The Reunion of Families in Time of Armed Conflict

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General

The destruction of the unity and integrity of the family, *the natural and fundamental group unit of society*, according to Article 16 (3) of the Universal Declaration of Human Rights, 1948, is one of the more tragic consequences of armed conflict. Likewise, in time of peace, the threat to family unity and integrity is one of the potent and inhuman forms of pressure exercised upon individual men and women by Governments in order to secure the regimentation of their peoples. It is salutary to recall, in this context, that one of the purposes of the Law of Nations is *to give effect, through appropriate limitations and international supervision of the internal sovereignty of States, to the principle that the protection of human personality and of fundamental rights is the ultimate purpose of all Law, national and international.* [1]

International Law is not created for the benefit of States, but for the ultimate benefit of the individuals who comprise such political societies. Although such a fundamental proposition as to the purpose of International Law can be found in Grotius,[2] its practical realisation has been a slow process and today we have journeyed but part of the way. The International Law of armed conflicts has treated individuals with severity exposing those who violate its rules to the penal jurisdiction of States, on a universal basis, and exposing convicted offenders to the risk of

[1] Lauterpacht, *International Law: Collected Documents*, vol. II, p. 47.
[2] *Ibid.*, pp. 336, 339.

execution or harsh punishments. The worst of such war crimes, namely genocide, were committed at the direct instigation and under the organization of the State, being a gross and vast criminality beyond the resources of the individual. Yet even the international law of war criminality is, in the last resort, established and enforced for the benefit of the individual. That law has dealt harshly with the individual and leniently, if at all, with the State at the behest of which the grosser war crimes have been committed. The liability to pay compensation, imposed upon States by Article 3 of the Hague Convention No. IV of 1907, has but rarely been invoked even in treaties of peace. The penal enforcement of the Law of War against States is something we have not yet seen.

The preservation of the integrity of the family is a fundamental humanitarian and social value with which the International Humanitarian Law of Armed Conflict cannot fail to be closely concerned, if that Law wishes to be true to its nature and purpose. If the Law of War be a perennial and persistent attempt to accommodate military needs with the dictates of humanity, as was classically expressed in the de Martens Preamble to the Hague Convention of 1907, then it must be said on any fair appraisal that to date the family, as the *unit of society*, has not done well out of the attempt. Almost the first casualty in any armed conflict, international or internal, is the integrity of the family, invariably destroyed temporarily, and all too frequently, permanently.

Armed conflict and family unity

Article 46 of the Hague Regulations appended to Hague Convention No. IV of 1907, provides that: *Family honour and rights... must be respected.* This provision, now part of international customary law, applies solely in territory occupied by the enemy. It was upon this simple but vital legal injunction that certain charges of serious war criminality were grounded in the last war. The Third Reich, in the occupied territories of Europe, paid scant attention to the integrity of the family in the peoples living beneath the occupation régime, particularly in Eastern Europe. The normal method of destroying or violating family unity was by the systematic murder of its members, men, women and children, without remorse or pity, in exercise of the Nazi ideology and upon the occasion of successful war.

The Geneva Conventions of 1949, framed in the light of the excesses of man to man in World War II, built modestly upon the platform of the Hague Regulations, Article 46. The Fourth (Civilians) Convention, Articles 24-26, assume the dispersal of the family as a necessary concomitant of the existence of an armed conflict, and provide limited measures for the taking care of young children separated from their parents by the tide of war, and for the exchange of news between members of families so dispersed. Article 26 more than any other provision of law yet established, shows the precise calibre of legal protection afforded to the integrity of the family: *Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged in this task provided they are acceptable to it and conform to its security regulations.* This spells out, by silence, the predicament of the family in time of armed conflict. The latent premise of the provision, modestly mandatory and mainly hortatory, is that the dispersal of the family is assumed to be the normal war time condition. The Law of War has been accused of a traditional *mischievous propensity to artificiality.*[1] In this instance it is blameless of that failing. With that in mind, the Conventions go no further than requiring Parties to the conflict to *facilitate enquiries* designed to lead to the renewal of contact by one member of the family with another, and *meeting, if possible.* Organizations acceptable to the Parties to the conflict engaged in such work are to be encouraged provided security requirements are not disturbed. The subjection of a hortatory provision to such unlimited inroads makes it well nigh useless except as an ideal. The veil of legal protection cast over the integrity of the family is transparent in every part.

