OF PARIS 1420–1436 (1982); Rogers, *Hoton v. Shakell: A Ransom Case in the Court of Chivalry, 1390–5*, 6 NOTTINGHAM MEDIEVAL STUDS. 74 (L. Thorpe ed. 1962). For an illustration of a contested case of *subversio armorum*, see P.-C. TIMBAL, *supra*, at 307–13.

arms. Despite those constraints, which had called for a modicum of humane conduct, this war was both cruel and bloody.

In contrast to the dramatist's familiarity with Holinshed and Hall, "[i]t cannot be maintained that Shakespeare even knew of the works"[11] of the various contemporary writers on *jus gentium*.[12] These include the Spanish Dominican Francisco de Vitoria (1480–1546), who in 1532 delivered his famous lectures *De Indis et de jure belli hispanorum in barbaros;* Alberico Gentili (1552–1608), Shakespeare's contemporary in England;[13] and Francisco Suárez (1548–1617), the Spanish Jesuit scholar.[14] The best-known Renaissance writer on international law, the Dutchman Hugo Grotius (1583–1645), wrote somewhat later (his magisterial *De jure belli ac pacis* of 1625[15] appeared after Shakespeare's death). There is no evidence that the sixteenth-century writers on *jus gentium* influenced Shakespeare the dramatist either directly or indirectly. However, their work, and sometimes that of earlier, medieval writers, demonstrates the legal environment of the era.

The fact that Shakespeare preceded the birth of modern international law does not mean that no broadly recognized rules applied, at least in principle, to nations' conduct of war. Indeed, much as in the Middle Ages, most rules of *jus gentium* formed part of the law of war and there was hardly any discrete law of peace.[16] The law of peace was largely limited to rules dealing with the termination of war and the conclusion of peace. For the most part, however, as in the medieval period, the sixteenth-century law of warfare "was not international but municipal and military."[17] Sixteenth-century treatises on the law of war failed, on the whole, to distinguish among strategy, military discipline and legal rules governing warfare.[18] Not surprisingly, the lack of clarity regarding these distinctions also characterizes Shakespeare's histories.[19]

[11] G. KEETON, SHAKESPEARE'S LEGAL AND POLITICAL BACKGROUND 82 (1967).

[12] Because of the dates when the works of Gentili and Suárez were completed, finding much of an echo of their work in either Holinshed or Hall seems nearly impossible. That is not necessarily true of Vitoria, but his special interest in the law concerning colonization and wars with "barbarians" was one the English were not yet encountering to a marked degree.

[13] G. KEETON, *supra* note 11, at 80. *See generally* Meron, *supra* note 5. Gentili, an Italian Protestant, took refuge in England and in 1587 became the Regius Professor of Civil Law in Oxford (the Regius Chair was first established in 1546). Gentili's Oxford lectures appeared in book form in 1588 under the title *Prima commentatio de jure belli* and were republished, in considerably expanded form, in 1598 as *De jure belli libri tres.*

[14] Suárez's *De legibus, ac deo legislatore* (Treatise on Law and God the Legislator) was published in 1612. The law of war was the subject of *De triplici virtute theologica, fide, spe, et charitate* (The Three Theological Virtues, Faith, Hope and Charity), published posthumously in 1621.

[15] The principal work on Grotius is P. HAGGENMACHER, *supra* note 6.

[16] Haggenmacher, *supra* note 8, at 157.

[17] A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 69 (1954).

[18] G. KEETON, SHAKESPEARE AND HIS LEGAL PROBLEMS 59 (1930). Consider, e.g., the title of Balthazar Ayala's work, "Three Books on the Law of War and on the Duties Connected with War and on Military Discipline" (1582).

[19] Shakespeare tends to refer to the law of arms, disciplines of war, etc. In *Henry V,* Captain Fluellen regards the law of war sometimes as a purely military discipline and sometimes as normative. His plea for silence in the proximity of the enemy ("I warrant you, that there is no tiddle-taddle nor pibble-pabble in Pompey's camp") relies on "the true and aunchient prerogatifes and laws of the wars" as a military discipline (4, 1, 67–71). But the law of arms is invoked by Fluellen in the strictly normative sense in his famous condemnation of the French attack on the English encampment (see section VII *infra*). Shakespeare also refers to the normative significance of the laws of war in *Henry VIII*: "Nay ladies, fear not./By all the laws of war y'are privileg'd" (1, 4, 51–52). Kittredge, *supra* note 2.

III. JUST WAR: *JUS AD BELLUM* AND *JUS IN BELLO*

In invading France in 1415, Henry hoped not only to recover lost territory but, far more importantly, to reactivate the English claim to the French crown that had been asserted—though never pursued in such earnestness—since the beginning of the Hundred Years' War. That claim derived from Isabel, the mother of his great-grandfather Edward III (Isabel was the daughter of French King Philip IV and the wife of Edward II). In the play, Henry is anxious to have the Archbishop of Canterbury reassure him that the Salic law,[20] which disqualified women and the female line from succession to the crown of France, does not bar his claim. He commands the Archbishop to give him an objective and balanced opinion:

> *King.* Why the law Salic that they have in France
> Or should or should not bar us in our claim.
> And God forbid, my dear and faithful lord,
> That you should fashion, wrest, or bow your reading . . . .
> [1, 2, 11–14]

The Archbishop reassures the King that his claim to the throne of France is just.[21]

[20] White writes:

> The code of laws known as the *salic law* is a collection of the popular laws of the Salic or Salian Franks, committed to writing in barbarous Latin, in the 5' century. Several texts of this code are in existence, but because of the dark ages in which it had its origin, more or less mystery surrounds it. The code relates principally to the definition and punishment of crimes, but there is a chapter . . . relating to the succession of salic lands, which was probably inserted in the law, at a later date. *Salic lands*, or *terra salica*, came to mean inherited land as distinguished from property otherwise acquired, but even in the 15' century . . . there was but little known as to the origin or exact meaning of this law. It was by a very doubtful construction that the salic law in the 14' century was held to exclude the succession of females to the throne of France, but on the accession of Phillip the Long, it was given this interpretation, and the fact that Edward III rested his claim to the throne on female succession no doubt led the French to place this meaning on the law . . . .

E. WHITE, COMMENTARIES ON THE LAW IN SHAKESPEARE 283–84 (1913) (footnotes omitted). On Salic law and just war, see also J. O'MALLEY, JUSTICE IN SHAKESPEARE: THREE ENGLISH KINGS IN THE LIGHT OF THOMISTIC THOUGHT 42–45 (1964); G. KEETON, *supra* note 18, at 64.

[21]

> There is no bar
> To make against your highness' claim to France
> But this which they produce from Pharamond:
> *In terram Salicam mulieres ne succedant—*
> 'No woman shall succeed in Salic land.'
> Which Salic land the French unjustly gloze
> To be the realm of France, and Pharamond
> The founder of this law and female bar.
> Yet their own authors faithfully affirm
> That the land Salic is in Germany,
> Between the floods of Sala and of Elbe . . . .
> Then doth it well appear the Salic law
> Was not devised for the realm of France,
> Nor did the French possess the Salic land
> Until four hundred one and twenty years
> After defunction of King Pharamond,
> Idly suppos'd the founder of this law . . . .
> So that, as clear as is the summer's sun,
> King Pepin's title and Hugh Capet's claim,
> King Lewis his satisfaction, all appear
> To hold in right and title of the female.
> So do the kings of France unto this day,
> Howbeit they would hold up this Salic law
> To bar your highness claiming from the female . . . .

The modern reader cannot but marvel at the craftsmanship and timelessness of Canterbury's legal arguments: Territorially, Salic land does not mean France but a specific area in Germany. The law was wrongly interpreted as applying to France. Since the Salic lands became a French possession under the reign of Charles the Great, 421 years after the death of the supposed author of the Salic law—the Frankish King Pharamond—its continued vitality is in doubt. French kings themselves have succeeded to the crown, in Shakespeare's words, through "the right and title of the female." They are therefore precluded from invoking the law against Henry.[22] Finally, Henry's claim is bolstered by the Old Testament, which explicitly commands that "[i]f a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter."[23] The biblical argument should not necessarily be viewed as exclusively theological; it may have been presented under the law of nature, or *jus naturale*,[24] which so prominently figures later in the play in Exeter's ultimatum to the King of France (see section IV below).

Shakespeare's account of the exchange between the Archbishop and the King very closely follows Archbishop Chichele's prepared statement ("prepared tale" in Holinshed's words; "prepared purpose" in Hall's), as reported by Holinshed in his *Chronicles*.[25] The striking legal craftsmanship of Shakespeare's Henry therefore cannot be credited to the dramatist alone. Shakespeare the dramatist must

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King. May I with right and conscience make this claim?
Canterbury. The sin upon my head, dread sovereign!
For in the Book of Numbers is it writ:
When the man dies, let the inheritance
Descend unto the daughter.

[1, 2, 35–100]

[22] *See* P. SACCIO, SHAKESPEARE'S ENGLISH KINGS 75–77, 79 (1977). It is not clear that, in the period from Hugh Capet to Philip the Tall, anyone thought the Salic law was relevant to the French royal succession, or knew of its implications. P. S. Lewis observes that while the question of succession was complicated by the English claim to the throne of France, "[t]he exclusion of women derived, not from the Salic Law (which was first invoked in its aid in the reign of Jean II [1350–1364]), but from custom . . . ." P. LEWIS, LATER MEDIEVAL FRANCE 94–95 (1968). C. WOOD, JOAN OF ARC AND RICHARD III, at 12–14 (1988), explains the exclusion of women from rights of succession in France by reference to the adulteries of the daughters of Philip the Fair, which were discovered in 1314. He emphasizes that doubts about legitimacy played an important role in changing the anticipated royal succession and the accession of Philip V, and he concludes that, "[a]lthough these theories were not to reach full flower until Charles V—or even Charles VII—France was well on its way to inventing the Salic law." *Id.* at 26.

First invoked and applied in 1317, as a categorical but unexplained customary rule, to the Valois succession, the Salic law was later "rationalized" by theological and philosophical arguments, in which antifeminism and nationalism played an important role, and eventually matured into a constitutional principle. The Salic law was first mentioned in terms in 1358 by Richard Lescot and first invoked against the English claims by Jean de Montreuil between 1408 and 1413. Contamine, *"Le Royaume de France ne Peut Tomber en Fille": Fondement, Formulation et Implication d'une Théorie Politique à la Fin du Moyen Age,* 13 PERSPECTIVES MÉDIÉVALES 67 (1987). The ancient Frankish legend of the Salic law, which resembles Hall's-Holinshed's-Shakespeare's version, first appeared in an anonymous work in 1464 under the title *La Loy salicque, premiere loy des françois.* Potter, *The Development and Significance of the Salic Law of the French,* 52 ENG. HIST. REV. 235, 249–51 (1937). On the different view in England of legitimacy and succession, see C. WOOD, *supra,* at 14–18.

[23] *Numbers* 27:8.

[24] *See generally* G. KEETON, *supra* note 11, at 78.

[25] R. HOLINSHED, *supra* note 3, at 9–11. *See also* E. HALL, *supra* note 4, at 49–52. Hall clearly set out the temporal element: Pharamond, the supposed author of the Salic law, could not have created it for a land he neither possessed nor knew of at the time it was issued. The biblical argument, by invoking God's authority, was intended to put to rest any doubts that may have survived the secular reasoning *Id.* at 50–51.

share the credit either with the person who actually voiced these arguments in the court of Henry V in *anno regni* 2 (1414) or with the chroniclers.[26]

In addition to assuring himself of the legitimacy of his claim, Henry needed to be satisfied that the war that might be necessary to secure that claim (should France refuse to yield) was grounded in a just cause.[27] The question was important for spiritual reasons (the immortality of his soul) and for such secular reasons as the validity of the title that he and his troops would acquire over the spoils of war; their enjoyment of combatant privileges; their protection by the laws of war; and, in consequence of these considerations, his ability to raise troops and to sustain their morale. Although, as a matter of realpolitik, a victorious prince faced few difficulties in maintaining that his war was just, this could have posed a real problem to a knight whose right to ransom or to other spoils of war was contested before a court of chivalry applying the customary *jus armorum*. The discussion that follows suggests that there was ample reason in contemporary legal doctrine for Shakespeare's Henry to follow a prudent course by attempting to establish as just a cause as possible for the invasion of France.

A just cause was essential to avoid responsibility for causing death. In requesting Canterbury's opinion on the justness of his cause, Shakespeare's Henry emphasizes that "God doth know how many now in health/Shall drop their blood in approbation/Of what your reverence shall incite us to" (1, 2, 18–20). That spiritual responsibility was critical to Henry is demonstrated by his deathbed speech, as reported by Holinshed in his *Chronicles*,[28] and by the following conversation be-

[26] Henry Chichele, Archbishop of Canterbury at the time of Agincourt, is perhaps best remembered by international lawyers for the (Oxford) Chichele Chair of Public International Law and for having cofounded in 1438 with Henry VI the All Souls College (the College of All Souls of the Faithful Departed) at Oxford, in memory of those fallen in the wars in France, of which Henry V's campaign was but one segment. *See* J. SIMMONS, ALL SOULS COLLEGE: A CONCISE ACCOUNT 1 (1988); J. SIMMONS, ALL SOULS COLLEGE, THE CODRINGTON LIBRARY AND THE LAW 1 (1986). Thus, the person to whom Hall (followed by Holinshed) attributed the justification for starting the campaign later founded the memorial to the souls of those who died in it. It is doubtful, however, whether this attribution was appropriate. P. SACCIO, *supra* note 22, at 79, asserts that "Archbishop Chichele almost certainly never made the speech on the Salic law that is assigned to him." The anonymous early sixteenth-century work, THE FIRST ENGLISH LIFE OF KING HENRY THE FIFTH 24–25 (C. Kingsford ed. 1911) (1513) does not mention Canterbury's participation in the deliberations of the King's Council, and refers to him as having delivered the King's answer to the French ambassadors. It was Henry's Chancellor, Bishop Beaufort, who appears to have had a leading role in the discussions in Henry's court and with the envoys of France. *See also* 1 J. WYLIE, THE REIGN OF HENRY THE FIFTH 491 (1914); E. JACOB, HENRY V AND THE INVASION OF FRANCE 73 (1947) [hereinafter HENRY V]; 3 W. STUBBS, A CONSTITUTIONAL HISTORY OF ENGLAND 89–90 (1880); 1 E. JACOB, THE REGISTER OF HENRY CHICHELE, at xxxiv–xxxv (1943); C. KINGSFORD, HENRY V, at 109–10 (1901). The critical role of Beaufort in advocating resort to arms to uphold Henry's just cause is made clear by G. HARRISS, CARDINAL BEAUFORT 71–73, 84–86 (1988).

In his "Aphotegms New and Old," written about a quarter of a century after *Henry V*, Francis Bacon demonstrated England's skepticism regarding the very existence of the Salic law. FRANCIS LO. VERULAM VISCOUNT ST ALBAN, APHOTEGM NO. 184 (32), at 150 (1625).

[27] On St. Thomas Aquinas's views on just war, see G. WEIGEL, TRANQUILLITAS ORDINIS 36–38 (1987); on St. Augustine's theory of just war, see *id.* at 29–30. *See also* T. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 80–81 (1990).

[28]

> [H]e protested unto them, that neither the ambitious desire to inlarge his dominions, neither to purchase vaine renowme and worldlie fame, nor anie other consideration had mooved him to take the warres in hand; but onelie that in prosecuting his just title, he might in the end atteine to a perfect peace, and come to enjoie those peeces of his inheritance, which to him of right belonged: and that before the beginning of the same warres, he was fullie persuaded by men both wise and of

tween Shakespeare's Henry and one of his soldiers, Williams (discussed further in section V below):

> *King* [in disguise]. Methinks I could not die anywhere so contented as in the king's company, his cause being just and his quarrel honorable.
> *Williams.* That's more than we know.
> . . . .
> *Williams.* But if the cause be not good, the king himself hath a heavy reckoning to make when all those legs and arms and heads chopp'd off in a battle shall join together at the latter day . . . . Now if these men do not die well, it will be a black matter for the king that led them to it . . . .
> [4, 1, 126–45]

Writers on *jus gentium* in Shakespeare's era often linked spiritual and secular elements as components of the just war doctrine. Thus, Suárez advanced a combination of moral, humanistic and legal considerations as reasons for limiting lawful resort to war to unquestionably just wars. He observed that since, "in war, men are despoiled of their property, their liberty, and their lives[,] . . . to do such things without just cause is absolutely iniquitous, for if this were permissible, men could kill one another without cause."[29] He also pointed out that aggressive war is frequently waged against foreign nationals ("non-subjects"), who would deserve neither punishment nor subjection to foreign jurisdiction unless they "have committed some wrong on account of which they render themselves subjects."[30]

Of the possible secular causes for a just war, the cause most directly relevant to King Henry was the recapture of the French territory that he considered to belong to England, or to the Lancastrians as descendants of the Plantagenets. According to writers on international law contemporaneous with Shakespeare, a war aimed at repossessing property captured by an enemy would be a defensive, not an aggressive, war.[31] "[T]he seizure by a prince of another's property, and his refusal to restore it," was the very first example of a just cause of war given by Suárez.[32] Vitoria, too, regarded a war designed to repossess property as a defensive, and necessarily just, war.[33] In those circumstances, it was "permissible to recapt everything that has been lost."[34]

In reality, of course, the situation was more complex, because each party to the conflict was likely to maintain that its cause was just (*bellum nostrum justum*).[35] Yet, under medieval legal theory, war could be just for one side only. More realistically, and perhaps ahead of his time, Gentili believed that a war might objectively be just on both sides.[36] "It is the nature of wars for both sides to maintain that they

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> great holinesse of life, that upon such intent he might and ought both begin the same warres, and follow them . . . and that without all danger of Gods displeasure or perill of soule.

R. HOLINSHED, *supra* note 3, at 129–30.

[29] 2 F. SUÁREZ, SELECTIONS FROM THREE WORKS 816 (Carnegie ed., G. Williams, A. Brown & J. Waldron trans. 1944) (1612, 1613, 1621).

