THE CONCEPT OF INTERNATIONAL ARMED CONFLICT: FURTHER OUTLOOK

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It would be unduly ambitious to try to deal here with all the aspects and problems which the subject of this symposium brings to mind. The different forms which conflicts have, in fact, taken since the end of the Second World War and may take in the future, constitute a vast subject requiring careful study before any kind of forecast can be made. Many writers, diplomats, journalists and publicists believe that the outbreak of wide-scale armed conflict involving several nations is now somewhat unlikely: we are more likely to witness ill-defined skirmishing than open warfare between regular armies. In armed conflict, however, it is usually the unexpected that happens!

It is for this reason that we shall here confine ourselves to examining two important contemporary aspects of international armed conflict: first, the effect of aggression on the application of humanitarian law and, secondly, the inclusion of the fight for self-determination in international conflicts. Naturally, these two aspects will be examined only in so far as they concern humanitarian law.

Agression and the application of humanitarian law

Since the beginning of recorded history, war has always been a prerogative of the State; the right to declare war has generally been vested in the Head of State, although in some constitutions that right has been reserved to Parliament.

The laws and customs of war which developed in the 18th and 19th centuries and at the beginning of the 20th century, have taken this situation for granted, and their entire system is based on the premise that States are free to have recourse to war when they see fit. It was with this in mind that the Geneva Convention of 1864 and the Hague Conventions of 1899 and 1907 were drawn up. In 1929, when the Geneva Convention was revised and the Convention relative to the Treatment of Prisoners of War established, the Kellogg-Briand Pact outlawing war, signed on 27 August 1928, had already been in existence for a year; it does not appear, however, to have had the slightest influence on the drafting of those two Conventions which continued to regard war as a fact, no pronouncement being made as to the responsibilities which might arise from its outbreak.

In 1949, the revision or drawing up of the four Geneva Conventions stemmed from the same idea. At best, to prevent governments from taking advantage of confused situations and avoiding their obligations, provision was made for the Conventions to apply both in the case of declared warfare and in any other armed conflict. One sees here the clear intent to cover unacknowledged states of war. A government, while opening hostilities against another State, might deny that there was any question of war, and assert that a mere policing operation was involved, an act of self-defence, or a limited operation sanctioned by a treaty... Such precautions are principally due to the fact that the Charter of the United Nations, confirming previous instruments, prohibits recourse to force, except in such cases as provided for in the Charter itself.

The draft Additional Protocols submitted by the ICRC to the 1974 Diplomatic Conference proceeded from the same idea.

In the United Nations itself, however, and in world opinion, anti-war sentiment has continued to grow. Wherever possible, United Nations bodies have put a stop to armed conflicts and ordered a cease-fire or an armistice. War has thus increasingly become an illegal act which the

international community is trying to abolish. This has led many to wonder whether the illegal character of war, at least so far as the aggressor is concerned, should not affect humanitarian law applicable in conflicts. Several speakers voiced their views in the matter at the 1973 General Assembly of the United Nations, at the 1974 Diplomatic Conference and at the Lucerne Conference of Government Experts on Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects. The argument most often put forward is that it is unlawful and morally wrong for the aggressor and the State attacked to find themselves in the same situation with regard to the laws and customs of war; again, acts of war committed by an aggressor State are, *ipso facto*, illegal, and those who commit them deliberately put themselves outside the law, and should therefore be sought out and punished.

These considerations hinge, of course, on the possibility of rapidly determining, in each case, who is actually the aggressor. In this connection, it should be noted that, after much hesitation and research, it was possible to establish a definition of aggression;[1] the twenty-ninth session of the United Nations General Assembly had before it, last autumn, a draft report which has now been adopted. The Security Council or the General Assembly of the United Nations, as the case may be, will thus have an objective basis for identifying the aggressor and taking the necessary military, economic or political measures against him. This endeavour by the United Nations is not to be overlooked or underestimated. It is an important step forward, but it should also be remembered that decisions of the Security Council may be paralysed if the five permanent members do not vote for them, and that decisions of the General Assembly in this sphere are in fact frequently contested.

