CHAPTER II

OUTLINE OF THE DEVELOPMENTS OF THE LAWS OF WAR PRIOR TO THE FIRST WORLD WAR

A. SURVEY OF THE LAWS OF WAR

Laws of war are the rules of international law with which belligerents have customarily, or by special conventions, agreed to comply in case of war. They involve certain mutual legal obligations and duties respecting warfare. The origin of the laws of war can be traced back to practices of belligerents which evolved during the latter part of the Middle Ages.

In the centuries-long chain of developments which tended gradually to modify the unsparing cruelty of war practices and which aimed at transforming the usages in war into legal rules of warfare, a decided progress was made after the close of the Napoleonic wars. The general treaties concluded between the majority of States, which constitute the most important developments of the laws of war prior to 1907, are the following:

(1) The Declaration of Paris of 16th April, 1856, respecting warfare on sea, which abolished privateering, recognised the principles that the neutral flag protects non-contraband enemy goods, and that non-contraband neutral goods under an enemy flag cannot be seized.

(2) The Geneva Convention of 22nd August, 1864, for the amelioration of the conditions of wounded soldiers in armies in the field, which was followed by a Convention signed in Geneva on 6th July, 1906. Its principles were later adapted to maritime warfare by conventions of the Hague Peace Conferences of 1899 and 1907.

(3) The Declaration of St. Petersburgh of 11th December, 1868, which prohibited the use in war of projectiles under 400 grammes (14 ounces) which are either explosive or charged with inflammable substances.

(4) The Convention enacting regulations respecting the Laws of War on Land agreed upon at the First Peace Conference of 1899, which was the first international endeavour to codify the laws of war. This Convention was revised in 1907 and its place is now taken by Convention IV of the Second Peace Conference.

The Second Peace Conference held at the Hague in 1907 marked the turning point in these developments. This Conference, which had been convened for the purpose of “giving a fresh development to the humanitarian principles” that served as a basis for the work of the First Conference of 1899, drew up a number of Conventions which represented a most important step in “evolving a lofty conception of the common welfare of humanity.”

The principle which underlines all these enactments and conventions is the principle of humanity. Its aim is to establish, as firmly as possible, that all such kinds and degrees of violence as are not necessary for overpowering the opponent should not be permitted to a belligerent, and that, in contradistinction to the savage cruelty of former times, fairness of conduct and respect for human rights should be observed in the realisation of the purpose of war.

Thus the fourth of the Hague Conventions of 1907, the one concerning the Laws and Customs of War on Land, recalled in the Preamble that the Contracting Parties “animated by the desire to serve... the interests of humanity and the ever-progressive needs of civilisation,” and “inspired by the desire to diminish the evils of war, so far as military requirements permit,” thought it important to revise the general laws and customs of war, with the view on the one hand of defining them with greater precision, and, on the other hand, of confining them within limits intended to mitigate their severity as far as possible. According to the intention of the signatory States, these provisions were intended to serve as a general rule of conduct for belligerents, not only in their mutual relations, but also in their relations with the civilian population. Accordingly, in the eighth paragraph of the Preamble the Contracting Parties expressly declared that “the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience.”

The preceding declaration was necessitated by the state of development of international law at the time of the drafting of the Convention and was intended to serve as a general rule of conduct in all cases not covered by the rules adopted by the Contracting Parties, until a more complete code of the laws of war could be drawn up. It was a clear expression of the intention of the Parties that unforeseen cases should not, in default of written agreement, be left to the arbitrary opinion of military commanders. It is quite clear that this Convention did not aim at establishing a complete code of the laws of war on land, and that cases beyond its scope would still remain the subject of customary rules and usages.

It is in this sense that the Regulations Respecting the Laws and Customs of War on Land annexed to the Convention must be understood. These Regulations lay down the laws, rights and duties of war which are arranged into three sections; the first one deals with the status of belligerents, prisoners of war, and the sick and wounded; the second with hostilities (i.e. means of injuring the enemy, sieges, and bombardments, spies, flags of truce, capitulations, and armistices); the third with military authority over the territory of the hostile State. According to Articles 1 and 3 of the Convention the belligerents are under the obligation to issue instructions to their armed forces which shall be in conformity with these Regulations, and a belligerent party which violates the provisions of the said Regulations shall be responsible for all acts committed by persons forming part of its armed forces.

