

The Protection of War Victims under Polish Legislation, up to the end of the 18th Century

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The international law of armed conflict (*jus in bello*) has undergone a long course of development. Its first traces date from antiquity, but we find a more substantial evolution during the latter part of the Middle Ages.

One of the remarkable elements in this development was the « Code of Chivalry ». Although this was not a written document, being transmitted only by tradition, it possessed great authority. It prescribed that combat must take place in such a manner as not to compromise the honour of the knight and condemned unnecessary killing and killing by treachery. It required that the vanquished be treated with generosity and that assistance be rendered to the helpless and destitute.¹

The second and more decisive element consisted of the military regulations which the European monarchs began to promulgate, from the 14th century onwards, designed to establish greater order and discipline in their armies, which often committed outrages and abuses not only on enemy territory but at home as well.

As these regulations spread and became better known, there came to be more uniformity in the conduct of belligerents, and some rules covering periods of warfare began gradually to develop. At first, these were not obligatory, but they were generally applied and respected as customs (*usus in bello*). With the passage of time, and as they became more widespread, these customs began to have obligatory force (*opinio juris vel necessitatis*). In this way, the customary law of war took form, but it was not codified until the second half of the 19th century, in the form of international conventions.

¹ Students of international law history have reported that an immediate effect was exercised by the humanitarian ideals of Islamic law on the principles upon which the code was based.

The process of codifying the *jus in bello* is still incomplete, despite the conclusion of nearly twenty international treaties, which are now in force, dealing with the law of international conflicts. There are still quite a few areas within this law in which customary rules are regularly applied. In addition, the customary law of war plays an important part as a useful device for interpreting the provisions of the conventions when they are not sufficiently clear and precise.

This also applies in the very large field of international protection for victims of war, for wounded and sick combatants, for prisoners of war and for civilians in periods of armed conflict. There are still numerous gaps in the four Geneva Conventions of 12 August 1949, despite their great length, with regard to the rules for such protection.

It is essential therefore to give close study to the content of the norms of the customary *jus in bello* and hence to study its history, primarily with regard to the practice of states during the period of its formation, with particular attention to military regulations, which are highly significant in this respect.

The ill-founded and unwarranted opinion has long prevailed in the world's scientific literature on international law that the first regulations in this field appeared in England. Ernest Nys, an eminent Belgian professor and specialist in the history of international public law, maintained that the first document of this kind was drawn up in 1385 by Richard II of England.¹

The fact is, however, irrefutably established by more painstaking and profound historical research, that King Casimir the Great, who acceded to the throne of Poland in 1333 and died in 1370, established the first such act in Poland, several years earlier.² The original document has not come down to us but we know its contents through an extensive quotation of it by Wladislaus IIJ agiello, King of Poland and Grand Duke

¹ E. Nys, *Les origines du droit international*, Brussels-Paris, 1894, p. 205 *et seq.*

² This sovereign, of the first Polish dynasty, owes his designation "the Great" to his major achievement in affirming and strengthening the power of the state after assuming the throne on the death of his father Wladislaus I (1305-1333), who had brought about the unification of the kingdom, previously divided into several principalities.

of Lithuania (1386-1434) in his edict on "the passage of troops".¹ The same act was reaffirmed by the son of Wladislaus II, King Casimir II (1447-1492), on 3 September 1457, at Piotrkow.²

The most important provisions in the edict consisted of the orders given to soldiers forbidding them to perpetrate any act of pillage or violence "in the towns, villages, farms and other ecclesiastic, conventional and laic possessions". It forbade the troops to take food from the people without paying the prices laid down in regulations.

The first royal edicts contained compulsory provisions, unlimited in time and covering all wars in which the Kingdom of Poland was a belligerent. Under the reign of Sigismund I, also known as Sigismund the Elder (1506-1548), there were already some rules promulgated for a specific military expedition.

The destruction of a great part of the Polish archives, during the subsequent wars and after the partitions of Poland toward the end of the 18th century, explains the disappearance of most of the original texts of these military regulations. The few that were saved, however, are sufficient to show how the Polish sovereigns sought to carry out warfare in a less cruel and less destructive manner.

