

THE LAW OF WAR IN SERBIA IN 1877

Although the Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field has today only symbolic significance, its spirit lives still in the Conventions that were subsequently elaborated. It played, indeed, a capital role in the development of international humanitarian law and, in view of that fact, it may be appropriate to indicate in what way it exerted an influence that became increasingly stronger and that made itself quickly felt on the laws of various countries.

Some evidence of its effect is to be found in the rules of the law of war promulgated by Serbia a little more than ten years after the first Geneva Convention was signed. The text of these regulations, entitled Instructions issued by the Ministry of War of the Principality of Serbia concerning the Application of the Geneva Convention of August 22, 1864, and of the Rules of the Law of War, was recently discovered in Belgrade's archives of history. These instructions were published on 1 December 1877 and were to all officers and other ranks.

Besides the rules for the application of the first Geneva Convention, the instructions contain a notable outline of the customary law of war considered to be valid at that time. This summary will be judged to be highly in advance of its time if it is remembered that it was drawn up more than twenty years before the first Hague Conventions, which it foreshadows in many respects.

The Serbian rules of the law of war are of genuine historical value and we are certain that for our readers the selection of the articles ¹

¹ Translated from the Serbian by the ICRC.

reproduced here, illustrating a new attitude towards the victims of war and testifying also to the respect in which, in accordance with the instructions, the sign of the red cross was to be held, will be of great interest. We commence with article 4 of an eight-part commentary on the Geneva Convention, signed by the Minister of War.

(Ed.)

Aid to the wounded

§ 4.

Inhabitants of an enemy country who go to the aid of the wounded are entitled to all their rights, and their freedom is guaranteed. The presence of a wounded person receiving shelter and treatment in a house will ensure the protection of that house; soldiers may not be billeted in that house, the householder who has decided to care for the wounded is exempted from a portion of such contributions as may be levied in his town and, in such a case, the services he renders to the wounded and sick as well as his financial situation are taken into account. It is quite immaterial, of course, to which of the belligerents the wounded or sick whom this person has accepted to care for in his home belong. No attacks must be carried out on dwellings containing wounded or sick, unless the requirements of war necessitate such attacks, but even then, the safety of the wounded and sick in question must be ensured. However, a person who cared for the wounded in his house and, through that action, enjoyed the aforesaid privileges, lost those privileges from the moment it was established that he took unfair advantage of them by concealing in his own house spies or deserters.

Preliminary provisions

§ 6.

The laws of war concern everything that lies within the field of military operations; they define all the circumstances and all

the acts that constitute the manner in which war is waged and determine the behaviour of belligerents in all the situations that are likely to arise in the course of hostilities. While recognizing to belligerents the right to annihilate each other, these rules prohibit all brutality, for torturing an enemy to death is not quite the same thing as wounding or killing him outright. Various laws therefore lay down what acts against an enemy are or are not permitted. They are founded on the general rule that in time of war the depth of suffering and the extent of the losses inflicted upon the enemy should not be in excess of that which is necessary to defeat his forces and that all persons should abstain from cruel and inhumane acts.

§ 7.

These rules may be violated only in extreme cases, or when they have already been violated by the enemy. But, under no circumstances should extreme necessity or military requirements be put forward as a reason if the injury inflicted upon the enemy has no direct relationship to the ultimate goal of the war, which is victory, and if that injury is in glaring contradiction with basic humanitarian principles.

Permissible and non-permissible means in wartime

§ 10.

Although it is permitted by the necessities of war to kill, to place *hors de combat* and to plunder the enemy, the right of belligerents to adopt means of injuring the enemy is not unlimited. First of all, it is not permitted to use excessively violent means which do not contribute in any way to the attainment of the ultimate goal of the war. Next, it is prohibited to employ means which are obviously useless and means which bring dishonour upon those who use them. The law of war forbids belligerents the use of such measures and refuses, at the same time, all protection to those who carry them out. Those who employ means of combat forbidden by the law of war must bear the consequences of such acts, for

the enemy may retaliate by having recourse to similar means and will thus increase the suffering and hardship of his own adversary.

§ 12.

In no circumstances can any justification be found for the use of poison, and people who do employ such means are held to be savages. The laws of war rigorously prohibit the use of poisoned weapons or the employment of poison, whether it is against an enemy army or within enemy territory. It is, in particular, prohibited to poison water supplies in enemy-occupied territory, to poison the enemy's food and to spread by any means whatsoever epidemics and contagious diseases. The employment of poison or contagion against the enemy is not only dishonourable but is also a double-edged weapon that can easily turn against those who resort to it.

§ 13.

Although war is an out-and-out struggle between belligerents, yet it must be conducted honourably. The enemy must be destroyed in open and fair combat. Consequently, it is prohibited by the law of war to kill an enemy brutally or by perfidious means. If, for instance, an enemy came to the camp under a flag of truce and on being brought before the commander-in-chief, killed him, this act would be considered as a perfidious and treacherous assassination and the guilty person would have to be sentenced to death. Similarly, it is forbidden by the law of war to kill an enemy who, having laid down his arms, has no means of defence.

§ 14.