[30] *Id. See also* P. HAGGENMACHER, *supra* note 6, at 409–26.

[31] F. SUÁREZ, *supra* note 29, at 804.

[32] *Id.* at 817.

[33] F. VICTORIA, *The Second Relectio on the Indians, or on the Law of War made by the Spaniards on the Barbarians,* in DE INDIS ET DE IURE BELLI RELECTIONES 166–67(1) (Carnegie ed., J. P. Bate trans. 1917). These lectures were published posthumously in 1557.

[34] *Id.* at 171(16).

[35] M. KEEN, *supra* note 7, at 71.

[36] A. NUSSBAUM, *supra* note 17, at 97. *See also* P. HAGGENMACHER, *supra* note 6, at 203–23, 279–311; text at and note 54 *infra.*

are supporting a just cause."[37] In most cases, it is difficult to determine on which side justice rests, "and if each side aims at justice, neither can be called unjust."[38]

This view was also taken by another contemporary of Shakespeare, Balthazar Ayala (1548–1584), who related the just war doctrine to the duties of the religious man. He believed that a war between legitimate sovereigns, lawfully conducted, might be just for both sides.[39] But Suárez argued that if purposes such as ambition or avarice were sufficient to justify resort to war, "any state whatsoever could aspire to these ends; and hence, a war would be just on both sides, essentially and apart from any element of ignorance. This supposition is entirely absurd; for two mutually conflicting rights cannot both be just."[40] "Excluding cases of ignorance," the war cannot "incidentally be just for both sides." Suárez conceded, however, that a war could be *unjust* for both sides,[41] for example, when waged by mutual agreement.[42]

That mere expansionism ("extension of empire") could not be a just cause of war was already suggested by Vitoria. Otherwise, he claimed, "each of the two belligerents might have an equally just cause and so both would be innocent. . . . [T]he consequence [would be] that it would not be lawful to kill them and so imply a contradiction, because it would be a just war."[43] Presumably, Henry's counsel would distinguish between recapturing property lost to another prince, which would constitute a just cause of the war, and extension of the empire, which would not. The King of France, however, would surely believe that Henry was expanding his empire, not reclaiming property lost to France.

In such circumstances, the right of every prince to judge whether or not his cause was just appears inherently arbitrary, self-serving and even hypocritical. Shakespeare's contemporaries were not unaware of these difficulties. They are hardly dispelled by the fact that Shakespeare's King of England, like Holinshed's Henry, defers to the moral and religious authority of the senior English ecclesiastic (the Archbishop of Canterbury) for assurance of the justness of the English cause.

Actually, advancing an idea that has yet to gain acceptance, Vitoria stated that,

> if there were any competent judge over the two belligerents, he would have to condemn the unjust aggressors and authors of wrong, not only to make restitution of what they have carried off, but also to make good the expenses of the war to the other side, and also all damages.[44]

[37] 2 A. GENTILI, DE JURE BELLI LIBRI TRES 31 (Carnegie ed., trans. J. Rolfe 1933) (This is the 1931 translation of the 1612 edition. *Prima commentatio de jure belli* was published in 1588, the second and third parts in 1589. The three books appeared, as a new work, in 1598 under the title *De jure belli libri tres*. *See* Phillipson, *Introduction* to *id.* at 14a).

[38] *Id.* at 32.

[39] A. NUSSBAUM, *supra* note 17, at 92.

[40] F. SUÁREZ, *supra* note 29, at 816. Vitoria implied, *supra* note 33, at 177(32), that ignorance may make the war just for both sides. He wrote that "[a]part from ignorance [a war cannot be just on both sides] . . . for if the right and justice of each side be certain, it is unlawful to fight against it . . . ." However, "[a]ssuming a demonstrable ignorance either of fact or of law," he continued, "it may be that on the side where true justice is the war is just of itself, while on the other side the war is just in the sense of being excused from sin by reason of good faith, because invincible ignorance is a complete excuse." *Id.*

[41] F. SUÁREZ, *supra* note 29, at 850–51. *Compare* Abraham Lincoln's statement: "In great contests each party claims to act in accordance with the will of God. Both *may* be, and one *must* be wrong." *Quoted by* W. SAFIRE, FREEDOM 787 (1987).

[42] *See* P. HAGGENMACHER, *supra* note 6, at 436–37.

[43] F. VICTORIA, *supra* note 33, at 170(11).

[44] *Id.* at 171(17).

Absent such a third-party determination, "a prince who is carrying on a just war is as it were his own judge."[45] "[A] superior judge has competence to mulct the author of a wrong by taking away from him a city . . . or a fortress. . . . [In the same way] a prince who has suffered wrong can do this too, because by the law of war he is put in the position of a judge."[46]

Suárez appears to have been less troubled by the privilege of every prince to determine the justness of his own cause. In discussing the possibility of a king's claiming a certain city "as falling newly to him by hereditary right" (such as Henry's claim to France), he wrote that, "when the case of each side contains [an element of] probability, then the king ought to act as a just judge. . . . [I]f he finds that the opinion favouring his own side is the more probably true, he may, even justly, prosecute his own right . . . ."[47]

Just cause concerned not only *jus ad bellum* (the right to resort to war), but also *jus in bello* (the law governing the conduct of war), since it had bearing on the effects of war. Because medieval legal doctrine taught that the lawfulness of the title to the spoils of war turned on the justness of its cause, Henry required a good cause to realize his objectives. Thus, Vitoria emphasized that in a just war it was lawful "to recover things taken from us."[48] Subject to certain limits, which he suggested, "everything captured in a just war vests in the seizor . . . . This needs no proof, for that is the end and aim of war."[49]

There therefore continued into Shakespeare's era a much closer link than remains today between *jus ad bellum* and *jus in bello.* As Keen has pointed out, the first concern of the medieval soldier was to show that "his booty was *prise de bonne guerre,* that is, taken in just war. If it was not taken in these circumstances, restitution could be demanded."[50] A just war could legitimize criminal acts and create a legal title to goods whose taking in other circumstances would be considered robbery.[51] Only in a just war could spoils and prisoners be taken lawfully.[52] Whether or not a captor would acquire a property right in the person of prisoners and the consequent right to the payment of ransom hinged on whether or not the war was just.[53]

Cracks already began to appear in this rigid doctrine during the fourteenth and fifteenth centuries. In discussing *jus in bello,* Keen explains that, according to the canonists, rights to the spoils of a public war—that is, a war declared by a prince, waged on his authority and governed by *jus gentium*—were in theory dependent on the satisfaction of several standards of justice, in addition to that of authority to wage war. However, because there was no superior or third party to judge the justice of the cause, "[i]n practice . . . a just war . . . and a public war meant the same thing."[54]

[45] *Id.*

[46] *Id.* at 186(56). *See also* P. HAGGENMACHER, *supra* note 6, at 409–26.

[47] F. SUÁREZ, *supra* note 29, at 828. [48] F. VICTORIA, *supra* note 33, at 182(44).

[49] *Id.* at 184(50).

[50] M. KEEN, *supra* note 7, at 139. *See also* P. HAGGENMACHER, *supra* note 6, at 300–05.

[51] M. KEEN, *supra* note 7, at 65. [52] *Id.* at 70.

[53] *Id.* at 137.

[54] *Id.* at 71. Keen cites the fourteenth-century BARTHOLOMEW OF SALICETO, SUPER VIII COD., tit. 51, *l.* 12: "It is tacitly assumed that it is in the nature of war waged by kings and lords, that it is public and general on both sides," and the ca. 1396 disputations of ANGELUS OF PERUSIA, DISPUTATIO, INC. 'RENOVATA GUERRA' (printed ca. 1490, unpag.): "propter dubium ex utroque latere dicere possumus guerram justam." M. KEEN, *supra* note 7, at 71 n.1.

The jurists of Shakespeare's time departed even more sharply from the medieval doctrine. Suárez stated that only in a just war may the prince seize cities and provinces,[55] but he conceded that in a war that is unjust for both sides, the victor would acquire the property of the vanquished as a result of the agreement to wage war, i.e., by a sort of implied contract theory.[56]

Gentili suggested that the belligerents' rights to prisoners and booty do not depend on the war's justness.[57] By insisting, with considerable sophistication, that war may be just on both sides, he reached the conclusion that the law must be impartial to both sides. He thus paved the way for the uniform applicability of *jus in bello*,[58] an approach inherently less subject to abuse that is characteristic of modern international law. The rights of war, Gentili wrote, belong to both contestants, "mak[ing] what is taken on each side the property of the captors."[59]

Gentili thus felt that the distinction between just and unjust war was sophistry, at least to a large extent. While not unique, however, he was not typical of his times. Moreover, like Ayala, he wrote about 175 years after the discussion Shakespeare ascribes to Henry and the Archbishop of Canterbury, in which the justness of Henry's cause is so central.

In the same vein, Ayala held that "[n]othing more is needed . . . so far as concerns the legal effects which are produced and the bringing into operation of the laws of war, than that the war should be waged by parties who are within the definition of 'enemies' and who have the right to wage war."[60] Nevertheless, a soldier who is summoned to fight in an unjust war "has no action at law either for the recovery of pay or for reimbursement of loss, for no right of action is allowed to arise out of circumstances of disgrace [*ex turpi causa nulla datur actio*]."[61] Since the right of combatants to engage in war and hence to be protected by the laws of war also depended on the justness of the war, demonstrating just cause was important for many practical reasons, including raising troops and maintaining morale.

To give rise to combatant privileges, the war had to be declared by a prince, acting on behalf of the state. A state could wage war if it constituted "[a] perfect State or community . . . [i.e.,] one which is complete in itself, that is, which is not a part of another community."[62] According to Suárez, war could be waged only by a power entitled to declare war, i.e., a sovereign prince who has no superior in temporal affairs.[63] Indeed, whether war had been declared by a sovereign prince was an important practical test of the justness of the conflict and its public nature.[64]

Suárez argued that the captured soldiers of a prince who waged an unjust war would not enjoy the protection of the *jus gentium* and could be killed, but he favored such protection of mercenary soldiers, who were innocent in the sense

[55] F. SUÁREZ, *supra* note 29, at 850.

[56] *Id.* at 851–52. *See* P. HAGGENMACHER, *supra* note 6, at 426–37.

[57] A. NUSSBAUM, *supra* note 17, at 97.

[58] *See generally* P. HAGGENMACHER, *supra* note 6, at 597–612.

[59] A. GENTILI, *supra* note 37, at 33. *See generally* P. HAGGENMACHER, *supra* note 6, at 74–139.

[60] B. AYALA, THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE 23 (Carnegie ed. 1912, J. Bate trans.) (1582). It follows that things captured in war become the property of the captors. *Id.* at 35.

[61] *Id.* at 25.

[62] F. VICTORIA, *supra* note 33, at 169(7).

[63] F. SUÁREZ, *supra* note 29, at 805. Gentili criticized Spain for not treating as "lawful enemies" some Frenchmen captured in a war with Portugal who held letters from a king unrecognized by Spain. A. GENTILI, *supra* note 37, at 26.

[64] M. KEEN, *supra* note 7, at 72.

that they did not know any reasons indicating the justness of the other side's cause.[65] Neither unjust war nor those participating in it had standing in law.[66]

In contrast to medieval law, most modern rules of warfare (e.g., on requisitioning property and the treatment of prisoners of war and civilians, that is, *jus in bello*) apply equally to a state fighting a war of aggression and to one involved in lawful self-defense. Prisoner-of-war status and combatant privileges in modern international law depend, in principle, on the combatants' conformity with conditions of openness and respect for the laws and customs of war enumerated in Article 4 of the third Geneva Convention of 1949[67] and in Articles 43 and 44 of Additional Protocol I,[68] regardless of the cause of the conflict. *Jus ad bellum* has survived in such matters as the right of self-defense (Article 51 of the United Nations Charter) and action necessary to maintain international peace and security (Articles 42–43 of the UN Charter). An echo of the medieval doctrine of just war can be found in the modern principle outlawing the annexation of territory acquired in a war of aggression.[69]

IV. Declaration of War

On the basis of the Archbishop of Canterbury's reassurances about the justness of Henry's cause, the King's ambassador and special envoy to the court of France, the Duke of Exeter, addresses the following ultimatum to the King of France:

> That you divest yourself and lay apart
> The borrow'd glories that by gift of heaven,
> By law of nature and of nations, 'longs

[65] A. Nussbaum, *supra* note 17, at 90.

[66] M. Keen, *supra* note 7, at 65 (citing Nicholas of Tudeschi, who wrote in 1524).

[67] Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135.

Professor Haggenmacher aptly suggests that in contrast to the medieval doctrine of just war, which focused on the justness of the cause of war, the modern law of war, which underlies the Hague Regulations and the Geneva Conventions for the Protection of Victims of War, focuses on whether the war constitutes a "regular war," i.e., on its "formal aspects." Haggenmacher, *La doctrine de la guerre juste chez les théologiens et les juristes du siècle d'or*, in L'Espagne et la formation du droit des gens moderne 27, 28–29 (G. Van Hecke ed. 1988).

[68] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 UNTS 3.

[69] This doctrine has been applied by the United Nations rather selectively. The General Assembly's Resolution on the Definition of Aggression of December 14, 1974, reaffirms that "the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force . . . and . . . shall not be the object of acquisition by another State resulting from such measures or the threat thereof." GA Res. 3314, 29 UN GAOR Supp. (No. 31) at 142, UN Doc. A/9631 (1975).

By Resolution 662 of August 9, 1990 (*reprinted in* 29 ILM 1327 (1990)), the Security Council asserted its determination "to restore the sovereignty, independence and territorial integrity of Kuwait" and decided "that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void." *See also* SC Res. 687A of April 3, 1991 (*reprinted in* 30 ILM 847 (1991)); Schachter, *United Nations Law in the Gulf Conflict*, 85 AJIL 452, 454 (1991).

In the more general context of the blueprint for settling the Six-Day War between Israel and the neighboring Arab states, for whose outbreak responsibility has not been authoritatively established, the Security Council emphasized in Resolution 242 of November 22, 1967, "the inadmissibility of the acquisition of territory by war."

On some contemporary aspects of just war, see Y. Dinstein, War, Aggression and Self-Defence 66–74 (1988); Schachter, *In Defense of International Rules on the Use of Force*, 53 U. Chi. L. Rev. 113, 142–44 (1986).

To him and to his heirs—namely, the crown
And all wide-stretched honors that pertain
By custom and the ordinance of times
Unto the crown of France. . . .
King. Or else what follows?
Exeter. Bloody constraint . . . .
Deliver up the crown, and . . . take mercy
On the poor souls for whom this hungry war
Opens his vasty jaws . . . .[70]

[2, 4, 78–105]

Here Shakespeare renders in dramatic form a declaration of war, or an ultimatum that in effect amounted to a declaration of war, required by the *jus gentium* of both the medieval and the Renaissance periods. The message states the claim to the crown of France, the legal basis for that claim *in the law of nature and the law of nations*, and the consequences of noncompliance with its demands, i.e., war.

In the Middle Ages, the requirement that a war be publicly declared was commonly met by issuing letters of defiance; later Elizabethan doctrine required not only that the cause of war be just, but also that the procedures of war be followed,[71] and, in particular, that resort be made to a formal declaration of war.[72] Accordingly, Queen Elizabeth published, in 1585, A Declaration of the Causes Mooving the Queene of England to Give Aide to the Defence of the People Afflicted and Oppressed in the Lowe Countries and, in 1596, A Declaration of the Causes Moving the Queenes Majestie of England, to Prepare and Send a Navy to the Seas, for the Defence of Her Realmes against the King of Spaines Forces.[73] Shakespeare's Henry faithfully reflects this doctrine in the message carried by the Duke of Exeter to the court of France. The dramatist's version finds support in Hall's *Chronicle:*

> The Kyng like a wise prince and pollitique governor, entendyng to observe the auncient ordres of famous kynges and renoumed potentates used aswel emong Paynimes as Christians, which is, not to invade another mannes territory without open war and the cause of the same to hym published and declared, dispatched into Fraunce his uncle the duke of Excester . . . .[74]

A similar declaration of war can be found in Shakespeare's *King John:*

K[ing] John. Now, say, Chatillon, what would France with us?
Chatillon. Thus, after greeting, speaks the King of France . . . .
. . . .
Chatillon. Philip of France, in right and true behalf
Of thy deceased brother Geffrey's son,
Arthur Plantagenet, lays most lawful claim

[70] *Compare The final demands of Henry V's ambassadors, March 1415, reprinted in* 4 ENGLISH HISTORICAL DOCUMENTS 1327–1485, at 209 (D. Douglas ed. 1969); R. HOLINSHED, *supra* note 3, at 12–13. For an English translation of some of the correspondence between Henry V and Charles VI, see H. NICOLAS, A HISTORY OF THE BATTLE OF AGINCOURT, App. 1 (2d ed. 1832). For the French text of part of the correspondence, see 5 CHRONIQUE DU RELIGIEUX DE SAINT-DENYS 507–11, 527–31 (Collection de Documents Inédits sur l'Histoire de France, 1ère série, 1844). For the Latin version, see 4 T. RYMER, FOEDERA, pt. 2 at 106 (Hague ed. 1740). See also the self-justifying account of the negotiations in GESTA HENRICI QUINTI 14–15 (F. Taylor & J. Roskell eds. 1975).

[71] L. CAMPBELL, *supra* note 1, at 287, regards Henry's demand for the surrender of Harfleur, to be discussed further in this essay, as an example of observance of such procedures.

[72] *Id.* at 285–86.

[73] *Id.*

[74] E. HALL, *supra* note 4, at 57.

