The function of the laws of war in peacetime

by Henri Meyrowitz

Several provisions of the 1949 Geneva Conventions and of Protocol I of 1977 stipulate, expressly or implicitly, that the respective Contracting Power must implement them as soon as said instruments enter into force, that is already in peacetime. This is the case, in particular, of the articles common to the four Geneva Conventions concerning the widest possible dissemination of the text of the Conventions [1] and the obligation of the Contracting Parties to communicate to one another the official translations of the Conventions, as well as the laws and regulations they adopt to ensure the application thereof.[2]

Protocol I increased the number of provisions requiring measures to be taken in peacetime. Thus under Art. 80, the Contracting Parties must *"take without delay all necessary measures for the execution of their obligations under the Conventions and this Protocol"*, including, of course, the obligations which are applicable only in armed conflict. Paragraph 2 of the same Article stipulates that the Parties *"shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution"*. Although the text does not specify that such orders and instructions must be enacted in peacetime, it seems obvious that compliance with the Conventions and the Protocol—at least with

[1] First Convention, Art. 47; Second Convention, Art. 48; Third Convention, Art. 127; Fourth Convention, Art. 144.

[2] First Convention, Art. 48; Second Convention, Art. 49; Third Convention, Art. 128; Fourth Convention, Art. 145.

their main provisions—can be effectively ensured only if appropriate instructions are given in peacetime. This also applies to the obligation set forth in Art. 43 (1) that the armed forces must be subject to an internal disciplinary system which "inter alia, *shall enforce compliance with the rules of international law applicable in armed conflict*". Art. 82, which provides that the Contracting Parties *"shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject"* stipulates that the Contracting Parties must implement it "*at all times*".[3] Art. 83 and 84 correspond to the two above-mentioned articles common to the four Conventions. Finally, although the important Art. 36 relative to new weapons—this article will be considered below—does not specify its temporal scope of application, it is meant primarily for peacetime.

However, these provisions (except Art. 36) are not what we have in mind when we talk of *the purpose of the laws of war in peacetime.* We are trying to answer the following questions: what purpose do the laws of war serve in peacetime? What is their value in the absence of war? Their provisions regulate the conduct of the *belligerents,* which does not mean that they are applicable only if and when an armed conflict occurs, for the laws of war are not a set of sealed orders meant only to be opened on D-Day.

In peacetime, too, they fulfil an important dual function: first, in anticipation of a potential armed conflict, and secondly, outside such prospect.

I. – THE FUNCTION OF THE LAWS OF WAR IN ANTICIPATION OF A POTENTIAL ARMED CONFLICT

1. Art. 36 of Protocol I sets forth, or rather repeats, a principle of great significance which, however, only partially conveys the

[3] See Resolution 21 adopted by the 1974-1977 Diplomatic Conference and inviting the signatory States *"to take all appropriate measures to ensure that knowledge of international humanitarian law applicable in armed conflict, and of the fundamental principles on which that law is based, is effectively disseminated"*, particularly by encouraging the authorities concerned to plan and give effect to arrangements to teach international humanitarian law and by undertaking in peacetime the training of suitable persons to teach international humanitarian law.

even more important principle which underlies it. Under the heading "New weapons"—which is too restrictive in relation to its bearing—Art. 36 states: *"In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party".*

The article very appropriately reminds governments, chiefs of staff, members of parliament and the public in general, of two facts: firstly, that the laws of war are binding on States not only in the event of an armed conflict and for the duration thereof, but also and already in peacetime; secondly, that the provisions of the laws of war overrule military technology both in peacetime and in war. One can even say that as regards research, development, production and deployment of new means of warfare, the main temporal scope of application of the law of war is peacetime. In other words, although Art. 36 has no influence on the distinction and the normative separation of arms control and deterrence on the one hand and the laws of war on the other, it applies "retroactively" to peacetime.

Nowadays, the principle of the precedence of political over military concerns is generally recognized as a condition *sine qua non* for any attempt at civilising, i.e. regulating war at international level. But there is a growing risk of this principle being undermined by the material, financial and political ascendancy of armament research and technology, whose influence extends both upwards to political decision-makers, and downwards to military strategists. In other words, research and technology are tending to impose their own dictates on *strategy*, which belongs in the realm of political power, and on *military or operational strategy,* which is the purview of the chiefs of staff.

