

PREFACE TO PART IX-A

As explained in my Foreword, this volume IX of the series, containing Part IX-A of my systematic exposé, will be devoted to the laws of war.

The laws of war have a long history. Prohibitions of specific methods of warfare, such as the poisoning of wells or the desecration of temples, can already be found in ancient legal sources. Many historical works recall the inhumane practices of belligerent armies which have been current at different periods of time. Since 1863 repeated attempts have been made to codify the rules which should govern the conduct of war, beginning with those relating to warfare on land.

A first attempt to this effect was made in the municipal domain by Professor F. Lieber on the instructions of President Lincoln of the United States in the early stage of the Civil War, resulting in the issuance of Instructions of 24 April 1863 to the United States Armies in the Field (L. Friedman, *The law of war*, N.Y. 1972, vol. 1, p. 158).

A first international effort for the same purpose was, after the Franco-German War of 1870-1871, made at a Conference in Brussels, which convened in July 1874 on the invitation of the Russian Tsar, but its results (protocols and draft Declaration in Martens, N.R.G.², II, 1-228) never achieved the status of a ratified treaty.

A binding codification was not adopted until the two Hague Peace Conferences of 1899 and 1907.

These attempts were paralleled in the first decade of the 20th century by efforts to codify the rules and practices respecting a less comprehensive and more limited number of methods of naval warfare—also in 1907 at The Hague. The results of this Second Peace Conference were reviewed in a series of expert articles in *A.J.I.L.* 1908(2).

An unfortunate feature of the codification of The Hague in 1899 and 1907 was the weakness arising from a fairly large number of reservations and from the fact that all the Conventions included the so-called *si omnes* clause or general participation clause, worded as follows:

(1899) “Les règles contenues dans les Articles ci-dessus ne sont obligatoires que pour les Puissances contractantes, en cas de guerre entre deux ou plusieurs d’entre elles.

Lesdites règles cesseront d’être obligatoires du moment où, dans une guerre entre des Puissances contractantes, une Puissance non contractante se joindrait à l’un des belligérants,”

or

(1907) "Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention."

What needs description in the present context is not the *jus ad bellum* (whereupon comp. *infra*, p. 10), but the *jus in bello*, i.e. the body of rules destined to regulate the actual conduct of war.

Attempts followed later, after World War I, during which Convention IV has on the whole normally operated, to ban the abuses of aerial warfare and to complete the existing laws of war by rules for the control of the new technical methods of submarine warfare and of radiotelegraphy in time of war. Submarine warfare was severely limited by a Resolution of the Disarmament Conference of the great Naval Powers at Washington (1922), whereas the two other subjects (aerial warfare and radiotelegraphy) were referred by that Conference to a Commission of Jurists which was to meet at The Hague. This Commission submitted its report in 1923. It was divided into two parts, the first of which was concerned with the legal implications of the installation and operation of radiotelegraphic stations, the second with aerial warfare.

The rules which the Commission drafted on the subject of radiotelegraphy (*A.J.I.L.* 1923(17), Supplement, pp. 243 *et seq.*) can, because of their diversity, best be distributed from a systematic point of view over different Parts, Chapters and Sections of this publication. However, since they have never been officially transformed into treaty provisions but form a unity, I will briefly deal with their general content here.

The Articles which constitute together Part I of the Report of 1923 under the heading "Rules on the control of radiotelegraphy in time of war" comprise in effect various groups of provisions which belong partly (a) to the laws of war, partly (b) to the law of neutrality and partly (c) to the law of prize.

ad (a) While the normal interdiction to disturb radiotelegraphic services is maintained in principle, an exception is made in time of war in respect of enemy stations (Art. 1). The obligation of belligerents to comply with Conventions concerning emergency signals remains in principle intact and belligerents are not allowed to forbid the sending of such signals.

ad (b) The neutrality aspects of radiotelegraphy, which will be discussed in Part IX-B of this work (vol. X), relate in particular to the abuse which belligerents can make of neutral territory, either land or water (Arts. 3 *et seq.*).

ad (c) The prize law aspects of radiotelegraphy, to be set out in Part IX-C (vol. XI) of this publication, concern the sanctions which belligerents are entitled to impose upon neutral ships and aircraft which abuse that novel means of communication to give hostile assistance to

the belligerents.

Much later, after World War II, during which Convention IV of 1907 was most scandalously violated, in particular by the Axis Powers, and humanity was faced by a new horror, the nuclear bombing of Hiroshima and Nagasaki by American aircraft, urgent occasion arose for efforts to protect humanity against the novel dangers of, especially nuclear, warfare from the air and perhaps even from outer space. They were partly countered by preventive agreements against the spread of nuclear weapons and by denuclearization compacts, and partly by a treaty of 27 January 1967 on “principles governing the activities of States in the exploitation and use of outer space, including the moon and other celestial bodies” (comp. Part IV of this publication, p. 295).

The rules on the conduct of war from the air, laid down in Part II of the Commission’s Report of 1923 in its Chapters I-V and VIII, will be set out in the present Part IX-A, *infra*, pp. 320 *et seq.* Chapter VI (Arts. 39-48) of that Report, which is specifically concerned with the neutrality aspects of aerial warfare, will be dealt with in Part IX-B (vol. X) of this work, Chapter VII (Arts. 49-60), regarding the prize law aspects of aerial warfare, will be commented upon in Part IX-C (vol. XI).

Apart from the above-mentioned major regulations and proposals, a special group of prohibitions is formed by provisions against the so-called A-B-C (asphyxiating, biological or bacteriological and chemical) weapons—Protocol of 17 June 1925 (Martens, N.R.G.³, XXVI, 643)—and, very recently (18 May 1977), by a Convention to ban meteorological, climatological or environmental weapons, aimed at influencing weather or other comparable natural conditions. They will also be discussed in this Part IX-A in the context of a special Chapter VI devoted to a new aggregate of rules, designated by the name of humanitarian laws of war and means of mass destruction (pp. 327 *et seq.*).

The traditional laws of war have, moreover, since World War II been revised, specified or complemented by new Red Cross Conferences of 1949 and 1974-1977. The contents of the Conventions and Protocols agreed upon by those Conferences will likewise be set out below in Chapter VI.