CONFERENCE OF GOVERNMENT EXPERTS ON

the Reaffirmation and Development of

International Humanitarian Law Applicable

in Armed Conflicts

Geneva, 24 May - 12 June 1971

IV

RULES RELATIVE TO BEHAVIOUR OF COMBATANTS

Submitted by the

International Committee of the Red Cross

Geneva
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C O N T E N T S

I N T R O D U C T I O N

In its June 1969 Report on Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts 1/, the International Committee of the Red Cross (ICRC) made the following point, among others :-

> "Humanitarian law should extend to every aspect of armed conflict, whether the choice of weapons and the use to which they are put, or behaviour in combat .... There is, of course, no question of opposing the violence employed by combatants to disable the enemy, sometimes to the limits of their strength. It is a question of avoiding the violence which exceeds this aim and entails useless suffering. It should be noted that such abuses add not only to the difficulty of reverting to peace, but to that of mutual reconciliation. The Red Cross always starts out from the idea that an armed conflict presents an exceptional and extreme situation; it also knows by experience that those who are impelled to hate and fight each other in such circumstances are led not only to resume normal relationships once peace is restored, but sometimes even closely co-operate."

1/ Report submitted by the ICRC to the XXIst International Conference of the Red Cross (Istanbul, September 1969) and which will hereinafter be referred to as the "Report of the ICRC on Reaffirmation".

The Red Cross concerns itself chiefly with the plight and the treatment of those who are hors de combat. Nevertheless, any study it may undertake in the spirit alluded to above with respect to the reaffirmation and development of laws applicable in armed conflicts must inevitably deal also with the rules of international law which govern the behaviour of the combatants toward each other and toward non-combatants. This concern is all the more justified in that observance of these rules will often prove decisive with regard to the situation of the very persons the Red Cross is intended primarily to aid. For example, in a given conflict, all the rules set up by the IIIrd Convention of Geneva concerning the treatment of prisoners of war become meaningless if the belligerents decide a priori that there will not be any prisoners and if the enemy who surrenders is immediately executed.

Regarding behaviour, there are certain fundamental rules which were expressed in the Regulations appended to the IVth Convention of The Hague of 1907 1/, but which are considered as having become customary law applicable in all circumstances. This document is intended to review that series of rules and to examine the extent to which it is desirable to reaffirm them and to make them more explicit.

The problems raised by the behaviour of combatants toward the civil population are more particularly explored in the document devoted to the protection of civil populations against the dangers of hostilities. As for the complex aspects of behaviour in guerilla warfare, these are treated in greater detail in the document concerning that form of struggle. In the present document, therefore, the rules relative to behaviour are considered from a wholly general point of view.

1/ In the annex (page 012) will be found the provisions of The Hague Regulations with regard to this subject.

A reconsideration of these regulations has become imperative, for three reasons in particular :

- they have frequently been violated in the armed conflicts which have characterised the XXth Century, to such an extent that at times their validity has been questioned, and their underlying reasons have no longer been discernable;

- since the time when they found expression in the Hague Regulations, the international community has grown considerably. Even if they are considered as part of customary law, they may, by that very fact, be disadvantaged by the reserved attitude sometimes assumed by the new States with respect to international customary law;

- lastly, in contrast to other rules of The Hague Conventions which have been taken up again and made more specific in subsequent conventions (Geneva Conventions, Convention on Cultural Property, Protocol of Geneva), the rules relating to behaviour have not been instilled with renewed vigour by incorporation in new texts of international law. Whether or not a revision is made of The Hague Regulations as regards its stipulations which have not already been taken up in other humanitarian conventions - and on this point we refer the reader to the general considerations set forth in the document entitled "Introduction" - the ICRC considers it timely to have these fundamental rules recast some day soon, in one form or another, in a new instrument of international law to which all the States could adhere explicitly.

In particular, the ICRC has submitted these rules to the thorough scrutiny of the experts it convened in February 1969, and it has summarized their opinions in its report for the Istanbul Conference referred to above. On the basis of that report, the matter was taken up and developed by the Secretary-General of the United Nations in his second report on Respect for Human Rights in Armed Conflicts. 1/

1/ This document (A/8052) of 18 September 1970 will hereinafter be referred to as "Second Report of the Secretary-General".

Consequently, in order to facilitate the study of the views and proposals developed in this document as regards each of these rules, extracts from the reports of the ICRC and of the Secretary-General on these matters are appended hereto.

In carrying on its work for the development of international humanitarian law, pursuant to Resolution XIII of the Istanbul Conference, the International Committee has oriented its principal endeavours toward areas of the law of armed conflicts other than the one which is dealt with in this document, because it felt, among other reasons, that this latter domain was specifically one which called for the observations of governmental and military experts. Until the Conference of Governmental Experts has been held, it will, for its part, continue its studies covering certain aspects of these rules of behaviour, so that it may be in a position to submit more concrete proposals with regard to some of these points.

RULES RELATING TO THE BEHAVIOUR OF COMBATANTS

1. Limitation as to the choice of means of harming the enemy

Report of the ICRC on Reaffirmation, page 75
(see annexes, page 01)

As this report pointed out, the principle according to which "the right of belligerents to adopt means of injuring the enemy is not unlimited" (The Hague Regulations, Article 22), as reaffirmed by the XXth International Conference of the Red Cross and by the General Assembly of the United Nations on 19 December 1968, applies not only to attacks by air, but also to the behaviour of the combatants on the battlefield. As an essential basis underlying the law of war as such, also called the law of The Hague, its validity remains unimpaired to this day.

