FOURTEENTH ANNUAL GROTIUS LECTURE RESPONSE*

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Good afternoon. It is an honor to comment upon the remarks of Dr. Jakob Kellenberger, President of the International Committee of the Red Cross. This lecture, named for one of international law's founding fathers, and cosponsored by the American University Washington College of Law and the American Society of International Law, has become a much-anticipated highlight of the Society's annual meeting. Thank you, President Caron, Professor Hunter, and Dean Grossman for the opportunity to serve as a discussant this afternoon; thank you Dr. Kellenberger for your important and thoughtful lecture; and thank you, distinguished listeners, for your kind attention.

The theme of today's Grotius lecture is the importance of law in confronting the complexity of violence, and, more specifically, the role of international humanitarian law in confronting the complexity of armed conflict. In his masterful survey of the work of the ICRC, guardian of the Geneva conventions, as well as the challenges it faces in carrying out its mandate, Dr. Kellenberger has suggested that three ideas should inform our efforts to address these complexities: (i) a commitment to reason and understanding, (ii) a sense of vision that helps us understand where we would like to go and illuminates the path we must choose to get there, and (iii) a commitment to our common humanity.

I cannot in the time allotted to me do justice to the breadth and depth of Dr. Kellenberger's lecture but can perhaps suggest points

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for discussion as regards all three of these fundamental ideas and contextualize them further. As for reason, Dr. Kellenberger's remarks assume that law—legal rules and international institutions—can moderate the effects of violence in the world, whether that violence emerges from interstate conflicts or, as is more commonly the case now, non-international armed conflicts with or without an extraterritorial element. I share this assumption and, because time is short, will not comment further upon it, other than to observe, as Dr. Kellenberger himself admits, that law alone is insufficient to restrain violence, and that increased emphasis must be placed upon prevention, education, and increased international cooperation and understanding if the suffering of humanity is to be alleviated. The power and effectiveness of international law has been hotly contested by scholars, at least in the United States. Yet it would seem a common-sense proposition that the inverse situation—a world without law—would be the kind of Hobbesian world in which life is nasty, brutish, and short—rather like the battlefield of Solferino in 1863—and the kind of world that most of us would rather not inhabit.

As for humanity, Dr. Kellenberger's lecture quite fittingly evokes and renders homage to some of the European founders of international humanitarian law, whose ideas and writings have illuminated many dark corners of human behavior, and have continued salience today. Yet his remarks were perhaps too modest. The International Red Cross and Red Crescent movement is the world's largest humanitarian network, with more than 97 million volunteers, supporters, and staff in 186 countries.[1] The ICRC itself has more than 12,000 staff in 80 countries around the world.[2] From the earliest days of its founding by a group of five Genevan personalities that included Henry Dunant himself (author of *A Memory of Solferino*), the ICRC has embraced universality as a guiding principle and has held many of its international conferences outside of Europe, in Tokyo, New Delhi, Istanbul, Teheran, and Manila, in addition to Geneva and Vienna. I am reminded of Judge Christopher Weeramantry's dissent in the *Nuclear Weapons*

1. *The International Red Cross and Red Crescent Movement at a Glance*. INT'L FED'N OF RED CROSS AND RED CRESCENT SOCIETIES (2007), *available at* http://www.ifrc.org/Global/Publications/general/at_a_glance-en.pdf.

2. *Id.*

Advisory Opinion, which observed that the concept of humanitarian law is neither a recent invention nor the product of any one culture. It is, rather, of "ancient origin" with a lineage stretching back at least three millennia and deeply rooted in many cultures including Hindu, Buddhist, Chinese, Christian, Islamic, Jewish, and traditional African.[3]

As for vision, I would like to explore Dr. Kellenberger's invitation to adopt new norms to make international humanitarian law more complete and effective. As is characteristic of the ICRC's general approach, he has proposed important, but incremental, changes to enhance the effectiveness of international humanitarian law by filling gaps in the current regime. These suggested improvements involve establishing more and better rules on detention in non-international armed conflict and establishing more effective monitoring and compliance mechanisms specific to the needs of international humanitarian law, which could be undertaken by someone or some entity other than the ICRC. He has also—quite diplomatically—suggested that states should follow the current rules more closely, rather than reject them or withdraw from them, actions which introduce additional complexities into the infrastructure of international humanitarian law and weakens it considerably. These suggestions are consistent with the mission and mandate of the ICRC, which rests upon a commitment to the principles of neutrality and confidentiality, principles that have guaranteed the ICRC's successes through the decades, but which may also, as Dr. Kellenberger acknowledges, hamper the ICRC's effectiveness in enhancing compliance with international humanitarian law by state and non-state actors. His remarks quite sensibly target Geneva law—the texts entrusted specifically to the ICRC as guardian—but take note of the important role of the ICRC regarding the formation and codification of the customary international law of war, including the law of The Hague and of weapons conventions, as well.

