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TOPIC IX.

METHODS OF INJURING THE ENEMY.

What regulations should be made in regard to deceiving and injuring the enemy?

CONCLUSIONS.

The following are in general prohibited:

1. Deceit, involving perfidy.
2. To declare that no quarter will be given.
3. To declare that no flag of truce will be received.
4. To kill or wound an enemy who has surrendered and has no longer the means of defense.
5. To destroy a vessel which has surrendered before attempting to rescue those on board.

NOTES.

Treachery.—Ruses of war have always been common and are regarded as legitimate and often praiseworthy. Ruses and stratagems must not be confused with deceit involving treachery or perfidy. Treachery or perfidy in the sense used in war implies a betrayal of legitimate confidence or breaking of faith. The use of the white flag or of the Red Cross flag for purpose of attack upon an enemy would be a breach of faith. There may be a conventional or tacit agreement in regard to a course of conduct between enemies in time of war, and action contrary to such agreement would involve a breach of faith. Deceit is often resorted to and is not criticized. False reports may be circulated in regard to the position or movements of forces, but deceit not involving perfidy is usually admitted as legitimate practice.

Denial of quarter or of flag of truce.—The Hague convention respecting the laws and customs of war on land of 1907 says it is especially forbidden, "Article 23 (*d*). To declare that no quarter will be given."

Unquestionably, if this is to be read literally, it would meet general approval, because a literal reading would imply that the *declaration* that no quarter will be given is what is prohibited. Declaration that no quarter would be given was sometimes resorted to in early wars in order to deter or coerce an enemy. Several threats that no quarter would be granted were made during the American Civil War. The Brussels rules of 1874 contained the prohibition against "The declaration that no quarter will be given." The idea in these rules was to prevent threats of "extermination towards a garrison which obstinately defends a fortress." It is clear that there will be times when quarter can not be granted, as when in an attack a small part of the opposing forces offers to surrender while the remaining forces continue to fight. At such time the officer in command of the attacking force must be free to judge whether he will grant quarter to a small part of the forces or shall continue his attack on all. To accept the surrender of a few might burden the commander with prisoners to such a degree as would defeat his movement and would perhaps prolong the war and make the sacrifice greater in the end.

While a commander of forces on land or sea is forbidden "to declare that no quarter will be given," it is not thereby implied that he will in every case give quarter in time of actual operations.

The right to deny a flag of truce is granted in article 33 of The Hague convention respecting the laws and customs of war on land.

The commander to whom a flag of truce is sent is not obliged to receive it in all circumstances.

In general the obligation, both on land and sea, would be to receive the flag of truce, but this obligation may be overridden by the military obligation to bring the operation in which the forces are engaged to a successful issue with the least sacrifice of life and property.

Prof. Oppenheim, who assisted in preparation of the British Manual of Land Warfare, says:

As soon as an attacked or counter-attacked vessel hauls down her flag, and therefore signals that she is ready to surrender, she

must be given quarter and seized without further firing. To continue an attack, though she is ready to surrender, and to sink her and her crew would constitute a violation of customary international law and would only, as an exception, be admissible in case of imperative necessity or of reprisals. (International Law, 2d ed., Vol. II, p. 231.)

Institute of International Law, 1913.—After considering the means of injuring an enemy, the committee of the Institute of International Law in 1913 proposed a regulation as follows:

ART. 20. Il est interdit :

1° De tuer ou de blesser un ennemi qui, ayant mis bas les armes ou n'ayant plus les moyens de se défendre, s'est rendu à discrétion.

2° De couler un navire qui s'est rendu, avant d'avoir recueilli l'équipage.

3° De déclarer qu'il ne sera pas fait de quartier.

The provisions contained in this article had been the subject of much discussion before 1913. The committee, however, reports upon the article, showing some of the opinions:

Cet article, qui prévoyait pour les défendre quatre sortes de moyens de nuire, a motivé certaines remarques de la part des membres de la Commission.

