INTERNATIONAL LAW AND TOTALITARIAN WAR

Advocates, as we all are, of a better world order sometimes decry the effort to regulate the conduct of war because they consider such regulation futile and because they think that efforts should be concentrated on the elimination of war itself.

It is fair to say that most proposals looking toward the elimination of war contemplate the substitution of some kind of international police. This means that they recognize the possibility that in the international society, as in the national society, lawless persons or groups may have to be suppressed by force. In the international society, plans for an international police force must contemplate the use of the police against sizeable armed groups, whether or not we speak in terms of a recalcitrant state rebelling against the international order. Just as it was difficult in 1937 to distinguish factually between war and the clash of Chinese and Japanese arms, so in 1947, let us say, it may be difficult to distinguish factually between war and the clash of international police forces and an "aggressor." It is not to be assumed that an international police force would carry out its function with anarchic barbarity. Presumably it would not use dumdum bullets, would not poison wells, would not resort to bacteriological warfare, would not kill prisoners or torture the wounded. National police forces are regulated, although the regulations are sometimes violated. The same would have to be true of international police forces. The situation might be comparable to that of civil war. *Mutatis mutandis,* one may quote Article 152 of the Instructions for the Government of Armies of the United States in the Field—Lieber's code:

> When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.[1]

Law often lags behind facts, but if it does not correspond to facts it is eventually nullified or modified. Take air law as an illustration. In private law, we find that the civil codes of many countries have long contained provisions indicating some right of private ownership in the airspace above a person's land.[2] In Anglo-American law, the same idea found its place in the frequent reiteration of the maxim *cuius est solum eius est usque ad coelum.*[3] All this was before the practical development of aviation, and

[1] Naval War College, International Law Discussions, 1903, pp. 115, 138.

[2] *E.g.,* Art. 552 of the French Civil Code, Art. 905 of the German Civil Code of 1896, Art. 207 of the Japanese Civil Code, Art. 2552 of the Argentine Civil Code of 1871.

[3] See Thurston, "Trespass to Air Space," Harvard Legal Essays, 1934, p. 501; Hackley, "Trespassers in the Sky," 31 Minnesota Law Review (1937), p. 773.

involved the right to build overhanging projections, telephone wires and like problems.[4] Since the development of aviation, the American courts at least have broken with the old maxim and have rejected the idea of a property right *usque ad coelum*. "We think it is not the law, and that it never was the law," said the Circuit Court of Appeals for the 9th Circuit in 1936. "We will not foist any such chimerical concept of property rights upon the jurisprudence of this country."[5] The judges could not bring themselves to hold that a transcontinental plane committed thousands of trespasses as it soared from Los Angeles to New York. In international law, during the first decade of the twentieth century, the overwhelmingly dominant view was that the air was free and no state had sovereignty *usque ad coelum*.[6] With the development of aviation, and particularly the use of aircraft from 1914 to 1918, the prevailing view changed with great rapidity. As a result, the Air Navigation Convention of 1919, and subsequent legislative treaties largely modelled upon it, recognized as an existing fact or rule of law "that every Power has complete and exclusive sovereignty over the airspace above its territory." The rule of sovereignty is admitted with practical unanimity today. Governments could not bring themselves to agree that foreign aircraft could fly at will over their territories. The contrast may be stressed: in private law, we start before the development of aviation with the rule of property in the airspace and we end after the development of aviation with the rule of freedom. In international law, we start with the rule of freedom and end with the rule of sovereignty. Both legal developments are comprehensible in the light of facts and contemporaneous interpretations of social and political needs.

In the law of aërial warfare, the development has been neither so rapid nor so clear. At The Hague in 1907, governments could agree to a rule prohibiting the launching of projectiles from the air; the prohibition had a humanitarian appeal and military men were not concerned to preserve a weapon which then seemed unimportant. After the World War demonstrated the potential military importance of aërial bombardment, no agreement could be reached on the regulations proposed by the Hague Commission of Jurists in 1923. As a result, the present war broke upon a legal scene whose stage was not set with adequate regulation. Between the two wars there had been abundant humanitarian appeals and proposals to protect the civilian populations, but the other essential element of military utility had not been swung into line.[7] Thus, although the United States Govern-

[4] *Cf.* Pickering *v.* Rudd (Kings Bench 1815), 4 Camp. 219, 16 Revised Reports 777; and Catoire *c.* Foulon et Gislain (1880) III, Dalloz 103; Butler *v.* Frontier Tel. Co., 186 N. Y. 486 (1906), and Delahaye *c.* Société Générale des Industries Electriques (1900), II Dalloz 361.

[5] Hinman *v.* Pacific Air Transport, 84 F. (2d) 755.

[6] *Cf.* the discussions of the Institut de Droit International in the *Annuaire*, 1902, 1906, 1910 and 1911; but see the Reports of the International Law Association for 1912, 1913 and 1920.

[7] *Cf.* Royse, Aërial Bombardment (1928), p. 2.

ment expresses its revulsion against the bombardment of civilians through the imposition of moral embargoes, it is impossible for the international lawyer to demonstrate that it is illegal for a bomber to release its bombs upon a factory, a railroad center, a bridge or docks even if the bombs may kill numerous innocent civilians. But one may well argue that the bombing is illegal if the objective is merely to terrorize the civilian population. That proposition can be maintained, *inter alia,* upon two grounds:

1st. The advocates of "totalitarian war" have not succeeded in grafting upon international law the proposition that the distinction between combatants and noncombatants has been eliminated. If this proposition were true, an invading army could lawfully shoot or capture as a military prisoner every civilian it encountered, just as well as every soldier under arms. I do not believe that is either the law or, as a matter of fact, the practice.

2nd. The law against indiscriminate bombing for purposes of terrorization is supported by both humanitarianism and military utilitarianism. The military judgment here expressed is a lay echo of informed opinion, but is believed to be correct.

One reason why aërial bombardment has defied detailed regulation is that the science prior to 1920 was in its infancy. Today it may be in a state of extravagant adolescence. Tomorrow, when it has reached maturity, and with maturity a greater degree of accuracy, I venture to think it will be regulated like dum dum bullets and poisoned weapons and for the same reason that the ends of humanitarianism and of military utility will coincide.

The effect of totalitarian war upon this particular rule of international law may well be to clarify the definition of a military objective, since the test of a "defended" place which was utilized in the old rules governing terrestrial and maritime bombardment has been definitely unsatisfactory.

It is not possible here to review the numerous laws regulating the conduct of warfare, although it is an illuminating record from the precepts "enshrined in the Mahābhārata and in the Rāmāyana" of ancient India,[8] through the rules of Western European chivalry, down to such effective instruments as the Convention Concerning the Treatment of Prisoners of War, signed at Geneva, July 27, 1929. *Flagrante bello,* it is difficult for the scholar to gather reliable data on the conduct of armed forces. But it is possible, though dangerous, to hazard the prophecy that international lawyers of the future will be able to record the applications as well as the breaches of international law during the current war. Changes in international society will be reflected in the law governing both the resort to war and the conduct of war, whether war continues as a legal anomaly or as the regulated application of force to restrain law-breakers.

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[8] Armour, "Customs of Warfare in Ancient India," 8 Transactions of the Grotius Society (1923), p. 72.