Yet the notion of international humanitarian law as a tool of legal repression is broader than the laws of war, and the question arises whether incremental change is sufficient, or whether our vision should include other very significant areas of human suffering and

3. Legality of the Threat of Use of Nuclear Weapons, Dissenting Opinion of Judge Weeramantry, 1996 I.C.J. 429, 478 (July 8).

harm. In the short time remaining, I would like to at least raise the question whether we do not need, at the current stage of the world's civilization, to complete norms addressing other aspects of international humanitarian law, including crimes against humanity and crimes against peace. When the Security Council adopted a Statute for the International Criminal Tribunal for the former Yugoslavia in 1993, it was a Statute that granted the ICTY the power to prosecute persons responsible for "serious violations of international humanitarian law," including not only war crimes, but genocide (article 4) and crimes against humanity (article 5).[4] Building upon the Nuremberg Charter itself, the Kampala amendments to the ICC Statute added to this trio of crimes the crime of aggression—albeit not until 2017 at the earliest and only as regards states agreeing to its inclusion.[5] Thus, it may be useful to expand our vision to consider how these areas of international humanitarian law may be in need of development as well, and how their development might assist with the critical goals of prevention and compliance enhancement identified by today's lecture.

With respect to crimes against humanity, that crime, so important at Nuremberg and vital to the work of the ad hoc international criminal tribunals and the ICC, has never been made the object of a comprehensive international codification. Having been "de-linked" from armed conflict by the judgment of the ICTY in the *Tadić* case,[6] as well as in the negotiations that resulted in its inclusion as article 7 of the Rome Statute for the International Criminal Court,[7] crimes against humanity enhance international humanitarian law's effectiveness by criminalizing widespread or systematic attacks upon civilians even prior to the onset of armed conflict. In the work of the ICC, we see the importance of crimes against humanity not only as parallel charges during times of armed conflict, as appear in the

4. Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 4–5, S.C. Res. 827, U.N. Doc. S/RES/827 (1993); *see also* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶¶ 33–49, U.N. Doc. S/25704 (May 3, 1993).

5. Int'l Criminal Court [ICC] Assembly of States Parties, *The Crime of Aggression*, Review Conf. res. RC/Res.6, ICC Doc. RC/11 (June 11, 2010).

6. Prosecutor v. Tadic, Case No. IT-94-1, Opinion and Judgment, ¶¶ 629–34 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

7. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 3.

Katanga and *Bemba* cases, but as the only source of law applicable in the charges brought in the Libya and Kenya situations. Crimes against humanity as a category of incrimination prohibits mass atrocities—including persecution and ethnic cleansing—that take place prior to, during, or even following an armed conflict. The failure of the international community to take up CAH's codification is perhaps reflective of the first category of problematic state behavior noted in Dr. Kellenberger's lecture, that of abstention or failure to respond to a problem. A group of distinguished experts working under the auspices of the Harris Institute at Washington University recently drafted a proposed international convention for the prevention and punishment of crimes against humanity, but no state has yet taken up the challenge of spearheading an effort to get such a convention adopted.[8] It may not be within the ICRC's purview to take up a project like this, but it is certainly related to the work of the ICRC in alleviating human suffering during conflict, whether armed or not, as the thirty-first international conference recently noted.

A second important gap in international humanitarian law is the absence of an effective prohibition against the crime of aggression. In *A Memory of Solferino,* Dunant wrote of the terrible suffering of soldiers, which was a catalyst for the ICRC's founding in Geneva. For that great battle of 1859 between Austria, on the one hand, and France and Sardinia, on the other, left 6,000 soldiers dead, with another 30,000 wounded, who were suffering from the most appalling injuries. Crimes against humanity protect civilian populations from the depredations of war or other widespread or systematic human rights abuses, but it is the crime of aggression that protects combatants, who may otherwise be made the lawful target of military operations. While the laws of war endeavor to protect them from unnecessary suffering, they cannot save them from death. Think of the chilling example given by Judge Schwebel—also in the *Nuclear Weapons Advisory Opinion*—that a lawful use of a nuclear weapon would include targeting—and thereby incinerating—an army in a desert.[9] Less dramatically, the recent incident between North and

8. *See generally* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed., 2011).