When a State has recourse to force, whether or not it is legitimate to do so, this recourse is simply a means for it - the ultimate means - to compel another State to submit to its will. Such recourse to force must never be an end in itself. It will consist in employing the constraint necessary to obtain that result. Any violence reaching beyond this aim would prove useless and cruel. The principle of humanity enjoins that capture is to be preferred to wounding, and wounding to killing; that the wounding should be effectuated in the least serious manner - so that the wounded person may be treated and may recover - and in the least painful manner; that the captivity should be as bearable as possible, etc. 1/.

1/ See also Article 4 of the International Covenant on Civil and Political Rights, and Article 15 of the European Convention of Human Rights, which says "within the strict limits required by the situation".

Although military necessity can authorise the employment of all legal means, it cannot justify going beyond this by resorting to means which would not be in conformity with the laws of armed conflict.

To conclude, the principle recalled at the beginning of this heading, a great achievement of the Conventions of The Hague, should be maintained or reaffirmed.

2. Prohibition of the use of means calculated to cause unnecessary suffering.

The Hague Regulations (Article 23, letter e) state as follows : "It is forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering".

This rule, which derives from the aforementioned principle, likewise appears to have retained its validity for today's world. It was with a view to impart substance to this general standard that certain special declarations have been signed forbidding explosive projectiles (St. Petersburg, 1868), asphyxiating and poisonous gases (The Hague, 1899), and "dum-dum" bullets (The Hague, 1899). Article 23 of the 1907 Regulations expressly prohibited poison and poisoned weapons (letter a).

It is a question of sparing even combatants from injuries to no purpose or from sufferings which exceed what is necessary to put the adversary hors de combat. To this end, the combatants must forego the use of certain weapons or certain methods of warfare. The rule evidently leaves a rather broad latitude for evaluation.

In conclusion, it appears that there too The Hague rule should be retained. But since it covers explicitly only arms, projectiles or material, might it not be given a more general scope by extending it to take in all means or methods calculated to cause unnecessary suffering ?

3. Prohibition to kill or wound an enemy who has surrendered.

Report of the ICRC on Reaffirmation, pages 76-78
(see annexes, pages 02-04)

Second Report of the Secretary-General, para 104-107
(see annexes, pages 09-010)

The Hague Regulations, in Article 23, c, decrees : "It is forbidden to kill or wound an enemy who, having laid down his arms or no longer having means to defend himself, has surrendered unconditionally."

In the abovementioned Reports, the question has been raised whether The Hague rule (which is only implicit in Article 4 of the IIIrd Geneva Convention) ought not to be made more specific, in particular by indicating in concrete terms how a combatant can make known his intention to surrender. The case of aviators in distress who are descending by parachute should be the subject of a new provision, since this case, now occurring frequently in practice, had not yet presented itself in 1907. The experts consulted were of the same opinion.

Three situations can be distinguished :

a) automatic surrender : the military personnel are hors de combat, all resistance having come to an end, or they lie wounded on the field of battle taken over by the adversary;

b) surrender by indication of intention : the enemy forces raise the white flag, advance with hands in the air or weapons held over their heads, or open the turret of armoured tanks,etc.;

c) circumstantial surrender : an armed force is reduced to actual powerlessness by being outclassed, often at a distance. Here the individual case is transcended. The troop which holds, or believes that it holds the adversary at its mercy should propose (directly or by radio, etc.) that the latter surrender, this being accepted or refused.

In the cases referred to under b particularly, the moment of surrender may be delicate, for, especially when the front is ablaze, it is not always easy to detect a willingness on the part of the enemy to surrender. If the firing from the opposite side ceases, it is an indication, but not a proof : it may possibly be a legitimate ruse or stratagem of war. If the white flag appears, it is the sign of intention to suspend the combat, at least for a time. The stratagem is no longer tolerated; it would become a perfidious act. The troop will cease firing, but will remain on guard. The nature of the situation will be shown by what comes next : either it is a bearer of a flag of truce who advances, or the combatants come forward with their hands in the air. In both such cases, firing is prohibited. If the combatants come armed, they can be ordered to throw down their weapons; if they fail to do so, firing is allowed, but only to the extent required to obtain obedience.

It should be noted that, in case of surrender, safeguard is unequivocally due to the prisoner. Later on, the captor will be able to institute the requisite checking; he may possibly take the repressive steps authorised by law, if it is proved that he has to do with war criminals or irregular combatants, unless those giving themselves up have been promised immunity at the time of surrendering.

As we have stated, the case of airmen in distress descending by parachute requires exhaustive study, for it has not been covered by any written rules. But there does exist a common-law rule : <u>occupants of an aircraft in distress who parachute down to save their lives shall not be attacked in the course of their descent or upon landing, unless they manifest a hostile attitude.</u>

Some experts have raised a question in this respect. They admit the legitimacy of an attack if the aviator leaping by parachute would be landing on territory dominated by the army of his own country; most of the teachings of the publicists hold that such a view is incompatible with humanitarian principles.

The case of occupants of a plane in distress should not be confused with the radically different one of armed troops launched by parachute for some offensive purpose (attack against the rear lines, or a mission of sabotage or intelligence). Admittedly these soldiers can be attacked, even before they have reached the ground.