To this fair island and the territories,
To Ireland, Poictiers, Anjou, Touraine, Maine, . . .
And put the same into young Arthur's hand,
Thy nephew and right royal sovereign.
K. John. What follows if we disallow of this?
Chatillon. The proud control of fierce and bloody war,
To enforce these rights so forcibly withheld.[75]

[1, 1, 1–18]

Actually, Henry's invasion of France in August 1415 did not start a new war but continued the war that legally was still extant. The Hundred Years' War was renewed with the collapse in 1369 of the Treaty of Brétigny (1360) after the rejection, or "defiance," by France of Edward III's ultimatum. Since then, the conflict had been interrupted only by truces, which, according to medieval doctrine, suspended, but did not end, the war. Because truces suspended the fighting for an agreed period of time only, it was not even necessary, as a matter of law, to declare war when they came to an end.[76]

Henry's negotiations with France made it clear that additional extensions of the truces depended on the satisfaction of his demands. Indeed, to press for faster negotiations and concessions, Henry refused to extend the passports or safe conducts of the French ambassadors beyond June 8, 1415. The invasion started on August 13 after the expiration of the truce as last prolonged, there being no record of a definitive rejection of the English demands. Such a rejection was contained only in Charles's letter to Henry of August 24, which followed the English invasion. Although Henry took an uncompromising stand in the negotiations, insisting on "justice" and the restoration of his right to the French crown rather than on this or that French duchy, he certainly could not be accused of having failed to give ample and public notice of his intention to resume hostilities. Henry's ultimatums, although possibly not drafted in the form of declarations of war, undoubtedly satisfied the requirements of an open and public war.

George Keeton, a modern commentator, believes that in Shakespeare's times declarations of war were becoming obsolete and "nations not infrequently found themselves at war without any further notification than the appearance of the army of one belligerent in the territory of another. . . . In the Historical plays, however, where Shakespeare was following the Chronicles, a formal declaration of war by a herald or ambassador precedes hostilities . . . ."[77] Regardless of the practice in Renaissance Europe, contemporaneous legal theory clearly articulated the duty to declare war. Gentili asserted that the "enemy are those who have officially declared war upon us, or upon whom we have officially declared war."[78] Those who did not declare war would be considered pirates or brigands, i.e., nonprivileged combatants in contemporary usage. The "war on both sides must be public and official and there must be sovereigns on both sides to direct the

[75] Kittredge, *supra* note 2.

[76] Regarding termination of the Treaty of Brétigny, see 4 R. DELACHENAL, HISTOIRE DE CHARLES V, at 134–45 (1928). On the status of truces in medieval war, see M. KEEN, *supra* note 7, at 206–17; A. GENTILI, *supra* note 37, at 187 ("it is not necessary to declare war when such truces come to an end"). On the extension of truces in 1415 and their expiration, see 1 J. WYLIE, *supra* note 26, at 444. Henry's dispatch on July 28 of a herald bearing a letter to the King of France "was no doubt intended as a formal defiance to war, and as such the French accepted it." C. KINGSFORD, *supra* note 26, at 122; *accord,* J. WYLIE, *supra,* at 493–94. For the text of the letter of July 28, see H. NICOLAS, *supra* note 70, at 5. On the "ultimatum" of Bishop Beaufort, see J. WYLIE, *supra,* at 491.

[77] G. KEETON, *supra* note 11, at 89; *see also* G. KEETON, *supra* note 18, at 72–73.

[78] A. GENTILI, *supra* note 37, at 15 (citing Pomponius).

war."[79] In his 1929 introduction to the Carnegie edition of Gentili's *De jure belli libri tres,* Coleman Phillipson explains Gentili's insistence on the obligation to declare war prior to resorting to hostilities:

> [I]n the time of Gentili, though we find a few instances in which heralds were dispatched to announce the commencement of hostilities, the practice of declaring war was generally falling into disuse; so that Gentili was performing a great service by protesting so vigorously against its discontinuance and by demanding a long interval in accordance (in his view) with the old-established law of nations as well as with Divine injunctions.[80]

Grotius stated that "[d]eclarations of war in fact . . . were wont to be made publicly, with a statement of the cause, in order that the whole human race as it were might judge of the justness of it."[81] Referring to past events that suggested that "most wars begin without declaration,"[82] Grotius observed:

> [B]efore the possessor of sovereign power is attacked for the debt or crime of a subject, a demand for settlement should be made, which may place him in the wrong, and in consequence of which he may be held either to be causing us loss or to be himself committing a crime, according to the principles which have previously been discussed.
>
> But even in case the law of nature does not require that such a demand be made, still it is honourable and praiseworthy to make it, in order that, for instance, we may avoid giving offence, or that the wrong may be atoned for by repentance and compensation, according to what we have said regarding the means to be tried to avoid war. . . .
>
> . . . But by the law of nations a proclamation is required in all cases in order to secure [the] . . . particular effects [of war] . . . .[83]

Whatever their normative status, since Henry's era declarations of war have proved remarkably resilient. The question of the duty to declare war may have been rendered moot by the law of the United Nations Charter, with its categorical prohibition of resort to war (subject to the inherent right of individual or collective self-defense). In determining whether the duty to declare war is firmly rooted in customary law, examples of the failure of states to issue declarations of war must be taken into account. As for conventional law, Article 1 of the 1907 Hague Convention Relative to the Opening of Hostilities, which is still in force between forty-two states, including all the permanent members of the UN Security Council except China, provides that the "Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."[84] At least as between the parties to this Convention, the law remains formally[85] as it was during the reign of Henry V.

[79] *Id.* "[I]f war is not declared when it ought to be declared, then war is said to be carried on treacherously; and such a war is unjust, detestable, and savage. [That is] because it is waged according to none of the laws of war . . . ." *Id.* at 140. *See also* F. SUÁREZ, *supra* note 29, at 837–38.

[80] A. GENTILI, *supra* note 37, at 39a.

[81] H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, bk. II, ch. XXVI, pt. IV(7) (Carnegie ed., F. Kelsey trans. 1925) (1646). Kelsey translated the 1646 edition rather than the first, 1625, edition.

[82] *Id.*, bk. III, ch. III, pt. VI(1). [83] *Id.*, (2)–(3).

[84] Oct. 18, 1907, 36 Stat. 2259, 2271 (pt. 2), TS No. 538, 1 Bevans 619. In a note to the entry on China, *Treaties in Force,* published by the U.S. Department of State, indicates that this Convention is "applicable only to Taiwan."

[85] *See* 2 L. OPPENHEIM, INTERNATIONAL LAW 293 (H. Lauterpacht 7th ed. 1952); [UNITED KINGDOM] WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW 7–8 (1958).

V. RESPONSIBILITY OF PRINCES

On the eve of the battle of Agincourt, Shakespeare has Henry circulate among his troops in disguise. The King's exchange with the soldier Williams[86] concerns the spiritual responsibility of princes[87] for the death of soldiers in war, whether just or not. They discuss the King's responsibility both from a Christian perspective, reflecting the doctrine that persons dying without having had a chance to repent are doomed to eternal damnation, and from a legal viewpoint. In explaining whether the King should be held responsible for the damnation of soldiers killed in battle with "many irreconcil'd iniquities" on their conscience, Henry makes a clear distinction between authorized acts, committed by soldiers in their official capacity, for which the King is indeed responsible ("every subject's duty is the king's"), and private acts, for which he is not ("but every subject's soul is his own").

Modern commentators such as Edward White have already observed that Henry's statement is faithful to the basic common law principle *respondere non sovereign*, an exception to *respondeat superior*.[88] The rule that the principal is liable for the acts of his agents, even negligent acts, performed pursuant to authority or powers delegated to them was thus inapplicable to the King. These rules, of course, govern civil responsibility; penal responsibility in common law is usually personal. Henry's discourse merits consideration in this essay not because it is faithful to the common law but because of what it implies about the important question of the King's responsibility for the unauthorized or criminal acts of soldiers in war. The emphasis in act 4, scene 1, on the King's exemption from responsibility for his soldiers' misdeeds such as pillage and murder is unremarkable for an era in which the concept of central authority over the army was still rudimentary.

Responsibility for the treatment of prisoners depended to a large extent on who possessed them. In modern law, Article 12 of the third Geneva Convention provides that "[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them"; and that "[i]rrespective of the individual responsibilities that may exist, the Detaining Power is responsible

[86] For the beginning of the exchange, see text following note 28 *supra*. The King continues:

> *King.* So, if a son that is by his father sent about merchandise do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon his father that sent him. Or if a servant under his master's command transporting a sum of money be assailed by robbers and die in many irreconcil'd iniquities, you may call the business of the master the author of the servant's damnation. But this is not so. The king is not bound to answer the particular endings of his soldiers, the father of his son, nor the master of his servant. For they purpose not their death when they purpose their services. Besides, there is no king, be his cause never so spotless, if it come to the arbitrement of swords, can try it out with all unspotted soldiers. Some peradventure have on them the guilt of premeditated and contrived murther; some, of beguiling virgins with the broken seals of perjury; some, making the wars their bulwark, that have before gored the gentle bosom of peace with pillage and robbery. Now if these men have defeated the law and outrun native punishment, though they can outstrip men, they have no wings to fly from God. . . . Then if they die unprovided, no more is the king guilty of their damnation than he was before guilty of those impieties for the which they are now visited. Every subject's duty is the king's, but every subject's soul is his own. . . .
>
> *Williams.* 'Tis certain every man that dies ill, the ill upon his own head—the king is not to answer it.
>
> [4, 1, 148–89]

[87] *See generally* F. SHELLING, SHAKESPEARE AND "DEMI-SCIENCE" 97 (1927); J. O'MALLEY, *supra* note 20, at 46–47.

[88] E. WHITE, *supra* note 20, at 291–92.

for the treatment given them." In medieval law, however, it was not always clear whether a prisoner of war "belonged" to the captor or the prince.[89]

Contemporary legal doctrine was probably consistent with the denial of responsibility by Shakespeare's King for the improper acts of his troops when acting in their private capacity. Nevertheless, in view of the feudal structure of fifteenth-century armies, it would be misleading to regard the fighting men of France and England exclusively as soldiers of the realm whose sole duty of fealty was to their prince. The medieval system was quite different from the absolutist monarchical

[89] *See* Geneva Convention No. III, *supra* note 67. Compare the conflict between Henry IV and Hotspur over the prisoners that Hotspur took. Shakespeare, *The First Part of King Henry the Fourth,* act 1, scenes 1 & 3.

English indentures commonly show the king reserving certain classes of prisoners to himself (e.g., high-ranking officials, members of the opposing royal family). A captor normally owed a share of his ransom money to his captain, and a captain a share to the king. After all, the right to make such captures only arose because the war was "licensed" by the king and waged on his authority. What Honoré Bonet said about spoil in his late fourteenth-century work is indicative of how difficult the problem was seen to be:

> [T]he law on the matter is . . . by no means clear, and expressed opinion is doubtful. According to one law it is thought that the chattels a man wins should be his, but another law says that if a man comes into possession of chattels in war, he must deliver them to the duke of the battle [i.e., the commander, the prince or the lieutenant]. For my part I say that what a man gains from his enemies belongs to him, if we bear in mind that previously it belonged to his enemies, who have lost their lordship over it; but it does not belong to the captor to the extent that he is not obliged to hand it over to the duke of the battle; and the duke should share the spoils out among his men . . . .

H. BONET, THE TREE OF BATTLES 150 (G. Coopland ed. 1949) (trans. of Nys ed. 1883). More directly, Bonet's discussion of prisoners points to similar difficulties:

> I ask now, if a soldier has captured [a duke or marshal] . . . , to whom should he belong as prisoner, to the soldier, or to that soldier's lord; for according to these laws it would appear that he is the soldier's prisoner because the laws say that the captive is at the disposal of the captor. I assert, however, the contrary; for, if it is the case that the soldier is in the king's pay, or in that of another lord, the prisoners or other possessions acquired should be the lord's in whose pay the soldier is. And with regard to this the decretal says that all the booty should be at the king's disposal, and he should dispose of it at his pleasure to those who, according to his estimation, have helped him to win. And, if anyone said the contrary, he could not maintain it according to written law, for if a prisoner must belong to him who has taken and conquered him, by similar reasoning every strong castle and fortified town should be his if he took them. And it would not be reasonable that at the king's cost and expense he should gain land, for he does all that he does as a deputy of the king or of the lord in whose pay he is. Therefore what he conquers should be his lord's; for what he does he does not by his own industry or his own initiative.

Id. at 134–35. *See also* M. KEEN, *supra* note 7, at 144–45. While acknowledging that views on this question differed, C. DE PISAN, *supra* note 5, at 223, believed that both prisoners and other spoils of war were "atte wille of the prynce whom apparteyneth to dystrybute them after dyscrecyon."

The Ordinances of War attributed to King Henry V provided that soldiers pay their captains one-third of war booty ("wynnyng by werr") (para. 16). As regards prisoners, the ordinances required that the captor bring his prisoners to his captain or master. The penalty for noncompliance was forfeiture of the captor's part of the ransom to his captain or master. Within eight days, the captain or the master was to bring the prisoner to the king, constable or marshal (para. 20). If he failed to do so, he forfeited his share to whoever first gave notice to the constable or marshal. *Id. Ordinances of War made by King Henry V at Mawnt* [Mantes], *reprinted in* MONUMENTA JURIDICA, THE BLACK BOOK OF ADMIRALTY, App. at 459 (Travers Twiss ed. 1871). Sir Travers believes that these ordinances were probably issued by King Henry V in July 1419, when he was negotiating a treaty with the Duke of Burgundy and the Queen of France. Another text, The Statutes and Ordinaunces to be Keped in Time of Werre, although attributed to King Richard II, is probably a translation into English of a Latin version of Henry's ordinances; this version omits nine of the ordinances found in the Mantes version. *See* THE BLACK BOOK OF ADMIRALTY, *supra,* at 282 ed. nn.1 & 2.

state later advocated by Jean Bodin.[90] The connection between a soldier and his immediate captain or lord was extremely important; soldiers were thus enmeshed in a web of relationships involving both king and captain. Keen observes that "[a] company was a *societas,* a corporate body of itself; . . . [the captain] was its head . . . . As such he could be held liable for unauthorised pillaging by his men . . . . He might even, by the terms of his contracts with his soldiers, be bound to ransom them . . . ."[91] Although the king could deny responsibility for the improper acts of his soldiers, this was not necessarily true of their captain. That the captain could and should be held criminally responsible for such acts by his men, including illegal pillaging, is manifested by the ordinance issued by Charles VII of France in 1439.[92]

Gentili addressed the broader question whether the faults of individuals could be "charged against a community."[93] In principle, the act of a private citizen, not necessarily including soldiers, does not involve the entire community, the wrong not being caused "by act of the state."[94] But the state may become responsible if it fails to right the wrong. Since the community "can hold its citizens to their duty, and indeed is bound to hold them, it does wrong if it fails to do so."[95] The state has a clear duty to prevent wrongs of which it has notice and which it has the power to prevent: "the state, which knows because it has been warned, and which ought to prevent the misdeeds of its citizens, and through its jurisdiction can prevent them, will be at fault and guilty of a crime if it does not do so."[96] In language anticipating Article 18 of the UN International Law Commission's draft articles on state responsibility,[97] Gentili observed that "a state is liable for such offences of its citizens as are not for the moment but are *successive and continuous;* but even then, only if it knew of them and could have prevented them."[98] Had Gentili applied the same, if not a higher, duty of care to the acts of soldiers and sailors, the king would have been responsible for those wrongs he had known about and could have prevented.

Grotius took a similar approach: "Kings and public officials are liable for neglect if they do not employ the remedies which they can and ought to employ for

[90] J. BODIN, SIX LIVRES DE LA RÉPUBLIQUE (1577), *translated as* THE SIX BOOKES OF A COMMONWEALE (K. McRae ed. 1962) (facsimile reprint of Eng. trans., 1606).

[91] M. KEEN, *supra* note 7, at 150–51 (footnotes omitted).

[92] *See* Lettres de Charles VII, Pour obvier aux pilleries et vexations des gens de guerre (Orléans, le 2 Novembre, 1439), 13 ORDONNANCES DES ROIS DE FRANCE 306, 308 (Paris 1782):

> cl.18) Item, Ordonne le Roi, que chacun Capitaine ou Lieutenant sera tenu des excès, maux & outrages commis par ceux de sa compagnie, ou aucun d'eux, en tant que sitost que plainte ou clameur sera faite au Capitaine, de ses gens, ou d'aucun d'eux, d'aucun malfait ou excès, que incontinent il prenne le délinquant, et le baille à Justice pour en estre faite punition, selon son délit, raisonnable, selon ces présentes Ordonnances: & en cas qu'il ne le fera ou dissimulera ou delayera en quelque maniere que ce soit, ou que par négligence ou autrement le délinquant évadera & s'en ira, en telle maniere que punition & justice n'en soit faite, le Capitaine sera tenu du délit, comme celui qui l'aura fait, & en souffrira pareille peine qu'eust fait le délinquant.

See also M. KEEN, *supra* note 7, at 150.

[93] A. GENTILI, *supra* note 37, at 99.

[94] *Id.* at 100.

[95] *Id.*

[96] *Id.*

[97] *See* Article 18 and Commentary:

> [T]hree different cases are treated separately in the three paragraphs mentioned: that of a single State act of a continuing character extending over a period of time (continuing act); that of an act consisting of a systematic repetition of actions or omissions relating to separate cases (composite act); and that of an act consisting of a plurality of different actions or omissions by State organs relating to a single case (complex act).

[1976] 2 Y.B. INT'L L. COMM'N, pt. 2 at 88, UN Doc. A/CN.4/SER.A/1976/Add.1 (Pt. 2).

[98] A. GENTILI, *supra* note 37, at 101 (emphasis added).

the prevention of robbery and piracy,"[99] but their responsibility is limited to the punishment and "surrender" (extradition) of the guilty persons and the confiscation of the plundered goods. He added that if persons authorized to make captures from enemies at sea unlawfully captured the property of friends, a claim for restitution would not be acceptable even if the assertion were made that the rulers "utilized the services of wicked men, or . . . had not required a bond."[100] Grotius appears to have distinguished between liability for neglect and nonliability for acts disobeying specific orders. As regards the latter, he categorically denied a prince's responsibility under the law of nations for those acts committed by his troops "contrary to orders": "this rule has been approved by witness of France and England. The liability of one for the acts of his servants without fault of his own does not belong to the law of nations, according to which this question has to be settled, but to municipal law . . . ."[101]

The principle of civil responsibility of the state for the unauthorized acts of its soldiers is relatively recent. Recognized in international arbitrations,[102] its most authoritative statement is found in Article 3 of the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land.[103] This provision, now accepted as customary law,[104] goes beyond the generally applicable rules governing the international responsibility of states, which are based on the distinction between official capacity and private capacity, to establish a more stringent standard for members of the armed forces. Article 3 constitutes "a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs [of the state] or as private persons."[105] This special rule, however, addresses the *consequences* of acts by a particular category of state agents rather

[99] H. GROTIUS, *supra* note 81, bk. II, ch. XVII, pt. XX(1).