In form, Art. 36 is an innovative provision. In content, it enounces a provision commanded both by common sense and by the rule of interpretation of treaties called "the principle of useful effect", which declares inadmissible the interpretation of a treaty (and consequently an act carried out in accordance with that interpretation) whereby an international obligation entered into under that treaty is rendered ineffective.

Not only the States party to Protocol I are under the obligation to ask themselves—and endeavour to answer as objectively as possible—the question whether the *use* of a new means or method

of warfare is prohibited or restricted by the provisions of the Protocol or any other rule of the laws of war. The same obligation is incumbent *de lege lata* on the Powers which are not party to Protocol I; they, too, must examine this question in the light of the laws of war, including those *reaffirmed* by Protocol I.

Here, the importance of *language* can never be stressed enough. The fact that Protocol I explicitly defines the parameters for analysis of this question confers upon the written laws of war an invaluable advantage over the customary rules and general principles of the laws of war, not to mention moral standards. Language obviously is no guarantee for an objective analysis; but without it, the analysis would be impossible. It is thanks to language that the laws of war can fulfil their educational purpose, both in peacetime and in times of war, provided that governments properly discharge their obligation to "*disseminate the Conventions and this Protocol as widely as possible, in time of peace as in time of armed conflict*".

Art. 36 is silent as to the conclusions governments must draw if their analysis of legality shows that the use of a new weapon is prohibited, either under certain circumstances or at all times, by the laws of war. Nor does it place a government under any obligation to abandon the development, production or deployment of the weapon concerned. In other words, neither Art. 36 nor any other rule of international law—except the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, of 10 April 1972 [4]—prohibit the introduction of a new arms system, the analysis of which has shown that its actual use would be prohibited *de lege lata,* or would be lawful only with certain restrictions. But it goes without saying—and therein lies the true significance of Art. 36—that a government must take the results of such analysis into account already in peacetime when devising and formulating its strategic plans. However the fact remains that

[4] The Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, of 10 December 1976, does not refer to any specific type of weapons, but to *"any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the earth"*. Such techniques are included in the notion of "new weapons" of Art. 36. But the Convention prohibits only the "military or any other hostile *use*" of these techniques. Not only does it not prohibit the study, development or adoption of such techniques, but it also expressly stipulates that its provisions *"shall not hinder the use of environmental modification techniques for peaceful purposes"*. It is beyond doubt that this Convention is covered by the phrase *"or by any other rule of international law applicable to the High Contracting Party"* of Art. 36, *in fine*.

should the analysis of legality prove negative, the conclusion the government must draw is likely to be coloured by two factors: first, the possibility of *reprisals,* insofar as they are still licit,[5] and secondly, especially for the super-powers, the motive of *deterrence.*

A government may deem it advisable—and international law, apart from the above-mentioned Convention, does not forbid it to do so—to equip itself with weapons whose first use is prohibited, but which it knows or suspects its potential enemy is equipped with. From the viewpoint of the laws of war, the usefulness of having such weapons is restricted to the hypothesis of reprisals in kind. Their deterrent value—apart from the significant deterrent effect of potential reprisals in kind—is virtually nil, or at least very minor, since one of the prime elements of deterrence is *publicity.* Not only are the possession and deployment of deterrents displayed ostentatiously before the potential enemy, but their rôle in the strategic plans of the government which owns them or of the alliance which it heads is repeatedly proclaimed ("declaratory strategy"; "deterrent threat"). Just as the big powers have hitherto strictly refrained from including chemical weapons—the use of which is prohibited by the Geneva Protocol of 17 June 1925, but which they stockpile quite lawfully—in their deterrence strategy, possibly to be able to use them in legitimate self-defence against an attack with conventional weapons, it is hardly conceivable that a government should decide to use as a deterrent new weapons whose first use is shown by an analysis of their legality to be prohibited in any event, or under certain circumstances. In any case, the main thing is that should a government decide to include in its arsenal weapons which it would be prohibited from using, such weapons would have to be labelled "first use prohibited under all circumstances whatsoever" or "use allowed only under the following circumstances:...".