In this state of affairs, it is therefore essential that the aviators who seek to save their lives be recognized as such. This will be easy when they leap from a plane in distress. On the ground, their attitude will make clear their intention to surrender. On the other hand, if they make use of their arms, or if they take to flight, it would be reasonable to allow that they would not be fired on, in so far as possible, without prior warning.

The distinction will be less easy to make during the descent. The fact that it takes place during the daytime - at night it is not detectable - will constitute a strong presumption of harmlessness of intent, as will the absence of weapons. The individual involved should always be given the benefit of the doubt. Once the descent has been spotted, it will be signalled, so that the capture of the parachutist sooner or later should not present any insurmountable obstacle.

To be sure, sometimes an armed force has been known to recover a fallen aviator by force. In itself, that does not obviate the immunity of the parachutist, who might be wounded or might have surrendered, but he may become the stake of the combat and could in that way be exposed to certain actual risks. If he seeks to flee, his situation is analogous to that of the prisoner who tries to escape.

In conclusion, it may be asked whether The Hague rule, while being retained, ought not to be given more specific content, especially by indicating in concrete terms how a combatant can make known his intention to surrender.

As for the particular case of aviators in distress, it seems that provision should be made that "the occupants of an aircraft in distress who leap by parachute to save their lives shall not be attacked in the course of their descent or on the ground, unless they manifest a hostile attitude".

4. Prohibition against declaring that there shall be no quarter.

Report of the ICRC on Reaffirmation, pages 78-79 (see annexes, pages 04-05)

Second Report of the Secretary-General, para 108-110 (see annexes, page 010)

The Hague Regulations provide, in Article 23 d: "It is prohibited ... to declare that no quarter will be given".

The Report of the ICRC considers that this rule, which should be maintained, could be couched in less outmoded form and in more concrete terms. As for the report of the Secretary-General, it advocates substituting in its place an express provision proclaiming in adequate fashion the respect for the lives of combatants who lay down their arms. It can, however, be stressed that the endeavour has been to prevent threats of massacre, since massacre itself is already categorically prohibited.

Indeed, the rule under consideration, which looks toward the safeguarding of the enemy who surrenders, is related to the one treated under the preceding heading. This latter necessarily implies the prohibition of refusing quarter.

To declare that no quarter will be given signifies that the struggle will be carried on to the bitter end, as they used to say, in other words, until death ensues, or, as it is put more simply now-a-days "that no prisoners will be taken".

If we refer to past practices, we find that the most frequent example would occur during the siege of a fortified place : the garrison was called upon to surrender in short order, failing which, once the resistance was overcome, the survivors would be put to death with surrender no longer being accepted. More recently, certain declarations of leading cadres have been encountered, stating that such and such a category of the enemy forces would be "liquidated" (irregulars, commandos, mercenaries, etc.).

Refusal of quarter is a measure of intimidation, meant to pressure the enemy into an early surrender, and it may or may not produce the calculated effect. But that is not the question : the declaration itself must be proscribed. There are a number of reasons for this. First, because a fortiori it is contrary to the rule of safeguard of the enemy who surrenders; next, because it tends to distort the arbitrament of war by resorting to a particularly cruel and unfair tactical line of action; because it falls into the same category as reprisals and collective punishments; lastly, because it incites the opposing side to employ methods of a similar type, and in this way the struggle may degenerate to a hateful, implacable and inhuman level, making the restoration of peace all the more difficult.

Whereas in 1863 Francis Lieber still considered that the belligerent who gave no quarter could expect to be given none, the general principles of law no longer leave room for such a line of thought in our days. Quite the contrary, the refusal to give quarter by one of the armies does not legitimate a refusal of quarter by the opposing army. The humanitarian Conventions are not subject to the clause of reciprocity. But those who are guilty may have to answer for their misdeeds before the tribunals.

In conclusion, the principle of The Hague must be maintained. If it were sought to couch it in more concrete terms, better adapted to our epoch, we might, for example, say: "It is forbidden to decide that there will be no survivors or that no prisoners will be taken, to threaten the adversary therewith and to conduct the struggle in terms of such a decision."

5. Prohibition of perfidious means.

Report of the ICRC on Reaffirmation, pages 79-81
(see annexes, pages 05-07

Second Report of the Secretary-General, para 111
(see annexes, pages 010-011)

The Hague Regulations provide (Article 23, b) that "it is forbidden to kill or wound treacherously individuals belonging to the hostile nation or army". However, Article 24 states : "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible."

The ICRC Report stressed how fundamental it is, if it is sought to prevent conflicts from degenerating, for the armies confronting each other to observe a certain reciprocal loyalty. From a practical point of view, the Report advocated maintaining The Hague rule, and at the same time distinguishing more specifically between the acts of perfidy (or of treason, according to the somewhat incorrect terminology of 1907) which are prohibited, and the ruses or stratagems of war which are permitted, even if such a distinction is not always easy to make. Perhaps at least an illustrative listing should be undertaken.

Perfidy consists in deceiving the enemy, in breaking faith with him, so as to cut him down thereafter with impunity. Generally speaking, one is perfidious if he improperly appeals to the promise extended by the adversary, to his good sentiments or to an agreement reached, with the aim of obtaining a substantial military advantage over him.

As has been seen, it is sometimes difficult to trace an exact line between perfidious acts and ruses of war. Hence, it becomes necessary to make use of examples taken from practice.