Sigismund the Elder, on 6 February 1530, on the occasion of the meeting of the Diet at Cracow, then the capital of the kingdom, promulgated a long and detailed edict³ consisting of two chapters, each of which was divided into a number of articles. In the first chapter, consisting of eleven articles, under the general heading, "De profectione ad bellum", Article 7 forbade the imposition of any exactions upon, or the causing of unnecessary damage to, the inhabitants of localities in which soldiers were stationed.⁴

Article 9 forbade the violation of women under pain of death. The death penalty was also provided, in the following article, for looters

¹ After citing the text of the edict by Casimir the Great, Wladislaus II Jagiello stated, "We therefore, by the grace of God King of Poland, renew and reaffirm the praiseworthy edict cited above, promulgated by our ancestor, the Most Serene Prince and Monsignor, by the Grace of God King of Poland..."

² Under the title, as given in the original, "Statutum regis Kasimiri primi et per regem Kasimirum modernem confirmatum in Pyotrkow pro transiundis ad bellum".

³ Entitled "Constitutiones sive mandata de profectione ad bellum facienda et ordine in castris servando articulatum scriptae".

⁴ In the original: « Ne autem homines onerentur et indebito damnificantur in locis ubi statio facta fuerit... »

and for those who desecrated churches. The last article in the first chapter forbade "on the pain of severe punishment" the destruction of beehives and fishponds.

The second chapter, entitled "Ordinatio secundum quam omnes in castris se conservare debent", contained provisions whose purpose was to minimize the abuses to which inhabitants were subjected in connection with the provisioning of military camps. Capital punishment was provided for those violating those provisions.

On 3 August 1557, King Sigismund Augustus (1548-1572), son and successor to Sigismund the Elder, issued a decree on the rules of military law to be applied during the war in Livonia. Article 14 stated: "Anyone who pillages a church, even on enemy territory, shall be put to death". In the following article, the same penalty was provided for anyone violating a girl or woman. Article 34 forbade "the killing on enemy territory of girls, women, children, old people, sick people and priests".

During the latter half of the 16th century, in addition to military rules issued by kings in their capacity as supreme commanders of the armed forces, there were also rules promulgated by army commanders who at that time were known in Poland as "hetmans". In some relatively rare instances, comparable regulations were issued by commanders appointed *ad hoc* who did not have the rank of hetman. Among the earliest of these were the "martial laws" issued in a camp near the locality of Zelberk in Livonia by hetman Florian Zebrzydowski, on 10 September 1561, during the reign of Sigismund Augustus.

Their basic provisions were divided into seventeen articles, preceded by an introduction which explained their purpose in the following terms: "These articles... apply to all the knights at the camp near Zelberk... and to all their servants and all others in the vicinity of the camp, so that they should all know how they must comport themselves, whether they are stationed in the camp or are only passing by, in order that everyone should keep them in mind and not offer ignorance as an excuse."

They also provided in the introduction that "the articles are to be read for one week, by order of the captain and in his presence, to the entire detachment, the members of which will thus be able to learn the

conduct required of them, without oppressing anyone.¹ The provisions which follow show very convincingly that the desire to minimize the evils of war, as they affected the civilian population, was indeed the main *ratio legis* for these martial laws.

A great many of the orders issued by the hetman Florian Zebrzydowski repeated, with some changes, rules which were to be found in earlier Polish military codes, relating for example to punishment for those guilty of violating girls and women, killing children, women, old people and priests, and pillaging places of worship in enemy territory.

