

INTERNATIONAL LAW AND LITERATURE

The panel was convened at 8:10 p.m., Thursday, April 10, 1997, by its Chair, Theodor Meron, who introduced the panelists: Kenneth Anderson, Washington College of Law, American University; and Julie Stone Peters, Department of English and Comparative Literature, Columbia University.

REMARKS BY THEODOR MERON*

This is the first time ASIL has ever held a panel on literature and international law. Before starting, I would like to recognize the presence in the audience of Justice Anthony M. Kennedy and Mrs. Kennedy. We are greatly honored, Justice Kennedy, by your presence here.

I hope our panel tonight will start a new tradition in ASIL. I believe that literature, especially great literature, has a story to tell about international law that may be more poignant, more powerful and more memorable than anything we can read in the language of international treaties or international customary law.

Our presentations tonight will move from the most recent literature to the most ancient. First, Professor Kenneth Anderson will discuss notions of shame and honor in adherence to the laws of war as reflected by soldiers and police in Nicholas Shakespeare's 1995 novel about Peru, *The Dancer Upstairs*. The novel centers on the Peruvian government's war against the Sendero Luminoso (Shining Path). Professor Anderson's theme is particularly important, because throughout the centuries, indeed, throughout the millennia, the ideas of honor and shame have been among the most important motivations for compliance with all law, especially international humanitarian law.

Professor Julie Stone Peters will discuss the literary and symbolic Joan of Arc under trial as a reflection of twentieth-century views of nationalism and internationalism, the rule of force, and the rule of law. Professor Peters will treat the story of Joan of Arc as an allegory for rethinking the role of tribunals, freedom of belief, rights and due process. She will focus on three modern plays: George Bernard Shaw's *Saint Joan* (1923), Bertolt Brecht's *Saint Joan of the Stockyards* (1930), and Brecht's subsequent radio play, *The Trial of Joan of Arc at Rouen* (1935). Finally, I will discuss literary reflections of early humanitarian law. I shall examine how two great works of literature, Homer's *Iliad* (eighth century B.C.) and Shakespeare's *Troilus and Cressida* (1601-1602), composed some twenty-three centuries apart, address humanitarian principles and principles of chivalry supposedly practiced in the Trojan Wars.

REMARKS BY KENNETH ANDERSON**

I would like first to say a word about the methodology I am employing in what, as Professor Meron has said, is a new genre at this annual meeting of ASIL. There is great value in approaching international law through examples from literature of the canonical greats, if only because such iconic literature can support iconically weighty analysis. In contrast, tonight, I will be looking at a work of contemporary literature that is not only not canonical but of the genre of the "literary thriller," Nicholas Shakespeare's *The*

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Dancer Upstairs.¹ This novel has a particularly important message about the roles of honor and shame as motivations for police, on the one hand, and soldiers, on the other, during times of enormous social stress, such as the war with Sendero Luminoso and the Tupac Amaru terrorists in Peru. The novel is more than merely a case study of the disappearances and other horrible atrocities that have occurred in Peru. The point of turning to literature is more than to provide illustrative cases of human rights abuses (which, after all, piles of unread human rights reports already provide); it is also to provide evidence of the interior sensibility of honor and shame, and of certain other virtues and vices, to promote understanding of their place as motivations for soldiers and police in relation to the laws of war. My goal in reaching to literature is to suggest lessons about the source or “engine” of obligation for the laws of war.

Let me turn to the novel briefly. I am sure that many of you were as horrified, but fascinated, as I at the pictures of the capture of Abimael Guzman, the supreme leader of the Shining Path in Peru, in 1992. The police and the military, as you may recall, paraded Guzman, dressed in what looked to be the striped pajamas of a cartoon jail-bird, in a specially constructed cell in a deliberate attempt to shame him in front of the Peruvian public. *The Dancer Upstairs* is the story of how Guzman was captured, from the point of view of the policeman assigned to find him, Colonel Rejas. This policeman is, interestingly, a lawyer of indigenous origins. He strives to live in an honest way on a policeman’s salary while facing pressure from his wife to earn a better living. To enroll his daughter at the local ballet school, he is forced to negotiate with the ballet teacher, who is gradually adopting the revolutionary Maoist ideology held by some indigenous people of the highlands.