2. As previously mentioned, Art. 36 is an application of a broader principle: *the principle of subjection of strategy to the rules of the law of armed conflict, in time of peace as in time of war.* Both at government level—where defence policies and overall strategy are devised—and at general staff level—where operational plans

[5] Protocol I prohibits attacks by way of reprisals against the civilian population or civilians [Art. 51 (6)], civilian objects [Art. 52 (1)], cultural objects and places of worship (Art. 53), objects indispensable to the survival of the civilian population [Art. 54 (4)], the natural environment (Art. 55), the works and installations containing dangerous forces or the military objectives mentioned in paragraph 1 of Art. 56 [Art. 56 (4)].

are formulated—strategists must take into account the prohibitions and restrictions laid down by the laws of war with which their states have undertaken to comply. Should a government, in its war plan—one should not shy at the term: the laws of war *presuppose* a violation, by one of the Parties to the conflict, of the prohibition to use force (see Preamble, paragraph 2, of Protocol I); they therefore also presuppose the aggressor to have a war plan and the potential victim of the aggression to have, in peacetime, practically and very legitimately, a plan for a defensive war—provide for or allow the use of methods or means of warfare, whose first use is prohibited, to be included in the operational plans drawn up by its general staff, it would in peacetime be committing a grave breach, regardless of whether such government is the potential aggressor or the potential defender.

From a legal point of view, though, it is difficult, or even impossible, to define this breach. It is not a war crime, which can only be committed in wartime in effective violation of a prohibition laid down by the laws of war.[6]

It is not an international crime or offence under the provisions of international law applicable in peacetime (except for breaches of the 1972 Convention on Biological Weapons). In this respect, an analogy with criminal law is permissible. In most municipal criminal law systems, *premeditation* and *preparation* are statutory offences only in very exceptional cases. Art. 6, final paragraph, of the Charter of the International Military Tribunal stipulated that *"Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan"*. This provision was based on the fact that the "common plan" for crimes against peace, war crimes and crimes against humanity had been *implemented by acts of war*. It should be noted that the Nuremberg Tribunal was extremely reserved towards the notion of *"common plan or conspiracy"* and that when it dealt with this charge, it actually restricted the scope suggested by the French version of that paragraph: it simply ignored the concepts of *common plan* and *conspiracy*, and applied the rules of common criminal law relative to complicity in a criminal act. It must therefore be concluded that

[6] Consequently, the question of criminal liability for the execution of orders in violation of the laws of war cannot arise in peacetime, whether at national or international level.

neither devising and drawing up a strategic plan incorporating the use of weapons whose first use is banned, nor the acts performed in peacetime—deployment, training, etc.—with a view to its implementation, but only the actual execution of such a plan by committing acts of war engages the criminal liability of political or military leaders who participated in the formulation of the plan and helped with peacetime preparations to put it into effect.

The adoption, in peacetime, of a strategy involving first use of a means of warfare prohibited by positive law would nonetheless constitute a grave misdeed. It would be a grave misdeed because the strategic decisions taken in peacetime are momentous, owing to the consequences their material application will have. For obvious reasons, the arsenal constituted in peacetime—which, in the case of the great powers, largely consists of weapons stockpiled in anticipation of potential *reprisals* or as *deterrents*—carries the strong risk of irreversibly predetermining the course of operations in the event of a conflict, so that weapons intended for reprisals would be used *before* the contingency arose, and those stockpiled as deterrents would be launched *afterwards,* when their object and the legal justification for their use had become meaningless. The *raison d'être* of Art. 36 of Protocol I is to avert that risk by preventing strategic plans from being conditioned, in peacetime, by the pressure of military technology and the real, suspected or alleged necessities of deterrence, without consideration of whether or not the armaments adopted are compatible with the rules of the laws of war.

3. In recent years, the question as to the *relationship between strategy and ethics* has frequently been raised in the West, the term strategy being used to denote deterrence, war plans and operational plans, i.e. three types of strategy drawn up in peacetime. As a rule, both military strategists and civilian strategic experts maintain that ethical considerations are outside the scope of military commanders and strategists. The following quotation of a renowned American civilian strategic analyst is a typical illustration of this opinion: *"Strategists, typically, do not weigh ethical considerations in their analyses. (...) Ethical judgment is not obviously within the mandate of an individual functioning as a strategist. Decisions as to the moral acceptability of one or another policy action have to be determined by expert political decision makers in the light of the values of the whole national (and international) community".*[7]

[7] Colin S. Gray, *Strategic Studies. A Critical Assessment,* Westport, Conn., Greenwood Press, 1982, p. 125.