[100] *Id.*

[101] *Id.*, pt. XX(2).

[102] *See, e.g.*, Jeannaud v. United States, 3 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3000 (1898); Zafiro case (Gr. Brit. v. U.S.), 6 R. Int'l Arb. Awards 160 (1925). *See also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 452 (4th ed. 1990).

[103] Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 1 Bevans 631. Article 3 provides that a belligerent party "shall be responsible for all acts committed by persons forming part of its armed forces." On responsibility of states under Article 3, see Affaire des Biens Britanniques au Maroc Espagnol (Spain v. U.K.), Report III (Oct. 23, 1924), 2 R. Int'l Arb. Awards 615, 645 (1925).

Article 3, of course, constitutes *lex specialis.* Regarding the general customary law rules on attribution, see F. GARCÍA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 247–49 (1974); Meron, *International Responsibility of States for Unauthorized Acts of Their Officials,* 33 BRIT. Y.B. INT'L L. 85 (1957). *See also* Condorelli, *L'Imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances,* 189 RECUEIL DES COURS 9, 147–48 (1984 VI); Christenson, *The Doctrine of Attribution in State Responsibility,* in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 321 (R. Lillich ed. 1983); T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 155–71 (1989). For other scholarly writings on attribution to states of *ultra vires* acts of state organs, see [1975] 2 Y.B. INT'L L. COMM'N 66 nn.71–72, UN Doc. A/CN.4/SER.A/1975/Add.1 (1976).

[104] [1975] 1 Y.B. INT'L L. COMM'N 7, UN Doc. A/CN.4/SER.A/1975 (comments of Prof. Reuter); *see also* T. MERON, *supra* note 103, at 225–26.

[105] [1975] 1 Y.B. INT'L L. COMM'N, *supra* note 104, at 16 (comments by Special Rapporteur Roberto Ago). The ILC observed that "article 3 . . . attributes to the State responsibility . . . whether [the actors] acted as organs or as individuals." 2 *id.*, *supra* note 103, at 69 (footnote omitted). *See also* 1 L. OPPENHEIM, INTERNATIONAL LAW 363 n.1 (H. Lauterpacht 8th ed. 1955). Article 3 was also intended to apply to cases "in which negligence cannot be attributed to the government itself," i.e., violations committed "without the knowledge of governments, or against their will." Sandoz, *Unlawful Damage in Armed Conflicts and Redress under International Humanitarian Law,* INT'L REV. RED CROSS, No. 228, May–June 1982, at 131, 136–37. *See also* Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces,* 40 INT'L & COMP. L.Q. 827, 837–38 (1991).

than the attribution of their acts to the state.[106] In contrast to the statement by Shakespeare's Henry, Article 3 holds the state responsible for the misdeeds of the members of its armed forces even when their acts cannot be imputed to the state.

The recognition of the leader's penal responsibility for acts committed by members of the armed forces in violation of the law of war came still later with the "*Yamashita* doctrine."[107] Nevertheless, the *Yamashita* doctrine, which can be regarded as a statement of customary law, was not expressed in the Geneva Conventions of 12 August 1949 for the Protection of Victims of War[108] and it found explicit recognition in a treaty only in 1977.[109]

This principle of responsibility, *respondere sovereign,* was incorporated into modern international customary and conventional law as necessary to ensure the effec-

[106] Note the opinion of Professor Brownlie that "[i]mputability would seem to be a superfluous notion, since the major issue in a given situation is whether there has been a breach of duty: the content of 'imputability' will vary according to the particular duty, the nature of the breach, and so on." I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I, at 36 (1983) (footnote omitted). *See also* Arangio-Ruiz, Second Report on State Responsibility, UN Doc. A/CN.4/425/Add.1, para. 173 (1989) ("in the case of States as international persons a *legal* attribution seems actually to be an error and a redundancy").

[107] In 1946 General Tomuyuki Yamashita, the commander of the Japanese armed forces in the Philippines in 1944–1945, voiced a defense that echoed Henry's plea of *respondere non sovereign.* Charged with failing to discharge his duty to control the operations of the persons subject to his command who had violated the laws of war by committing massacres, acts of violence, cruelty, homicide, pillage and destruction against the civilian population and prisoners of war, Yamashita maintained that the charge did not allege that he personally had either committed or directed the commission of these acts and that he could therefore not be held responsible for any violation of the law of war. On a petition of certiorari from a U.S. military commission, the U.S. Supreme Court considered a military commander's criminal liability for such violations and stated that the aim of protecting civilian populations and POWs from brutality would largely be defeated if the commander of an invading army "could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." *In re* Yamashita, 327 U.S. 1, 15 (1945). Extrapolating from provisions of the Hague Convention No. IV and other treaties, Chief Justice Stone concluded that they "plainly imposed on petitioner . . . an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals." *Id.* at 16. See the criticism of this decision by M. WALZER, JUST AND UNJUST WARS 319–22 (1977).

In *United States v. Sadao Araki,* the International Tribunal for the Far East followed the *Yamashita* doctrine with regard to the responsibility of members of the Japanese cabinet for mistreatment of POWs, "even though they delegate the duties of maintenance and protection to others." U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES, VOL. 60, DOCUMENTS ON PRISONERS OF WAR 437, 438 (H. Levie ed. 1979). The Tribunal held that members of the government and military and civilian officials with control over POWs fail in their duty and become responsible for ill-treatment of prisoners if they do not establish and secure the efficient functioning of a system aimed at preventing such treatment. *Id.* at 438. Only for the last two centuries, however, had prisoners of war and civilian internees been considered to be in the power of the captor sovereign. *Id.* at 437. The principle of the responsibility of the state for the POWs captured by its troops is stated in the nineteenth- and twentieth-century law of war instruments.

[108] The authoritative Commentary on Article 146 of the Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287, prepared by the International Committee of the Red Cross, mentions the guilty verdicts in several cases in Allied courts and observes: "In view of the Convention's silence on this point, it will have to be determined under municipal law either by the enactment of special provisions or by the application of the general clauses which may occur in the penal codes." COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 591–92 (O. Uhler & H. Coursier eds. 1958).

[109] Article 86(2) of Protocol I Additional to the Geneva Conventions, *supra* note 68.

tiveness of the law of war. It is a far cry from Henry's statement on his own responsibility in act 4, scene 1.

VI. The Siege of Harfleur and Treatment of Occupied Territory

A commentator on the modern law of war would be hard pressed to offer a more terrifying catalog of violations of the law of war than that contained in the speech by Shakespeare's Henry before the walls of Harfleur, threatening cruel retribution should Harfleur refuse to surrender:[110] denying quarter; killing or

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King. How yet resolves the governor of the town?
This is the latest parle we will admit.
Therefore to our best mercy give yourselves,
Or like to men proud of destruction
Defy us to our worst. For, as I am a soldier,
A name that in my thoughts becomes me best,
If I begin the batt'ry once again,
I will not leave the half-achiev'd Harflew
Till in her ashes she lie buried.
The gates of mercy shall be all shut up,
And the flesh'd soldier, rough and hard of heart,
In liberty of bloody hand shall range
With conscience wide as hell, mowing like grass
Your fresh fair virgins and your flow'ring infants.
What is it then to me if impious War,
Array'd in flames like to the prince of fiends,
Do with his smirch'd complexion all fell feats
Enlink'd to waste and desolation?
What is't to me, when you yourselves are cause,
If your pure maidens fall into the hand
Of hot and forcing violation?
What rein can hold licentious wickedness
When down the hill he holds his fierce career?
We may as bootless spend our vain command
Upon th' enraged soldiers in their spoil
As send precepts to the leviathan
To come ashore. Therefore, you men of Harflew,
Take pity of your town and of your people
Whiles yet my soldiers are in my command,
Whiles yet the cool and temperate wind of grace
O'erblows the filthy and contagious clouds
Of heady murther, spoil, and villainy.
If not—why, in a moment look to see
The blind and bloody soldier with foul hand
Defile the locks of your shrill-shrieking daughters,
Your fathers taken by the silver beards
And their most reverend heads dash'd to the walls,
Your naked infants spitted upon pikes
Whiles the mad mothers with their howls confus'd
Do break the clouds, as did the wives of Jewry
At Herod's bloody-hunting slaughtermen.
What say you? Will you yield, and this avoid,
Or, guilty in defense, be thus destroy'd?
Governor. . . . We yield our town and lives to thy soft mercy.
Enter our gates, dispose of us and ours,
For we no longer are defensible.
King. Open your gates. Come, Uncle Exeter,
Go you and enter Harflew. There remain,
And fortify it strongly 'gainst the French.
Use mercy to them all.

[3, 3, 1–54]

Compare White, *Shakespeare and Psychological Warfare,* 12 Pub. Opinion Q. 68, 70–72 (1948).

wounding an enemy who, having laid down his arms or no longer having a means of defense, has been captured;[111] ignoring the principle of distinction between combatants and civilians; attacking civilians;[112] enforcing collective penalties; resorting to measures of intimidation and terrorism; and engaging in pillaging and rape.[113] Of course, Henry cannot be judged by modern international norms, which in any case are too often honored only in the breach.[114] Rather, the relevant questions are, first, how did the real Henry treat the conquered inhabitants of Harfleur? Did he actually "use mercy to them all"? Second, to what extent did the speech of Shakespeare's Henry and the conduct of the real Henry's troops comport with the then-prevailing standards?

Of considerable legal importance is the fact that, in the negotiations preceding its surrender, the leaders of Harfleur had offered "to deliver the towne into the kings hands, their lives and goods saved." This offer, however, was refused, the King having successfully insisted on "their bodies and goods to stand at the kings pleasure."[115] After the surrender, which was achieved by agreement ("composition"),[116] "[t]he souldiors were ransomed, and the towne sacked, to the great gaine of the Englishmen."[117] The wealthy were allowed to pay ransom in return for permission to stay,[118] but "a greate part of the women and children"[119] were "expelled out of their habitations . . . parents with their children, yoong maids and old folke went out of the towne gates with heavie harts."[120] "The priestes had licence to depart leuyng behinde them their substaunce."[121] The King then issued a proclamation in England "that whosoever . . . would inhabit in Harflue, should have his dwelling given him gratis."[122] Although from the modern viewpoint the

[111] *Compare* Hague Regulations annexed to Convention No. IV, *supra* note 103, Art. 23(c)–(d). In negotiating the terms of surrender of Rone, Henry insisted that "the gunners that had discharged anie peece against the Englishmen should suffer death." R. HOLINSHED, *supra* note 3, at 69.

[112] Additional Protocol I, *supra* note 68, Art. 51.

[113] Geneva Convention No. IV, *supra* note 108, Arts. 33 and 27, respectively.

[114] E.g., the treatment of Kuwaiti civilians by Iraq in 1990. *See, e.g.*, SC Res. 674 (Oct. 29, 1990), *reprinted in* 29 ILM 1561 (1990); and UN Doc. A/C.3/45/L.90 (Nov. 27, 1990).

[115] R. HOLINSHED, *supra* note 3, at 23–24. Sir Harris Nicolas writes that King Henry intimated to the French that, unless they would yield at discretion, they must not expect any terms. H. NICOLAS, *supra* note 70, at 62. After the surrender, the King is reported to have stated that, although Harfleur had defied him, "in consideration of their having submitted to his clemency, he would not entirely withhold his mercy from them." *Id.* at 66. This version is not mentioned in Holinshed or Hall and is therefore unlikely to have been known to Shakespeare. *See also infra* text at and notes 165–66.

[116] 2 J. WYLIE, *supra* note 26, at 50 (1919).

[117] R. HOLINSHED, *supra* note 3, at 24. But see H. HUTCHISON, KING HENRY V, at 114 (1967), who argues that Harfleur was not sacked. He explains the deportation order as based on Henry's belief that Harfleur belonged to him, and on his wish to settle Englishmen in place of the departed natives. *See also* D. SEWARD, HENRY V, at 67–68 (1988); and E. JACOB, HENRY V, *supra* note 26, at 90. Jacob mentions Henry's order prohibiting the sacking of Harfleur. *Id.* G. TOWLE, THE HISTORY OF HENRY THE FIFTH 304 (1866), wrote that Henry tried to prevent pillage, but in vain. Despite Holinshed's statement that Harfleur was sacked, historians thus obviously differ on whether it was. Because of his familiarity with Holinshed, Shakespeare must have assumed that Harfleur was sacked.

[118] E. HALL, *supra* note 4, at 63; 2 J. WYLIE, *supra* note 116, at 58–59.

[119] E. HALL, *supra* note 4, at 63.

[120] R. HOLINSHED, *supra* note 3, at 24. THE FIRST ENGLISH LIFE OF KING HENRY THE FIFTH, *supra* note 26, at 41, does not mention the deportation. *See also* H. NICOLAS, *supra* note 70, at 68–69.

[121] E. HALL, *supra* note 4, at 63.

[122] R. HOLINSHED, *supra* note 3, at 24. *Compare* Geneva Convention No. IV, *supra* note 108, Art. 49 (which categorically prohibits deportation of the population of occupied territories and transfer of the occupying power's population to occupied territory). Henry also expelled French population elsewhere, e.g., in Caen. R. HOLINSHED, *supra*, at 58. In Rone, however, the terms of surrender included the right of the townspeople to remain in their dwellings.

treatment of the captured Harfleur cannot easily be seen as merciful, more massive violations, particularly widespread killing of the population such as that resorted to by Henry's troops in taking Caen,[123] were avoided. Not surprisingly, Henry's contemporaries, including the French chronicler the Religieux de Saint-Denys, thus considered the treatment of Harfleur lenient.[124]

Turning from the facts to the prevailing law, it must be made clear that some norms regulating warfare were agreed upon, at least in theory.

The canonistic doctrine of privilege "was rooted in the notion that the public welfare could be promoted in certain circumstances by granting special rights to groups who served the general interests of the community"[125] (e.g., scholars and clerics). The concept of Peace of God,[126] a canonical attempt to humanize warfare, was instrumental in establishing the principle of the immunity of noncombatants, though it was frequently disrespected in practice. That concept, which was developed considerably earlier,[127] was incorporated into canon law during the papacy of Gregory IX in the thirteenth century. *De treuga et pace* (Of Truces and Peace) listed eight categories of persons "who should have full security against the ravages of war: clerics, monks, friars, other religious, pilgrims, travelers, merchants and peasants cultivating the soil";[128] they were also to be accorded protection for at least some of their property. These classes were composed of persons whose social functions precluded their engaging in war; reciprocity required that war not be waged against them.[129] In elaborating this list, the church took good care of its own. Strikingly, the classification did not include women, children and the aged, i.e., those physically unable to bear arms.[130] In theory, however, these groups benefited from the parallel, secular code of chivalry, which required the protection of broader categories of persons, defined by weakness and innocence, i.e., women, children, the aged, the sick and other peaceable persons.[131]

Account must also be taken of various ordinances of war and admiralty promulgated by the Kings of England in the Middle Ages.[132] Of these, the most comprehensive and important regarding war on land are the Ordinances of War made by King Richard II at Durham (1385)[133] and the Ordinances of War made by King

[123] M. KEEN, *supra* note 7, at 121.

[124] 2 J. WYLIE, *supra* note 116, at 59. "Il [Henry V] traita les chevaliers et les écuyers qui avaient été faits prisonniers avec plus de douceur et de générosité qu'on s'y attendait." 5 CHRONIQUE DU RELIGIEUX DE SAINT-DENYS, *supra* note 70, at 545.

[125] J. BRUNDAGE, MEDIEVAL CANON LAW AND THE CRUSADER 140 (1969). The foundations of this doctrine can be found in Gratian's *Decretum*. *Id.* at 141. On the latter, see notes 127, 130 *infra*.

[126] Brundage does not appear to distinguish between the Truce of God and the Peace of God. *See* J. BRUNDAGE, *supra* note 125, at 13 n.40, 161.

[127] For a discussion of Gratian's *Decretum* (ca. 1140), see F. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 55, 70 (1975). Gratian proclaimed immunity from violence for pilgrims, clerics, monks, women and the unarmed poor. *Id.* at 70.

[128] J. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 127 (1981); P. HAGGENMACHER, *supra* note 6, at 268–72. The Magna Carta (June 12, 1215), *reprinted in* SOURCES OF OUR LIBERTIES 11, 17 (R. Perry & J. Cooper eds. 1959), Art. 41, already recognized, on the basis of reciprocity, the immunity of merchants in time of war.

[129] J. JOHNSON, *supra* note 128, at 132.

[130] Women and the unarmed poor, however, were included in the protected categories in Gratian's *Decretum*. F. RUSSELL, *supra* note 127, at 70.

[131] J. JOHNSON, *supra* note 128, at 135–36. Both women and unarmed priests were protected by King Henry V's Ordinances of War, *supra* note 89; *see also infra* note 196.

[132] *See generally* Twiss, *Introduction* to THE BLACK BOOK OF ADMIRALTY, *supra* note 89, at lviii–lxxvii.

[133] These ordinances are in French. *See id.* at lxxvi. On the official use of French in England in the thirteenth and fourteenth centuries, see *id.* at xlv–lvi.

