

PROBLEMS OF INTERNATIONAL HUMANITARIAN LAW

We read in The Military Law and Law of War Review (1975, XIV-3-4) the text of the address delivered under the title: Some Existing Problems of Humanitarian Law by Professor R. R. Baxter, on the occasion of the celebration of the Centenary of the Brussels Declaration of 1874 on the Laws and Customs of War. We reproduce some extracts as follows:

...What are some of these basic principles to which we should rededicate ourselves?

The first of these is that those who take no active part in the hostilities should not be made the object of attack under any circumstances. This should be true whether the conflict is international or non-international, whether it falls under common Article 2 or common Article 3, whether it is governed by the new Protocol on Non-International Armed Conflicts or not. It should be true whether the violence is employed by military or civilian persons. The terrorist who kills a civilian at an airport in a country not participating in the conflict is as bad a man as the soldier who deliberately and unjustifiably kills a civilian in the course of combat during an undoubted war. The crime that each commits is the same. The commandment should speak loudly "Thou shalt not kill the innocent". If the answer is that civilians are not innocent, or that deprivation justifies depravity, or that the cause was after all a good one, then one should be prepared to reformulate the rule "Thou shalt feel free to kill the innocent whenever it suits thee".

A second basic principle is that those who fight openly in arms and are captured—that is to say, military personnel—are to be protected against torture and intentional mistreatment and are to be maintained at a level of feeding, housing, and medical care that is relative to the means available to the Detaining Power. It seems incredible in these days that one should have to say that prisoners of war should not be

starved, should not be beaten, should not be tortured, should not be denied medical attention. This is the core of the protection of prisoners of war. The articles on prisoners' representatives and pay and the number of letters a prisoner may send a month are subsidiary, auxiliary provisions which are far from being indispensable.

It is essential to the proper application of these two principles that the line be maintained between those who fight and those who do not. If persons attempt to take advantage of the protection given to those who do not fight in order to commit belligerent acts, then they jeopardize the position of the civilian population as a whole. The requirement of openness on the part of those who fight is the lynch-pin of the protection of civilians. If the distinction is abandoned, every civilian may become subject to attack, not as a matter of law but as a matter of fact. But the law will crack under the blows of fact...

... These then are the six principles.

- The principle that those who take no part in hostilities should not be attacked.
- The principle that those who do fight openly should be humanely treated upon capture.
- The principle that the line must be maintained between those who fight and those who do not.
- The principle that the core of humanitarian law should be the same for all types of conflicts.
- The principle of openness and accountability.
- The principle that the application of force should not cause unnecessary suffering or be indiscriminate.

A hundred years after the Brussels Declaration is too late to tear down the existing edifice of the law and to replace it with a new body of law more responsive to human needs. We must work with what we have. It is, as I have indicated, unfortunate that we draw a hard and fast line between internal and international conflicts, but the law has long since shaped itself according to that distinction. And by now we probably have too much law and too many detailed regulations.

In light of what I have said about the proliferation of law, I hope that I will not be accused of inconsistency when I say that that law is often inadequate to perform the multiplicity of functions with which it is charged. The law of war is supposed to:

- Guide the conduct of states;
- Educate the soldier as to his duties;

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- Provide detailed regulations for the internment of prisoners and for their protection through the International Committee of the Red Cross; and
- Serve as a penal code.

The amplitude and complexity of the law are a deterrent to the second of these—the education of soldiers. What is vital is commingled with what is, relatively speaking, inconsequential. The central ideas do not shine through the opaque texts drafted by lawyers, diplomats, and military personnel...

... If we were once to complete the work of the Diplomatic Conference on International Humanitarian Law, the next step might be to rationalize and simplify the law in such a way as to make the basic humanitarian principles speak loudly and clearly to those states and individuals that must apply them. This would enhance the vital educational role of the law.

At this time of stock-taking, we must turn our minds to the protection of man against suffering. The words, the legal concepts, the abstractions blind us. It is the blood on the pavement, the cry of agony, the amputation of the leg, the burned flesh, the swollen stomach and spindly limbs of malnutrition, nausea, the mourning of death, the agony of separation and of ignorance that should be foremost in our minds—not such intriguing questions as whether it would be more humanitarian to say “every civilian” instead of “a civilian” in article 206, paragraph 3. We are dealing with something evil and ugly. We must face it on those terms.

What more fitting way could there be to celebrate an anniversary of this sort than for all of us, in humility and in good will, to dedicate ourselves to the enhancement of humanity in war?