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INTERNATIONAL LAWS OF WAR

By Samuel H. Sterling of the Denver Bar

IN this present period which has witnessed the end of the greatest conflict between nations, and which has been followed up by several disarmament conferences, proposals to outlaw war, and other treaties whose purpose has been to lessen the barbarism of war as much as possible, it is interesting to go back to the beginning of man's intercourse with his neighbors and trace the evolution of a phase of his conduct thru to the present time. Law and laws do not stand still, and this applies with equal force to the laws of the land, laws of the nations, or laws of war.

The earliest form of government or power which our early ancestors recognized was merely a patriarchal family. We are familiar with this form of government which consisted of merely a body of men banded together thru a common basis of family ties. This body or tribe was necessarily small in numbers, and for common protection against similar groups, the next step was an alliance between several closely related groups or families. These nomadic tribes wandered from place to place, for after the pasturage in one place was exhausted they had to find some other place, or starve. This, then, marked the beginning of war. A tribe merely went thru the process of moving on the desired land, and if this was contested the more powerful tribe wiped out the vanquished tribe. The men of the vanquished tribe were killed, and the women and children were taken as slaves, or for whatever purpose best served the conquerors. All of the captured herds, pastures, and property belonged to the victor, and no mercy was expected or given.

As the tribes multiplied and the pastures became scarcer, the people discovered that it was possible to plant their foodstuffs, and since this was much easier, they gave up their nomadic life, and settled along river valleys. This meant that it was unnecessary to keep as strong a fighting force as they had previously needed, so soldiers were only used for the purpose of repelling encroachments upon their land by neighboring settlements. However, the next natural step was the town,

and immediately after this the stronger tribes found themselves with so much land on their hands that it was necessary to branch out into several towns. People living in the towns found they could manufacture the produce or articles in that particular region which would be saleable to the other towns, so the immediate result was the establishment of trade routes, and it was the opening and shutting of these ancient trade routes, with the resultant wealth or poverty brought about by the existence or lack of existence of the trade routes, which provided the thing par excellence to fight about.

Certain rules of warfare were recognized from these earliest of times. For instance, about the time of Alexander, the Hindus studiously refrained from injuring the husbandman or his crops. The Greeks and Romans made use of formal declarations of war, and they sometimes released their prisoners on parole or for ransom. They also appear to have denounced acts of violence against women and children. The beginning of the Laws of War proper, however, came about at the time of the Mohammedan invasion of Europe. Mohammed and his successors had codified the laws, and a brilliant line of jurists had recorded the decisions under this code. That portion of the laws applicable to a state of war is of considerable magnitude and is the first example we have of a systematic code of written laws of war.

According to the Mohammedan Code, war was to be made once a year upon the unbelievers, on the unorthodox, and in tributary countries which had failed to live up to their obligations. There were injunctions against the use of incendiary projectiles, cutting trees belonging to the enemy, intercepting his water supply and the poisoning of wells. The killing of women and children or the insane, and mutilation of prisoners without orders, were all absolutely forbidden. However, minors of both sexes, and women, became the property of their captors. The disposition of the adult male prisoners was reserved to the commander, but the giving of food and drink to prisoners was compulsory. The actual practice of the Mohammedans was not always up to the standard of their Code, but their method of conducting warfare along these lines compared favorably with that of other nations of this period.

The great influx of barbarians into Western Europe during the fourth and fifth centuries introduced what was, perhaps, the lowest estate to which mankind has descended since the beginning of recorded history. This period was characterized by a disregard of all laws on land, and piracy was the common practice upon the seas. However, this was only the darkness preceding the dawn, for during the reign of Charlemagne, and only to a little less extent afterwards, the restrictions which the kings of France and the Church placed on private wars tended strongly to reinstate more humane conditions. The enslavement of prisoners gave way to a system of ransom. Formal declarations of war came to be recognized as obligatory. The principles of chivalry were so conscientiously drilled into the knights and aristocracy of Europe, that these principles became a part of all that was best of the life of Christian Europe. However, piracy had by no means been stamped out at the close of the fourteenth century.