We see, through the story, that the army is gradually replacing the police as the lead force tracking down Guzman and his followers. It is also replacing the police in conducting what, on all sides, has been one of the most brutal 20th century counterinsurgencies in the Americas. In the end, Rejas finds Guzman, a.k.a. Ezequiel in the novel, in the upstairs apartment of the ballet studio—for the dancer downstairs, the dance teacher, is harboring Ezequiel, the dancer upstairs. Remarkably, Rejas uses the most ordinary of police methods, locating Ezequiel by tracking down the pharmacies from which the rebel leader sought medicine to cure his psoriasis. At this point, the dance teacher, with whom Rejas has fallen in love, has been disappeared by the military. To save her, Rejas tells his story to a foreign journalist in an attempt to put pressure on the military for her release. He is ultimately successful in securing her release, in the midst of a nationwide wave of disappearances carried out by the army, which, as a policeman supposedly enforcing the rule of law, he is powerless to prevent.

In the course of the novel, Rejas examines both the role the army gradually takes on in the conflict and his own role as a policeman. I propose to draw out of Rejas’ experiences a number of differences that he seems to see between the proper role of a policeman and that of the army, in the context of insurgency and counterinsurgency campaigns that really constitute a war. Yet, first, we need to ask why honor and shame matter in professions that use violence, such as the police and the military. After all, in a system of *complete* exterior control, in which all actions by those using violence can be subject to monitoring and, hence, perfect justice, honor and shame do not matter because there is perfect accountability. However, since complete exterior control and perfect accountability never exist, the professional character of police and soldiers, in their respective missions, matters greatly.

¹ NICHOLAS SHAKESPEARE, *THE DANCER UPSTAIRS* (1995).

John Keegan explains this point well in his *Times Literary Supplement* review of Adam Roberts's *The Laws of War*.² Quoting Roberts, he writes that "the experience of land war in two world wars must raise a question as to whether formal legal codification is necessarily superior to notions of custom, honour, professional standards, and natural law' in making for battlefield decencies." Indeed, Keegan suggests that Roberts ought to have been more emphatic, and declares, "There is no substitute for honour as a medium of enforcing decency on the battlefield, never has been, and never will be."³ Although only implied in this quote, Keegan seems to suggest that the current enthusiasm for war crimes trials, especially among international lawyers, puts the cart of corrective justice ahead of the horse of the formation of professional attitudes and character among officers.

I would go still further than Keegan and suggest that, although codifications of international law are a useful template for organizing the categories of a soldier's professional honor, finally it is honor, not law, that is the engine driving such adherence as exists to the laws of war. The current enthusiasm for war crimes tribunals, while not necessarily at odds with emphasizing the formation of professional virtue among soldiers, today seems to contemplate, first, that mechanisms of justice really can govern the conduct of soldiers in the field; second, that justice after the fact can actually be a remedy for mass violations of the laws of war; and third, that the example of convictions in one part of the world can actually serve as a deterrent to the behavior of those who already lack a professional commitment to soldierly honor someplace else. Each of these three assumptions—all grounded in a fourth assumption, particularly suspect but particularly embedded among international lawyers, that the world and its law are a *unitary* place—which I perceive to permeate the work of the war crimes tribunals, seems to me heroic at best.

This is a contentious assertion and, worse, one that I do not intend to defend here, but one that I use as a supposition upon which to build remarks about the differing, respective professional formations of soldiers and police that draw on the experiences of Colonel Rejas in his dealings with the military and Sendero Luminoso.

The first difference Rejas identifies between soldiers and police is that being a police officer is about maintaining public order within a society. This is obviously quite different from destroying an enemy's will to resist on a battlefield. Thus, the fundamental difference is that of what we might call the field of action: a society for police versus a battlefield for soldiers. When one is confused with the other, many civilians will die.