Henry V at Mantes (1419).[134] The latter obviously drew on the former, particularly in the provision that prohibited stealing from the church and the killing or raping of women.[135] The penalty for violating these prohibitions was death. Apart from military discipline, the ordinances of Henry V imposed such humanitarian measures as prohibiting the taking of children under the age of fourteen as prisoners and protecting women confined by childbirth[136] and peasants, whose agricultural tools and work animals were safeguarded from seizure. This was not the first time that Henry had promulgated laws protecting the civilian population of France from the excesses of his soldiery. Soon after reaching Harfleur in 1415, Henry issued a proclamation, mentioned by Holinshed, prohibiting, under penalty of death, such crimes as setting houses on fire and violating churches or the person of women and priests, unless any of the latter were armed[137] (in reality, ecclesiastics often engaged in warfare). Henry found it necessary to reaffirm these strictures by issuing a similar proclamation after the conquest of Harfleur, forbidding his troops to devastate the area or to plunder the inhabitants, except for food and other necessities of life.[138]

Writers on *jus gentium* contemporaneous with Shakespeare recognized several protected categories of noncombatants. Vitoria asserted that even when fighting against Turks it was unlawful to kill children, because they are innocent, and women, because they are presumed innocent.[139] In war between Christians, "harmless agricultural folk," other "peaceable civilian population," "foreigners or guests," "clerics and members of a religious order" are all presumed innocent and therefore could not be killed.[140] The presumption of innocence could be rebutted by showing that the person concerned took part in the hostilities. Although Vitoria subjected the prohibition on killing innocents to the necessities of war ("when there is no other means of carrying on the operations of a just war"),[141] he articulated a precursor of the modern principle of proportionality:[142]

> [If] little effect upon the ultimate issue of the war is to be expected from the storming of a fortress . . . wherein are many innocent folk, it would not be right, for the purpose of assailing a few guilty, to slay the many innocent by

[134] *Supra* note 89. These ordinances were probably written in Latin, but there is no complete Latin text extant. Editor's Notes, THE BLACK BOOK OF ADMIRALTY, *supra* note 89, at 282–83. For the earliest English form of these ordinances, see *supra* note 89.

[135] *See infra* note 196. [136] *See also infra* note 202.

[137] H. NICOLAS, *supra* note 70, at 52–53. According to Holinshed:

> At his first comming on land, he caused proclamation to be made, that no person should be so hardie on paine of death, either to take anie thing out of anie church that belonged to the same, or to hurt or doo anie violence either to priests, women, or anie such as should be found without weapon or armor, and not readie to make resistance . . . .

R. HOLINSHED, *supra* note 3, at 21–22.

[138] H. NICOLAS, *supra* note 70, at 81–82. *See also infra* text at notes 196–204; H. HUTCHISON, *supra* note 117, at 111. Hutchison believes that "such regulations were common to most medieval armies, and the fact that they were issued at all argues as much for their regrettable necessity as for the mercy . . . of those who made them." *Id.*

[139] F. VICTORIA, *supra* note 33, at 179(36). [140] *Id.*

[141] *Id.* at 179(37).

[142] *See* Additional Protocol I, *supra* note 68, Art. 51(5)(*b*), which prohibits as indiscriminate an attack "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

> use of fire or engines of war or other means likely to overwhelm indifferently both innocent and guilty.[143]

Gentili, for his part, insisted that "[c]hildren should always be spared, and so should women."[144] "[W]omen, because they cannot handle arms, are treated like the clergy . . . . [T]hey are spared."[145] He also advocated the protection of farmers, traders and foreigners.[146] Suárez argued that the innocent include children, women and all those unable to bear arms, by virtue of natural law; ambassadors, by virtue of *jus gentium;* and members of religious orders and priests, by virtue of canon law. All other persons forming part of a hostile state (which excludes strangers and foreigners) are considered enemies.[147] In practice, these rules may have been breached more than respected, as was claimed by the military law expert Ayala, who wrote that the canons requiring that "clergy, monks, converts, foreigners, merchants, and country folk" be spared had been abrogated by contrary usage.[148]

The 1785 Treaty of Amity and Commerce between the United States and Prussia exemplifies the convergence of the canonical and chivalric lists of protected persons. This Treaty, cited by the U.S. Supreme Court in *The Paquete Habana,*[149] reflects the medieval concepts of both innocence and social function. Modern international law differs in that it is informed primarily by the notions of civilian status and the immunity of civilians from attack, into which the concept of innocence metamorphosed. It focuses on the protection of individual civilians and the civilian population,[150] with the exception of the special protection granted to the Red Cross and other humanitarian organizations.[151] Additional measures regarding children and women are subsumed under the protection of the civilian population. With the exception of the Red Cross and medical and religious personnel, beneficial social function as a criterion for protection has become obsolete.

How, then, can the dire threats of Shakespeare's Henry be reconciled with the existing and emerging norms protecting women and others 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

[143] F. VICTORIA, *supra* note 33, at 179(37). *See* P. HAGGENMACHER, *supra* note 6, at 275–76.

[144] A. GENTILI, *supra* note 37, at 251.

[145] *Id.* Gentili believed that women (*id.* at 251–54) and clergy (*id.* at 427–28) who take up arms lose their immunity. Regarding armed clergy's loss of protection from acts of war, see also C. DE PISAN, *supra* note 5, at 235–36, 257, 283.

[146] A. GENTILI, *supra* note 37, at 261–69.

[147] F. SUÁREZ, *supra* note 29, at 843.

[148] B. AYALA, *supra* note 60, at 45.

[149] 175 U.S. 677, 690–91 (1900). Article XXIII of the Treaty of Amity and Commerce between the United States and Prussia, July 9 and Sept. 10, 1785, provided that in case of war:

> the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance. And all women and children, scholars of every faculty, cultivators of the earth, artizans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power by the events of war they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.

8 Stat. 84, TS No. 292, 8 Bevans 78, 85–86.

[150] *See, e.g.,* Additional Protocol I, *supra* note 68, Arts. 50–52.

[151] *Id.,* Art. 81.

treatment in a besieged city or fortress[152] that was taken by "assault,"[153] on the other hand, suggests an explanation. Unmitigated brutality was reserved for the latter:

> In a city taken by storm almost any licence was condoned by the law. Only churches and churchmen were technically secure, but even they were not often spared. Women could be raped, and men killed out of hand. All the goods of the inhabitants were regarded as forfeit. . . . The prospect of this free run of his lusts for blood, spoil and women was a major incentive to a soldier to persevere in the rigours which were likely to attend a protracted siege.[154]

Notwithstanding the importance of such famous battles as Crécy and Agincourt, medieval warfare turned far more on sieges of strongholds than on pitched battles.[155] Only through the conquest of fortresses could a territory be effectively occupied. Resistance therefore was grimly viewed and severely punished. Both the goods and the lives of the inhabitants of a conquered town "were forefeit [*sic*] for the contumacious disregard of a prince's summons to surrender. . . . [S]poliation was not an act of war, but the sentence of justice."[156] A city such as Harfleur, which "held out till it had to yield unconditionally was at the mercy of its captor, to be given up to plunder or ransomed according to his will. Its population [could be] . . . subjected to pillage, slaughter and rape . . . ."[157]

Vitoria's later, reluctant recognition that the sacking of a city was legal if it was "necessary for the conduct of the war or as a deterrent to the enemy or as a spur to the courage of the troops"[158] indicates that the threats made by Shakespeare's Henry measured up to the norms prevailing during the Hundred Years' War. However, because such sacking resulted "in many horrors and cruelties, enacted beyond all humane limits by a barbarous soldiery, such as slaughter and torture of the innocent, rape of virgins, dishonor of matrons, and looting of temples,"[159] delivering up a city to be sacked "without the greatest necessity and weightiest reason" was unjust.[160]

These harsh norms, seldom questioned in medieval times, were challenged by Renaissance writers on international law. As was often the case, Gentili led the way

[152] On sieges, see generally M. WALZER, *supra* note 107, ch. 10.

[153] I.e., following an unconditional surrender, whether or not the city was stormed. M. KEEN, *supra* note 7, at 122. A city that did not surrender by a treaty (*appointment*) could be taken by assault. *Id.* at 119. Medieval strategists taught that a fortress could be reduced "by methods of drought [poisoning or cutting the supply of water], famine [blockade] or fight [assault]." 2 J. WYLIE, *supra* note 116, at 32.

The prohibition of starvation of civilians as a method of warfare is of quite recent origin. *See* Additional Protocol I, *supra* note 68, Art. 54. Interpreting its Resolution 661 of August 6, 1990 (*reprinted in* 29 ILM 1325 (1990)), which imposed sanctions on Iraq and prohibited importation of foodstuffs, except in humanitarian circumstances, the Security Council recognized, in Resolution 666 of September 13, 1990 (*reprinted in* 29 ILM at 1330), that foodstuffs might have to be supplied to the civilian population of Iraq or Kuwait to relieve human suffering.

[154] M. KEEN, *supra* note 7, at 121–22.

[155] J. JOHNSON, *supra* note 128, at 133. Keen writes that the "stories of great sieges . . . loom large in the history of the Hundred Years War; in fact they are its turning points." M. KEEN, *supra* note 7, at 119. *See also* G. PARKER, THE MILITARY REVOLUTION 7–9 (1988).

[156] M. KEEN, *supra* note 7, at 123. While the penalties for holding out against a siege were brutal, a captain who surrendered a town without siege while there was a chance of defending it would be guilty of treason toward another prince. *Id.* at 124–25. *See also* B. AYALA, *supra* note 60, at 233.

[157] E. CHEYNEY, THE DAWN OF A NEW ERA: 1250–1453, at 165 (1936).

[158] F. VICTORIA, *supra* note 33, at 184(52).

[159] *Id.* at 184–85(52).

[160] *Id.* at 185(52).

in promoting the humanization of the law.[161] With eloquence and clarity, he proclaimed that "[t]hese are called the rights of humanity and the laws of war, which order the sparing of those who surrender."[162] If conditions of surrender are stipulated, the law of nature requires that they be observed.[163] Even unconditional surrenders, "surrender . . . at discretion," may not lead to license with regard to "property, life, and honour" because discretion ought to be understood as "the discretion of a good man."[164] If Henry's speech reflected the medieval norms contemporaneous with the siege of Harfleur, Henry's command to Exeter to "use mercy" may well have reflected the wide medieval recognition of the injunction to use mercy (the word "mercy" appears four times in the speech), a secular counterpart and reflection of the Christian concept of charity or *caritas*.[165] Be that as it may, Shakespeare probably wanted to emphasize Henry's humanity, for the order to use mercy is mentioned neither by Holinshed nor by Hall,[166] and both the sack of Harfleur and the deportations that followed are passed over in silence in the play, though related by Holinshed (Hall mentioned the sack of Harfleur but not the deportations).

Three of the elements in Henry's ultimatum merit more detailed comment: the denial of quarter, and the threats of rape and of pillage. The chivalric code of conduct "required that a knight vanquished in battle be given quarter rather than being killed, that when taken prisoner he must be treated as a gentleman, and that he be ransomed for a reasonable sum not beyond his means to pay."[167] Of course, a knight who surrendered might refuse to enter into a contract to pay ransom and would be killed or condemned to captivity, or would have to fight on and risk being killed on the battlefield. The latter possibility is heroically depicted by Shakespeare's Henry:

> *King.* . . . Herald, save thou thy labor.
> Come thou no more for ransom, gentle herald.
> They shall have none, I swear, but these my joints,

[161] *See also* P. HAGGENMACHER, *supra* note 6, at 277.

[162] A. GENTILI, *supra* note 37, at 216. Invoking the law of Lycurgus and the Greeks, Gentili wrote that "when the victory was assured the slaying of the enemy should cease." *Id.* at 211.

[163] *Id.* at 219. [164] *Id.* at 227.

[165] On the concept of mercy, see J. JOHNSON, *supra* note 128, at 6–10; P. RAMSEY, THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY 150–51 (1968). In discussing war, St. Thomas Aquinas cited Augustine:

> *Among true worshippers of God those wars are looked on as peace-making which are waged neither from aggrandisement nor cruelty, but with the object of securing peace, of repressing the evil and supporting the good. . . . The craving to hurt people, the cruel thirst for revenge, the unappeased and unrelenting spirit, the savageness of fighting on, . . . all these are rightly condemned in wars.*

35 SUMMA THEOLOGIAE: CONSEQUENCES OF CHARITY, Question 40, at 83 (Blackfriars ed. 1972). See also Question 44, on the commands to love, *id.* at 143, 155, 157.

Grotius recognized that history abounded with accounts of "the destruction of whole cities, or the levelling of walls to the ground, the devastation of fields, and conflagrations. . . . [They were] permissible also against those who have surrendered." H. GROTIUS, *supra* note 81, bk. III, ch. V, pt. I. However, both in battle and in a siege, a "surrender of those who yield upon condition that their lives be spared ought not to be rejected," *id.*, ch. XI, pt. XIV(1), and "[t]he same sense of justice bids that those be spared who yield themselves unconditionally to the victor, or who become suppliants." *Id.*, pt. XV.

See also supra note 115.

[166] *See* R. HOLINSHED, *supra* note 3, at 23–25; E. HALL, *supra* note 4, at 62–63.

[167] J. JOHNSON, *supra* note 128, at 126.

> Which if they have as I will leave 'em them,
> Shall yield them little, tell the Constable.
>
> [4, 3, 121–25]

It was unclear, however, to what extent these protective rules applied to "non-knightly infantry" (commoners and peasants who, not infrequently, were massacred[168]) and to non-Christians.[169] It should not be assumed that only gentlemen were given the chance to ransom themselves. Honoré Bonet, writing before Agincourt, thus complained that "excessive payments and ransoms [were demanded] without pity or mercy . . . from the poor labourers who cultivate lands and vineyards."[170] Nevertheless, a lowly prisoner could call upon his lord's duty to him when it came to ransom, which might encourage the captor to treat him kindly.[171]

Even knights could not always rely on an offer of quarter on the battlefield.[172] In his important fourteenth-century work on the law of war, John of Legnano (Giovanni da Legnano)[173] favored sparing captured generals but made the grant of quarter subject to the necessities of war:

> [Q]uarter should be granted to one who humbles himself and does not try to resist, unless the grant of quarter gives reason for fearing a disturbance of the peace, in which case he must suffer. . . . [Q]uarter is to be granted only when disturbance of the peace is not feared, and otherwise not.[174]

According to the modern historian James Hamilton Wylie, word had circulated among Henry's troops in Agincourt "that the Frenchmen meant to give no quarter save to the king and his nobles, for whose captivity . . . they had already begun to make arrangements, while the rumour ran that they would cut off every archer's right hand."[175] The practice of denying quarter even on the battlefield found support among some writers on *jus gentium* in Shakespeare's era. Thus, Vitoria stated that "[a]ll the doubt and difficulty [was] . . . to know whether, when we have won our victory and the enemy is no longer any danger to us, we may kill all who have borne arms against us. Manifestly, yes."[176] He justified this

[168] *Id.* at 137.

[169] F. VICTORIA, *supra* note 33, at 183(48). However, even in war with the Turks, it was not lawful to kill women, who were presumed innocent, or children. *Id.* at 179(36).

[170] H. BONET, *supra* note 89, at 153.

[171] M. KEEN, *supra* note 7, at 150–51, points out that by the terms of his contracts with his soldiers, the captain might be bound to ransom them. *See also* P. LEWIS, *supra* note 22, at 212 ("It was possible to get help with one's ransom from one's lord: from the king or from one's commander").

[172] H. BONET, *supra* note 89, at 152, wrote that "if a knight, captain, or champion, take another in battle he may freely kill him . . . . [B]ut out of battle no man may kill another save in self-defence . . . ."

[173] M. KEEN, *supra* note 7, at 7, regards John of Legnano and Honoré Bonet (*supra* note 89) as the most famous academic lawyers (actually, Bonet was a monk, rather than an academic lawyer) who wrote about the law of war. Holland describes Legnano's work as "the earliest attempt to deal, as a whole, with the group of rights and duties which arise out of a state of War." Holland, *Introduction* to GIOVANNI DA LEGNANO, TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO, at b (T. Holland ed. 1917) (Bologna ms. ca. 1390). Legnano completed his work in 1360, but it was published in 1477 and in better-known editions in 1487 and 1584. *Id.* at xxvii–xxix.

[174] G. DA LEGNANO, *supra* note 173, ch. XXX, at 253–54. *See also id.*, ch. LXIX, at 274 ("Should mercy be shown to persons captured in a lawful war? We must say that it should, unless by sparing them there is fear of a disturbance of the peace").

[175] 2 J. WYLIE, *supra* note 116, at 154.

[176] F. VICTORIA, *supra* note 33, at 182(45). F. SUÁREZ, *supra* note 29, at 845, argued for the protection from killing of innocent persons, even if the punishment inflicted upon their state was insufficient; but he favored allowing, in these circumstances, the killing of some additional guilty

license to kill on the basis of its promise of future security through the deterrent effect of punishment.[177] He attempted to temper the severity of the law by invoking the need "to take into account the nature of the wrong done by the enemy and of the damage they have caused . . . and from that standpoint to move to our revenge and punishment, without any cruelty and inhumanity."[178] Gentili, however, advocated greater humanity.[179]

In contrast to combat on the battlefield, siege warfare was waged in accordance with the rule of "war to the death without quarter (though the rule could be waived for anyone, and a prisoner who could pay a good ransom was likely enough to be spared)."[180] The rule applied "not against soldiers only, but against all the able-bodied inhabitants of the town."[181] Disregarding those cases where the attacking prince insisted on unconditional surrender, Vitoria argued that, if a city surrendered unconditionally without providing in the conditions of capitulation for the safety of its inhabitants, it would be permissible, subject to some qualifications, to put "the more notorious offenders" to death.[182] Nevertheless, guided by his theory of innocence, Vitoria believed that troops engaged in defending or attacking cities, whether in a just or an unjust war, should not be killed if the presumption was "that they entered on the strife in good faith."[183] Gentili criticized the denial of quarter more directly. Specifically in the context of siege warfare, he admitted that there might be reasons for refusing to accept a surrender, "but if there is no such cause, it surely seems right to accept it; otherwise we have a war of extermination."[184] He regarded an order to kill a large number of warriors "who surrendered themselves and threw down their arms on the ground . . . [as a grave] crime."[185]

I turn now to the second element specified in Shakespeare's ultimatum: the rape of women. Henry's speech, which implies that violation of women would be inevitable because soldiery could not be controlled in the heat of battle, falls short of the real Henry's severe prohibition of rape,[186] though rape in a town taken by assault following a siege would have been more leniently treated. Here, Shakespeare's Henry may have reflected the difficulties of the real Henry. The latter's Ordinances of War attempted to protect the noncombatant, but enforcing compliance with the norms was—and remains—a real problem. Keen observes that "[w]hat is important is not that the law of arms tolerated outrages (which it did not do); but that it was not effectively enforced throughout most of the Hundred Years War."[187]

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individuals after the war. *Id.* at 841. "[T]he slaying of a great multitude would be thus permissible only when there was most urgent cause, nevertheless, even such slaughter may sometimes be allowed, in order to terrify the rest . . . ." *Id.*

[177] F. VICTORIA, *supra* note 33, at 182(46).