Among the things which marked the change from medieval to modern times was the great interest which was taken in everything the ancients had to teach of the art of war. The great principle enunciated at this time was that of Grotius, who said "Measures that are necessary to a lawful end, we have a right to use in war." In other words, useless injury is unlawful. This meant that the nations go to war to accomplish some definite end, not for the destruction of their enemies, and that only those things are lawful in the conduct of war that are necessary to attain the object or end of the war. This doctrine marks the change in trend of thought of the Romans, or even of Machiavelli, who as late as 1513 stated that ordinary moral rules did not apply in matters of state.

The eighteenth century saw the death of the practice of ransom, and the birth of provisions for the better care of the sick and wounded. Pillage had already been done away with, generally, and had been replaced by a system of contributions. During the Revolutionary War, Great Britain promulgated the following as recognized laws of war:

1. An army which has occupied the country of an enemy may demand provisions there and levy contributions and, to force the inhabitants to satisfy these demands, may resort to military executions; that is, ravage and destruction.

2. When the enemy, being in his own country, finds it to his advantage to prolong the war and evade coming to action, it is permissible to ravage the country in his presence to make him expose himself in attempting to protect the country.

3. When, in war, one is not able to destroy the adverse party or lead him to reason without reducing his country to distress, it is permitted to carry distress into his country.

4. When the inhabitants are themselves the principal parties to the war, which happens in the case of a revolt or a rebellion, they are themselves the principal objects of hostilities which one is under the necessity of directing against them to attain the end of the war.

The Napoleonic Wars spread the doctrine that the ownership of invaded territory, like that of other forms of property, passed without qualification to the belligerent who had taken the property or territory securely into his possession. It was presumed that a belligerent always intended to appropriate all the territory that he could lay his hands on. This theory was shattered by the French Revolution, and thereafter it became settled law that the ownership of territory is not gained by military occupation but by terms of the subsequent treaty of peace.

All of the early efforts for the amelioration of the hardships of war were contained in treaties that were entered into by the belligerents, usually with reference to a single battle. The first real step towards the codification of the laws of war, a step which had been advocated for many years, came with the Congress which assembled at Paris in 1856 at the end of the Crimean War. The resulting 'Declaration of Paris,' signed by representatives of England, France, Russia, Prussia, Austria and later by Turkey and Sardinia, was also quite generally accepted by the other powers. Its four articles were:

1. Privateering is and remains abolished.
2. The neutral flag covers enemy goods, except contraband of war.
3. Neutral goods, except contraband of war, are not liable to capture under the enemy's flag.
4. Blockades, to be binding, must be effective.

The United States, on account of the strict prohibition against privateering, refused to sign the Declaration of Paris unless the articles were so changed as to exempt all private property at sea from capture, except in cases of contraband or where the property was involved in the violation of an effective

blockade. The second and third of the above articles were departed from by Germany during this last war, and France and Great Britain departed from the second by way of retaliation, but the rules, nevertheless, still have behind them the express consent of most civilized states, and the tacit consent of the remainder.

The efforts of the Geneva Society of Public Utility resulted in the assemblage, in a semi-official conference, of military and medical men, about half of whom represented various governments, for "the consideration of the amelioration of the condition of the sick and wounded in warfare." This conference sitting in 1863 had the power to take steps toward calling a congress to represent the governments themselves. This was done, with the result that delegates from sixteen countries met at Geneva in August of 1864. A treaty known as the "Geneva Convention," adopted the general views expressed by the conference of the preceding year, and this treaty now binds practically all the outstanding powers of the world.

In 1868, at the instance of the Emperor Alexander of Russia, Russia issued an invitation to the various powers of the world to meet and draw up a treaty chiefly concerning the prohibition of the explosive bullet, or bullet which had been invented at that time which exploded upon coming in contact with the human body. The labors of this "International Military Commission," as the conference styled itself, resulted in a declaration acceded to by most European states, to the effect that the only legitimate object of accomplishment of war was to weaken the military forces of the enemy; that for this purpose it was sufficient to disable; that this object should not be exceeded by the employment of arms which uselessly aggravated the sufferings of the disabled men or rendered their death inevitable. The treaty also prescribed the minimum size of explosive projectiles.

