

M I S C E L L A N E O U S

THE BRUSSELS INTERNATIONAL DECLARATION OF 1874 CONCERNING THE LAWS AND CUSTOMS OF WAR

Mr. Jean De Breucker, adviser to the Belgian Ministry of Foreign Affairs, has written a masterly study on the Brussels International Declaration, the centenary of which is being commemorated this year.¹ Mr. De Breucker, who has always taken a lively interest in the work of the ICRC, represented his country at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. As rapporteur of Commission II, he drew up two notable reports on the protection of victims of non-international armed conflicts. He led the Belgian delegation at the first session of the Diplomatic Conference which met in Geneva earlier this year.

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Although not endowed with force of law since it was not ratified by the Powers, the Brussels Declaration, which Mr. De Breucker describes as a necessary if discarded stage between customary practices and the codification of those practices in the Hague texts, was an outstanding contribution to the gradual development of treaty law applicable in armed conflicts. Indeed, as Mr. De

¹ J. De Breucker, *La Déclaration de Bruxelles de 1874 concernant les lois et coutumes de la guerre*, Chronique de politique étrangère, volume XXVII, Institut royal des relations internationales, Brussels, January 1974.

Breucker shows in a minute analysis of the provisions of the Declaration, the Geneva Conventions of 1899 and 1907 restated the principles laid down in 1874 and sometimes went so far as to repeat, word for word, the rules drafted in Brussels.

It was in Brussels, too, that the historic distinction was made "between those two well known branches of the law of war: the one which determines the rights and duties of belligerents in the conduct of operations and which limits the choice of the means of inflicting injury, and the one which ensures respect, protection and humane treatment for those who are *hors de combat* and for those not directly taking part in hostilities". This distinction between the "Hague law" and the "Geneva law" dates back to 1868. In the month of October of that year, in Geneva, articles were drafted additional to the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, while in Saint Petersburg, in December 1868, "the first chapter of what was subsequently to be known as the law of the Hague was embodied in a Declaration¹ signed by seventeen States, prohibiting the use of any projectile weighing less than 400 g that was explosive or contained fulminating or inflammable matter".

Following an introduction which outlined the historic context in which the Brussels Conference had been held, Mr. De Breucker applied himself to restoring the scene and the atmosphere of the Conference, with the kindly and humorous assistance of Baron Lambermont, Belgium's first delegate to the Conference, from whose private correspondence there are a great many quotations: a description of the principal delegates, references to the procedural problems with which the Conference had to deal, and some reflections on "Conference gossip". Thus the reader was plunged into the discussions of 1874.

The Conference produced a draft Declaration of fifty-six articles governing the main problems of the law of war. Mr. De Breucker has made a choice among the subjects covered and focussed on six basic questions:

¹ Saint Petersburg Declaration concerning the prohibition of explosive projectiles in time of war, 29 November-11 December 1868.

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- Military authority over the territory of the enemy State.
- Who should be recognized as a belligerent party : combatants and non-combatants.
- Means of injuring the enemy.
- Siege and bombardment.
- Prisoners of war.
- The sick and the wounded.

To this he has added an item not covered by the Conference : reprisals.

Mr. De Breucker's analysis shows very clearly that in 1874 all discussion was governed by two "concepts diametrically contrary to one another, although both were tinged with the virulent nationalism characteristic of that period, along with humanitarian considerations". As they were by no means inclined to play into the hands of the Big Powers and to work in their interest, the smaller States tried to avoid any undue limitation of their means of defence and evinced no wish to be drawn into a narrow system of rights and duties that might lend the acts of some future more powerful adversary a legal complexion. That attitude was contested by the Big Powers, who put forward the view that "without rules war would spell ruin for the countries invaded, since a people who wanted to defend itself should have the pluck to organize in peace time".

As Mr. De Breucker pointed out, those contrasting views clashed sharply on two occasions : when studying problems connected with occupation and determining temporary rights and obligations arising out of that situation, and when defining rightful combatants who, if captured, should be granted prisoner-of-war status and entitled to special treatment.

Occupation posed the problem of the delicate balance which should be maintained between the rights of the occupant and the interests of the occupied. The two aspects of that problem — the rights and duties of belligerent parties towards one another, and the rights and duties of belligerent parties towards private persons — hinged on a basic question : the definition of occupation. While Germany favoured a definition which would be as broad as possible,

the smaller Powers, who were aware of "the dialectical relationship between the definition of occupation and the population's right to resist the invader", did not agree that occupation could be presumed but demanded that it be visible and real. Those contradictory tendencies led to a definition of occupation which was embodied in the Hague Conventions and which holds good to this day.

The penetrating light which Mr. De Breucker has shed on the Conference discussions regarding the definition of a belligerent shows that the delegates were here again sharply divided. While the representatives of the Big Powers maintained that war was something within the province of the military alone, that a sharp distinction must therefore be drawn between combatants and civilians, and that the latter must enjoy absolute protection, the smaller Powers contended that the entire population should be armed in its open struggle against the invader or occupant. Hence it is not surprising that the Conference did not achieve a complete definition of belligerents.

Admittedly, as Mr. De Breucker points out, the Brussels Conference proceedings had important results. It was in Brussels that the four conditions which were to be fulfilled by militia and volunteer corps, in order that their members might have the benefit of prisoner-of-war status, were laid down. Those conditions were repeated in Article 1 of the 1907 Hague Regulations. It was in Brussels, too, that a people who spontaneously took up arms on the enemy's approach was recognized as belligerent. Lastly, it was in Brussels that the principle was laid down that the armed forces could be composed of combatants and non-combatants. A question remained open, however, and that is the condition of combatants in occupied territory, who remained subject to the rules of the unwritten law of nations. Yet the plenipotentiaries in Brussels, like those in The Hague later, did not propose to leave such people without any protection. This is indicated in the preamble to the Hague Convention No. IV of 1907, the so-called Martens clause which should be referred to for an interpretation of Articles 1 to 3 of the Regulations appended to that Convention.

A century elapsed between the Brussels Conference and the Diplomatic Conference on the Reaffirmation and Development of

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International Humanitarian Law Applicable in Armed Conflicts, which was convened by the Swiss Federal Council and which held its first session in Geneva from 20 February to 29 March 1974. Mr. Jean De Breucker's excellent study comes at the right time, on the eve of the second session of the Diplomatic Conference, to remind us that despite the difficulties which were encountered, the Brussels plenipotentiaries lent the codification of the law of armed conflicts a considerable impetus, filled as they were with a true spirit of humanity in the performance of their task. It is hoped that, as happened then, the plenipotentiaries who will meet in Geneva early next year will serve mankind's higher needs by limiting the ruthless harshness of armed conflict. Even though international humanitarian law has steadily developed since 1874, that is still a necessary and urgent duty, for, as Mr. De Breucker wisely concludes, "we consider it a characteristic of conventional and codified humanitarian law that it always falls short of the profound demands of human conscience which have been its constant source and spur".

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