In this way, it is legitimate to make a surprise attack, to simulate a retreat, to camouflage one's

installations or to construct dummy equipment, to lay an ambush, to utilise the enemy telecommunications or to issue false messages, to incite the adversary forces to surrender, to desert or to mutiny. It is likewise permissible to have recourse to the forces of nature against the antagonist : fire, flood, avalanches. Ruses or stratagems are a far from negligible portion of the art of war.

On the other hand, it is not legitimate to attack under cover of a truce or across a demilitarised territory, to refuse to carry out the terms of a capitulation or of an armistice, to simulate surrender and then to open fire, to make an untruthful announcement that an armistice has been concluded, to put a price on the head of an enemy leader. We have dealt elsewhere with the use of poison. Under the heading which follows we shall take up the prohibition against utilising the recognized protective emblems as well as the insignia of the enemy.

In conclusion, according to the ICRC, it would be desirable to make a better definition between acts of perfidy and ruses of war, doing so perhaps by a listing which would be at least illustrative.

6. Prohibition against making improper use of internationally recognized emblems.

Report of the ICRC on Reaffirmation, pages 79-80 (see annexes, pages 03-04)

Second Report of the Secretary-General, para. 102 (see annexes, page 08)

Article 23, f of The Hague Regulations states : "It is forbidden to make improper use of a flag of truce ... as well as the distinctive badges of the Geneva Convention."

The internationally recognized signs are the flag of truce, or white flag, the emblem of the red cross on a white ground (red crescent, red lion-and-sun for the countries employing them), to which should now be added the blue and white escutscheon created in 1954 by the Convention of The Hague for the protection of cultural property.

The white flag is the symbol of surrender and it is also the sign hoisted when one party wishes to parley with the adversary. In this way, it will be used, for example, when a party desires to ask for a truce, to propose the exchange of prisoners or the evacuation of civilians, to call attention to the violation of some provision of a convention. The use of the flag of truce is not authorised, in particular, for purposes of espionage, or to dissimulate a military movement, to threaten an unlawful act and, in general, to cover any act of perfidy. Its abuse is serious, for it compromises the chances for its further use and even the chances of peace.

The white flag is normally accompanied by a cease fire. But the right to parley cannot be called for at any arbitrary moment. The party to whom the question is put is the judge of the timeliness. He will not grant it in the midst of an attack. But a valid reason is required for refusing the parley 1/.

While the flag of truce is intended for parleying, the sign of the red cross is intended for the providing of relief. It must be respected in all circumstances and its use

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1/ Chapter III of The Hague Regulations (Articles 32 to 34), with which we have no need to deal here, sets forth the procedure relative to bearers of the flag of truce. Nevertheless, these provisions will be found appended hereto, since they provide in particular (Article 32) for the white flag, and it is precisely the improper use of this flag which is examined above.

must be strictly reserved to promotion of the humanitarian aims for which it was created. The 1st Geneva Convention of 1949 contains provisions intended to eliminate abuses of the sign. But it may be pointed out that national legislations for the application thereof have chiefly envisaged curbing the commercial abuses. Be that as it may, what must be eliminated, above all, is any abuse of the sign of protection in time of armed conflict, and especially acts of perfidy which might be perpetrated under its cover. Great humanitarian interests are involved in this, for abuses of such nature might lead to rendering it ineffective to protect persons making legitimate use of it and, as a result, weakening the value of the emblem and the high signification it should retain in all circumstances.

In conclusion, it would be desirable to maintain the provision of The Hague Regulations and even to strengthen it, particularly by providing severe penal sanctions against on perfidious abuses of the protective sign of the red cross.

7. Prohibiting the improper use of the uniform and the insignia of the enemy.

Report of the ICRC on Reaffirmation, pages 80-81 (see annexes, pages 06-07)

Second Report of the Secretary-General, para 103 (see annexes, page 09)

Article 23, f of the Regulations of The Hague decrees: "It is forbidden ... to make improper use of ... the national flag or of the military insignia and uniform of the enemy ..."

Hence, it is not admissible for a force in combat to make use of the colours or the insignia of the enemy.

Thus, for example, it will not be allowable to return a captured tank to the field of battle without having modified its national emblem. It appears that the rule should be maintained as it stands.

Wearing the enemy uniform is likewise prohibited by the text of The Hague, which is as clear on this point as on the others. Nevertheless, a part of publicists' teachings considers that the enemy uniform can be worn prior to combat, as a sort of acceptable ruse or stratagem. But the wearing of the opponent's uniform could not be tolerated during the operations themselves. One tribunal made a ruling along the same lines in connection with the Skorzeny case. Doubtless what is to be seen in this is comparable to the rule in naval warfare, where it is possible to make use of the enemy flag, on condition that it is lowered before the first cannon shot. Should the text of 1907 be modified or made more explicit in this respect so as to avoid divergent interpretations ?

8. Spies and saboteurs

This point was not treated, either in the reports of the ICRC for Istanbul or in those of the Secretary-General of the United Nations. Nevertheless, it is a sector in which precise details would be welcome. Fairly frequently, in fact, acts of espionage and of sabotage are legitimate acts of war and in no case can their author be held penally responsible.

It is appropriate to note that Articles 5 (derogations) and 68 (death penalty) of the IVth Geneva Convention expressly mention espionage and sabotage, but fail to give any definition whatsoever of them.