The articles of 1561, however, introduced new and more detailed provisions concerning the provisioning of troops on enemy territory. Article 9 forbade the "taking of any object, even of small value, whether in a house, in the fields or in the forest, with the exception of food". Food which was taken had to be paid for "in accordance with the law". If it was impossible to pay for such food items, a report had to be made to the hetman or his deputy so that payment could be ordered. Anyone taking food without paying its full value in money and without reporting to the hetman "would be punished as a thief".²

Somewhat surprising from the military point of view was the ban in the fourth paragraph of the same article: "Since horses and mares do not constitute food, they must not be taken by anyone to harness to wagons or for any other purpose, because one might forget to return them and because it would be difficult under such circumstances for the peasant to follow them". Finally, the sixth paragraph of the same article stated that "No one has the right to dismantle houses or any other buildings and anyone found with construction wood in his possession shall be punished dy death."³

At about the same time that hetman Florian Zebrzydowski was issuing these regulations, Stanislas Cikowski, vice-regent of the Polish

¹ The introduction contained a further specific stipulation providing that the articles were to be applied not only within the military camp but also in any place to which the detachment might be "ordered or sent".

² The same article contained a somewhat curious provision forbidding the removal of honey from beehives on the ground that "honey should not be dealt with in the same manner as food, since the troops can get along without such delicacies".

A further provision in the same article stated that "kitchen gardens must be regarded as the same as larders; anyone entering such a garden and taking anything whatsoever will have committed an offence like that of stealing from a larder."

³ In addition, all the costs of reconstruction were to be charged against the offender's property.

armed forces in the Grand Duchy of Lithuania, was promulgating his own, at Born on 14 February 1565, for the troops under his command. Issued "before entering upon enemy territory", they contained two particular provisions which were not found in earlier Polish military codes. The first of these forbade "the burning of villages, settlements or any cottages whatsoever without orders from the hetman" (Article 22). The second forbade the soldiers "to take, or to keep, even for an hour, any woman of an enemy country, except in the case of a girl under the age of six years".

On 10 August 1581, in a camp near Woroniec, the Polish king Stephan Batory (1576-1586) signed a long document containing 44 articles, characterized especially by provisions concerning prisoners of war. Article 12 forbade the capturing or imprisonment of "peasants, priests, children, women and girls". Article 24 ordered that prisoners of war be presented to the hetman and "be liberated at the discretion of the hetman".

A little less than six months later, on 3 February 1582, the great hetman Jean Zamoyski, then near Pskov, promulgated an order containing 11 articles whose purpose was primarily to protect against hunger and cold the children and women of enemy nationality in territory under the control of Polish troops. Article 8 ordered that they were to be brought to the hetman's camp so that they could be turned over to the enemy authorities. Another provision worthy of mention is Article 11, concerning the duty of burying all the dead.

In August 1635, the great hetman Prince Christophe Radziwill issued a decree with 89 articles. Article 22 provided that "within His Majesty's kingdom, no one should cause any injury whatsoever to a widow, to a married or unmarried woman, to a woman in childbirth, to a pregnant woman, to any other woman, or to any child, under pain of such punishment as the hetman should decide. Whoever might dare, even on enemy territory, to violate a woman, whoever she may be, or incarcerate any of the persons enumerated above, shall be punished by death". Article 27 stated: "If anyone brings grain into the field for the purpose of sowing it, or comes into the field with an ox or horse to plough or harrow the land, any soldier who dares to take them away from him shall be punished by death".

The various provisions we have noted, dispersed among a number of codes, were brought together and excellently amplified in a huge

compilation prepared at the order of King Wladislaus IV, who reigned from 1632 to 1648. This compilation, consisting of twenty chapters divided into articles, constitutes in a way a relatively complete codification of the laws of war. Its language is precise and its subject matter is presented systematically. Primarily, however, its content constitutes a great step forward, since it testifies to the desire to provide victims of war with the utmost possible guarantee of protection against the disasters and suffering resulting from armed conflicts.

Without risk of exaggeration—and this is on the basis of exhaustive comparative research of historical sources and documents—we can definitely affirm that the Europe of the 17th century, which witnessed almost constant warfare, has no comparable laws of war. In evidence, we may note the fact that many of the rules proclaimed in the decrees of Wladislaus IV of Poland were not regarded as obligatory until the signing of the international humanitarian conventions of Geneva and The Hague in the latter half of the 19th century. In such an article as this, it is not possible to illustrate this fact in full detail, and we shall therefore limit ourselves to some especially significant examples.

