



The Role and Importance of the Hague Conferences: A Historical Perspective

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Presentation by Mr. Nobuo Hayashi

Excellencies, ladies and gentlemen,

Thank you for giving me this opportunity to discuss the historical significance of the Hague conferences.

I wish to extend my particular gratitude to the Russian delegation for organizing this event, for approaching UNIDIR with the idea of my paper, and for providing financial support for its preparation and presentation. Also, on behalf of UNIDIR, may I express our sincere condolences to the Russian delegation on the untimely passing of Ambassador Churkin.

In his 1832 book, Carl von Clausewitz likened war to duelling and wrestling. He saw real-life warfare as organized and rational human violence, shaped by social conditions and used between States to pursue political ends.

Clausewitz's exposition preceded sustained efforts to codify and develop the rules of war. Twenty-six mostly European States attended the 1899 conference, at which they adopted three conventions and three declarations. Forty-four States, including those from Latin America, assembled in 1907. This gathering produced thirteen conventions and one declaration.

Although these occasions achieved nothing significant on the limitation of armaments and military expenditure, they proved productive on the peaceful settlement of international disputes and the rules of war.

There are four major historical explanations for this.

One is the prevailing perception about war. War as understood by Clausewitz only occurred between States. He also portrayed war as about weakening enemy military strength and susceptible to reason and political authority.

Similarly, the 19th century international law limited itself to regulating inter-State behaviour. Codifiers also sought to ensure that war involved violence between duly authorized personnel. The rights and duties of belligerency were reserved to regular forces and irregular forces placed under the command of the States involved. States undertook to issue instructions in conformity with international law and accepted responsibility for acts committed by members of their armed forces.

The second explanation is that resorting to war was a legitimate means of settling inter-State disputes. Peace and war stood at the opposite extremes of a spectrum in the communal life of sometimes disputatious nations. They were anxious to ensure fairness in their violent contestations through previously agreed-upon rules.

The 1899 Convention on peaceful dispute settlement set out a series of non-obligatory techniques. A Permanent Court of Arbitration was also created. The fact remained, however, that States retained the right to go to war as a settlement of last resort. Though crude, expensive and distasteful, war had become a “litigation of nations”.

The third explanation is the Hague conferences’ State-centric character. Vulnerable States looked to law to buttress national security vis-à-vis their more dominant counterparts. At the first conference, Belgium proposed leaving the right of populations to resist invaders with arms, one of the uncodified areas at the time, “under the governance of that tacit and common law which arises from the principles of the law of nations”.

Russia suggested a compromise formula. The so-called Martens Clause reads: “in cases not included in the regulations ..., the inhabitants and the belligerents remain under the protection and the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience”. Various versions of the clause can now be found in modern law of war and weapons treaties.

The fourth explanation is that the Hague undertakings were driven by the “desire to diminish the evils of war so far as military necessities permit”. Preserving room for militarily necessary violence was a foregone conclusion, once States had entrenched war as a legitimate mode of settling disputes between them.

Disabling the greatest possible number of enemy soldiers was the essence of war-fighting. States met in The Hague to delineate where war’s necessary evils ended and unnecessary ones began. The so-called “Hague law” stood in contrast to the spirit animating the “Geneva law”. At stake for the latter was the humane treatment of those already disabled and abandoned, and the facilitation of relief work by medical personnel and local volunteers.

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Post-World War I attempts at limiting naval armaments ended with mixed results. The League of Nations, the UN, and this very body meeting here today have all struggled with general disarmament. A world free of nuclear weapons remains an unfulfilled promise.

Meanwhile, the Hague regulations on occupation and the conduct of hostilities have passed into custom. It is also widely agreed that customary law prohibits expanding bullets in armed conflicts. Wartime use of chemical weapons is now a rarity.

The Hague experiment with compulsory arbitration and standing courts led to the Permanent Court of International Justice and the International Court of Justice. Many of today’s boundary disputes are resolved peacefully. States have set up judicial and quasi-judicial bodies in areas such as human rights, war crimes prosecution, the law of the sea, trade, and investment.