The Society for the Amelioration of the Condition of Prisoners of War, in 1874, again took steps towards calling a convention, which met that year in Brussels. At this conference an effort was made to abolish contributions, but without success. However, it was decided that requisitions and contributions should be limited to the necessities of the case. Great Britain refused to ratify the resulting declaration, ob-

jecting to certain articles concerning the use of irregular troops. This meeting disclosed two different views as to the kind of troops permissible of use in war. States maintaining great military establishments desired to make it unlawful for an invaded country to use irregular forces or to organize levees en masse among the inhabitants. States with small regular establishments held out just as strongly for almost any kind of patriotic resistance to invasion. While the Brussels Conference of 1874 never obtained official recognition, the discussion bore great weight in the later Hague Conventions. In fact, these subsequent Hague Conventions did little more than adopt the principles enunciated by the Brussels Conference.

Shortly after the close of hostilities between the United States and Spain, the Czar of Russia issued an invitation to a conference "which would seek the most effectual means for securing to all peoples the benefits of a real and durable peace, and above all, for putting an end to the progressive development of the present armaments." So we see that Disarmament Conferences are no new innovations, for this invitation in 1898 extended the first invitation to a conference of this kind. Thus, for the first time in history, a great international assembly met for the express purpose of acting as a sort of rudimentary legislature by considering not one question alone, but many, and making laws thereon for the whole family of nations. The Brussels draft of 1874 was considered, and for the most part accepted. In addition, three new rules were adopted, namely, the first prohibited the throwing of projectiles or explosives from ballons for a period of five years; the second prohibited the employment of projectiles the sole object of which was the diffusion of asphyxiating or deleterious gases; and the third prohibited the employment of bullets which expand or flatten easily in the human body.

The next step in the development of a codification of the laws of war was taken by the Swiss Government which invited the powers signatory to the Geneva Convention of 1864 to a conference for the purpose of discussing the advisability of a revision of the rules adopted at that time. The conference met in 1906, thirty-seven powers being represented. This conference remedied various faults which had been found to exist

in the earlier convention, and cleared up numerous misunderstandings growing out of uncertainty as to the meaning of certain words and phrases which rendered some of the earlier provisions unworkable.

A year later a second peace conference met at the Hague, which was proposed by President Roosevelt. Forty-seven nations were invited to send representatives, and all but three complied. The results of the work of this conference were voluminous, and form the last great effort to reduce the laws of war to a code and secure for the same the general recognition of the civilized world. The voluminous treaty adopted at this time dealt with the status and qualifications of belligerents, prisoners of war, sick and wounded, means of injuring the enemy, sieges, bombardments, spies, truces, capitulations, armistices, military authority over the territory of the hostile state, the rights and duties of neutral powers, belligerents interned and wounded tended in neutral territory, railway material, restrictions relative to the laying of automatic submarine contact mines, the Red Cross—their personnel, material, emblems, and rights. Many of the stipulations in this treaty were departed from, either knowingly or in retaliation, during this last war, however, it still remains as the greatest humanitarian treaty between nations opposed to each other, or as neutrals, in war.

The Conference on the Limitation of Armament called by President Harding in 1921 primarily considered the limitation of the armaments of nations. However, the representatives also approved a resolution, not in the nature of a treaty, which provided for the assembling of a commission of jurists to amend the laws of war. This commission assembled in 1922, held its last session at the Hague on February 19, 1923. Its work was limited to recently developed implements of war.

Briefly stating the general precepts and rules which are at the present time in force by reason of the foregoing treaties, we find that the taking or destruction of private property is prohibited except in cases of urgent necessity where it is needed for the use or subsistence of the army or for defense against the enemy. However, a commander may seize or destroy any private property to keep it from falling into the hands of the enemy or from being availed of by him for attack or defense.

