THE LAWS OF WAR[1]

I

EVOLUTION OF THE LAWS OF WAR

Heraclites of Ephesus said that war is the mother of the law of nations. Nothing could be more true for, alas, war is first and foremost in the relations among peoples. In 3,400 years of recorded history, there have been only 250 years of world peace !

Violence, cruelty and the tendency to kill and destroy derive from the age-old instinct of self-preservation. One tries to kill or injure another in order to improve one's own chances of survival. Among some animals, if one of them is wounded, he is set upon and killed by his fellows. For thousands of years men had to act in the same way among themselves. Then the instinct of self-preservation spread to the group. It was recognized that if society was to be organized, the instinctive reactions of the individual must be curbed. So the community set up a social order, through rules of conduct, and that was the origin of law. The community also established an authority capable of ensuring respect for those standards.

At the same time, however, limits had to be placed on that authority. For while the supreme aim of the State is to permit individual personality to develop, it might crush it in so doing. Man therefore required certain guaranteed basic rights which he requests and can consequently grant to others. Thus the principle of respect for the human person came into being—respect for his life, liberty and happiness.

[1] Talks given on June 15 and 22, 1960 in the lecture series of the *International Radio University*.

For a long time this tremendous and slow evolution was limited to the domestic sphere in each State ; eventually, however, it reached the international plane where the law immediately came up against war which, in ancient times, was nothing but a general massacre.

Man could not hope to vanquish the scourge of war at the outset, but at least endeavoured to mitigate its dreadful consequences and make it more humane. It is logical to try to lessen the extent of an evil which one cannot banish completely. The reciprocal interest of chivalry also led men to observe certain " rules of the game " in the conduct of hostilities. That was how the laws of war originated.

The evolution was as hard to achieve on the international plane as it had been at the domestic level. For the State, which represents the interests of its citizens, became the champion of collective egoism vis-à-vis other countries.

Therefore, the law of nations is only first of all materially the result of the interests of the parties concerned, that is to say, of States. But the men and institutions concerned with making some measure of justice and compassion prevail, even when violent events are occurring, endeavoured to introduce some humanitarian principles into the law of nations for the benefit of the individual. In particular, the International Committee of the Red Cross has always contributed to this undertaking, which can only be conducted with patient determination and in gradual stages. For any provisions of a convention which were too unrealistic or the result of heedless humanism would simply not be accepted or, at the least, would not be applied and would fail in their purpose.

Thus war engendered laws and the latter in turn, inspired by the spirit of charity, took the lead of war, have limited the damage it does, and will one day overcome it.

As long ago as classical times, the stoic philosophers counselled moderation, as in the dictum : *hostes dum vulnerati fratres*. But they did not extend like treatment to the " barbarians " and allowed the latter to be put into slavery.

Christianity formulated the admirable doctrine of love for one's fellow-men and brought it onto the universal plane. But that

doctrine was only too often deformed by men who viewed altruism as a means of ensuring their own salvation and applied its precepts only in wars among those of the same faith. During the Crusades, it was in fact Saladin who displayed the most humanity.

Towards the end of the Middle Ages, scholars such as Vitoria laid the foundations of " natural law " which was considered of divine origin. Besides, they taught only too timidly that war must be waged in a " proper " way, i.e. that useless suffering should be avoided. Then the law-makers came up against a distinction drawn between just and unjust war, which was to hinder progress of the humanitarian cause for centuries. He who goes to war justly—that is to say with good cause and in accordance with morality—can do anything he pleases to nationals of the enemy country. But each party holds his cause to be the only just one, and massacres at will.

After the Reformation, Grotius and his disciples developed the law of nations along the same principles, but this time in the name of human reason only.

Modern humanitarianism did not come into being until the Enlightenment, and the basic rule of the law of war was definitively proclaimed by Vattel and Jean-Jacques Rousseau, both Swiss citizens. One knows this passage from the *Contrat Social* : " War is not a relationship between one man and another, but between one State and another ; in war, individuals are enemies only by accident, not as men but as soldiers . . . Since the end of war is the destruction of the enemy State, one is entitled to kill its defenders so long as they bear arms ; but as soon as they lay down their weapons or surrender . . . they become merely men once more, and one no longer has any right over their lives . . ." These ideas were taken up and developed by the French Revolution, which proclaimed the " imprescriptible right " of the wounded to be tended, and placed prisoners of war " in the safe-keeping of the nation ".

In parallel, in the XVIIIth Century, cartels and capitulation agreements between heads of armed forces provided for more humane treatment for the wounded and prisoners. Those cartels, however, applied only to a single battle and were not always put into effect. Moreover, the wars of the French Republic and Empire, when military conscription was introduced, became mass wars, " all-out " wars in which the humanitarian cause suffered a definite setback.