It is not laid down that an enemy who is fighting to defend himself should not be killed; but, if he does not offer any defence, or begs for mercy, his life must be spared. Refusal to spare an enemy is only permissible if he has committed many acts of brutality, or if one's own life is at stake. He who does not spare an enemy cannot expect that enemy to be more merciful towards him

than he himself has been. Even the refusal to show mercy to an enemy who has fought with valour is prohibited by the law of war.

§ 15.

Belligerents may employ any means which are justified by military necessity to reach the goals they have set themselves in going to war. Such means include: (1) the carrying out of all operations that would cause injury to the enemy; (2) the destruction and seizure of all that is indispensable to the enemy for the conduct of the war and the destruction of all objects liable to increase the enemy's fighting power; (3) the destruction of everything that might impede military operations; (4) the employment of ruses of war, subject to any pledges made to the enemy, in which case such pledges must be respected, for it is contrary to international law and proof of treachery not to honour promises made to the enemy; (5) the right of belligerents to employ all means to obtain information on the enemy; in this connection, it should not be considered that the laws of war have been violated when belligerents approach the subjects of the enemy in order to procure information on their adversary, provided they abstained, in such case, from applying coercion.

§ 19.

Open towns and localities, not defended by the army or by their inhabitants, must not be the object of sieges or bombardments. Only those towns and localities which have been fortified and defended by the army may be the object of such operations.

Enemy persons, combatants and non-combatants

§ 57.

All persons who fight with weapons under their government's orders are considered as enemy combatants. All other persons, including women, children and the aged may not be considered as active enemies. Those who wage war for their own account (pirates, marauders, etc.) are also excluded. Persons considered as active or recognized enemies are entitled to all the advantages

conferred upon them by the law of war. When captured, such persons may not be punished and may only be held as prisoners of war, while others (marauders, etc.) may be sentenced by a court-martial.

§ 58.

The following are considered as being combatants: (1) all the members of the regular land army; (2) of the navy; (3) of the people's army; (4) volunteers. Members of the people's army and volunteers are not considered as legitimate enemies unless: (1) they are organized in military groups with the authorization of the lawful government and under the command of recognized leaders; (2) they respect and apply the rules of the civilized law of war, when the whole nation is under arms; in such a case, citizens constituting the army must be considered as legitimate and official enemies, even though they may not possess a uniform, if it may be deduced from all the circumstances that the lack of uniform was not a means adopted to wage irregular and unfair warfare.

§ 60.

The following are considered as being non-combatants: (1) priests; (2) doctors, chemists, nursing orderlies and all those bearing the sign of the red cross or red crescent; (3) quartermasters, cooks and court clerks; (4) coffee-shop and restaurant keepers, suppliers, agents, etc.

§ 61.

People living peacefully in an enemy country (called passive enemies) who do not take an active part in the conflict and do not belong to the army are, it is true, victims of the general situation inevitably generated by a war and must bow before the superior strength of a victorious enemy. But they must never be considered as official enemies and must be treated accordingly. They must not be killed, tortured, ill-treated or led away into captivity, and it is forbidden to assail their honour or to lay hands on their property. The power that has emerged victorious from the war may not compel the inhabitants of the enemy country to serve in its army. The situation is different if those people volunteer to join the army.

Persons taking part in the war, but not considered as recognized enemies

§ 62.

Those persons who go out singly or in bands to fight only with the object of looting and who have no link of any kind with the rest of the army are not considered as recognized enemies. At times they sally forth to fight, at other times they return to their homes to hide their loot. They are not entitled to the protection afforded by the law of war and may be tried by a court-martial. The same applies to marauders, deserters and spies.

Ways and means to ensure application of the rules of the law of war and the right of recourse to reprisals

§ 83.

The application of the rules of the law of war is ensured by the following: (1) the consciousness of the mutual advantages that flow from such application; (2) the consciousness of an obligation that one bears towards the enemy, for a pledge made to an enemy must be honoured as strictly as one made to a friend; (3) the sentiments of justice and humanity which demand that everything be brought back to its true measure and which condemn useless acts of brutality; (4) in order to oblige the parties to the conflict to respect its rules, the law of war provides a means of redress known as “reprisals”.

§ 84.

Reprisals consist of an act of retaliation against the enemy in respect of a violation committed by him against the law of war; they follow the old adage of “an eye for an eye and a tooth for a tooth”. When one of the belligerents commits some excessive act against his adversary, the latter may retort in the same fashion, with the sharp difference that, having been provoked, he has acted

in accordance with the law of war, and the responsibility falls wholly on the party which started the provocation. If a party to the conflict employs against its adversary means that are excessively violent and inhumane, the latter has the right to take his revenge. The law of recourse to reprisals is the most brutal of the laws of war and should only be very rarely resorted to. It is important to find out exactly whether the law of war has really been violated by the enemy. The choice of the means of reprisals as well as their execution must, as far as possible, be equivalent or at least proportionate to the violations committed by the enemy. Extremely brutal and manifestly inhumane reprisals, exceeding in severity the enemy's acts, are considered as violations of the law of war.

§ 85.

Only commanders-in-chief have the right to order reprisals to be taken and they alone may lay down how severe they should be and how long they should last.