How will this affect the 1949 Geneva Conventions and the Additional Protocol to these Conventions concerning international armed conflicts, the study of which the second session of the Diplomatic Conference will resume, in Geneva in February 1975? To answer this question, it should be recalled that, while the Conventions take the form of agreements between States, they are above all a declaration of the rights of the individual vis-à-vis the arbitrary acts of the enemy; moreover, they were drawn up in the interests of individuals rather than governments.

[1] Report of the Special Committee on the Question of Defining Agression, 1974, A/9619, United Nations.

If one considers the problem from the individual's point of view—the only one of concern to the Red Cross —one cannot see why, during armed conflict, mobilized or enlisted soldiers, civilian enemy aliens, prisoners of war, the inhabitants of an occupied territory, the sick or the wounded, should receive different treatment according to whether they belong to the aggressor State or to the State which is the victim of aggression. This would, in fact, amount to punishing men for faults which they themselves have not committed. It would also be a direct attack on the principle of progress stated by Rousseau, in the *Social Contract*, that war was not a relationship between men but between States, and that individuals were merely enemies by accident.

Moreover, how is an individual to know that he is taking part in a war of aggression? In practice, the most clear-cut cases of aggression have been presented as acts of self-defence or justice. It is difficult to see by what means the individual could gain true knowledge of the facts. Besides this, patriotism often leads individuals to trust blindly in their government, in keeping with the well-known American motto: " My country, right or wrong ".

Even if individuals were aware that they were participating in aggression, they would still have to find means of withdrawing from the obligations imposed on them by their own country's laws. Could one seriously expect individuals under arms to mutiny or desert the flag? As is well known, in times of war the most severe sanctions, including the death penalty, are applied for acts of this kind. As for those civilian or military leaders who hold some share of authority within the State, their position is hardly less invidious. In most instances, they are unable to abandon their functions or to refuse to apply laws and ordinances of the State and orders which they have been given. In the trial of the General Staff and High Command of the German Army, the military tribunal sitting at Nuremberg in 1948 concluded that the crime of participation in a war of aggression could be imputed to an individual only in the following circumstances:

(a) there must be actual knowledge that an aggressive war is intended;

(b) he must be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation.[1]

[1] *Law Reports of War Criminals*, Vol. XII, p. 68. Published for the United Nations War Crimes Commission by His Majesty's Stationery Office, London 1949.

It is clear then, that whereas the criminal character of wars of aggression has been well established, only a very limited number of individuals can ever be held responsible.

Finally, a practical observation should be added to what has gone before: it is idle to imagine that, in the course of hostilities, one set of combatants, if captured or wounded, would agree to be less well treated than captured or wounded enemy combatants. If some sort of parity is not maintained, it is quite certain that the least favourable treatment will become the general rule, to the great detriment of all individuals concerned.

This argument shows clearly that, on humanitarian grounds, any attempt to put war victims on a different footing, according to whether they belong to the aggressor State or to the State which is the victim of aggression, inevitably leads to the imperilling and even destruction of the structure of humanitarian rules painfully established over the last two centuries. Apart from those humanitarian rules, it is entirely possible, in other spheres of the law of war, to refer to the fact that a State has committed an act of aggression against another State. Obvious instances of this are the field of reparations, the relations of parties to a conflict with States not involved in the conflict, the validity of measures taken by an aggressor in occupied territory, etc.

The protective rules of the 1949 Geneva Conventions are entirely of a humanitarian nature: the definition of the aggressor by a United Nations body or under any other procedure therefore cannot influence their application; and this is equally true of the Additional Protocols to the Geneva Conventions submitted for consideration to the 1974 Diplomatic Conference; all their provisions are of a humanitarian nature.