It is therefore difficult to realise how important the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field was in regard to the development of the laws of war. That Convention was drawn up at the instigation of the founders of the Red Cross, who had been shocked by the horrors of the battle of Solferino. For the first time, a still sporadic and hesitant practice was transformed into a universal law, valid everywhere and at all times. For the first time, or nearly so, war yielded to law. For the first time, the political and military interests of States were no longer the only issues at stake : even at the height of battle, a humanitarian duty prevailed, namely, that a suffering man must be tended with equal care and attention, whether he be friend or foe.

The 1864 Convention, so far ahead of its time, is the cornerstone of all positive law in regard to war. Its principle, first limited in application to wounded in the armed forces, was extended gradually to other categories of war victims : prisoners of war, shipwrecked persons and civilians are now protected by the four Geneva Conventions of 1949, which alone embody perhaps three-quarters of the laws of war. The " Lieber laws " which the United States brought out in 1863 also had a beneficial influence in this domain, as did Bluntschli's monumental *Droit international codifié*, published in 1868, which contains this redeeming sentence : " The purpose of the laws of war is to civilize war, whether just or unjust ". We may note in passing that the notion of unjust war has recently been taken up again, in a slightly different sense. The aggressor State, or the State committing a breach of a pact, goes to war unjustly. But nowadays a distinction is made between *jus ad bellum* and *jus in bello*, the latter being applicable in any conflict, to rebels as well as to the representatives of international order.

From the movement launched by the Red Cross sprang not only the Geneva Conventions, which protect the victims of war, but also Conventions regarding the conduct of hostilities and restrictions on the use of certains weapons. After the St. Petersburg Conference in 1868, which prohibited the use of explosive projectiles, came the Hague Conferences of 1899 which, *inter alia*, drew up the great " Regulations concerning the Laws and Customs of War ". That is known as the Hague movement, running parallel to the Geneva provisions, though originating in the latter.

One might say that present-day efforts for the peaceful settlement of disputes and the outlawing of war also have their origin, though more indirectly, in the brief Geneva Convention of 1864, but today they are completely separate from the other two movements referred to above. The Hague Conventions opened the way for the establishment of investigating commissions and courts of arbitration. The Covenant of the League of Nations then laid down rules for the settlement of disputes through arbitration, and subsequently the Kellogg Pact even prohibited recourse to war. In present times, these efforts are actively pursued by the United Nations.

This process of development had been predicted by Gustave Moynier, one of the founders of the Red Cross, who wrote in 1864 in connection with the conclusion of the First Geneva Convention : " To take this path is to take a decisive step on a steep slope on which one cannot possibly stop ; it cannot fail to culminate in an absolute condemnation of war . . . Future generations will witness the gradual disappearance of war. An infallible logic wills it so."

II

LAWS OF WAR IN FORCE

War does not disrupt all legal ties between the States involved ; over and above acts of violence, certain rules survive which must be observed and which stem as much from reason as from humanitarian feeling ; they are the laws of war.

In a famous phrase, Talleyrand said that international law is based on " the principle that nations must do each other the most possible good in peace and the least possible ill in war ".

The laws of war, which are an integral part of international public law, fall under two main headings which we shall consider in turn : the Geneva laws and the Hague laws.

Let us first take the Geneva laws. They were re-affirmed in the four Geneva Conventions of 1949 and are traditionally concerned with the protection of all war victims and, by extension, the weaker members of the community who need special care, such as children

and old people. In its own defence, the State may be justified in placing restrictions on the free exercise of individual human rights, but any such restrictions must not exceed what is absolutely necessary. The particular function of the Geneva Conventions is to determine the permissible level of restriction, establish regulations for the treatment of men by their fellows, and find a compromise between military requirements and the dictates of present-day conscience.

The principle underlying the Geneva laws may be expressed in the following terms : persons placed *hors de combat* or who take no direct part in the hostilities must be respected and humanely treated. This definition covers members of the armed forces who are out of active service because of wounds, sickness, shipwreck, capture or surrender, and civilians who have no notable influence on their country's military potential.

The First Convention stipulates that wounded or sick members of the armed forces, who are thus without defence, must be respected and protected in all circumstances. That is the cardinal principle of the Convention, from which almost all the other provisions stem. Members of the enemy armed forces who are *hors de combat* must be treated in the same way as those of one's own side, without any discrimination. Any priority in treatment must be granted solely for urgent medical reasons. The lives of the wounded may not therefore be endangered, nor may they be harmed in any way, provided of course that they have renounced fighting.