The exigency must be imminent, not contingent or remote. Ordinarily, property taken by the government must be paid for by the government, but where the destruction or damage is occasioned by legitimate operations against an enemy in an emergency, the owner cannot prosecute any claim. No intercourse between two enemy nations can be had by any of the inhabitants of either of them, unless it is done under a flag of truce, armistice, or under a license issued by the government. Wars are waged against the state as a belligerent only, and not against individuals. So, killing or disabling the members of one army by those of a hostile army are permissible, but it is a crime to kill or commit violence against non-combatants and private individuals not in arms, including surrendering prisoners, surgeons, first-aid workers, and the sick. Property does not become the property of the capturing forces, except in case of funds, munitions, supplies, or means of transportation. Public buildings cannot be destroyed, but factories, mills, foundaries, depots, offices or any other buildings may be destroyed at will. Only regular forces are considered as soldiers with the corresponding rights. Guerillas or other irregular armed bodies not a part of the organized forces of a belligerent, when captured, may be summarily punished, even with death. Illegitimate weapons of war include those which, in disabling or causing death, inflict a needless, unusual or unreasonable amount of torture or injury. Poison or poisoned weapons, explosive bullets weighing less than 400 grammes, projectiles filled with powdered glass, dum-dum bullets, etc., come under this head. Poisoning wells constitutes a marked violation of this principle. The use of poison gas is a violation of the treaty, but Germany's use brought about the retaliatory use by the Allies. Resort to the employment of assassins, or other violent and secret methods which cannot be guarded against by ordinary vigilance, such as the use of savage allies, introduction of infectious or contagious diseases, etc., is interdicted by civilized usage.

Prisoners of war are not convicts, and no violence against them is justified by the mere fact that they are enemies. If they cannot be subsisted, they should be released on parole. The days of "no quarter" on the battlefield have passed, and it is a grave violation of the laws of war to kill prisoners of

war or subject them to unreasonably harsh or cruel treatment. The personal effects of prisoners of war remain their own property, except such as may be intended for or adapted to military use.

Offenders against the laws of war are usually brought to trial before a military commission. Should a belligerent refuse to bring an offender to trial, the other belligerent may resort to the taking of hostages, to reprisal, or some other form of retaliation. The right of retaliation will not justify a resort to measures repudiated by civilized warfare. Cruelty, inhumanity, or gross and unjustifiable injury practiced by one belligerent will not justify or warrant a similar proceeding by way of retaliation on the part of the other.

These are but a few examples taken at random from what is, at the present time, a very large body of laws and regulations acceded to, and followed by, practically all of the civilized nations of the world. The laws of war are unlike military law proper in that they are not comprised in a formal written code, but consist mainly of general rules derived from international law, supplemented by acts and orders of the military power. They are also quite unlike and independent of the ordinary law. In the actual theater of active military operations, for example, the ordinary laws of the land are superseded by the laws of war. Even the highest law of our land, the Constitution itself, during a crisis or grave national emergency, apparently may be supplanted for a time, in the theatre of active military operations, by the laws of war. Thus in *Varner v. Arnold*, 83 N. C. 210, the court said, referring to the Constitution, that during the Civil War "Its voice was hushed and its power suspended amid the din of arms."

It is a fact that since medieval times the laws of war have undergone a great change in the direction of the amelioration of the conduct of war generally. That moral considerations have been the dominant force in bringing about their upward trend, cannot be denied. One of the most impressive features of the laws of war is that in their influence on the conduct of war they stand apart. Improvements in strategy, tactics, munitions, equipment, and other adjuncts to carrying on war, are destructive in their nature. That fact is not altered by the contention that this or that species of weapon or bullet is more

humane than some other form of the same thing. The Laws of War, on the other hand, tend to preserve and ameliorate rather than to overthrow and destroy, and while they have moved upward hand in hand with the growth and development of the conduct of war along other phases, their effect has been to continue, so far as possible, the normal and well balanced conditions of peace, not only with respect to neutral nations but also with respect to those nations actually in belligerency who are playing no direct part in the clash of arms. The laws of war have even gone farther than this. While recognizing the right of the nations at war to destroy human life in battle and to wound the members of the enemy's army in active conflict, yet the moment one of those members is placed *hors de combat*, either by reason of wounds or capture, the Laws of War step in and shield him from further harm until his legal status is so changed that he again becomes an active element.

It is useless to speculate upon whether in this interplay of forces the laws of war with their ameliorations on the one hand and the implements of war with their intensive destructive powers on the other will eventually result in victory for the former with the accompaniment of a perpetual world peace. The only thing that can now be said is that the Laws of War constitute an imperfect manifestation of what is best in modern civilization, and seems to strive for still higher levels with each stage of development of the human race.