In Chapter XVI of the Code of Wladislaus IV, concerning fire and theft, Article 1 categorically forbids setting on fire “whether in towns or villages, churches, hospitals, schools or mills, in enemy territory, or to demolish and destroy buildings not used for the purpose of war, forges, ploughs or other agricultural implements. Any person doing so shall be punished by death as an outlaw”.

It was not until 1899 that the Hague Regulations—annexed to the Convention on the Laws and Customs of War on Land—set forth, in Article 27, that “in sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals . . .” We can see that this article in the Hague Regulations is clearly more restrictive than Article 1 of Chapter XVI of the military regulations of King Wladislaus IV, promulgated more than two and a half centuries earlier.

The first article of Chapter XVII forbids, under penalty of death, looting, in towns and villages, hospitals, religious buildings and buildings devoted to the education of the poor, even when towns and villages have been taken by assault.

To understand the real significance of these two provisions in the Polish royal ordinance dating from the first half of the 17th century, we should remember that the renowned Swiss author Emerich de Vattel, justly recognized for his direct influence on the development of international law in the modern epoch through his great work published in 1758, considered that one had the right to demolish religious and public buildings if this should prove to be necessary in the course of a siege.¹

Article 3 of Chapter XVII of the code of Wladislaus IV contained, among other provisions, instructions concerning the care to be given to sick people in captured localities. Article 4 forbade even officers of the highest rank to hold prisoners of war for any longer than thirty-six hours. Before the expiration of this period, the prisoners had to be taken to the hetman or provost marshall.

To ensure the utmost respect for the royal decree, all officers and soldiers were required to swear an oath to obey all of its provisions to the letter.

Later on, other military regulations were promulgated by Polish kings and hetmans, such as the 97 articles concerning the conduct of war issued in a camp near Kluck in 1684 by the great hetman Prince Janusz Radziwill, the law on military courts by King Jean Casimir (1648-1668), and orders concerning the conduct of war by King Augustus II (1697-1706 and 1709-1733) which were issued in 1698.

As evidence of a religious toleration which was quite uncommon in Europe at that time, there is the decree of the hetman Prince Janusz Radziwill which said that the ban, "on pain of death and without mercy", on the desecration, burning or destruction of religious buildings was effective without regard for what religion was practised or what rites were observed in those buildings.

Jean Casimir banned "looting or any damage whatsoever in churches, hospitals or schools or in any other buildings devoted and dedicated to the worship of God and for assistance to the poor, whether in one's own state or in that of the enemy". Article 16 of the same law forbade, "under pain of severe corporal punishment, the causing of injury to

¹ Emerich de Vattel, International Law or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns, London, 1758, I. III, ch. VIII, Section 138.

old and handicapped people, to women, to pregnant women and to children.”¹

Augustus II, in his orders, provided a more extensive list than those given in earlier Polish codes of the property in enemy territory which should be exempt from burning or devastation. He enumerated, among other things, “churches, convents, town halls, other public buildings, mills, bakeries, refineries and all institutions serving the needs of the community” (Article XVIII). In defining the way in which prisoners of war should be treated, Article XXI forbade “dealing with them in an unworthy manner”.²

The tragic events in Poland towards the end of the 18th century, involving the total loss of its independence following the successive partitions of its territory by the three neighbouring powers, put an end for a long time to the international existence of Poland, which had been a sovereign state ever since the 10th century. During 122 years of occupation, until it regained its independence in 1918, Poland could play no part in the development of international law. The conclusive and incontrovertible examples we have cited above, however, with regard to legislative practice and juridical thinking, testify to the important contribution made by an independent Poland to the universal patrimony of mankind in the international law of armed conflicts. They also offer convincing proof of the great humanitarian spirit of the Polish people.

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¹ Article 23 of this law contained an instruction to captains “to have readings, as often as necessary, of the articles concerning the duties of their units”.

² It is interesting to note that articles in the decree of Augustus II, as well as those in the 1635 ordinance of the hetman Prince Krzysztof Radziwill, provided that no one violating their terms could invoke drunkenness as an excuse or justification, and that under such circumstances the punishment would be more severe (Article XXIII).