Article 27 of the Fourth Convention repeats the requirements of Article 46 of the Hague Regulations of 1907 as to *protection of family rights* and extends the protection from families in occupied territory to those in the territory of the adversary belligerent: *Protected persons are entitled, in all circumstances, to respect for their family rights...* That was a step forward, in legal terms, although its beneficient opening is somewhat marred by the concluding paragraph: *However, the Parties to the conflict may take such measures of control and security in regard to*

[1] Lauterpacht, *ibid.*, p. 38.

protected persons as may be necessary as a result of war. The arbiter of these measures will be the Party to the conflict in whose power the family is for the time being. The monitoring of such a provision, difficult though it may be, will devolve upon the Protecting Power, if there is one, under Article 9 of that Convention or upon an organization such as the ICRC if it is allowed to function. Such monitoring agency will have to approach the Party to the conflict concerned for information as to whether the security requirements of the military situation justify the inroads made upon *the respect for family rights*, among which is included the unity and integrity of the family as a prime social unit. It is not difficult to imagine the answer that such an organization will receive in the majority of cases, but the skill, patience and diplomacy of delegates of the ICRC has contrived to do something to protect the integrity of the family. It is manifest that this branch of the duties of a Protecting Power or ICRC delegate should be the subject of careful and thorough training in time of peace. Delegates confronted with the *obstat* of security arrangements are entitled to draw the attention of the Government concerned, and of the dispersed members of the families if they can gain access to them, to Article 30 of that Convention. Thereunder, *protected persons* are entitled to *every facility for making application to the Protecting Power* and such bodies as the ICRC. To that right there is a correlative duty of the State concerned to allow members of a dispersed family, being *protected persons*, to make such applications. *Protected persons* are defined in Article 4 of the Convention and will exclude the stateless and nationals of States not Parties to the Convention, a class of persons sought to be reduced in the draft Protocol I now before the Diplomatic Conference on the Humanitarian Law of Armed Conflict at Geneva. Article 30 of the Fourth Convention is a provision of considerable use if resort be made to it by *protected persons.* Here, the value of instruction in the Conventions to the civilian population, envisaged by Article 144, becomes self-evident. Few members of the civilian population are not members of a family

Article 49 of the same Convention seeks to preserve the unity of the family when evacuations from, or transfers within, occupied territory take place. Such occasions have all too often been the cause of great hardship by the separation of members of families. Para. 3 of this Article requires that *Occupying Powers undertaking such transfers or evacuations shall ensure, to the greatest practical extent, ... that members*

of the same family are not separated... By the same Article para. 4, *The Protecting Power*, which will in this context include the ICRC, *shall be informed of any transfers and evacuations as soon as they have taken place.* This does not strengthen the monitoring of such evacuations and transfers. There should be a provision that representatives of the Protecting Power should be allowed to accompany such evacuations and transfers. This *lacuna* does not appear to have been met in draft Protocol 1, to date.