The Fourth Hague Convention and the Regulations annexed thereto are the instruments dealing per definitionem with war crimes in the con-
ventional and narrower sense. All such references to “humanity,” “interests of humanity” and “laws of humanity,” as appear in this Convention and in the other documents and enactments of that period, are used in a non-technical sense and certainly not with the intention of indicating a set of norms different from the “laws and customs of war,” the violations of which constitute war crimes within the meaning of Article 6 and Article 5 of the Charters of the International Military Tribunals at Nuremberg and Tokyo respectively, and Article II of the Control Council (for Germany) Law No. 10.(1) The “interests of humanity” are conceived in these documents only as the object which the laws and customs of war are intended to serve, and the “laws of humanity” only as one of the sources of the law of nations.

The other Hague Conventions and Declarations agreed upon by the Second Peace Conference of 1907(2) and which are of relevance to the development of the laws of war are the following:

First Convention for the Pacific Settlement of International Disputes.


Third Convention relative to the Opening of Hostilities.

Fifth Convention respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land. This Convention lays down *inter alia* that a neutral, i.e. a subject or citizen of a State which is not taking part in the war, cannot in principle claim the benefit of his neutrality: (a) if he commits hostile acts against a belligerent; (b) if he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties. In such a case, however, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a subject or citizen of the other belligerent State could be for the same act.(3)

Sixth Convention relative to the Status of Enemy Merchant-Ships on the Outbreak of Hostilities.

Seventh Convention relative to the Conversion of Merchant-Ships into War-Ships.

Eighth Convention relative to the Laying of Automatic Submarine Contact Mines.

Ninth Convention respecting Bombardment by Naval Forces in Time of War. This Convention lays down rules respecting the bombardment by naval forces of undefended ports, towns, and villages, which aim at safe-

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(1) See:
(1) The Agreement of 8th August, 1945, for the Prosecution and Punishment of the Major War Criminals of the European Axis, together with the Charter.
(2) The Charter of the International Military Tribunal for the Far East, of 1946.
(2) See the Final Act of the Second Peace Conference and Conventions and Declarations Annexed thereto, Cmd. 4175 of 1914.
(3) Cf. Article 17 which is to be interpreted in conjunction with Article 18.
guarding the rights of inhabitants and assuring the preservation of the
more important buildings, by applying, as far as possible to these operations
of war, the principles of the Regulations respecting the Laws and Customs
of War on Land.

_Tenth Convention_ for the Adaptation to Naval War of the Principles of
the Geneva Convention of 1906.

_Eleventh Convention_ relative to certain Restrictions with regard to the
Exercise of the Right of Capture in Naval Wars.

_Thirteenth Convention_ concerning the Rights and Duties of Neutral
Powers in Naval Wars.

_Declaration_ prohibiting the Discharge of Projectiles and Explosives from
Balloons. Out of twenty-seven States which signed this Declaration, only
a few ratified it before the First World War. When that World War
broke out, not one of the Central Powers had ratified it; thus its provisions
were not binding, and were not observed.(1)

It should also be mentioned that the First Hague Conference of 1899
adopted the Declaration concerning expanding (dum-dum) bullets, stipulating that the contracting Parties should abstain, in case of war
between two or more of them, from the use of bullets which expand or
flatten easily in the human body. During the First World War the
belligerents charged one another with using these bullets. According
to Garner(2) the evidence at hand did not indicate that any general use of
this type of bullet was authorised by any belligerent, or that it was in fact
used except perhaps in occasional instances. During the Italo-
Abyssinian War in 1935 and 1936 Italy protested to the League of Nations
on account of the alleged use of dum-dum bullets by Abyssinia.

The First Hague Conference also adopted the Declaration concerning
projectiles diffusing asphyxiating or deleterious gases, stipulating that the
signatory Powers should abstain from the use of projectiles the sole
purpose of which is the diffusion of such gases. This Declaration gave
expression to the customary and one of the oldest and most generally
admitted rules of warfare, which prohibits the use of poison and of material
cause unnecessary suffering. These rules were formally enacted in
Articles 23(a) and 23(c) of the Hague Regulations of 1907, but were not
observed during the First World War. Since then there has been a series
of attempts to abolish the use of gas and chemical methods of warfare,
evidenced by the Treaty of Versailles (Article 171), other peace treaties of
1919, the Treaty of Berlin of 1921, the Treaty of Washington of 1922
(Article 5), the Geneva Convention of 1925 and others.