A zone of immunity is thus established around the wounded, and it may not be breached by weapon or fire. The emblem of a red cross on a white ground is the visible sign of this immunity, which also extends to hospitals or dressing stations in which wounded persons are, to the vehicles which transport them, the staff who look after them and the medical equipment provided for them. Doctors and nurses are protected not as individuals but as medical personnel, because they care for the wounded. In return for the security granted them, they must remain outside the fighting and observe strict military neutrality. Medical personnel who fall into the hands of the adverse Party must be repatriated if they are no longer needed to give assistance to prisoners of war.

The Second Geneva Convention extends the same principles to war at sea.

The Third Convention relates to the treatment of prisoners of war. Members of the enemy armed forces who surrender, including members of organized resistance movements, must be protected and given humane treatment. The camp in which they are interned must meet proper standards of security and hygiene. Prisoners must be able to lead a normal life there. The camps are open to inspection by delegates of the Protecting Power—that is to say the neutral State representing the interests of a belligerent vis-à-vis its adversary—and also by delegates of the International Committee of the Red Cross. Food must be sufficient to maintain prisoners in a good state of health. They may not be required to perform any work connected with the war effort, or which is dangerous or unhealthy. Prisoners of war are permitted to send and receive family news and to receive relief parcels.

The Fourth Convention of 1949 is entirely new and was intended to fill a regrettable gap, following the bitter experience of the Second World War. Civilians are not involved in the fighting and may never be attacked ; on the contrary, they must be respected and protected and always treated humanely. Any civilians deprived of their liberty for any reason will enjoy a status similar to that of prisoners of war. All internment camps are to be open to inspection by representatives of the Protecting Power and the International Committee of the Red Cross. As far as possible, the civilian population in occupied countries must be able to continue to lead a normal life. Deportation, pillage and the taking of hostages are specifically forbidden. Personal honour, family rights and religious convictions must be safeguarded.

If provisions of this kind had come into effect ten years earlier, millions of human beings would have been saved from death and grievous suffering.

A series of general Articles specifies that the provisions of the four Geneva Conventions are to apply not only in the case of an international conflict which has been properly declared, but wherever *de facto* hostilities between two States have caused casualties, whatever the form of armed intervention and whatever it is called, whether the war be just or unjust. Moreover, civil war

is no longer left completely outside humanitarian law. Article 3, which is a complete innovation in international law, provides that the basic principles of the Geneva Conventions—those which ensure respect for the human person—shall be applied in all circumstances. This refers to respect for the wounded, protection against killing and against torture, the taking of hostages and the passing of sentences by a court which is not regularly constituted.

Lastly, control over the application of the Conventions has been strengthened. If there is no Protecting Power, the belligerents must appoint a substitute, which may be either a neutral State or a humanitarian organization such as the International Committee of the Red Cross.

So much for the Geneva laws. We must now outline briefly the Hague laws, which form the second group of the laws of war and lay down rules for the conduct of hostilities and in particular the choice of means of injuring the enemy. They are based on the principle that the belligerents may not inflict on the opposing Party any harm disproportionate to the issue at stake.

The rules regarding the conduct of hostilities relate to the declaration of war, sieges, ruses of war, bearers of a flag of truce, spies, quarter, capitulation and armistice. Most of them are contained in the Regulations concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907. Their purpose is to ensure fairness in the fighting.

More important still are the provisions limiting the use of certain weapons. The first is the St. Petersburg Convention of 1868, still in force, forbidding the use of explosive projectiles. Then come the 1907 Regulations referred to above, which forbid the use of poisoned weapons and in general any weapons which would cause " unnecessary suffering ". Most important, however, the Regulations forbid the bombardment of towns or villages which are undefended, and another Convention concluded in 1907, the XIVth Convention, prohibits " the discharge of projectiles and explosives from balloons ". What value do those provisions have after the bombing of Coventry, Hamburg and Hiroshima ? It is true that they date back to 1907, while bomb-carrying aircraft were unknown until 1911. But though the letter of those provisions may be outdated, their spirit must remain and it requires that so far as

possible civilians who take no active part in the hostilities must be protected. If the text of the 1907 provisions is no longer up to date, it should be revised so that the principles contained in them may regain their full significance. One should find a source of encouragement in the 1925 Geneva Protocol, which prohibits the use in war of asphyxiating gases, bacteriological methods of warfare and the like, constitutes a precedent and was respected during the Second World War. For its part, the International Committee of the Red Cross recently drew up draft regulations for the protection of civilians against the dangers of modern warfare, whatever the weapons used. But that is only one means and if the draft regulations are not adopted, other efforts should be made if we do not wish war to revert to what it was in early times—namely, bloodthirsty, merciless victory by brute force.

But above all, it is our hope that the world will see the coming of peace as desired by all men of goodwill. The implacable dilemma facing us today is that either men must disappear or war must disappear.

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