Article 82 seeks to support the integrity and unity of the family during internment to the extent of providing that: *Throughout the duration of the internment, members of the same family, in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated by reason of employment or health or for the enforcement of (disciplinary and penal provisions). Internees may request that their children who are left at liberty without parental care shall be interned with them. Wherever possible interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.* The right to *request* has no correlative duty on the part of the Detaining Power to respond. However, internment as a family unit, wherever possible, is mandatory and the standard of facilities to be given to the family in internment must be such as is consistent with the living of a proper family life. This is a major recognition — in the Convention — of the essential human value of the unity and integrity of the family. As representatives of the Protecting Power and of such bodies as the ICRC have, under Article 143 of this Convention, *permission to go to all places where protected persons are, particularly to places of internment*, subject to reasons of imperative military necessity which may not prohibit access except as an exceptional and temporary measure, this Article can be monitored. Its importance in the scale of humanitarian provisions for the family is considerable. Where places of internment reach the scale of horror only too well known and frequent in our generation, parents will count it a mercy that their children are not sharing their internment. The day to day existence of such places of internment, even in time of peace, makes it reasonably clear that such condition will not be improved in time of armed conflict and that, on one pretext or another, the Protecting Power and the ICRC will not be allowed access.

As for internal conflicts, the Geneva Conventions have only one provision in each of them, the common Article, 3 controlling such conflicts. The most that can be done by the ICRC, if the offer of its services is accepted by the parties to the conflicts is to try and persuade them to agree to bring into effect those Articles of the Fourth Convention above recited. When families on both sides of the conflict are so dispersed that some members are in the hands of one party and some in the hands of the other, it may be possible for the ICRC to persuade the authorities on both sides of the conflict, on the basis of reciprocal interest, to allow the dispersed members of the families to be reunited, and to act as a monitoring and convoying agency for that purpose.

By Article 132 of the Convention an interned person shall be released by the Detaining Power as soon as the reasons for his internment no longer exist. Further, the Parties to the conflict shall endeavour, during the hostilities, to conclude agreements for the release, repatriation, return to places of residence or the accommodation in neutral territory, of certain classes of internees, particularly children, pregnant women and mothers with infants and young children... and internees who have been interned for a long time. For the internee interned without his family, these provisions would be of benefit, but the framing of the obligation of States—*to endeavour... to conclude agreements*, deprives it of binding force.

Can we say that the International Humanitarian Law of War, as it was established in 1949 and as it stands now, is adequate and effective to preserve and safeguard the integrity of the family in time of armed conflict? It is perhaps not an unfair assessment of the present Law on this subject to suggest that the recognition of the family as a social unit and of the family rights of the individual is shown more by gesture than by substance, with some modest exceptions, and that the dispersal of the family is the latent premise of such Law as we have at the present time. Such dispersal is seen as the normal concomitant of armed conflict. As long as the hostilities last the rights of the belligerent have a marked primacy, in law, over the unity of the family which it is one of the purposes of all Law to ensure.

The family and Protocols 1 and 2

The silent premise of these two draft instruments is that the safeguarding of the unity and the integrity of the family in time of armed

conflict achieved by the Geneva Conventions of 1949 was sufficient, or that it was not feasible to seek to obtain any greater protection. Both assumptions are open to challenge. If anything, Protocol 2 has made a more progressive approach to this topic than Protocol 1. This has resulted in the latter instrument, although still in draft form, adopting an analogous provision to that found in Article 32 (d) of Protocol 2.

An important preliminary observation has to be made about the scope of application of Section 3 of Protocol 1, dealing with the treatment of persons in the power of a party to the conflict. By draft Article 64 persons considered as stateless or refugees under the law of the State of refuge or of residence, before the outbreak of hostilities are to be *protected persons* within the meaning of Parts I and III of the Fourth Convention, in all circumstances. This is an important extension of the ambit of Humanitarian Law. The key to the provisions for the protection and humanitarian treatment of civilians under the Fourth Convention is to be within the category of *protected persons*, a technical term defined with some precision in Article 4 thereof. That Article excludes persons not nationals of a State Party to the Convention and in so doing excluded stateless persons who often coincide with refugees. The stateless and refugees, as therein defined, are now within the considerable protection afforded by Part III of the Fourth Convention which extends to 115 articles.