The second difference is one of tactics. A police officer is to stop those involved in antisocial behavior—literally to "arrest" their behavior and put them in custody. In contrast, the military focuses on selectively destroying targets in order to destroy the enemy's will to resist. It may seem obvious, but it bears repeating that one cannot police a population, even a population one despises, with tanks or that now-universal weapon of the developing world, the rocket-propelled grenade, or even an assault rifle. Nonetheless, I have found that professional soldiers are repeatedly surprised that they cannot maintain order among civilians with machine guns.

The third difference is that between the police officer's affirmative duty to protect third parties and the soldier's acceptance of collateral damage to them. The fact that military destruction may collaterally damage third parties in the process is accepted, within certain legal limits, for military operations. Police work is different, however,

² John Keegan, *If You Won't, We Won't: Honour and the Decencies of Battle*, *TIMES LITERARY SUPPLEMENT* (London, No. 4834), Nov. 24, 1995, at 11.

³ *Id.*

because its fundamental goal is the protection of those innocent third parties, making the idea of permitting collateral damage, at least involving third-party life and limb, truly alien. For example, the police cannot defend the death of five innocent bystanders as part of the “necessary cost” of apprehending violent criminals, as the military would. Thus the shift in focus in counterinsurgency strategy from reliance upon the police to the military is largely about the shift in the attitude toward collateral damage, from being unacceptable to being part of the cost of winning what is redefined as war.

In the end, Colonel Rejas understands that the reason the Peruvian army has been brought into the struggle against Sendero Luminoso is precisely because the army does *not* follow police rules. As a military force, it may not bother to follow military rules of humanitarian law either, but even if it did, its activities would still differ from police work in the levels of firepower and the corresponding collateral damage accepted in the “war.” The struggle is thus redefined as a war because it is accepted that following the rules appropriate to a civilian society—rules of apprehension and arrest rather than destruction of enemy forces—will not succeed in destroying the enemy. None of this is to suggest that either the army or the police is somehow morally “better” than the other, but instead to recognize that they have profoundly different roles, methods and professional ends leading to profoundly different senses of honor, shame, mercy and justice. What Rejas observes in Peruvian society is the great risk, when the roles of police and soldiers are muddled together, that *all* professional norms will be lost.

I have thus elaborated sharp differences between the roles of police and soldiers in the context of a brutal counterinsurgency struggle in which both police and military have behaved with appalling callousness. It may therefore seem preposterous to suggest that these differences can be relevant to international peacekeeping operations. After all, international peacekeeping forces are the “good guys”; they go out to reestablish order in the worst situations in the world, buckling on the armor of God and angel wings that only Joan of Arc might be worthy to wear. What could the crimes of the Peruvian army and police teach them? In fact, however, from them one can make observations that are surprisingly applicable to peacekeeping forces and peacekeeping missions. The reason is that they demonstrate the fundamentally different sources of *legitimacy* on which these respective social agents rely. The Peruvian experience and *The Dancer Upstairs* can teach those who are *not* criminals the centrality of the issue of legitimacy and its source. For police officers, as those who enforce the rules of order in society, know perhaps better than anyone that their ability to act on the street depends first of all upon the perception of their legitimacy among the population. In contrast, the legitimacy of an army in the field depends almost entirely on the fact that it comes out of the barrel of a gun and is therefore effectively limited to the battlefield. This difference has important implications for international peacekeeping missions.

I look out across this audience and see, I believe, the disciples of Grotius. You are those who believe that legitimacy is inherent in the international system and that internationalism embodies a universalism that gives it this legitimacy. To the internationalist, this legitimacy flows from the top down and enables the United Nations Security Council or other intervening powers to impose order where it is, admittedly, desperately needed. I, however, doubt the moral proposition that internationalism is inherently legitimate because it presumptively embodies universalism, and I squarely reject the proposition that “internationalism” and “universalism” are identical—a contention that, however, I will not seek to defend here: Suffice it to say, disciples of Grotius, that I am not one of you.

The lesson of *The Dancer Upstairs* is that this perception of the legitimacy of international operations may not be shared by the people one goes out to police in their