We do not intend here to discuss this opinion in its actual context, that is the relationship between strategy and ethics. Let us rather, in the above quotation, replace the adjective "ethical" by the word "legal". Everyone can see that thus modified, the above statement is basically wrong, not only with respect to positive international law, but also to municipal law, of democratic States at least. By the above-mentioned articles of the Geneva Conventions and Protocol I, the Contracting Parties have undertaken to disseminate these instruments in peacetime too, to make them known to the armed forces and the civilian population. Furthermore, the customary rules of the laws of war concerning the repression of war crimes and the provisions of Section II, Part V, of Protocol I, provide for and regulate the *individual liability* under criminal law of the perpetrators of war crimes, be they civilians or members of the armed forces acting in a public or personal capacity. The liability, at criminal law, of members of the armed forces for giving or executing orders which violate the rules of the laws of war is also provided for in the laws or by-laws of many countries. By fulfilling their obligation to disseminate knowledge of the laws of war, states not only perform a task incumbent upon them by virtue of international law, but they also fulfil an obligation incumbent upon them by virtue of the principles of municipal law: the duty to provide protection.

But that is not all. Under the international laws of war, ignorance of their provisions does not exempt anyone from individual penal liability. The law of armed conflict makes it obligatory for all nationals, be they civilians or members of the armed forces, and indeed all inhabitants of a country at war, to know the contents of its provisions. In a war crime trial the court will no doubt, in all equity, have to take into account the actual possibilities the accused had of being sufficiently familiar with these provisions. All members of the armed forces are, however, presumed to know them; this presumption is absolute, and in the case of military or civilian authorities it applies, moreover, to the entire body of the provisions set forth in the Geneva Conventions and Protocol I [Art. 83 (2)]. It follows that those responsible for strategy must *a fortiori* be fully acquainted with the provisions of the laws of war. For this reason, before they devise, formulate or review strategic plans, they must familiarize themselves with the rules of the laws of war, in the same way as they are duty-bound—which they find quite natural—to gather all relevant material information to be taken into consideration in the formulation of their plans.

The relationship between strategy and ethics is radically different in yet another way from that between strategy and international law; this is a natural consequence of the intrinsic difference between international law and ethics.

The source and seat of ethics being individual conscience—which by nature is fallible—moral judgments are subjective, unsure, ambiguous, relative, contradictory and controversial. International law is the work—even the only joint work—of *States:* the plural is essential, and of paramount importance in the laws of war through which and within which the interests, the objectives, the individual and conflicting "reasons of State" are balanced out.

Based as they are, for want of other common values [8] on the survival of humanity and worded in terms adopted by mutual consent, the laws of war are an objective standard set up in peacetime for the conduct of States, peoples and individuals in time of war.

II. THE FUNCTION OF THE LAWS OF WAR IN PEACETIME, BUT NOT IN ANTICIPATION OF A POTENTIAL ARMED CONFLICT

1. Besides applying "retroactively" to peacetime—an inherent characteristic of the laws of war geared to potential armed con-

[8] It is the lack of common values—except the unformulated one which resulted in the four Conventions—which prevented the 1949 Diplomatic Conference from reaching a consensus on the terms of a preamble. See Max Huber, *Das Völkerrecht und der Mensch,* St. Gallen: Tschudi Verlag, 1952, p. 16.

Although Protocol I has a Preamble, it only propounds the value of *peace,* within the meaning of Art. 2 (4) of the Charter of the United Nations. Yet Protocol I and the laws of war as a whole presuppose a breach of peace by use of armed force (which is prohibited), a fact conveyed in the Preamble by a single word: nevertheless. As to the reasons why States believed it "necessary nevertheless" to reaffirm and develop the provisions of the laws of war (and not only those of the 1949 Conventions) and as to the values on which these reaffirmed or developed provisions are based, the authors of the Protocol were—and probably had no choice but to be—just as silent as the authors of the Conventions had been before them.

The importance of the Preamble lies in its final paragraph—one of the most significant provisions of the Protocol—which reaffirms the principle of "non-differenciation" under the laws of war, both as regards the nature or origin of a conflict (principle of equality of the belligerents, aggressed and aggressor, under *jus in bello*) and as regards the *"causes espoused by or attributed to the Parties to the conflict"*. The principle of neutrality of the laws of war, too, belongs to the rules which "retroact" on peacetime and which neither governments nor strategists have the right to ignore when they draw up their war and operational plans.

flict—their rules fulfil in peacetime a function in no way linked to a possible conflict and which, in contradistinction to the above-mentioned situations, does not involve any preparation for such a possibility.