Even those who favour different regimes for the treatment of war victims, according to whether they belong to an aggressor State or a State which has been attacked, admit that the State which has been attacked is not released from all obligations and that it must respect the laws of humanity. It has even been suggested that for situations of this kind, a new set of regulations should be drawn up from a different standpoint, bearing in mind the position of the " attacked ", frequently a State or an entity lacking material means and sophisticated weapons.

A study along these lines would be useful, but there can hardly be any doubt that the conclusion would soon be reached that the new set of

regulations would strangely resemble those contained in the Geneva Conventions and in the Additional Protocols. It is, in fact, experience in the field during hostilities that has guided government experts and the ICRC in drawing up the present rules and in drafting new ones. In simple logic, identical facts can only lead to identical conclusions.

Struggle for Self-Determination

During the first session of the Diplomatic Conference, held in Geneva in February and March 1974, Committee I, which was concerned with general problems, adopted as part of the draft Protocol for the protection of victims in international conflicts, Article 1, the first two paragraphs of which run as follows:

1. The present Protocol, which supplements the Geneva Conventions of 12 August 1949 for the Protection of War Victims, shall apply in the situations referred to in Article 2 common to these Conventions.

2. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting colonial domination and alien occupation and against racist regimes, in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, in accordance with the Charter of the United Nations.

The right of peoples to self-determination and the struggle arising therefrom are not new phenomena in the international community. That right has now merely received formal recognition. From the 16th century until the beginning of the 20th century, the peoples of the countries conquered by the Ottoman Empire waged bloody struggles to recover their identity. Closer to our times, the Italian people fought a long campaign before finally achieving independence. It was, of course, at the battle of Solferino, which took place during that struggle, that Henry Dunant conceived the idea of the Red Cross.

Our times, however, have witnessed a whole series of situations deriving from colonialism. Those under colonial rule have sometimes

had recourse to arms to put an end to the regime imposed on them, and it is undoubtedly situations such as these which the provision quoted above is intended to cover.

In the course of the struggle for self-determination, long-past or recent, there has in fact been no precise rule that could be applied. It should be mentioned, however, that since 1949, Article 3 common to the four Geneva Conventions has proved most effective, even though its application has sometimes been disputed. When the struggle has taken the form of a real war, some sort of equilibrium has often tended to establish itself, and the war victims have benefited from this. The ICRC, for its part, has made every effort to obtain guarantees for the victims of the conflicts and has rendered them aid to the full extent of its powers. The United Nations, in several resolutions, has asked that combatants captured during fighting for self-determination should be treated as prisoners of war, in accordance with the Geneva Conventions. The effectiveness of those resolutions has, however, remained uncertain owing to the opposition, abstentions and reservations which accompanied their adoption.

At the 1974 Diplomatic Conference, the discussion on Article 1 was lengthy and difficult. The article was finally adopted by a large majority whose members, moreover, were acting from different motives. There are those who considered that the provision was of a transitory nature and would apply merely in the very few cases where colonialism or foreign domination still existed. For others, this new category of armed conflict was of a permanent nature, and the list of such conflicts was by no means limited to those now taking place in the world.

This new article clarifies the treatment of the sick and the wounded, the shipwrecked and prisoners of war, in situations of this kind. The organizations, movements or authorities fighting to secure their people's right to self-determination, would now be aware of the regulations they should apply, and would be bound by them. Lastly, other governments would know what stand to take with regard to the parties to the conflict. An uncertain situation would therefore be replaced by a clearer and more precise legal system. On the other hand, it would be very regrettable if this new article were to prompt States to refuse to become parties to the Protocol, or even to make significant reservations.

In any event, it is clear that the new provision would scarcely be applied without adaptations and additions introduced in a special

section or spread over the different parts of the Protocol. This is not the place to consider what the different adaptations might be, but the principal points can be listed: definition of armed conflict and its extent; definition of the expressions "colonial domination", "foreign occupation" and "racist regime"; a procedure which would allow the organizations involved in the struggle to make themselves known and to proclaim their intention to abide by humanitarian law; supervision of application; penal provisions; release of prisoners of war at the end of hostilities; nationality of protected persons, and other subjects.