[178] *Id.* at 182–83(47).

[179] *See supra* text at notes 144–46, 162–64.

[180] M. KEEN, *supra* note 7, at 121.

[181] *Id.*

[182] F. VICTORIA, *supra* note 33, at 183–84(49).

[183] *Id.* at 183(48).

[184] A. GENTILI, *supra* note 37, at 218.

[185] *Id.* at 223.

[186] *See infra* note 196.

[187] M. KEEN, *supra* note 7, at 192; *see also id.* at 190. Compare common Article 1 of the Geneva Conventions, which requires the parties "to respect and to ensure respect for the present Convention in all circumstances." The authoritative Commentary prepared by the International Committee of the Red Cross adds: "[T]he Party to the conflict is responsible for the treatment accorded to protected persons. It would not, for example, be enough for a State to give orders or directions . . . . It is for the State to supervise the execution of the orders it gives." COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 108, at 16.

The reality was even grimmer. I have already cited Keen's observation that the license to rape was considered a major incentive for the soldier involved in 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 the troops,"[188] even when rape would result. These cruel rules, however, were rejected by Gentili:

> Further, to violate the honour of women will always be held to be unjust. For although it is not contrary to nature to despoil one whom it is honourable to kill, and although where the law of slavery obtains it is permitted according to the laws of war to sell the enemy together with his wives and children, yet it is not lawful for any captive to be visited with insult. . . . I make no allowance for retaliation. . . .
>
> At some time the enemy [who allows raping women] . . . will surely render an account to . . . the rest of the world, if there is no magistrate here to check and punish the injustice of the victor. He will render an account to those sovereigns who wish to observe honourable causes for war and to maintain the common law of nations and of nature.[189]

Under modern international law, despite the prohibition of "all rape" in Lieber's Code of 1863,[190] the protection of women's rights does not appear to have been a priority item. The Hague Regulations provide only indirect and partial protection against rape.[191] The 1929 Geneva Convention on Prisoners of War contained a general provision too vague to afford effective protection to women prisoners.[192] During the Second World War, rape was tolerated and, horrifyingly, was even utilized in some instances as an instrument of policy. Walzer recounts that Moroccan mercenary troops fought with Free French forces in Italy in 1943 on "terms [which] included [as a spur to masculine courage] license to rape."[193] In occupied Europe, thousands of women were subjected to rape and thousands more were forced to enter brothels for Nazi troops. Rape of German women by Soviet soldiers appears to have been tolerated. Only in the fourth Geneva Convention of 1949 was an unequivocal prohibition of rape established.[194] Even so, infringement of this provision was not listed among the "grave

[188] F. VICTORIA, *supra* note 33, at 184–85(52).

[189] A. GENTILI, *supra* note 37, at 257. *See also* Meron, *supra* note 5, at 115–16. Although Grotius mentioned the argument that rape should be legal on the ground that "it is not inconsistent with the law of war that everything which belongs to the enemy should be at the disposition of the victor," he reasoned that, being unrelated to either security or punishment, rape "should consequently not go unpunished in war any more than in peace. The latter view is the law not of all nations, but of the better ones." H. GROTIUS, *supra* note 81, bk. III, ch. IV, pt. XIX(1).

[190] F. Lieber, *Instructions for the Government of Armies of the United States in the Field*, Art. 44, originally published as U.S. WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE, GENERAL ORDERS NO. 100 (Apr. 24, 1863), *reprinted in* R. HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 54 (1983).

[191] *Supra* note 111, Art. 46.

[192] (Geneva) Convention Relative to the Treatment of Prisoners of War, July 27, 1929, Art. 3, 47 Stat. 2021, 2031 (pt. 2), TS No. 846, 2 Bevans 932 ("Women shall be treated with all the regard due to their sex").

[193] M. WALZER, *supra* note 107, at 133.

[194] "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Geneva Convention No. IV, *supra* note 108, Art. 27. For a similar prohibition, see Additional Protocol I, *supra* note 68, Art. 76(1).

breaches" of the Convention, which require the imposition of penal sanctions or extradition.[195]

We return to consideration of a third element in the King's ultimatum, pillage. With the exception of siege warfare, Henry's prohibition of pillage in occupied territories is best reflected by the previously mentioned incident of the stolen pyx, reported to Captain Fluellen by Lieutenant Pistol:

> *Pistol.* Fortune is Bardolph's foe, and frowns on him,
> For he hath stol'n a pax, and hanged must a' be—
> A damned death!
> Let gallows gape for dog, let man go free,
> And let not hemp his windpipe suffocate.
> But Exeter hath given the doom of death
> For pax of little price.
> Therefore go speak—the duke will hear thy voice,
> And let not Bardolph's vital thread be cut
> With edge of penny cord and vile reproach.
> Speak, captain, for his life, and I will thee requite.
>
> . . . .
>
> *Fluellen.* . . . [I]f, look you, he were my brother, I would desire the duke to use his good pleasure and put him to execution, for discipline ought to be used.
>
> [3, 6, 39–57]

As we have seen, when Fluellen later tells the King about Bardolph's offense and likely execution, Henry endorses the harsh punishment and orders that "in our marches through the country there be nothing compell'd from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language" (*id.*, 112–15).

Shakespeare based the story of the stolen pyx on Holinshed, who reported that, despite the needs of the English troops, nothing was taken from the local population without payment and no offenses were committed

> except one, which was, that a souldiour tooke a pix out of a church, for which he was apprehended, and the king not once remooved [did not move at all, halted] till the box was restored, and the offendor strangled. The people of the countries thereabout, hearing of such zeale in him, to the maintenance of

[195] Geneva Convention No. IV, *supra* note 108, Arts. 146–47. Rape and enforced prostitution were not included in the list of grave breaches in Article 85 of Additional Protocol I, *supra* note 68. *See generally* Krill, *The Protection of Women in International Humanitarian Law,* INT'L REV. RED CROSS, No. 249, November–December 1985, at 337, 341. A useful precedent for the international criminalization of rape as inhuman treatment, or even as torture, was established by the European Commission of Human Rights in Cyprus v. Turkey, Applications Nos. 6780/74 and 6950/75 (July 10, 1976). As regards rape committed by Turkish soldiers and officers, members of the armed forces of an occupying power, the Commission ruled that those acts which could be imputed to the occupying power constituted "inhuman . . . treatment" in the sense of Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 UNTS 221. Nos. 6780/74, 6950/75, paras. 373–74. The Commission emphasized that "[i]t has not been shown that the Turkish authorities took adequate measures to prevent this happening or that they generally took any disciplinary measures following such incidents." *Id.*, para. 373. *See generally* Byrnes, *The Committee against Torture,* in THE HUMAN RIGHTS ORGANS OF THE UNITED NATIONS (P. Alston ed. forthcoming); Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights,* 12 HUM. RTS. Q. 486 (1990).

> justice, ministered to his armie victuals, and other necessaries, although by open proclamation so to doo they were prohibited.[196]

The real Henry indeed ordered that churches and their contents be left unharmed and that no man lay hands on priests or women unless they were actually armed or planning a violent attack. "[A]ll victuals which might be useful for the support of the army were to be spared from waste and pillage."[197] These rules did not originate with Henry but preceded him. Christine de Pisan, who compiled the medieval laws of war and customs of chivalry in 1408–1409, supported the death penalty for soldiers committing pillage,[198] strongly advocated the protection of noncombatants,[199] and proclaimed prohibitions on the killing of prisoners[200] and, anticipating Article 23(a) of the Hague Regulations, the use of poisoned weapons, which she considered so inhumane as to be against the law of war for Christians.[201]

Henry V promulgated ordinances on warfare not only to maintain the necessary discipline among his troops, but also to promote various humane practices.[202] The army, however, disrespected these protective rules to such an extent, particularly through plunder, that six years later they had to be solemnly reissued.[203] Nevertheless, Henry's "humane intentions . . . had made so deep an impression in France that one of the most high-minded of the French ecclesiastics appealed to him to protect French churches from the plundering violence of their own people."[204]

Henry's conduct may seem surprising, as medieval rules of war liberally allowed the taking of spoils. In certain circumstances, real estate could be appropriated by the victorious prince;[205] but movables, including those not taken on the battlefield, could become the property of the captor himself (depending on certain

[196] R. HOLINSHED, *supra* note 3, at 30; *see also* E. HALL, *supra* note 4, at 64. According to 2 J. WYLIE, *supra* note 116, at 117, "A cry was at once raised, the battalion was halted and the king refused to advance till the thief was caught. He was dragged out before the gazing files and hanged on a tree beside the church where the theft had been committed; the pyx was restored . . . ." *See also* H. NICOLAS, *supra* note 70, at 91–92. The incident of the pyx is also reported in the contemporary account GESTA HENRICI QUINTI, *supra* note 70, at 69. The hanging of the offender appears to have been consistent with paragraph 3 of King Henry V's Ordinances of War, *supra* note 89:

> [A]lso, that no maner of man be so hardy to robbe ne to pille holy Church of no goode, ne ornament, that longeth to the Church, ne to sle no man of holy Church, religious, ne none other, but if he be armed, upon peyne of deth, noper that noman be so hardy to sle ne enforce no woman uppon the same peyn. And that noman take no woman prisoner, man of holy Churche, ne none oper religious, but if he be armed, uppon peyn of enprisonement and his body at the Kynges will.

Although these ordinances were promulgated in 1419, the earlier proclamations of King Henry appear to have contained similar prohibitions. *See supra* text at notes 137–38. According to R. HOLINSHED, *supra* note 3, at 58, Henry found a large amount of money at Caen castle, which he fully restored to the inhabitants.

[197] 2 J. WYLIE, *supra* note 116, at 20–22. The story of the pyx is confirmed by THE FIRST ENGLISH LIFE OF KING HENRY THE FIFTH, *supra* note 26, at 44–45.

[198] C. DE PISAN, *supra* note 5, at 44; *see also id.* at 217.

[199] *Id.* at 224–35.

[200] *Id.* at 222, 64–65, and *infra* note 245. Like writers on modern law of war, Christine de Pisan considered the use of ruses permissible, but not perfidy. C. DE PISAN, *supra* note 5, at 213–14.

[201] C. DE PISAN, *supra* note 5, at 184.

[202] E.g., the prohibition against making captives of children under 14 years of age, or requiring that an occupied lying-in room be spared. 2 J. WYLIE, *supra* note 116, at 22.

[203] *Id.* at 23–24. *See also supra* text at note 138.

[204] 2 J. WYLIE, *supra* note 116, at 24.

[205] *See* F. VICTORIA, *supra* note 33, at 185–86(56); H. GROTIUS, *supra* note 81, bk. III, ch. VI, pt. XI.

qualifications and the hazy entitlements of the prince and the captor, respectively).[206] Normally, movables would be distributed among the various parties, including the captor, his captain and the prince.[207]

Vitoria maintained that "[a]ll movables vest in the seizor by the law of nations, even if in amount they exceed what will compensate for damages sustained."[208] Although Vitoria advocated the protection of innocent civilians ("agricultural population and other innocent folk . . . ought not to be despoiled" if the war can be carried out effectively without their spoliation), he gave priority to the requirements of war by emphasizing that in a just war it is lawful to despoil even innocent enemy subjects so as to sap the enemy's strength.[209] Vitoria was less concerned about protecting enemy subjects' property than about ensuring that soldiers not loot without the authority of the prince or general.[210] Suárez similarly wrote that soldiers may take from their "hosts" only what the king has authorized.[211]

The harshness of the punishment meted out to the soldier who stole the pyx can be explained in part by the unauthorized nature of the taking, the King's desire to maintain law and order and, perhaps, the violation of protected religious objects (i.e., the church and pyx). Moreover, Henry felt that he was reclaiming his own duchy: he had no interest in pillaging or destroying what he regarded as rightfully his own. His political and propagandistic purpose was to befriend, not antagonize, the population. Nevertheless, Henry's proscriptions, as described by Shakespeare, against molesting the inhabitants and taking any goods from them without proper payment were quite advanced for their era and are comparable to nineteenth- and twentieth-century texts such as the Lieber Rules,[212] the Oxford *Manual*[213] and the Hague Regulations.[214] These texts are based on the distinction between private and public property, which was not central for writers on *jus gentium* in Shakespeare's era, and they grant far greater protection to the former. In contrast to the period of the Hundred Years' War, today the right to appropriate property in occupied territory has become a monopoly of the state and individual pillage is outlawed by both customary rules (of which Henry's ordinances are an important antecedent) and conventional rules. The taking of private property is strictly regulated and, in principle, is allowed only when required by the army. Requisitioned goods must be paid for, as ordered by Henry. The distinction between movable and immovable property has survived, but it has acquired a new meaning. Movables belonging to the state (public property) may still be appropriated by the occupying state, but not those belonging to individuals (private property) unless particularly suited to a military purpose. The latter may be requisitioned,

[206] M. KEEN, *supra* note 7, at 137, 139–40; H. BONET, *supra* note 89, at 150.

[207] John of Legnano wrote that movables "become the property of the captor; but he is bound to assign them to the general of the war, who will distribute them according to deserts." G. DA LEGNANO, *supra* note 173, ch. LXI, at 270. *See also* King Henry V's Ordinances of War, *supra* note 89.

[208] F. VICTORIA, *supra* note 33, at 184(51).

[209] *Id.* at 180 (39)–(40). A. GENTILI, *supra* note 37, at 270, wrote that "booty is commonly reckoned as a part of the fruits of victory."

[210] Soldiers who loot without a prince's permission are bound to make restitution. F. VICTORIA, *supra* note 33, at 185(53).

[211] F. SUÁREZ, *supra* note 29, at 837.

[212] *Supra* note 190, sec. II.

[213] THE LAWS OF WAR ON LAND (OXFORD MANUAL), pt. II and Art. 32 (adopted by the Institute of International Law at Oxford, 1880), *reprinted in* THE LAWS OF ARMED CONFLICTS 35 (D. Schindler & J. Toman eds. 1988).

[214] *Supra* note 115, Arts. 23(g), 28, 46, 47, 52, 53, 55, 56.

but they must be restored and compensation paid when peace is concluded. Immovable property, even that belonging to the state, is protected from expropriation by the occupying power, whose rights may not exceed those of an administrator and usufructuary.

VII. AGINCOURT: PRISONERS OF WAR AND SERVANTS

As the battle of Agincourt 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 large number of French prisoners, who, though disarmed, could have risen against their English captors, and a French attack on the English baggage train possibly involving loss of life among the attendants—all combined to trigger an unexpected order by the King. Shakespeare's Henry, hearing a sudden call to arms, cries out:

> *King.* But hark! What new alarum is this same?
> The French have reinforc'd their scatter'd men.
> Then every soldier kill his prisoners.
> Give the word through.
>
> [4, 6, 35–38]

The play reveals another reason for this order in the next scene:

> *Fluellen.* Kill the poys and the luggage! 'Tis expressly against the law of arms. 'Tis as arrant a piece of knavery, mark you now, as can be offert. In your conscience, now, is it not?
>
> *Gower.* 'Tis certain there's not a boy left alive, and the cowardly rascals that ran from the battle ha' done this slaughter. Besides, they have burned and carried away all that was in the king's tent, wherefore the king most worthily hath caus'd every soldier to cut his prisoner's throat. O, 'tis a gallant king!
>
> [4, 7, 1–11]

After this disclosure, the King elaborates on his order regarding the prisoners:

> *King.* I was not angry since I came to France
> Until this instant. Take a trumpet, herald.
> Ride thou unto the horsemen on yon hill.
> If they will fight with us, bid them come down,
> Or void the field. They do offend our sight.
> If they'll do neither, we will come to them
> And make them skirr away as swift as stones
> Enforced from the old Assyrian slings.
> Besides, we'll cut the throats of those we have,
> And not a man of them that we shall take
> Shall taste our mercy. Go and tell them so.
>
> [*id.*, 56–66]

Shakespeare thus explains Henry's cruel order to kill the French prisoners on two grounds: necessity, as the French appeared to be regrouping to attack; and reprisal for the unlawful attack on the servants[215] guarding the rear camp and its plunder. Attempting to highlight Henry's humanity, Shakespeare focuses on the King's impetuous anger ("I was not angry since I came to France until this instant"). However, Holinshed offers a different version of the facts:

[215] Lackeys, boys, pages, sutlers, waggoners and servants of the camp. 2 J. WYLIE, *supra* note 116, at 148 n.6.

> [C]erteine Frenchmen on horssebacke . . . to the number of six hundred horssemen, which were the first that fled, hearing that the English tents and pavillions were a good waie distant from the armie, without anie sufficient gard to defend the same . . . entred upon the kings campe, and there spoiled the hails, robbed the tents, brake up chests, and carried awaie caskets, and slue such servants as they found to make anie resistance. . . .
>
> But when the outcrie of the lackies and boies, which ran awaie for feare of the Frenchmen thus spoiling the campe, came to the kings eares, he doubting least his enimies should gather togither againe, and begin a new field; and mistrusting further that the prisoners would be an aid to his enimies . . . contrarie to his accustomed gentlenes, commanded by sound of trumpet, that everie man (upon paine of death) should incontinentlie slaie his prisoner.[216]

Accordingly, the chronicler whom Shakespeare most closely followed recorded that the French killed only those servants who offered resistance.[217] Holinshed's version of the story formed a part of the mythology of Agincourt by his time. Shakespeare modified the story, apparently to cast Henry's order in the best possible light.