9. Legality of the Threat of Use of Nuclear Weapons, Dissenting Opinion of Vice-President Schwebel, 1996 I.C.J. 311, 321 (July 8).

South Korea resulted in the death of forty-six sailors.

The ICRC, of course, is bound by its mandates of confidentiality and neutrality not to take sides, and labeling a particular use of force "unlawful" inevitably results in a legal assessment that one side (at least) was improper in its resort to violence. So perhaps it is preferable, in the imperfect world in which we live, to focus upon making conflicts more humane and civilized rather than attempting to distinguish between lawful and unlawful uses of force. Certainly, Clara Barton thought so; a passionate advocate for the ratification of the Geneva Convention of 1864 by the United States, she wrote in an address she gave just after the United States ratified the treaty in 1882 that the international convention at Geneva had considered two problems—the existence of war and the vast amount of needless cruelty it inflicted upon its victims.[10] The former problem, she wrote, could hardly be mitigated other than by "time, prolonged effort, national economics, universal progress and the pressure of public opinion." The latter, however, could be and was undertaken in 1864, and the establishment of the Geneva Convention and the ICRC was the result. It is true that, unlike the codification of crimes against humanity or war crimes, the codification of the crime of aggression comes closer to outlawing violence altogether, rather than simply mitigating its more pernicious forms. Yet in a post-Hiroshima age, there is perhaps more urgency in addressing not only the byproducts of war, but war itself. This burden must perhaps be taken up by entities other than the ICRC, but it represents a great unfinished work of humanity.

Finally, given the venue of today's lecture, it is perhaps appropriate to comment upon one additional aspect of today's Grotius lecture, and that is the role of major powers such as the United States in complying with their obligations under international humanitarian law. As we learn from Clara Barton's writings in 1898, the entry of the United States into the Geneva Convention of 1864 was not easily accomplished; President Garfield supported the treaty but noted the difficulties of convincing the Senate to do the same.[11] Clara was not a well woman, and yet she committed herself to

10. CLARA BARTON, THE RED CROSS: A HISTORY OF THIS REMARKABLE INTERNATIONAL MOVEMENT IN THE INTEREST OF HUMANITY (1898).

11. *Id.* at 60, 72.

bringing the United States on board, so passionately did she believe in the principles of Geneva.[12] She advocated for the treaty before Congress and finally, in 1882, the United States acceded to the treaty, making it the thirty-second country to do so.[13] Perhaps it is comforting to know that what seems to be a phenomenon of modern politics and resistance to international law in the United States is instead a venerable American tradition—and that *plus ça change, plus ça reste pareil* (the more things change, the more they stay the same). But just as the impassioned advocacy and dedication of Miss Clara Barton helped to convince a reluctant Congress of the importance of the 1864 Convention, I am sure that the eloquent remarks of Dr. Kellenberger before this important gathering of international lawyers will be of great effect. Solving the challenges he has identified will indeed require vision; this is also true as regards the additional challenges I have identified. But vision alone is not enough. Just last December, UN Secretary General Ban Ki-moon spoke at a reception hosted by the CICC in honor of the International Criminal Court and quipped, "at the United Nations, we don't believe in miracles, but in hard work. But sometimes small miracles occur."[14] The same could be said by and about the ICRC for whose tireless and quiet work on behalf of humanity we must indeed be most grateful, and which has produced many small and large miracles over the many decades of its existence—prisoners reunited with their families, amelioration of conditions of detention, the banning of weapons causing unnecessary suffering, and the mitigation of violence in the world. Thank you, Dr. Kellenberger, for your tireless advocacy on behalf of humanity, and thank you, distinguished guests, for your kind attention.

12. *Id.* at 60–72.

13. *Id.* at 58–59, 80–81.

14. Ban Ki-moon, Secretary General, United Nations, Remarks at a Reception of the Coalition for the International Criminal Court (Dec. 2011) (author's notes).