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*Focus On*

## Contemporary Challenges to Humanitarian Law\*

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### 1. Introduction

Apart from the constant challenges faced by international law during actual conflicts, it is also subjected to some adverse opinions against the new directions which the law has taken and which are contained in the Additional Protocols of 8th June 1977. These Protocols are additional to the Geneva Conventions of 1949: they develop the law relating to the protection of victims and codify and develop the law governing the conduct of hostilities. Opposition to the Protocols has principally been directed against the provisions regulating guerrilla warfare, particularly in wars of 'national liberation', and those outlawing the use of reprisals against the civilian population.

These two treaties, the most recent written development of the general rules of humanitarian law, are the fruit of almost ten years of negotiations and of a consensus obtained for the first time with the active participation of the Third World and the representatives of all civilizations, ideologies and cultures. At the price of a little compromise, the universality of humanitarian law was preserved. These days, when wars are frequently fought thousands of miles away from home base, when big and medium powers have a military presence all over the planet, a common and universal understanding and acceptance of humanitarian law is of increased importance. This essential universality is now being undermined by the negative attitude towards Additional Protocol I of a very small but crucial number of States, in particular the United States.

### 2. Nature and Purpose of International Humanitarian Law

International humanitarian law, the law of realism and of the lesser evil has, and always has had, as its principal objective the limiting of the ill-effects of war once it has broken out.

In the second part of the 19th century, when modern humanitarian law was born, military questions, in particular those relating to the conduct of combatants, were possibly approached with more frankness and less prudery than today. Combatants were not then told that they could kill other combatants in the context of an ethic and international rule forbidding the use of force. These days, citizens in general, but especially those incorporated into the army, constantly live this moral and legal paradox, namely that they are taught and ordered to kill, yet war is forbidden except in self-defence.

The existing level of individual and collective violence in the world, which, unfortunately, will probably not alter for some time to come, means that we will continue to be confronted with this paradox. It is therefore essential to approach the problem of violence and war with lucidity and frankness as well as to encourage the many positive endeavours which have resulted from this paradox and feeling of unease.

Three lines of action are therefore called for:

- (1) To foster the peaceful solution of disputes and to prevent recourse to force.
- (2) If a war nonetheless takes place, to limit its ill-effects by concrete action and the putting into effect of humanitarian law.
- (3) During wartime to improve the chances of and actively prepare for the return to peace.

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\*The views expressed in this article are personal and do not necessarily reflect those of the International Committee of the Red Cross.

To differing degrees the international Movement of the Red Cross and Red Crescent works to these ends.

Although the principal mandate of the International Committee of the Red Cross (ICRC) is that of humanitarian action for the victims of war as well as the promotion and putting into effect of international humanitarian law, its actions, directly or, even more so, indirectly, have an impact on the prevention of war and the return to peace.

### 3. *Weaknesses of International Humanitarian Law: Real or Alleged*

It is only too well known that there have never been so many conflicts, both internal and international, than since war has been prohibited and since human rights law has been developed in the international sphere. One has therefore to repeat over and over again, that in order to restore peace, in order to counteract the hypocrisy of those who are always the defenders and never the aggressors, we must continually fight for the instruction and acceptance of and respect for humanitarian law, this last rampart, this law based on realism and humanity.

Apart from the fact that the law of armed conflict is, and will always be, the law of the second best, it is true that it still suffers from certain weaknesses. However, these weaknesses or possible legal gaps appear minor compared with a refusal to accept and respect the law (both treaty and customary) by those to whom it is addressed, in particular the authorities, the armed forces and the combatants.

These weaknesses can be seen in three areas:

- (1) The insufficiency or lack of certain rules of behaviour.
- (2) The inadequate application of the law to persons or situations.
- (3) The weakness of institutional implementation mechanisms.

Let us now take a brief look at humanitarian needs and the state of the law in these three areas.

#### 3.1 *Rules of Behaviour*

With regard to rules of behaviour, it should first be recalled that the four Geneva Conventions of 1949 and their two additional protocols alone contain together some 600 articles. One finds amongst the critics of international humanitarian law more who consider the law to be too developed, detailed and complicated than those who consider there to be insufficient regulation. This is particularly the case for rules on the conduct of hostilities which have been reaffirmed and developed in Protocol I of 1977. The drafters of this treaty have adopted amongst others very detailed regulations for the new definition of combatant (Articles 43 and 44) and the protection of the civilian population and civilian objects (Articles 48–58), but this has been done to precisely define the concept of ‘civilian’ in order to reinforce the protection accorded. This care was particularly justified, because in contemporary guerilla wars the distinction between civilians and soldiers is sometimes difficult to make. It is true that some of the rules are complex, but it is the duty of each State to translate them into a language intelligible for its soldiers, in particular by means of military manuals.

Other criticisms of Protocol I, such as those on the absolute prohibition of reprisals against the civilian population or the accusation that the treaty favours terrorist acts, are even less comprehensive or tolerable. The absolute immunity of the civilian population against the effects of hostilities is possibly the most important means of sparing innocent people and of limiting the ill-effects of war. With regard to the second criticism, Protocol I has actually reinforced the prohibition of terrorist acts against civilians (particularly Article 51). It is therefore difficult to understand the Protocol’s detractors unless one concludes that for them political or strategic interests are of greater importance than humanitarian necessities.