Modern accounts by both Wylie[218] and Winston Churchill[219] speak of plunder but not killing. John Keegan refers to plunder by a body of armed peasants who were led by three mounted knights; they stole some objects and "inflicted some loss of life."[220] The anonymous early sixteenth-century biographer of Henry V explained that the King's order to kill the prisoners was triggered by his fear that he would have to fight them as well as the attacking French forces. This author did not even mention the assault on the baggage train.[221]

If Holinshed's version is correct, the French raid is unlikely to have violated any laws of war. The English rear camp constituted a lawful object of attack. In the absence of resistance, the immunity of persons serving the troops would have depended on whether they met the prevailing standards of innocence.[222] Assuming that the pages were not entitled to the immunity of children[223] and were to be treated as "youths," their right to be spared would have turned on their surrender, either on "fair terms" or unconditionally.[224] At least some medieval jurists regarded noncombatant servants of an army as a legitimate military objec-

[216] R. HOLINSHED, *supra* note 3, at 38.

[217] But E. HALL, *supra* note 4, at 69, stated that the French killed servants they could find. *Compare* Hague Convention No. IV, *supra* note 103, Art. 13; the 1929 Geneva POW Convention, *supra* note 192, Art. 81; Geneva Convention No. III, *supra* note 67, Art. 4(A)(4). Under such provisions, service personnel accompanying the armed forces, without actually being members thereof, would be entitled to POW status but, as noncombatants, would not be a lawful object of attack unless they took a direct part in the hostilities. Additional Protocol I, *supra* note 68, Art. 51(3).

[218] 2 J. WYLIE, *supra* note 116, at 171. In his discussion of the attack on the King's baggage, Hibbert does not mention any loss of life. C. HIBBERT, AGINCOURT 127 (1964).

[219] 1 W. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLE 319 (1956). *See also* J. DAVIES, HENRY V, at 190 (1935).

[220] J. KEEGAN, THE FACE OF BATTLE 84 (1978).

[221] THE FIRST ENGLISH LIFE OF KING HENRY THE FIFTH, *supra* note 26, at 60–61. H. NICOLAS, *supra* note 70, at 124, writes that King Henry was advised that the French had attacked his rear and plundered his baggage, but he does not mention any loss of life among the baggage attendants. Many other historians also mention the attack on the baggage train, but not loss of life among the attendants. *See* E. JACOB, HENRY V, *supra* note 26, at 105; G. TOWLE, *supra* note 117, at 340; D. SEWARD, *supra* note 117, at 80; R. MOWAT, HENRY V, at 159 (1920).

[222] F. VICTORIA, *supra* note 33, at 180(38)–(39).

[223] *See* H. GROTIUS, *supra* note 81, bk. III, ch. XI, pt. IX.

[224] *Id.*, pts. XIII(2), XIV, XV; *see also* A. GENTILI, *supra* note 37, at 216.

tive even when they were not involved in any fighting, either defensive or otherwise.[225] Perhaps Shakespeare himself was not quite persuaded that Fluellen's version of the law sufficiently justified the order to kill the prisoners. The sarcasm in Gower's response appears to be aimed both at the Welshman Fluellen and at the King. Indeed, the real Henry may later have been embarrassed by the order. In his eyewitness account of the Agincourt campaign, the anonymous English cleric attached to Henry's court clearly intended to justify Henry's foreign policy and to present him as a devout and humane Christian prince who was seeking peace with justice. Yet, in describing the killing of the prisoners ("by the swords either of their captors or of others following after, lest they should involve us in utter disaster in the fighting that would ensue"), he never mentioned the provocation of the French attack on the luggage train or even the existence of Henry's command.[226]

Although some of the French participants in the attack were subsequently punished by France for committing "treason" and leaving their camp for private plunder,[227] those punitive measures were motivated not by the violation of the laws of war, but by the "causing [of] the rumour [of a French counterattack] which led to the hideous massacre of the prisoners on the battlefield."[228] Under the circumstances, Fluellen's invocation of the law of arms may have reflected Shakespeare's desire to place the most favorable interpretation on the King's order; but, legally, it was flawed.

Without a manifest breach of the law by the French, Henry could not claim the defense of reprisal, which was then generally permissible[229] and, according to some views, was even allowed against innocent private persons.[230] Indeed, it did not occur to Gentili, in his discussion of Agincourt (see below), that reprisals might be relevant. The usually humane Gentili, while pleading for compassion "towards those who really suffer [retaliation] for the faults of others,"[231] nonetheless, as a matter of law, accepted the principle of collective responsibility as manifested by reprisals:

> [I]t avails not in this case to say that those who were punished were not the ones who acted cruelly, and that hence they ought not to have been treated cruelly; for the enemy make up one body, just as an army is a single body. . . . [T]he individuals are responsible, even if a fault was committed by all in common.[232]

[225] "Should those who attend in a war, but who cannot fight, enjoy the immunities [status] of combatants? Say that they should, provided that they are useful in counsel in other ways . . . ." G. DA LEGNANO, *supra* note 173, ch. LXXI, at 274.

[226] GESTA HENRICI QUINTI, *supra* note 70, at 93. *See also Introduction by the Editors, id.* at xviii, xxiii, xxviii.

[227] R. HOLINSHED, *supra* note 3, at 38.

[228] 2 J. WYLIE, *supra* note 116, at 171 (footnotes omitted); *see also* R. HOLINSHED, *supra* note 3, at 38.

[229] See the discussion of the breadth of permissible reprisals by G. DA LEGNANO, *supra* note 173, chs. CXXIV–CLXVI, at 308–30. Reprisals against prisoners of war are now outlawed. *See, e.g.,* Geneva Convention No. III, *supra* note 67, Art. 13.

[230] A rule protecting innocent private persons against reprisals was justified by Jacobus de Belvisio on the basis of the principle of individual responsibility: "a man ought not to be punished for another's offence." *Cited by* G. DA LEGNANO, *supra* note 173, ch. CXLIV, at 321. John of Legnano disagrees. *Id.*

[231] A. GENTILI, *supra* note 37, at 232.

[232] *Id. Compare Genesis* 18:23–26:

> 23. And Abraham drew near, and said, Wilt thou also destroy the righteous with the wicked?
> 24. Peradventure there be fifty righteous within the city: wilt thou also destroy and not spare the place for the fifty righteous that are therein?

Writing soon after Gentili, Grotius challenged the legality of reprisals against prisoners, except in those cases of individual responsibility for a previously committed crime that "a just judge would hold punishable by death."[233] Grotius argued that collective responsibility was a fiction and should not be invoked to justify reprisals against innocent persons: "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 . . . ."[234]

If the massacre of the French prisoners, whose horror was vividly described by Holinshed,[235] was not excusable as a reprisal, could it have been justified on grounds of necessity? Alluding to the necessities of war, the eminent medieval jurist John of Legnano recognized the captor's right to kill prisoners where there was "fear of a disturbance of the peace."[236] Holinshed's account suggests that the King's fear of an impending attack, in which the French prisoners would join, was real.[237] The heavily outnumbered English would have had difficulty repelling another attack while guarding their numerous prisoners. In the same vein, Wylie, basing himself on the chroniclers, writes that the danger of a new assault triggered the King's order. But this explanation is undercut by the fact that the King made an exception for dukes, earls and other high-placed leaders "as fell [insofar as ransom was concerned] to the king's own share."[238] Mindful of their expected ransoms, the captors were reluctant to carry out the order, "but the king threatened to hang any man that disobeyed and told off 200 of his ever-handy archers to begin the bloody work."[239] Churchill, defending Henry, claims that the King ordered the killing of the prisoners in the belief that he was being attacked from the rear; although "[t]he alarm in the rear was soon relieved," by then the massacre was almost over.[240] Less categorically, Keegan writes that the order to kill

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25. That be far from thee to do after this manner, to slay the righteous with the wicked: and that the righteous should be as the wicked, that be far from thee: Shall not the Judge of all the earth do right?
26. And the Lord said, If I find in Sodom fifty righteous within the city, then I will spare all the place for their sakes.

[233] H. GROTIUS, *supra* note 81, bk. III, ch. XI, pt. XVI(1).

[234] *Id.*, pt. XVI(2). "[R]etaliation that is lawful . . . must be inflicted upon the very person who has done wrong . . . ." *Id.*, ch. IV, pt. XIII(1).

[235] R. HOLINSHED, *supra* note 3, at 38–39.

[236] G. DA LEGNANO, *supra* note 173, at 274. Many historians believe that necessity justified Henry's order to kill the prisoners. Thus, H. HUTCHISON, *supra* note 117, at 124, observes that "[b]y medieval standards Henry was obeying his soldier creed—military necessity justified any butchery . . . ." *See also* G. TOWLE, *supra* note 117, at 339–40. D. SEWARD, *supra* note 117, at 81, strongly dissents: "In reality, by fifteenth-century standards, to massacre captive, unarmed noblemen who, according to the universally recognized international laws of chivalry, had every reason to expect to be ransomed if they surrendered formally, was a peculiarly nasty crime . . . ."

[237] *Supra* text at note 216. H. NICOLAS, *supra* note 70, at 124, believes that "[i]mperative necessity" dictated the King's order.

[238] 2 J. WYLIE, *supra* note 116, at 171. Hutchison, who supports the traditional justification of necessity, argues that the fact that Henry's own rich prisoners were exempted from being killed tallied with Henry's reputation for "shrewd common sense—he simply could not afford to miss the chance of spectacular ransoms." H. HUTCHISON, *supra* note 117, at 124.

[239] 2 J. WYLIE, *supra* note 116, at 171–72. The archers, not being knights, may have had fewer scruples about killing members of the French nobility. Moreover, under the law of chivalry, only knights could enforce agreements to pay ransom. M. KEEN, *supra* note 7, at 19–20. 1 F. GROSE, MILITARY ANTIQUITIES 345 (1786), cynically observed that "[t]he hopes of ransom frequently acted in the place of humanity, avarice assuming the place of mercy . . . ."

[240] 1 W. CHURCHILL, *supra* note 219, at 319–20.

the prisoners was prompted by either the attack on the rear camp or the continued menace of the French.[241]

However genuine the King's fear of an attack on his outnumbered troops may have been, the order to kill the French prisoners, already *hors de combat*, could hardly be justified on the ground that they might have joined the ranks of the attackers. The captured French were still encumbered by their heavy armor, as their basinets (helmets) alone had been removed.[242] Dismounted, defenseless, and barely able to move, they were not a menace to the English troops. In the face of real necessity, a threat of execution would not have been required to enforce Henry's order.

Did the order violate the applicable laws of war? While maintaining that, "speaking absolutely, there is nothing to prevent the killing of those who have surrendered or been captured in a just war so long as abstract equity is observed,"[243] Vitoria suggested that this harsh rule had been tempered by the law of nations and the customs of war; consequently, "after victory has been won . . . and all danger is over, [they] are not to be killed."[244] Because Henry believed that the victory had not been won and that the danger persisted, he would not have violated Vitoria's standards, and certainly not the earlier medieval norms described by John of Legnano. But such medieval writers as Bonet and Christine de Pisan advocated the prohibition of the killing of prisoners, though subject to some reservations.[245]

Gentili's humane position on the duty to give quarter has already been discussed. Faithful to the chivalric code of conduct,[246] Gentili suggested that an implied contract is formed between the captor and the captive, "a bargain with the enemy for his life." The "rights of humanity and the laws of war . . . order the sparing of those who surrender."[247] Gentili did not agree that danger justified the killing of captives and he praised those that "did not slay their captives, no matter how great danger threatened them."[248] He had harsh words for Henry:

> I cannot praise the English who, in that famous battle in which they overthrew the power of France, having taken more prisoners than the number of their victorious army and fearing danger from them by night, set aside

[241] J. KEEGAN, *supra* note 220, at 84.

[242] 2 J. WYLIE, *supra* note 116, at 171.

[243] F. VICTORIA, *supra* note 33, at 183(49).

[244] *Id.*

[245] H. BONET, *supra* note 89, pt. IV, ch. XIII, argued that "he who in battle has captured his enemy, especially if it be the duke or marshal of the battle . . . should have mercy on him, unless by his deliverance there is danger of having greater wars." Elsewhere, Bonet explains that "to kill an enemy in battle is allowed by law and by the lord, but out of battle no man may kill another save in self-defence, except the lord, after trial." *Id.*, ch. XLVI. C. DE PISAN, *supra* note 5, at 222, would prohibit the killing of prisoners even in battle: "Soo saye I to the well that it is ayenst all ryght and gentylnesse to slee hym that yeldeth hym." Arguing against "a thynge Inhumayne and to grete a cruelness" and answering critics who invoked the ancient right of the captor to kill his prisoners, sell them, or otherwise dispose of them, she asserted that "amonge crysten folke where the lawe is altogyder grounded vpon myldefulnes and pyte [it] is not lycyte nor accordynge to vse of suche terannye whyche be acursed and reproued." *Id.* Nevertheless, after the battle, she would allow the prince to kill a prisoner who would be dangerous to the prince if allowed to go free. *Id.*

[246] *See supra* text at notes 167, 162, 182–83.

[247] A. GENTILI, *supra* note 37, at 216. *Compare* H. GROTIUS, *supra* note 81, bk. III, ch. IV, pt. X(2) ("So far as the law of nations is concerned, the right of killing such slaves, that is, captives taken in war, is not precluded at any time, although it is restricted, now more, now less, by the laws of states"). Elsewhere, however, Grotius advocated sparing captives who have surrendered unconditionally. *Id.*, ch. XI, pt. XV.

[248] A. GENTILI, *supra* note 37, at 211–12.

those of high rank and slew the rest. "A hateful and inhuman deed," says the historian, "and the battle was not so bloody as the victory."[249]

Perhaps Gentili's stricture on Henry's action, had it been known to Shakespeare, would explain his sensitivity and his desire to depart from Holinshed's account. But Shakespeare's apparently deliberate departure from Holinshed can plausibly be explained, without reference to Gentili, as an attempt to put Henry's order in the best possible light.

Notwithstanding Gentili's condemnation, it cannot be concluded that Henry clearly violated contemporary standards. Wylie reports that, even though the writers of the time regarded the massacre as an inhuman deed, his French critics refrained from blaming Henry because "in those days the French would have done the same themselves had they been in so perilous a case."[250] Killing prisoners in an emergency was not unprecedented[251] and, while quarter was normally granted in Anglo-French wars, the virtual absence of "contemporary criticism" of Henry's action[252] suggests that, cruel though it was, his order did not violate the accepted norms of behavior.

VIII. HERALDS, AMBASSADORS AND THE TREATY OF TROYES

The scene on the battlefield at Agincourt, when the English appeared to have won and the French herald Montjoy arrived on yet another mission to Shakespeare's Henry, is vividly described by the playwright:

Exeter. Here comes the herald of the French, my liege.
Gloucester. His eyes are humbler than they us'd to be.
King. How now! What means this, herald? Know'st thou not
That I have fin'd these bones of mine for ransom? . . .[253]
Montjoy. No, great king.
I come to thee for charitable license,
That we may wander o'er this bloody field
To book our dead, and then to bury them,
To sort our nobles from our common men.
For many of our princes—woe the while!—
Lie drown'd and soak'd in mercenary blood.
So do our vulgar drench their peasant limbs
In blood of princes, and their wounded steeds
Fret fetlock-deep in gore and with wild rage
Yerk out their armed heels at their dead masters,
Killing them twice. O, give us leave, great king,

[249] *Id.*

[250] 2 J. WYLIE, *supra* note 116, at 175. C. HIBBERT, *supra* note 218, at 129, observes: "Even the French chroniclers write of [Henry's] action as though it were dictated by painful necessity."

[251] M. KEEN, CHIVALRY 276 n.7 (1984).

[252] *Id.* at 221. Note the matter-of-fact, nonjudgmental reference to the massacre by the French chronicler the Religieux de Saint-Denys: "Le roi d'Angleterre, croyant qu'ils [the French] voulaient revenir à la charge, ordonna qu'on tuat tous les prisonniers." 5 CHRONIQUE DU RELIGIEUX DE SAINT-DENYS, *supra* note 70, at 565.

[253] See also the heroic answer by Shakespeare's Henry to the French herald Montjoy before the battle of Agincourt, in which Henry ruled out the possibility of being ransomed in case of defeat:

Herald, save thou thy labor.
Come thou no more for ransom, gentle herald.
They shall have none, I swear, but these my joints,
Which if they have as I will leave 'em them,
Shall yield them little, tell the Constable.

[4, 3, 121–25].

To view the field in safety and dispose
Of their dead bodies!
King. I tell thee truly, herald,
I know not if the day be ours or no,
For yet a many of your horsemen peer
And gallop o'er the field.
Montjoy. The day is yours.[254]

[4, 7, 67–87]

Heralds performed an important role in medieval warfare, as is seen in the play.[255] The herald's function derives from an ancient tradition. The institution of the herald's office was mythically attributed to as ancient a source as Julius Caesar.[256] Attired in distinctive habits designed to protect them from acts of violence ("*Montjoy.* You know me by my habit" (3, 6, 118)), heralds carried messages between the warring parties; mediated and arranged the time and place of important battles (including Agincourt) in such a manner that, according to "the etiquette of chivalry . . . [neither side would] take . . . unfair advantage of the other";[257] and arranged truces.[258] They were the recognized experts on the code of chivalry,[259] whose verdicts were decisive for members of the "international order of knighthood,"[260] including even princes. They "refereed" tournaments and at battles recorded those who were present, those who had distinguished themselves, and those who had died. At Agincourt, Montjoy advised the winner of his victory.[261] However, the latter episode has few parallels in other engagements. Heralds carefully refrained from participating in hostilities.[262]

In some European countries, especially in France, heralds were soon to disappear, together with the medieval social order and the rules of chivalry. There are still heralds in England, however, serving as the sovereign's official and salaried officers of arms.