An essential problem should also be solved: that of the conflict which exists between national penal law, which represses acts of violence, and international law. A fundamental rule of international customary law, on which all laws and customs of war are based, permits combatants, in time of war, to attack and put out of action, by wounding or even by killing, members of enemy armed forces. It therefore follows that a member of the armed forces cannot be punished for legitimate acts of war, whether in his national territory or in enemy territory. It would probably be useful to settle this matter once and for all.[1] Adaptation is possible, as can be seen, but it will by no means be easy.

In 1948, the ICRC proposed, in the draft revised or new Conventions protecting war victims, that the four Geneva Conventions should, in common Article 2 relating to their application, contain the following paragraph:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory for each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status.

These drafts were submitted to the XVIIth International Conference of the Red Cross, held in Stockholm in 1948, and the Conference altered the text of the paragraph by deleting the words "especially

[1] This question arose in 1949 in connection with rules applicable in non-international conflicts. See Final Record of the 1949 Geneva Diplomatic Conference, Berne, Vol. II, Section B, pp. 44 and 83 (speeches of the Norwegian delegate).

cases of civil war, colonial conflicts or wars of religion". The Conference, moreover, decided to add to the Third Convention (prisoners of war) and to the Fourth Convention (civilians) the words "subject to the adverse party likewise acting in obedience thereto". The thus amended provisions were submitted to the 1949 Diplomatic Conference. As we know, they were not adopted, and Article 3 common to the four 1949 Geneva Conventions became the rule in internal conflicts.

It is much to be regretted that the ICRC drafts were not considered at that time. If they had been, the humanitarian problems with which the first session of the 1974 Diplomatic Conference was concerned would not have arisen, since under that humanitarian aspect the conflicts which we are at present trying to settle would already have been covered. Undoubtedly, minds were not yet ready in 1949 to cope with problems of this kind.

The discussions which took place in 1948 and 1949 nevertheless provide certain guidelines in the examination of this difficult question. In this context, it is realized that while the application of the Conventions for the amelioration of the condition of the sick and the wounded on land and at sea and of prisoners of war would in the case of armed struggle for self-determination be relatively simple, the application of the Fourth Convention protecting civilians would pose almost insoluble problems, since it is based on the nationality of the persons protected. This was, moreover, one of the principal arguments used in 1949 to oppose full application of the four Conventions to non-international armed conflicts. In the light of this, it might be possible to confine ourselves to the application of the provisions of the Fourth Convention common to the territories of the parties to the conflict and to the occupied territories (Articles 27 to 34), which embody the essential guarantees.

Finally, it has repeatedly been pointed out that liberation movements, which are fighting for self-determination, often do so under very difficult material conditions and are sometimes unable to provide the enemy wounded and prisoners of war with the care and treatment prescribed in the first three Geneva Conventions. They would therefore wish to have their treaty obligations eased, while fully recognizing that essential principles such as respect for life, physical integrity, honour, etc., must always be observed. If one were to accept this point of view, one might consider prescribing that the sick, the wounded and prisoners of war

should be treated in accordance with the Geneva Conventions, and that if for material reasons that were absolutely impossible, their condition should never be worse than that of the members of liberation movements themselves.

Solutions to these complex problems should be sought along these lines, and it is to be hoped that the Diplomatic Conference will reach unanimous or at least very wide agreement in the matter.

Further, it should be noted that these two problems are linked to the armed conflicts themselves and that a solution should be found in other international agreements. Unfortunately, the international agreements which should provide a definition of armed conflicts and which should state which persons can fight, and what means, weapons and methods are prohibited, have not been revised for almost seventy years. This is why some of the problems had to be dealt with in the 1949 Geneva Convention and in the draft Additional Protocols submitted to the 1974 Diplomatic Conference. As it is, at humanitarian level the solutions which have been provided have very grave consequences for the persons whom it is intended to protect.

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