As for espionage, a definition of this is given in Articles 29, 30 and 31 of the Hague Regulations 1/. This

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1/ See the appended text of these provisions.

definition was deemed outmoded by many experts and it was found that most of the ordinary or military penal codes give a far broader definition of espionage. Hence it is proper to ask whether The Hague Regulations should be revised or completed on this point, in the light of the modern forms of combat. Such a definition is important, since it makes regular combatants out of certain persons.

In the matter of sabotage, there is no definition to be found in positive international law. However, it is quite clear that when it is effectuated by military personnel in uniform, even if they are camouflaged, this constitutes a legitimate act of war and cannot be punished criminally. In that connection, for example, it will be recalled that the Nuremberg Tribunal judged contrary to law the order given by leaders of the IIIrd Reich to destroy the members of commando units who might be captured, without granting quarter and without making them prisoners.

In conclusion, perhaps it would be appropriate, in this case also, to provide a definition of what is to be understood by sabotage within the meaning of Articles 5 and 68 of the IVth Geneva Convention.

D O C U M E N T A R Y A N N E X

DOCUMENTARY ANNEX

CONTENTS

ANNEX 1

Extract of the Report of the ICRC to the XXIst International Conference of the Red Cross, Istanbul, 1969, "Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts".

C. BEHAVIOUR BETWEEN COMBATANTS

The general problem

Humanitarian law should extend to every aspect of armed conflict, whether the choice of weapons and the use to which they are put or behaviour in combat. Certain norms affecting relations between combatants themselves should therefore be examined here. There is of course no question of opposing the violence employed by combatants to disable the enemy, sometimes to the limits of their strength. It is a question of avoiding the violence which exceeds this aim and entails useless suffering. In this sphere likewise it is a matter of limiting certain forms of suffering and particularly excess of cruelty. It should be noted that such abuses add not only to the difficulty of reverting to peace but of mutual reconciliation. The Red Cross always starts out from the idea that an armed conflict presents an exceptional and extreme situation; it also knows by experience that those who are impelled to hate and fight each other in such circumstances are led not only to resume normal relationships once peace is restored but sometimes even closely cooperate.

The basic rules concerning behaviour between combatants are mainly formulated in Articles 22 and 23, b), c), d) and f) of The Hague Regulations ; these provisions are considered to have the value of customary rules. Their significance in contemporary forms of armed conflicts may be questioned. Moreover, on too many occasions during the Second World War, as in recent conflicts, combatants have appeared to be insufficiently familiar with these rules. This concerns the Red Cross.

The general principle established by Article 22 of The Hague Regulations and reaffirmed in the U.N.O. Resolution of 19 December, 1968, according to which belligerents have not unlimited right to adopt means of injuring the enemy, also applies to behaviour during combat. It is developed in the fundamental rules in Article 23, referred to above, which were examined during the discussion.

The experts' opinion

The great majority of experts, although having had no opportunity to discuss the matter at length, declared themselves favourable to a reaffirmation of the above rules; a form and wording better adapted to present conditions would endow them with their full value.

1. Prohibition to wound or kill the disabled enemy

The problem

The rule in Article 23, c) "it is forbidden to kill or wound an enemy who having laid down his arms or no longer having means to defend himself has surrendered unconditionally" is implicitly understood in the IIIrd Geneva Convention concerning the treatment of prisoners of war.

In view, however, of the very general terms of that Convention (Article 4) ("Prisoners of war... are persons... who have fallen into the power of the enemy"), the ICRC wondered whether there might not be advantage in reaffirming the present rule and even completing as an indication, it by specific cases of practices it prohibits; would it not also be of interest to define cases in which a combatant can clearly make known his intention to surrender? The plane in distress whose crew lands by parachute to save their lives is a particular case which should be clarified.

The experts' opinion

The experts replied in the affirmative to the questions raised by the ICRC. Their discussion mainly centred round the case of the airman descending by parachute.

a) In the air : the experts stressed the complexity of the problem. They nearly all agreed to the distinction, often more difficult to establish in practice than in theory, between the airman in distress and the armed parachutist. According to some, the former should benefit from the rule of quarter, as his situation could be compared to that of a shipwrecked individual, while the latter should be assimilated to a combatant proceeding to attack or in flight, whom it is consequently admissible to take as an objective. But how far does this analogy extend ? and what are the military factors to be considered : the number of "air-wrecked" their attitude, the nationality of the territory on which they are to land, the military situation of the moment ? It is difficult to establish criteria, but it was generally admitted that an airman in distress, cut off, and not employing any weapon, should be respected.

b) On the ground : the experts unanimously considered that, even if an airman had committed acts authorizing qualification as a war criminal, when captured he should be treated as a prisoner of war, without prejudice to regular judgement. It was reminded, however, that, while the legal situation was inarguable, there were difficulties in actual practice : the civilian population may feel savage towards the airman who has just bombed it; in this connection, one expert quoted an example of officers who had watched civilians lynch parachutists without interfering and who had subsequently been condemned by the Courts of the Allied Powers. (1)

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(1) Cf. Green L.C., International Law through the Cases, London, 1951, pp. 712-714 : War Crimes Court, Essen, The Essen Lynching Case (1945), 1 LRTWC 88.

International law on the subject, it was said, should develop on the same lines as internal penal law has developed. According to the latter, no one is entitled to take the law into his own hands and "to assassinate an assassin is an assassination".

2. Quarter (1)

The rule under which "it is prohibited to declare that there shall be no quarter" (Article 23, d)) is implicit in the Geneva Conventions, but it does not appear in specific terms, as these are above all concerned with the treatment of combatants from the time they fall into the hands of the enemy, while the rule in question already applies to the statement of intent.