Nevertheless, each of the four historical circumstances that engendered the Hague conferences have changed over time.

First, the post-World War II era saw the rise of internal armed conflicts. The idea that hostilities should be limited to military objectives is often rejected outright, ignored or stretched. Senseless slaughter, uncoordinated violence and general anarchy are not amenable to reason or political control. These developments undercut the Clausewitzian notion that war occurs between States, that armies fight intelligently and efficiently, and that war is subordinated to government policy.

They also expose the war rules' State-centricity to be untenably fictitious. The premise that hostilities must be limited to opposing armed forces of authorized individuals has come under strain. The idea underpinning the Hague law's enforceability—namely, that States command armed forces, issue sound instructions, and assume liability for their personnel—has become harder to uphold.

Second, the 1928 Kellogg-Briand Pact condemned “recourse to war for the solution of international controversies”. The UN Charter reiterates the duty to settle disputes by peaceful means, and strengthens the ban on resorting to force. This ban is subject to two widely accepted exceptions, namely individual or collective self-defence, and enforcement action under Chapter VII.

This makes it odd to regard war as a transaction involving opponents of equal standing, and its rules as safeguarding procedural fairness between them. The supposed parity between belligerents sits uneasily with the fact that one illegally attacks and the other defends itself. Should an aggressor be entitled to claim that its action is necessary? Conversely, should those fighting for the “good” side be given greater leeway in determining what is needed to accomplish their mission?

Third, although States formally remain the sole makers of international law, civil society influences its development. NGOs have become prominent in multilateral treaty-making efforts outside of formal inter-governmental disarmament forums, where the latter proved unable to take the matter forward themselves.

Although States originally introduced the Martens Clause with a view to safeguarding the law's customary development, more expansive interpretations have been put forward. If correct, these interpretations would not only extinguish the presumed freedom of action under international law, but also come close to replacing it with the presumed absence of such freedom.

States often demand a freer hand in dealing with rebels. Many of the newly independent States that so firmly insisted on upgrading national liberation struggles to international armed conflicts found themselves vehemently opposed to conceding any appearance of legitimacy to their domestic foes. Today, at least some of the rules bind non-State entities. Some also argue that they should be given a sense of ownership in the law's development and compliance.

Fourth, the rules of war have become “humanized”. What matters now is how humanitarian considerations constrain belligerent conduct, rather than what humanity can be preserved amid war's necessities. This also finds support in recent international rulings.

Where an adversary can be captured or killed, must that adversary, even an able-bodied and non-surrendering enemy combatant, not be killed? Those who respond affirmatively to this question believe that today's rules of war are concerned with minimizing violence generally, and that they require the employment of the least injurious means and methods of combat.

Anti-personnel landmines and cluster munitions were banned on account of their unacceptably in-humane effects, despite objections by States that ascribed overriding military value to their use. The same may be said of the widening rift between those advocating a ban on nuclear weapons on humanitarian grounds and those opposed to it on security grounds.

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The Hague conferences were products of their own era. Their much-lauded regulations on land warfare limited themselves to inter-State wars and to matters of mutual agreement. Key techniques and institutions of peaceful dispute settlement were developed, only to leave war intact as a measure of last resort. Goals such as limiting general levels of armaments and military budgets stood limited chances. Weapons considered to offer military value eluded meaningful restrictions.

Our era also has a very different outlook. Wars not only involve States, but also, and with an increasing frequency, non-State entities. Distinction between military objectives and civilian persons and objects is blurred. Conflicts are often characterized by chaos.

We also have different expectations of how the rules are made, and what they contain. Civil society input has become more vocal and influential. Organized armed groups carry more weight, both as duty-bearers and stakeholders. Neither fairness between parties nor military necessity may be so readily accepted as a controlling consideration in the law's development.

These observations reveal the imperative of multilateral law-making that is attuned to the needs and dispositions of its time. What should today's equivalent to the Hague conferences, if we were indeed to hold one, look like? The 110th anniversary is a fitting moment to reflect on this question.

I thank you for your kind attention.