That function of the laws of war in peacetime is linked to their rôle as a *standard of civilization*. The meaning of this term goes beyond the notion that the law of armed conflict indicates the minimum standards of civilization in a given era, as propounded by M. W. Royse [9] who considered the minimum standards of civilization [10] to be the main, if not the sole factor liable to restrict violence in war. The rôle played by the standard of civilization [11] in the development process of the laws of war is obvious. But it is difficult to grasp their essence if one considers them merely from their passive angle, i.e. as indicators of the state of civilization—that is from the angle of their conditionality—and disregards their intrinsic feature, i.e. their function as standardizers.

The law of armed conflict is a standard of civilization in two respects, corresponding to the two meanings of the term civilization: civilized condition or state, and the action or process of civilizing. In the first—passive— meaning, the laws of war reflect both the influence of the ambient civilization on the development of their rules—which is the only aspect considered by Royse—and the effect of that influence, namely the extent to which civilization has managed to civilize war by means of international law.

In the second—active—meaning of the term "standard of civilization", the laws of war are considered from the angle of their civilizing function, as a body of rules governing the conduct of belligerents and combatants. Here, in an operation exactly converse to the effect of the ambient civilization on the process of creation of the laws of war, the focus of attention is the question whether and how the law of armed conflict as a means of civilizing war influences the prevailing civilization of a given era.

This question may surprise the reader. Yet it is essential, because of the intrinsic interdependence of war and civilization which reflects the most tragic aspect of human life, owing both to the acts (and their effects) of which wars consist, and to the

[9] M. W. Royse, in *La protection des populations civiles contre les bombardements. Consultations juridiques,* Geneva, ICRC, 1930, p. 86.

[10] Id., *Aerial Bombardment and the International Regulation of Warfare,* New York, 1928, p. 139.

[11] Georg Schwarzenberger, *The Frontiers of International Law,* London, Stevens and Sons, 1962, p. 260.

aftermath of armed conflicts. The acts: *killing and destroying* on a huge scale; but also making sacrifices, willingly or unwillingly. The aftermath: upheavals which, by changing the political face of the world, are chronicled in the *history* of nations.

These tragedies, and the manner in which they are settled, are eminently contingent upon the level of civilization. The behaviour which States have pledged themselves to adopt in war not only reflects, but also influences the state of civilization, even in peacetime. The easiest way to grasp this is to imagine how things would be if there were no laws of war, or if they existed only in a totally different form and allowed most of the acts—including the most heinous—which are prohibited by the Geneva Conventions and Protocol I. Is it conceivable that such a code for the conduct of hostilities should influence the state of civilization only at such time as an armed conflict occurs? Would it not be bound to permeate that civilization even in peacetime?

2. As a standard of civilization, the laws of war are destined to come into their own during armed conflict; but already in peacetime, the concept of that civilizational standard is and must remain inseparably linked with the concept, the "image", of war. Never has this been so necessary as nowadays, when peace between the two super-powers is, as they themselves admit, maintained solely by stockpiling weapons automatically associated with the spectre of planetary war, and by its almost daily—and unnecessary—evocation.

In peacetime, the laws of war act as a standard of civilization by teaching us how States and peoples are to behave towards the enemy during armed conflicts. As for ordinary citizens whose activity has nothing to do with a potential armed conflict, the laws of war merely make it their duty to become acquainted, in peacetime, with their provisions. For the large majority of the population, the law of armed conflict fulfils its peacetime civilizing and educational function by making acquisition of that knowledge compulsory.

The usefulness of this effect of the laws of war is meant to come to the fore in the event of an armed conflict; but it is not restricted to the actual materialization of that eventuality. The usefulness of knowledge and understanding of the laws of war is not confined to their practical application. In the economic life of individuals and nations, reserves of goods of any kind are not only useful if the "contingency" for which they were constituted actually material-

izes, but have a function and a value independent thereof, a usefulness which continues throughout their whole existence as reserves. In just the same way, the laws of war are useful in peacetime as a standard of civilization, whether an armed conflict occurs or not.

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