The ICRC emphasized that this rule is very important from the humanitarian angle. On the other hand it may be questioned whether its wording is not somewhat outdated and it should not be reaffirmed in other, more uptodate, terms.

Further, would it not be well (this also applies to the other principles examined here) to complete this provision relating to quarter by examples of the gravest contrary practices, as an indication but not to limit ? It covers for instance, certain threats sometimes voiced by the belligerents to "wipe out" an ethnical group or certain categories of enemies, (threats which are moreover also contrary to the prohibition of genocide sanctioned by a special Convention concluded under the auspices of the United Nations).

The experts' advice

The experts generally replied affirmatively to the questions put, which they considered in close relation to the rule examined under 1. While some were doubtful whether quarter could be granted in exceptional military

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(1) The Shorter Oxford English Dictionary on historical principles, Oxford, 1933, gives the following definition of the "quarter": "Exemption from being put to death, granted to a vanquished opponent in a battle or fight; clemency shown in sparing the life of one who surrenders".

situations, they admitted in general that such cases should be very rare. And even in these it should always be possible to spare the lives of persons falling into the hands of the enemy.

One expert desired that the status of persons guilty of sabotage should be specifically defined, in order that they also benefit by the rule considered here.

3. Prohibition of treachery

The problem

In its preliminary documentation, the ICRC brought out two provisions in The Hague Regulations : that of Article 23, b) ("it is forbidden to kill or wound treacherously individuals belonging to the hostile nation or army"), which is completed and defined under f) "it is forbidden to make improper use of a flag of truce, the national flag or military insignia or the uniform of the enemy, as well as of the distinctive signs of the Geneva Convention" .

The ICRC pointed out that it is often difficult to draw a distinction between what is treachery and what is a ruse of war, which is admissible (Article 24 of The Hague Regulations). This difficulty has certainly been increased by some modern methods of combat (commandos, guerilla warfare, etc.). Furthermore, as regards wearing enemy uniform, after the Second World War, as is known, a Court (1) admitted that this was not illicit with a view to misleading the enemy prior to combat. Should it be concluded that a certain idea of loyalty in war is more in keeping with the period at which the above rules were drafted than with the conditions of our times ?

In any event, from the humanitarian standpoint, the three following observations can be made :

- For the red cross emblem, protection against abuses is regulated by the Geneva Conventions; national legislations of implementation have however above all considered the repression of commercial abuses. But what it is most important to prohibit is the abuses

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(1) See judgment in the case Otto Skorzeny, Law Reports of trials of War Criminals - United Nations War Crimes Commission, H.M.S.O. London 1949 .

of the protective emblem in times of armed conflict, owing to their unscrupulous nature and the importance of the interests at stake. Far from relinquishing the rule in Article 23, f) of The Hague Regulations, would it not therefore be indicated to strengthen it, asked the ICRC ?

- In any event, would it not be advisable to reaffirm specifically the prohibition of every type of perfidious means, which bar the way to a cease fire and consequently to the diminution of useless suffering or violate the basic laws of humanity ? It has frequently been observed that if it is wished to prevent conflicts from degenerating, the armies facing each other must behave with a minimum of reciprocal loyalty. For example, the abuse of the truce flag, i.e. the white flag of surrender, compromizes the chances of using it and consequently the chances of peace; similarly, the breach of a local truce, for example, to collect the wounded. Is it possible to reaffirm, regenerate the rules concerning the prohibition of perfidy in this light ?

- Finally, as regards the wearing of enemy uniform, would it not be judicious to state more precisely the cases in which this is unreservedly prohibited, possibly in the sense deriving from decisions of tribunals ?

The experts' opinion

First of all, two suggestions should be mentioned, one with the idea of replacing the term "treachery" by "perfidy" (1), the other aiming at the inclusion in all future regulations of a list of the various forms of perfidy which should be completely prohibited.

In general, everything that is perfidious should be prohibited. But, as the experts pointed out, it is no longer so much a matter of obtaining a spirit of chivalry on the battlefield or an ideal of loyalty, as

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(1) The same remark had been made at the 1874 Brussels Conference by a delegate who had pointed out that the term "treachery" could not be applied to an enemy (quoted by Mechelyinck, The Hague Convention relating to the Laws and Customs of Land Warfare', Ghant, 1915, page 244).

of denouncing everything that can make a return to peace more difficult. Mention was made of Kant's Project for Lasting Peace (1), in which it is said that a humane attitude should be preserved towards the enemy, since otherwise peace could never be re-established. Even if it is not easy to apply some rules strictly, it should at least be seen that means which would close the road to peace are not employed.

The abusive employment of the white flag and above all of the red cross emblem (red crescent, red lion and sun) are among the means which should be proscribed. Abuse should not only be prohibited but also involve sanctions, as it weakens humanitarian law.

On the other hand the experts were divided on the question of the wearing of enemy uniform. It was moreover pointed out that neither decisions of tribunal nor qualified publicists were unanimous on this question.

True the judgment referred to above, according to which it would not be illicit ("improper") to wear enemy uniform prior to combat, corresponds to a custom in maritime warfare whereby the enemy flag may be flown before combat. If however this judgment should be considered to settle the use appearing most in line with the conditions of today, it should be defined, perhaps after thorough study, in a more precise rule. This is necessary to avoid diverging interpretations, which are a source of difficulty, reprisals and consequently of increased suffering.