In our opinion, the problem relating to rules of behaviour is not that they are insufficient or badly drafted, but that they are insufficiently accepted and applied.

On the other hand, an area in which progress does need to be made is that of the

absolute prohibition of those weapons which have indiscriminate effects or which cause excessive suffering. This effort should be both permanent and follow the evolution of military technology.

Within the spirit of Article 36 of Protocol I, States should forbid the production of weapons the use of which would violate humanitarian law. But this requirement for forbearance has not — as yet — prevented many States from producing and piling up such kinds of weapons. Therefore ongoing efforts to fully outlaw specific arms have to be increased. High velocity small calibre bullets and laser beam weapons are but two types presently at stake.

Reinforced efforts have also to be made to quickly reach an understanding on the full prohibition of production of chemical weapons. Of course, the nuclear arms issue is no less vital. Whatever their deterrent effect, the aim can only be a complete halt to and prohibition of their production.

### 3.2 *Field of Application of the Law*

The aim of humanitarian law is to prevent and alleviate the sufferings of war in its widest sense. All too frequently parties to a conflict reject the applicability of all or part of international humanitarian law by invoking fallacious or excessively restrictive interpretations of its field of application.

These problems are particularly prevalent in conflicts which are not obviously from the outset inter-State conflicts and therefore international conflicts within the meaning of international humanitarian law.

Sixty-seven States are presently Parties to Protocol I and amongst those which have not yet accepted it, not one has contested that, in general, it represents progress for humanitarian purposes. As with all international treaties, clarifications and adaptations are possible by means of interpretative declarations and reservations. This is the way which should be followed in order to achieve the universality of these rules. This is what we would like to see being done by a great power such as the United States. However, the attitude of the USSR, which has not yet ratified, is even less comprehensible as, contrary to the recent position taken by the

United States, the USSR has, to our knowledge, always asserted that Protocol I represents a very positive evolution of international humanitarian law.

The example of these two great powers shows that the challenge to the future of humanitarian law is that of its acceptance rather than the filling of its gaps.

The willingness of States to apply humanitarian law is equally a primary factor within the framework of internationalized internal armed conflicts. The task here is no less than that of specifying the responsibility of the intervening State. What type and extent of outside intervention is required for the whole of humanitarian law to be applicable for all or some of the involved parties? Both law and legal writings do not give a clear enough reply. The result is that States and parties concerned tend to only consider themselves bound by the minimum rules, whereas humanitarian needs dictate the reverse.

Humanitarian law has followed the evolution of violence in order to try and temper its effects. This law only struggles against the violence of war. There are many other types of violence to which we have to give our attention. This is the case with regard to internal disturbances and tensions which escape the formal fields of application of humanitarian law. The protection of human rights law is insufficient and thus further normative regulation of these situations needs to be undertaken.

### 3.3 *Implementation Mechanisms*

Although, as we have just seen, humanitarian law is not free of any weakness, it has adapted itself over the years to reinforce the buttress against the destructive forces of war. However, this buttress will not hold if it is not supported. In the case of humanitarian law, this refers, above all, to the will to apply it, to respect it and to ensure respect for it, in the internal sphere as much as in the international sphere.

Within the limits of what is acceptable in the present state of the international community, international humanitarian law treaties contain detailed implementation mechanisms. They often remain a dead letter. We will just cite a few examples.

The Conventions of 1949, and even more strongly the additional Protocols, require States to take certain internal measures in time of peace. Legislation for the application of certain provisions, the teaching of humanitarian law, the assignment of legal advisers, etc . . . Although certain States conscientiously fulfil these obligations, there are more which, having completed their accession to the treaty, are guilty of appalling laxity.

In order to reinforce the methods of supervising the application of international humanitarian law in time of conflict, States have instituted by Protocol I a new international means of supervision in the form of a fact-finding commission (Article 90). To this day, of the sixty-seven States Parties to the treaty, only eight have made the declaration binding themselves to this procedure.

Finally, it is scarcely necessary to refer to the punishment of violations by internal or international judicial means. By virtue of the Conventions and Protocol I, those guilty of grave breaches have to be tried. One knows this but the reality is quite different.

Indeed, theoretically, new coercive international implementation mechanisms could be envisaged. However, although thinking in this direction should not be abandoned,

due to the present structure of the international community the main emphasis must be placed on the enforcement of existing mechanisms.

#### 4. *Conclusion: The Need for Universality*

Apart from the prevention and alleviation of suffering, humanitarian law is the expression of the wish to avoid the worst. In preserving a little dignity and humanity in war, it encourages the resumption of dialogue and the return to peace.

It is in this spirit that the Red Cross works. This is done during conflicts, in particular through ICRC operations, or in each country by the work of national Red Cross or Red Crescent societies which, guided by the fundamental principles of the Movement, not only help victims but also favour the development of individuals and the promotion of humanitarian ideals.

The universality of the international Movement of the Red Cross and Red Crescent is particularly important as it enables it to continue its work through all types of conflicts. In the same way, in order for international humanitarian law to survive, everything must be done to preserve and maintain its universal acceptance and application.