

ENFORCEMENT: THE DIFFERENCE BETWEEN THE LAWS OF WAR AND THE GENEVA CONVENTIONS

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After hearing two outstanding presentations and a beautiful comment from members of this panel, two possibilities occurred to me. The first was that I could limit my remarks to the prior discussion of Lieber's Code. Professor Haimbaugh, Colonel Draper, and Mr. Solf have all done an excellent job discussing this subject, but I must admire their courage in coming here to Georgia and speaking so highly of a man whose works have been used to justify Sherman's march through the state. Nevertheless, General Order 100 is a magnificent piece of work, and Francis Lieber certainly ranks high among the legal scholars of the laws of war. The second possibility that came to me was to give what is known in American literature as a perfect tribute and say absolutely nothing. But Lincoln was not talking to a group of lawyers, and lawyers do not tolerate silence.

The comments of the previous speakers remind me of a story about the head of German intelligence in World War II, Admiral Fenares. He received on his desk one day a proposition from an official in the Nazi Party that the Soviet Union was not a signatory to the Geneva Conventions. Therefore, this official suggested, Soviet prisoners of war could be subject to execution, or at the very least, they need not be given prisoner of war status. I pointed out, in disagreement with the memorandum, that the Geneva Conventions represent the lowest common denominator for the treatment of human beings by governments in wartime. This memorandum came to light after the war and caused great embarrassment for the official who wrote it. The point is that even if the Soviets were not a party, the Geneva Conventions represent a minimum standard of conduct for the treatment of people.

Colonel Draper has pointed out that the laws of war are contained in the Hague Conventions of 1907. Very little had been done to modernize these agreements until 1977, when Protocols I

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and II to the Geneva Conventions were signed. The problem is that the Hague Conventions and the Geneva Conventions have different purposes. While the Hague Conventions set out the rules for conducting war, the Geneva Conventions are designed to protect the victims of war. The two do not mix well because the basis for their enforcement is different. The Hague Conventions and the laws of war are based on the principle of reciprocity. The humanitarian laws of the Geneva Conventions are based on two principles: the protecting power which has been built into them and the respect for them which has developed.

Protocol II to the Geneva Conventions is designed to deal with the problem of internal conflicts. Colonel Draper said that in the last days of the drafting conference, Protocol II went through a debilitating process. I would say that it was emasculated. Half of the articles were taken out completely. Many of those dealt with rules of combat. I would like to suggest that perhaps removing those articles was not so bad. We need a set of rules for internal conflicts that commands respect by both sides without regard to reciprocity. I would even go so far as to say that Canada, which provided the primary impetus for the removal of many of those articles, would have probably found the Protocol unacceptable as it came out of the working committees. Indeed, many of the countries that submitted magnificent ideas for Protocol II were not moved by humanitarian principles, but were deliberately loading the Protocol with provisions for dealing with internal troublemakers that they knew most countries of the world would not accept.

I was disappointed with many of the articles that were removed. Even so, I think that the Protocol was an advance, not as much of an advance as I and many others would like to have seen, but still an advance. In the immediate future, I think internal conflicts can be controlled through regional human rights conventions, which have established commissions, courts, and protocols. At the present time regional attempts at control may be more effective than global attempts.