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(1) Kant, Emmanuel, Project for Lasting Peace ("Zum ewigen Frieden"), 1795, Section 1, Article 6 : "No State at war with another should admit hostilities of a nature to render mutual confidence impossible at the time of future peace

ANNEX II

EXTRACT OF THE REPORT OF THE GENERAL-SECRETARY OF UNITED NATIONS "RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICTS"

Doc. A/8052, XXVth Session of the General Assembly

B. Rights and obligations of combatants

99. As was stated in paragraph 178 of the preliminary report, there seems to be no pressing need for revision of the Geneva Conventions on the protection of wounded, sick and ship-wrecked combatants. Some questions concerning the protection of prisoners of war will be dealt with in chapter VI below. The following paragraphs of the present chapter will deal with the protection of combatants in the field who are neither sick nor wounded, nor prisoners of war in the sense of the Geneva Conventions.

100. As regards combatants in the field, their destruction or incapacitation may be, of course, essential to the attainment of military objectives. However, article 22 of the Hague Regulations of 1907, repeated in General Assembly resolution 2444 (XXIII), stresses that the choice of means of injuring the enemy is not unlimited, and the problem arises of identifying and prohibiting those means which entail unnecessary suffering and shock the conscience of mankind. The relevant rules are contained essentially in article 23 (b), (c), (d) and (f) of the Hague Regulations of 1907, quoted in paragraph 91 above.

(i) Prohibition to kill or wound the enemy "treacherously" (article 23 (b) and (f) of the Hague Regulations)

101. It has been pointed out, notably by experts of the International Committee of the Red Cross attending the twenty-first International Conference of the Red Cross in 1969, that it is often difficult to draw a distinction between what is "treachery" and what is a "ruse of war" which is admissible under article 24 of the Hague Regulations. The difficulty has certainly been increased by some modern methods of combat, essentially guerrilla warfare, which rely heavily on "ruses of war".

102. As was felt by the experts convened by the International Committee of the Red Cross in 1969, the prohibition of the improper use of the white flag and of the Red Cross emblem, contained in article 23 (f), should be strongly reaffirmed.

103. As regards the improper wearing of the military insignia and uniform of the enemy, also referred to in article 23 (f), the above-mentioned experts did not reach any definite conclusions. After the Second World War, it had been held in the case of Otto Skorzeny 48/ that the wearing of enemy uniform was not illicit when resorted to with a view to misleading the enemy prior to combat. This judgement appears to correspond to a custom in maritime warfare whereby the enemy flag may be flown before combat. This matter, among others, may call for further study with a view to formulating, if possible, a more precise rule.

(ii) Prohibition to kill or wound an enemy who surrenders (article 23 (c) of the Hague Regulations)

104. Article 23 (c) of the Hague Regulations refers to an enemy "who, having laid down his arms, or having no longer means of defence, has surrendered at discretion". Literally, this provision might be interpreted as meaning: either that a combatant is deemed to surrender as soon as he lays down his arms or as soon as he has no longer any means of defence; or that intention to surrender must be expressed in addition to the loss or abandonment of weapons. In spite of various usages in this respect, no international instruments in force describe the ways in which a combatant may convey his intention to surrender.

105. Experts of the International Committee of the Red Cross felt that the rule laid down in article 23 (c) of the Hague Regulations was implicitly dealt with, in general terms, in article 4 of Geneva Convention III relative to the Protection of Prisoners of War. This article recognizes the status of prisoners of war, including the right to life (article 13), to the combatants fulfilling the conditions laid down therein, who "have fallen into the power of the enemy". It may be noted that, literally, this provision does not require a positive act of surrender. The term "fallen into the power of the enemy" replaced the word "captured" which appeared in the previous 1929 Convention, and was intended to convey a somewhat broader meaning. 49/ There may still be some doubts, however, whether the article becomes operative in all cases from the moment a disabled combatant is surrounded or otherwise within the range of the weapons of the enemy or whether it requires actual apprehension by the enemy. Furthermore, verification of the fulfilment of the conditions laid down in article 4 requires a minimum of time during which full entitlement to the status of prisoner of war may be in doubt. Further mention of these problems is made in chapter VI of this report concerning the protection of prisoners of war.

106. Considering the lack of precision in some respects of the above-mentioned articles, the preliminary report by the Secretary-General 50/ as well as the 1969 report of the Experts of the International Committee of the Red Cross 51/ suggested that an attempt be made to define in concrete terms how a combatant can clearly make known his intention to surrender. More precision in this respect may result in the saving of lives and ensuring a greater degree of protection to a wounded combatant. Particular attention was paid to the case of the airman in distress who lands by parachute to save his life and who should not be confused with those still engaged in hostilities, such as armed parachutists who land to attack.

48/ Law Reports of Trials of War Criminals, published by the United Nations War Crimes Commission, HMSO London 1949.

49/ Commentary of the Geneva Conventions, vol. III, article 4, International Committee of the Red Cross, Geneva, 1960.

50/ A/7720, para. 181.

51/ XXIst International Conference of the Red Cross, document D.S. 4 a, b, e.

107. Further to the suggestion mentioned in the preceding paragraph, one may consider elaborating or supplementing the existing rules on the basis of the following two principles:

(a) It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.