En ce qui concerne le 1° de l'article, M. Holland a déclaré n'avoir aucune objection à présenter contre l'interdiction des projectiles ayant pour but unique de répandre des gaz asphyxiants ou délétères, lorsque la Déclaration de La Haye du 29 juillet 1899, qui y est relative, sera universellement acceptée par les États.

Sur le 2°, M. Kaulmann a formulé une observation qu'avait faite déjà M. de Bar. Il a demandé que, contrairement à la Déclaration de Saint-Petersbourg du 11 décembre 1868, on autorisât les projectiles explosibles ou chargés de matières fulminantes ou inflammables d'un poids inférieur à 400 grammes "en tant qu'ils sont employés contre des aéronefs et des hydro-aéroplanes," car ces projectiles peuvent dans certains cas être les seuls qui constituent un moyen d'action efficace contre les navires de l'air. La motion de M. Kaufmann a été rejetée par trois voix contre trois abstentions. Il a paru à la Commission que son adoption aurait nécessairement comme conséquence l'abolition complète de la Déclaration de Saint-Petersbourg, attendu qu'en fait il sera toujours impossible de savoir si les projectiles auront été dans la réalité lancés ou non sur des machines aériennes; or une pareille abolition constituerait sans conteste un retour en arrière.

M. Holland a estimé que les n^{os} 3 et 4, interdisant (3^o) de tuer ou de blesser un ennemi qui s'est rendu à discrétion et (4^o) de déclarer qu'il ne sera pas fait de quartier, n'étaient pas à leur place dans l'article 20. La Commission a résolu d'en faire l'objet d'un texte spécial qui serait inséré à la suite de l'article 20. Ce texte comprendra, de plus, une disposition nouvelle. M. Hagerup ayant observé que la rédaction du 3^o de l'article 20 visait trop exclusivement les personnes et qu'il fallait la compléter par une autre concernant les navires, on a en effet décidé d'ajouter à l'interdiction de tuer ou de blesser un ennemi qui s'est rendu à discrétion celle "de couler un navire qui s'est rendu, avant d'avoir recueilli l'équipage."

Destruction of enemy vessels at sea.—In 1905 the conference at the Naval War College considered as Topic IV the question of the destruction of captured vessels. At that time the practice and orders of the United States and of other states were considered. The conclusions reached were as follows:

Enemy vessels.—If there are controlling reasons why enemy vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this can not be done may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered. (International Law Topics, Naval War College, 1905, p. 62.)

Of course, there would also be the understood obligation of placing the ship's company of a private vessel in a place of safety.

French Regulations, 1912.—The French "Instructions sur l'application du Droit International en Cas de Guerre" (1912) provide for destruction of prizes taken from the enemy.

153. Les prises doivent être amarinées, conduites dans un port national ou allié, et non pas détruites.

Par exception, vous êtes autorisé à détruire toute prise dont la conservation compromettrait votre propre sécurité ou le succès de vos opérations, notamment si vous ne pouvez conserver la prise sans affaiblir votre équipage.

154. Avant la destruction, vous mettrez en sûreté les personnes, quelles qu'elles soient, qui se trouvent à bord, ainsi que tous les papiers et documents utiles pour le jugement de la prise.

155. En cas de combat provoqué par une résistance armée, ceux qui montent le navire suivent la fortune des armes. (See Appendix.)

Résumé.—While deceit is generally allowed in war, the principle that deceit involving perfidy is prohibited is approved. Ruses not involving perfidy are allowed in both land and sea warfare. The belligerents are supposed to be on the guard against ruses, such as feigned attacks or withdrawals to lead the pursuing party into a less advantageous position.

The denial of quarter or of a flag of truce might under certain exigencies be necessary, though such cases would be few. "To declare that no quarter will be given" or that no flag of truce will be received is to return to barbaric practices and is properly prohibited in modern times.

To kill those who have no longer arms with which to engage in combat and who surrender without conditions is in the class of acts which shock the sense of modern humanity.

Similarly the destruction of a vessel which has surrendered without first removing its officers and crew would be an act contrary to the sense of right which now prevails even between enemies in time of war.

Conclusions.—The following are in general prohibited:

1. Deceit involving perfidy.
2. To declare that no quarter will be given.
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