B. THE BINDING FORCE AND EFFECTIVENESS OF THE
LAWS OF WAR

As to the binding force of all these conventions and enactments, it is
sufficient to say quite generally that, according to the principles of inter-

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(2) See Garner's _Recent Development in International Law_, 1925, I, §177 and 178,
referred to in Oppenheim's _International Law_, §112.
national law, all the conventional and customary rules of warfare, that by custom or treaty evolved into laws of war, are binding upon belligerents under all circumstances and conditions, and, in principle, cannot be overruled even by military necessity. For instance, from the Preamble of the Fourth Hague Convention it follows that the rules of warfare were framed having regard to military necessities ("as far as military requirements permit"), which means that military necessity has already been discounted in the drawing up of these rules.(1) Moreover, some of the rules are actually qualified by express reference to military necessity (Article 23(g)).(2) The only exception to the general principle of the binding force of the rules of warfare is the case of reprisals, which constitute retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his own nationals. Neither do these rules lose their binding force even if their breach would mean an avoidance of extreme danger or affect the realisation of the purpose of war. These guiding principles found their expression in Article 22 of the Hague Regulations which stipulates expressly that the right of belligerents to adopt means of injuring the enemy is not unlimited.

The effectiveness of some of the Hague Conventions was considerably impaired by the incorporation of a so-called "general participation clause" providing that the Convention shall be binding only if all belligerents are parties to it. Thus, for instance, Article 2 of the Fourth Hague Convention expressly stipulates that the provisions contained in the Convention, as well as in the Regulations, do not apply except between the contracting Parties, and then only if all the belligerents are parties to the Convention. From this it follows that it shall cease to be binding in case of hostilities with a non-contracting Power, except in so far as it is declaratory of the existing customary rules of international law.

On the other hand some of the later Conventions expressly reject the general participation clause or include it in a different and modified form.(3) Thus, as regards the latter practice, the signatories of the Protocol of 1925 concerning the use of poisonous gases in war included a reservation to the effect that the instrument shall cease to be binding towards any belligerent power whose armed forces, "or the armed forces of whose Allies," fail to respect the prohibitions laid down in the Protocol. As Oppenheim says in this connection, "the effect might be that in a war in which a considerable number of belligerents are involved, the action of one State, however small, in a distant region of war, might become the starting point for a general abandonment of the restraints of the Convention. As between opposing belligerents actually in contact with one another some form of "participation" clause is clearly necessary. But the requirements of reciprocity and of effectiveness of treaties are not irreconcilable, and progress can undoubtedly be achieved by a less rigid and exacting formulation of the clause than has been the case hitherto."(4)

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(1) See Oppenheim, op. cit., p. 185.
(2) Article 23(g): "To destroy or seize enemy property, unless such destruction or seizure be imperatively demanded by the necessities of war"—is particularly forbidden.
(3) See the Geneva Conventions of 1929 and the Protocol of 1925.
(4) See Oppenheim, op. cit., p. 186.
Among other factors which limit, or until recently have limited, the effectiveness of the rules of war may be mentioned: (a) the institution of reprisals which, though designed to ensure the observance of rules of war, have systematically been used as a convenient cloak for disregarding the laws of war; and (b) the question of the plea of superior orders. These very important questions meriting serious attention by all Governments, will form the subject of separate sections of this History.