At the third session of the Diplomatic Conference held in 1976, a group of States, prominent among which was the Holy See, moved the text of a draft Article 64 bis in the following terms:

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organization engaged in this task in accordance with the provisions of the Conventions and the present Protocol and in conformity with their respective security regulations. What appears to have happened is that draft Article 32 (d) of Protocol 2, relating to internal conflicts, which provides: *The Parties to the conflict shall... take all necessary steps to facilitate the reuniting of families temporarily separated,* had no counterpart either in the Conventions or in draft Protocol 1. This seemed anomalous and, accordingly, a proposal in the form of Article 64 bis was moved for inclusion in draft Protocol 1 and has been adopted at Committee level. Admittedly, the terms of Article 64 bis are, in part

hortatory, but the provision is nevertheless valuable in promoting the integrity of the family. It is also of considerable assistance to such bodies as the ICRC which may be serving as a substitute for a Protecting Power and can thus assist in the tasks of reuniting dispersed families and monitor the satisfactory performance of those tasks *vis-à-vis* the party to the conflict concerned. When it is recalled that Protocol 1, by Article 1 (1), extends to armed conflicts waged by persons struggling for self-determination against racial minority Governments, and the nature of such conflicts, the inclusion of Article 64 bis has received an added value. The language of that provision, by referring to *Parties to the conflict* as well as to *High Contracting Parties*, i.e., States, makes clear that such was the intention of the redactors of Article 64 bis. Article 32 (d) of Protocol 2 has not yet been adopted or debated at the Conference.

Article 69 of Protocol 1 is primarily concerned with the evacuation, in time of conflict, of sick children to a foreign (neutral) country for health reasons. Para.1 provides that *Where they have not been separated by circumstances from their parents or legal guardians, the latter's consent must be obtained.* This provision assumes, realistically, that some children will have been separated by *circumstances*, a euphemism for the armed conflict situation. This provision is designed to secure the necessary treatment for the sick child, away from the territory in which the conflict is being waged. As such, its primary purpose is not to preserve the unity of the family. However, in para.3 of this draft Article there is provided a scheme for documentation by data cards to be sent by the authorities of the receiving neutral State to the central tracing agency established by Article 140 of the Fourth Convention in a neutral country, in fact Switzerland. This system is established, in para.3, *to facilitate the return to their families and countries of children cared for or received abroad.* The data to be provided on the cards sent to the central tracing agency will enable this to be done when conditions make such return possible.

Conclusions

There cannot be much doubt that, if the preservation of the integrity and unity of the family is a fundamental human and social value, the International Humanitarian Law of Armed Conflict has not to date fully expanded itself in that direction. Its inroad upon the sovereignty

of the belligerent States is minimal. It affords those States ample opportunity, within the law, to resist those strictly limited inroads if they think fit. By the nature of things an armed conflict presents the major threat to the integrity of the family. The high watermark of achievement so far is draft Article 64 bis of Protocol 1. The legal safeguarding of *the natural and fundamental group unit of society* is still meagre and weak. It would be assumed that the common interest of all States, in time of armed conflict, is to accord the maximum legal protection to the integrity and unity of the family that could be accommodated with the military situation. Unfortunately, Governments and their officials have discovered that one of the most effective ways of securing passivity and obedience by civilian members of a society is by threats to separate any recalcitrant individual from his or her family. Such threats normally work, particularly when the individual is in the hands and power of the adversary belligerent or in territory occupied by it.

Bodies such as the ICRC and the Holy See are particularly well placed to make decisive initiatives in this area of law-making. Protecting Powers and substitute organizations such as the ICRC have a vital role in monitoring the implementation of such law as there is, designed to preserve the integrity and unity of the family. Now that the protection of civilians from the effects of armed conflicts occupies the central attention of humanitarian jurists, it would seem that much more ought to be done in this direction. In the zones of hostilities, it is sufficient to survive as an individual and only later to seek to be reunited with other members who have had the like good fortune not to be killed. But in occupied areas and in the domestic territory of the adversary belligerent it would seem that mankind stands in urgent need of more cogent and incisive legal rules for the protection and preservation of the integrity and unity of the family.

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