Heralds should be distinguished from envoys. Heralds regularly acted as privileged messengers (Henry V himself sent a herald to deliver a letter to Charles VI during the negotiations that preceded the campaign described in Shakespeare's play); hence, they had a function in diplomatic exchanges (such as by delivering ultimatums and defiances, collecting safe conducts for embassies and carrying messages between belligerents) but did not perform in a real plenipotentiary capacity. That seems always to have involved envoys or ambassadors. Heralds did not have the status and were not expected to have the expertise to fit them to act as ambassadors.

Ambassadors, who play significant roles in *Henry V* as special envoys, or, in modern parlance, heads of special missions[263] (rather than permanent diplomatic

[254] *See also* act 3, scene 6, and act 4, scene 3.

[255] G. KEETON, *supra* note 18, at 70–71; G. KEETON, *supra* note 11, at 87–88. See also the oath of heralds in THE BLACK BOOK OF ADMIRALTY, *supra* note 89, at 297, and the oath of "kynges of armes," *id.* at 295.

[256] M. KEEN, *supra* note 7, at 57.

[257] 2 J. WYLIE, *supra* note 116, at 140.

[258] On the role of Montjoy at Agincourt, see R. HOLINSHED, *supra* note 3, at 39–40.

[259] M. KEEN, *supra* note 7, at 16, 50; *see also* M. KEEN, *supra* note 251, at 137–40.

[260] M. KEEN, *supra* note 7, at 50.

[261] R. HOLINSHED, *supra* note 3, at 39–40; *see also* C. HIBBERT, *supra* note 218, at 134.

[262] "Throughout the battle of Agincourt the heralds of both sides stood together on a hill, away from the fighting in which their order had no part . . . ." M. KEEN, *supra* note 7, at 195.

[263] Within the meaning of Article 1 of the Convention on Special Missions, *opened for signature* Dec. 16, 1969, Annex to GA Res. 2530 (XXIV), 24 UN GAOR Supp. (No. 30) at 99, UN Doc. A/7630 (1970).

missions[264]), were to become a permanent institution.[265] Shakespeare's ambassadors deliver messages between the courts of France and England[266] that include territorial claims, an ultimatum, a declaration of war and the corresponding replies. Like heralds, ambassadors enjoyed immunity,[267] but the rules of immunity must still have been relatively "soft" and unreliable for Henry's ambassador, Exeter, to feel impelled to threaten the King of France with Henry's might:

> *Exeter.* Dispatch us with all speed, lest that our king
> Come here himself to question our delay,
> For he is footed in this land already.
> *King.* You shall be soon dispatch'd with fair conditions.
> A night is but small breath and little pause
> To answer matters of this consequence.
>
> [2, 4, 141–46]

Equally interesting was the role entrusted to ambassadors by Henry V in negotiating the treaty of peace:

> *King Henry.* If, Duke of Burgundy, you would the peace
> Whose want gives growth to th' imperfections
> Which you have cited, you must buy that peace
> With full accord to all our just demands,
> Whose tenors and particular effects
> You have, enschedul'd briefly, in your hands.
> *Burgundy.* The king hath heard them, to the which as yet
> There is no answer made.
> *King Henry.* Well then, the peace
> Which you before so urg'd lies in his answer.
> *France.* I have but with a cursitory eye
> O'erglanc'd the articles. Pleaseth your grace
> To appoint some of your council presently
> To sit with us once more, with better heed
> To resurvey them, we will suddenly
> Pass our accept and peremptory answer.
> *King Henry.* Brother, we shall. Go, uncle Exeter,
> And brother Clarence, and you, brother Gloucester,
> Warwick, and Huntingdon, go with the king.
> And take with you free power to ratify,
> Augment, or alter, as your wisdoms best
> Shall see advantageable for our dignity,
> Anything in or out of our demands,
> And we'll consign thereto.
>
> [5, 2, 68–90]

The negotiation of the Treaty of Troyes (1420) lasted several months.[268] Although Henry himself took a leading role,[269] Shakespeare's Henry, echoing

[264] *See* Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 UST 3227, TIAS No. 7502, 500 UNTS 95.

[265] *See* H. NICOLSON, DIPLOMACY 30–31 (1963).

[266] *See* act 1, scene 2; act 2, scene 4.

[267] H. GROTIUS, *supra* note 81, bk. II, ch. XVIII. For a fourteenth-century statement of the immunity of ambassadors from reprisals, see G. DA LEGNANO, *supra* note 173, ch. CXXXIX, at 319. For an example of early fifteenth-century inviolability of ambassadors and their property, see C. DE PISAN, *supra* note 5, at 234–35.

[268] *Henry V*, 13 ENCYCLOPAEDIA BRITANNICA 285 (11th ed. 1910). For the English text of the Treaty, see 4 T. RYMER, *supra* note 70, pt. 3, at 179. For a detailed discussion of the negotiations, see P. BONENFANT, DU MEURTRE DE MONTEREAU AU TRAITÉ DE TROYES (1956).

[269] R. HOLINSHED, *supra* note 3, at 84–86; *see also* J. DAVIES, *supra* note 219, at 250.

Holinshed,[270] provides here a prime example of ambassadors' full powers to negotiate and conclude a treaty of peace.[271] With the advent of modern communications technology, which permits rapid communication between capitals and negotiators, the practice of granting ambassadors such full powers has almost fallen into desuetude, particularly in negotiations of vital importance.

The Anglo-French bargaining, in which both parties were assisted by competent lawyers, involved delicate points of law. As a part of the terms of peace, Henry was to marry King Charles's daughter Catherine. He therefore sought to secure his right to the crown of France, for which he had gone to war, without the embarrassment of deposing his future father-in-law. In fact, Henry wanted the immediate right to govern France, as well as a guarantee that the title to France would be transferred to him upon the death of Charles. The solution was to recognize Henry as the heir of the King of France, instead of Charles's legitimate son, the Dauphin, and France's regent.[272] In the concluding scene, Shakespeare portrays the negotiations that led to this resolution and the promise of peace that it held:

> *Westmoreland.* The King hath granted every article:
> His daughter first, and then in sequel all,
> According to their firm proposed natures.
> *Exeter.* Only he hath not yet subscribed this: Where your majesty demands that the King of France, having any occasion to write for matter of grant, shall name your highness in this form and with this addition, . . . 'Notre très-cher fils Henri, Roi d'Angleterre, Héritier de France' . . . .
> *French King.* Nor this I have not, brother, so denied,
> But your request shall make me let it pass.
> *King Henry.* I pray you, then, in love and dear alliance,
> Let that one article rank with the rest,
> And thereupon give me your daughter.

[270] "[T]he king of England should send in the companie of the duke of Burgognie his ambassadours unto Trois in Champaigne sufficientlie authorised to treat and conclude of so great matter." R. HOLINSHED, *supra* note 3, at 94. Henry V complained of the futility of the preinvasion negotiations with Charles VI on the ground that the French ambassadors "did not have full power to treat" (letter of April 7, 1415), and he demanded that the powers of the French ambassadors about to be sent should be "sufficiently ample" (letter of April 15, 1415). H. NICOLAS, *supra* note 70, App. 1 at 3. *See also* C. KINGSFORD, *supra* note 26, at 113. Regarding the English ambassadors' argument that they lacked power to conclude an agreement, see 1 J. WYLIE, *supra* note 26, at 442.

[271] *See* E. SATOW, GUIDE TO DIPLOMATIC PRACTICE 58–59 (Gore-Booth ed. 1979). An ancient chronicle notes:

> He [Henry] there found the King and Queen of France, their daughter . . . and the Duke of Burgundy, who then ratified and confirmed every article of the treaty which had been agreed upon by their ambassadors, according to the stipulations made between the two kings and the Duke of Burgundy, with the consent of the citizens of Paris . . . .

A Fragment of the Chronicle of Normandy from the Year 1414 to the Year 1422 (ca. 1581), *reprinted in* HENRICI QUINTI ANGLIAE REGIS GESTA 252 (B. Williams ed. 1850). On the background of the *Chronicle*, see the editor's *Preface* at viii.

[272] R. HOLINSHED, *supra* note 3, at 95, 102–03. Holinshed reports: "It was also agreed, that king Henrie, during his father in lawes life, should in his steed have the whole governement of the realme of France, as regent thereof . . . ." *Id.* at 95. The grant to Henry of the right to govern France was justified on the ground that Charles "is withholden with diverse sickenesse, in such manner as he maie not intend in his owne person for to dispose for the needs of the foresaid realme of France." *Id.* at 99. It was provided that during his lifetime, Charles would possess the crown of France, "and dignitie roiall of France, with rents and profits for the same." *Id.* at 98. *See also* J. DAVIES, *supra* note 219, at 250–51.

> *French King.* Take her, fair son, and from her blood raise up
> Issue to me, that the contending kingdoms
> Of France and England, whose very shores look pale
> With envy of each other's happiness,
> May cease their hatred . . . .
>
> [5, 2, 341–61]

Rather than follow the model of the Treaty of Brétigny, which transferred various French territories to English sovereignty, Henry intended to use the Treaty of Troyes, upon his marriage to Catherine, to change the French line of succession. By having himself described in the Treaty as Charles's son and heir of France, Henry hoped to avoid a direct conflict with the Salic law prohibiting the passing of the French crown through females or the female line. Accordingly, the carefully drafted Treaty of Troyes made no reference to the Plantagenet claim to the crown of France. To avoid future challenges to its validity, on the ground either of Charles's madness or of his lack of authority to alienate the crown or change the Valois succession, the Treaty required that it be ratified by the estates of both kingdoms.[273] Nevertheless, the Treaty would not long survive the nationalistic opposition that it provoked in France, which led to its eventual abrogation by the Burgundian French in 1435. The Salic law returned to haunt the English monarchs: the French jurists opposed to the Treaty invoked the law in a new and expanded interpretation as a fundamental constitutional principle prohibiting the alienation of the French crown to a foreigner.[274]

For international lawyers, the Treaty of Troyes is an instrument of extraordinary interest. Although the Treaty deals with the personal union of two kingdoms,[275] while the Hague Regulations of 1907[276] and the fourth Geneva Convention of 1949[277] concern occupied territories, the former anticipates the latter in providing for the maintenance of French laws, courts and other institutions.[278]

[273] The above discussion draws on Keen's excellent analysis of the Treaty of Troyes, *Diplomacy*, in HENRY V, at 181–99 (G. Harriss ed. 1985).

[274] *See* Potter, *supra* note 22, at 249–53.

[275] *See* E. JACOB, HENRY V, *supra* note 26, at 149. Both realms would be "under the same person[,] . . . keeping neverthelesse in all maner of other things to either of the same realmes, their rights, liberties, customes, usages, and lawes, not making subject in any maner of wise one of the same realmes, to the rights, lawes, or usages of that other." R. HOLINSHED, *supra* note 3, at 103.

[276] *Supra* note 111 (particularly Arts. 43, 46, 48). *See also* E. JACOB, HENRY V, *supra* note 26, at 155. Compare Article 48 of the Hague Regulations to this provision of the Treaty of Troyes:

> Also that we shall put none impositions or exactions, or doo charge the subjects of our said father without cause reasonable and necessarie, ne otherwise than for common good of the realme of France, and after the saieng and asking of the lawes and customes reasonable approoved of the same realme.

R. HOLINSHED, *supra* note 3, at 103.

[277] *Supra* note 108 (particularly Arts. 54, 64).

[278] Consider these excerpts from Holinshed's version:

> Also that we of our owne power shall doo the court of parlement in France to be kept and observed in his authoritie and sovereignetie . . . .
>
> Also we to our power shall defend and helpe all and everie of the peeres, nobles, cities, townes, communalties, and singular persons, now or in time comming, subjects to our father in their rights, customes, privileges, freedomes, and franchises, longing or due to them in all manner of places now or in time comming subject to our father.
>
> Also we diligentlie and truelie shall travell to our power, and doo that justice be administred and doone in the same realme of France after the lawes, customes, and rights of the same realme

IX. CONCLUDING REMARKS

Holinshed wrote about public affairs of state, and *jus gentium,* including the ordinances and proclamations of war of King Henry V, was an important element in those affairs. It was therefore only natural that Shakespeare, who was an ardent student of Holinshed and who explored the law of the land in such nonhistorical plays as the *Merchant of Venice,* should take a keen interest in *jus gentium* in *Henry V,* a history.[279]

A lawyer studying the play is impressed by Shakespeare's attention to historical detail and rules of law in international relations and diplomacy. One need only recall his careful formulation of the ultimatum to France, which contains a statement of the claim, its legal basis and the consequences of noncompliance.

We have examined clusters of norms that underlie Shakespeare's account of a phase of the Hundred Years' War. These clusters concern the just war doctrine, declarations of war, the responsibility of princes, the treatment of the population of occupied territory—including in the case of siege—and prisoners of war, and the conduct of diplomacy. We have used the play as a vehicle to analyze the law of war issues that governed, or should have governed, that conflict, and to develop an intertemporal, historical perspective on the law of war and its evolution.

Because Shakespeare wrote about a medieval war during the Elizabethan Renaissance, it would be comforting to suggest that during the 179 years that elapsed between the Treaty of Troyes and the writing of the play, the law had significantly progressed toward greater humanity. Yet major progress cannot be discerned when one considers, for example, the cruelty of the Thirty Years' War (1618–1648), which was soon to break out and was conducted without the constraints of chivalric rules.

Our analysis of such detailed rules as those pertaining to necessity, reprisals and the protection of prisoners of war and civilians, especially women, reveals that resort to humane principles, which was advocated by Renaissance scholars, particularly Gentili, was frequently rejected by other Renaissance writers on *jus gentium,* who gave preference to harsher, *Kriegsraison* rules. A more humane approach, however, was not alien to some medieval writers, especially Christine de Pisan, who insisted that religious and chivalric principles demanded a high degree of respect and mercy for the human person.

Indeed, in medieval times interest in *jus gentium* was not limited to scholars. Medieval English Kings, such as Richard II and Henry V, promulgated detailed proclamations and ordinances on war. The latter's proclamations, which attracted the attention of Holinshed and Shakespeare, were informed both by pragmatic concerns of good order and military discipline and by considerations of humanity. They were addressed to such matters as the right to ransom and other spoils of war, the prohibition of pillage, and the protection of women, ecclesiastics, and

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. . . .

> Also we to our power shall provide, and doo to our power, that able persons and profitable beene taken to the offices as well of justices and other offices belonging to the governance of the demaines, and of other offices of the said realme of France, for the good right and peaceable justice of the same, and for the administration that shall be committed unto them . . . .

R. HOLINSHED, *supra* note 3, at 99–100. On the Treaty of Troyes, see also H. HUTCHISON, *supra* note 117, at 186–89; E. JACOB, HENRY V, *supra* note 26, at 148–55; G. TOWLE, *supra* note 117, at 410–13; R. MOWAT, *supra* note 221, at 229–37; D. SEWARD, *supra* note 117, at 145–46; 3 J. WYLIE & W. WAUGH, THE REIGN OF HENRY THE FIFTH 198–204 (1968).

[279] In his other histories, Shakespeare, however, focused far less on *jus gentium.*

churches. Here considerations of humanity, frequently compelled by religious principles,[280] blended with the imperatives of military order to result in a higher standard of protection for the civilian population.

Like their twentieth-century counterparts, both medieval and Renaissance works on the law of war mirror the tension between principles of humanity and military necessity, broadly construed. Their authors defined some of the issues still central to the law of war and often enunciated policies and principles that shaped norms of modern international law on matters such as combatant privileges and the protection of civilians. The ancestry of these protective rules was recently acknowledged by the U.S. Department of Defense in a report to Congress on the conduct of the gulf war[281] and will weigh heavily in determining their character as customary law. That ordinances of war dating from the Middle Ages prohibited pillage and protected women goes far beyond the Hague Regulations or the Lieber Code in helping to establish the customary law pedigree of these rules.

The medieval umbilical cord connecting *jus ad bellum* and *jus in bello,* still conventional to the contemporaries of Shakespeare, was eventually cut, giving rise to the uniform and more equitable application of the law of war. But echoes of the medieval doctrine of just war can still be heard, as we have attempted to show, in some theories of modern international law.

The principle of *respondere non sovereign* had to give way to the much stricter modern concepts of attribution and responsibility, so essential to the effectiveness of international law. Although necessity has not been eliminated from the lexicon of the law of war, persons *hors de combat,* including prisoners of war, are now protected from both reprisal and slaughter on the altar of state necessity, in contrast to the unfortunates at Agincourt. In Henry's times, as still today, disrespect for the existing rules, rather than the absence of rules, was the principal problem.

Henry V illustrates the underlying issues implicated in the law of war. While, for the most part, Shakespeare is faithful to Holinshed's version of the facts, he departs from that version in two major instances: the addition of Henry's admonition to Exeter at Harfleur to "use mercy," and the favorable gloss put on the order to kill the French prisoners at Agincourt. There is no mention of "mercy" in Holinshed. Yet Shakespeare not only highlights it as the principal order issued by the King in Harfleur, but also passes over in silence the harsh measures taken by the English in Harfleur, including the deportation of its indigent population. The medieval concept of mercy on which the dramatist drew evolved into the concept of obligations of humanity in the modern law of war. What, after all, are the latter if not legally binding progeny of the former?

In these two deviations from Holinshed's *Chronicles,* the dramatist probably was simply trying to portray the heroic King to his best advantage. But, in so doing, Shakespeare aligned himself with the advocates of greater adherence to humane laws of war, whether medieval or Renaissance.

[280] *See, e.g., supra* text at notes 201, 245.

[281] The report notes:

> The law of armed conflict . . . with respect to collateral damage and collateral civilian casualties is derived from the Just War tradition of discrimination; that is, the necessity for distinguishing combatants from noncombatants and legitimate military targets from civilian objects. . . . [T]his tradition is a major part of the foundation on which the law of war is built . . . .

U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF CONFLICT: AN INTERIM REPORT TO CONGRESS PURSUANT TO TITLE V PERSIAN GULF CONFLICT SUPPLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991 (Public Law 102-25), at 12-2 (1991).