C. PUNISHMENT OF WAR CRIMES

The right of the belligerent to punish as war criminals persons who violate the laws or customs of war is a well-recognised principle of international law. It is a right of which a belligerent may effectively avail himself during the war in cases when such offenders fall into his hands, or after he has occupied all or part of enemy territory and is thus in the position to seize war criminals who happen to be there. A belligerent may, as a condition of the armistice, impose upon the authorities of the defeated State the obligation to hand over persons charged with the commission of war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he will be in a position to occupy. For in both cases the accused are, in effect, in his power. And although the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of international law prevents the victorious belligerent from imposing upon the defeated State the obligation, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes.\(^1\)

In contradistinction to hostile acts of soldiers, by which the latter do not lose their privilege of being treated as lawful members of armed forces, and in contradistinction to all sorts of force or means applied by a belligerent against enemy armed forces or other enemy persons or property and directed to the overpowering of the enemy as well as to the occupying and administering of enemy territory by all legitimate means, war crimes are such acts of soldiers or other individuals which constitute violations of the laws and customs of warfare. They also include acts contrary to international law perpetrated in violation of the laws of the criminals’ own State, as well as criminal acts contrary to the laws of war committed by order and/or on behalf of the enemy State. Such acts constitute violations of municipal penal laws, of international conventions, and of the general principles of criminal laws as derived from the criminal law of all civilised nations. To that extent the notion of war crimes is based on the view that States and their organs are subject to criminal responsibility under international law.

In spite of the uniform designation of various acts as war crimes, a number of different kinds and types of war crimes can be distinguished on account of the essentially different character of the acts, namely: (a) according to whether these acts have been committed by members of the enemy armed forces or by individuals who belong to or represent

\(^1\) See Oppenheim, op. cit., pp. 450-458. As to examples of provisions of the Peace Treaties imposing upon the defeated State the duty to surrender for trial of persons accused of war crimes, see: Chapter III: Developments during the First World War.
enemy authorities other than military, or are acting in the interest of the enemy; (b) according to what rights of individual persons or groups of persons have been violated, and/or what legitimate interests of other belligerents or general interests of the community of nations have been outraged.

So far as war crimes in the conventional and narrower sense are concerned, they have for long been treated as criminal acts for which members of the armed forces or civilians engaged in illegitimate warfare are held individually responsible by the other belligerent. In this regard, and especially in the case of violations of the Hague Convention IV of 1907 and the Geneva Conventions, there is no doubt that such crimes are war crimes under international customary law.

In the past there have been hundreds of cases in which national military tribunals have tried and convicted enemy nationals of breaches of the laws of war. The trials of war criminals by victorious opponents can be traced back to the dawn of modern international law. The first trial of war crimes in the technical sense of the term, appears to be the trial by an English court in 1305 of Sir William Wallace whose condemnation rested on the charge of his conduct of the war against his liege lord, namely, that he had engaged in an action of extermination against the English population, “sparing neither age nor sex, monk nor nun.”(1)

Generally speaking, all war crimes may be punished with death or with any other more lenient penalty. In this connection the question arose in the past in legal literature whether, in cases where a penalty of imprisonment is inflicted, persons so punished should be released at the end of the war, although their term of imprisonment has not yet expired. Some of the writers maintain that it could never be lawful to inflict a penalty extending beyond the duration of the war. Such a proposition should, of course, be looked upon as unacceptable as, if a belligerent has a right to pronounce a sentence of capital punishment, it is obvious that he may impose a less severe penalty and carry it out even beyond the duration of the war. It would, as Oppenheim says, in no wise be in the interest of humanity to deny this right, for otherwise belligerents would be tempted always to pronounce and carry out sentences of capital punishment in the interest of self-preservation.(2)

It must be pointed out that, in so far as prisoners of war in the technical and strict sense of the term are concerned, Article 75 of the Geneva Convention of 1929, dealing with the obligation of belligerents to repatriate prisoners as soon as possible after the conclusion of peace, provides that prisoners of war who are subject to criminal proceedings for a crime or offence at common law may, however, be detained until the end of the proceedings, and if need be, until the expiration of the sentence. The same applies to prisoners convicted for a crime or offence at common law.(3) As most war crimes are crimes of the common law type, it is believed

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(2) See Oppenheim, op. cit. §257.
(3) See the Geneva Convention of 27th July, 1929, relative to the treatment of prisoners of war.
that the above provision of the Geneva Convention is also applicable to
prisoners of war who, before their apprehension, committed war crimes,
and by analogy and in default of any written agreement, also to enemy
persons taken into custody or convicted after the cessation of hostilities
and before the conclusion of peace, solely on the ground of their having
committed war crimes.