(b) In the case of a combatant who has still some weapons or whenever, as frequently happens, it cannot be ascertained whether he has weapons, an expression of surrender should be required. Rules should be formulated to define as precisely as possible how the intent to surrender may be clearly conveyed. Modern conditions, where combatants may be separated by great distances, should be taken into account; and modern means of communications (radio) should be used in addition to the traditional ones (white flag etc.). If a combatant is overpowered and his defeat appears imminent, he should be invited to surrender with a promise that he would enjoy thereafter all the applicable benefits of the laws and customs of war (see sub-section (iii) below).

(iii) Prohibition to declare that "no quarter will be given" (article 23 (d) of the Hague Regulations)

108. The opinion has been expressed, notably by the Experts of the International Committee of the Red Cross in 1969, that the wording of this rule was outdated and called for a reformulation. The rule expressed in article 23 (d) is nevertheless important, since one of its purposes is to avoid pushing the enemy into a desperate fight and thereby to shorten the period of actual combat. The rule contained in article 23 (d) of the Hague Regulations does not appear in specific terms in the Geneva Conventions.

109. The main shortcoming of article 23 (d) seems to be that it imposes only a negative obligation upon the States Parties. It may be considered desirable to strengthen this provision by a clause which would require positively a proclamation that the lives of the combatants would be protected, in accordance with the laws and customs of war, after surrender and/or capture.

110. It should be stressed that the reaffirmation of, or amendments to the rules mentioned above should be without prejudice to the right of the States Parties to punish, as permitted or imposed by international law, individuals who have violated the laws and customs of war. Such punishment should be inflicted, however, after a fair trial with all the guarantees required under international law.

111. The preceding review of the existing substantive rules concerning the protection of combatants, has brought out, inter alia, the following suggestions for a further elaboration or amendment to some of those rules:

(a) That the definition of protected combatants be clarified and, if possible, extended (see also chapter IX on guerrilla warfare);

(b) That the definition of inadmissible "treacherous" conduct between combatants be further elaborated, attention being paid, in particular, to the problem of improper wearing of the enemy uniform;

(c) That the prohibition of killing or wounding the disabled enemy (article 23 (c) of the Hague Regulations) be further elaborated and illustrative definitions be given of how a combatant could clearly make known his intention to surrender (see paragraph 107 above);

(d) That article 23 (d) of the Hague Regulations prohibiting declarations that "no quarter will be given" be reformulated and replaced by a rule imposing upon the States Parties the obligation "to proclaim that the disabled enemy will be protected under the laws and customs of war".

112. It may be stated that the application of the existing provisions for the protection of combatants, and of such revised or new provisions as might be adopted for that purpose, would be effectively assisted by the availability of international procedures intended to verify their implementation. It would also have to be recognized that the effectiveness of such procedures would be mitigated by the practical difficulties and complexity of the task of ensuring the observance of humanitarian rules in conditions of actual combat. Bearing in mind these considerations, the function of contributing to the extent possible in the application of the provisions referred to above might possibly be included in the terms of reference of such international agency as might be entrusted with facilitating, through appropriate supervision and control, the application of humanitarian rules in general. In this connexion, reference is made to the contents of chapter XI below.

113. The inference may be drawn from various parts of the preliminary report that the 1907 Hague Regulations would benefit from, and would be strengthened by their up-dating and adaptation to modern conditions and developments in the field of armed conflicts. It was stated in paragraph 180 of the preliminary report that some of the provisions of the Hague Regulations relating to combatants would "in any event need re-examination, followed by elaboration and reformulation in a wording better adapted to present conditions". As was stated in paragraph 35 above, the same observation would be valid as regards some of the provisions of the Hague Regulations affecting civilians. Support for the idea of effecting appropriate revisions in the Hague Regulations as a whole has been forthcoming from various competent sources including the experts consulted by the Secretary-General. Accordingly, if the usefulness and advisability of such an initiative commend themselves to the General Assembly, the task of revising, adapting and completing the Hague Regulations, in the light of the relevant provisions of the Geneva Conventions and other international instruments, after adequate preparation, might be undertaken by a conference convened by an interested Member State or by the General Assembly itself. The outcome might possibly be an additional Protocol to the Geneva Convention or an independent international instrument.

ANNEX III

ANNEX TO THE HAGUE CONVENTION OF OCTOBER 18, 1907 REGULATIONS CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND

Means of Injuring the Enemy ; Sieges and Bombardments

ARTICLE 22

The right of belligerents to adopt means of injuring the enemy is not unlimited.

ARTICLE 23

In addition to the prohibitions provided by special Conventions, it is especially forbidden :

(a) To employ poison or poisoned weapons.

(b) To kill or wound treacherously individuals belonging to the hostile nation or army.

(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.

(d) To declare that no quarter will be given.

(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering.

(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

ARTICLE 24

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

ARTICLE 25

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

ARTICLE 26

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

ARTICLE 27

In sieges and bombardments all necesary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

ARTICLE 28

The pillage of a town or place, even when taken by assault, is prohibited.

Spies

ARTICLE 29

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies : soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

ARTICLE 30

A spy taken in the act shall not be punished without previous trial.

ARTICLE 31

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Flags of Truce

ARTICLE 32

A person is regarded as a bearer of a flag of truce who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and the interpreter who may accompany him.

ARTICLE 33

The commander to whom a bearer of a flag of truce is sent is not in all cases obliged to receive him.

He may take all the necessary steps to prevent the bearer of a flag of truce taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the bearer of a flag of truce temporarily.

ARTICLE 34

The bearer of a flag of truce loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.