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Inter Arma Caritas: Evolution and Nature of International Humanitarian Law

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International humanitarian law can be defined as the principles and rules which regulate hostilities in order to attenuate their hardships: they aim at safeguarding military personnel placed 'hors de combat' and persons not taking part in hostilities; they also determine the rights and duties of belligerents in the conduct of operations and limit the choice of means of doing harm. This law combines two ideas of a different nature, one legal and the other moral, which may explain the apparent paradoxes it raises (Part 1). The evolution of humanitarian thought through the ages (Part 2) — as well as the attitude of States, the weight of history and politics — have determined the uneasy but progressive codification of humanitarian norms (Part 3). To understand the very nature of humanitarian law, we have to take into account the so-called 'military necessity' which may be at the origin of limitations, if not gaps, in the development and the implementation of humanitarian law. However, because it is also indebted to superior principles derived from established custom, principles of humanity and the dictates of public conscience, humanitarian law has acquired specificities which make it universal and obligatory. If humanitarian law is a law concluded by States, its real aim is the protection of the human person (Part 4).

1. *International Humanitarian Law: Paradoxes and Contradictions?*

International Humanitarian Law is a part of Public International Law composed of 'international legal rules, established by treaties or customs which are specifically intended to solve humanitarian problems, directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of their choice or protect persons and property that are, or may be, affected by conflicts'.¹

But is it not paradoxical to speak of the law of armed conflict, i.e. of a legal system aiming to regulate acts which are fundamentally opposed to law?

How is it possible that, in the case of armed conflict consisting in settling a dispute through force and violence and not according to legal rules, the use of violence can be restricted by legal rules?

The philosopher Immanuel Kant already emphasized this paradox when he said: 'How is it possible to lay down laws to govern a situation which is inherently independent of

all laws?' (Quoted by Pictet 1985, p. 80). For many writers, as war simply replaces law by force, it is easy to understand the reasoning of Sir John Fisher, First Lord of the British Admiralty, when he made the following comment in 1907 on the occasion of the recently convoked Hague Conference: 'To humanize war is like trying to humanize hell' (ibid.).

A good many theorists, military thinkers and leaders have supported this all-or-nothing theory. Clausewitz used to say that war is a violent act in which the use of force is unlimited. At the Nuremberg trial, Goering proclaimed that in a total war the tenets of International Law are broken down.

Such an all-or-nothing theory defended by authors pretending that the most brutal wars are the most humane because they are finished most quickly has proved to be mere sophism. Firstly, history has shown us that the most destructive methods do not put an end to wars. Secondly, if a belligerent can reduce its adversary to its mercy by the application of a certain degree of violence, there is no reason to go beyond such violence when the objective has been achieved. War is a

resort to force, but not to unlimited force, says Jean Pictet quite rightly (*ibid.*). The belligerents may have political, economic and military interests in renouncing acts which exceed the aim of war and are not necessary to victory, such as physical extermination of civilian populations.

Finally, war must not obliterate the moral and cultural inheritance of mankind, accumulated over centuries, made of humanitarian values deep-rooted in the conscience of peoples. Above and beyond violence, there is still a body of rights and duties. As stated by Jean Pictet:

The laws of war are the products both of reason and of the deepest feelings of humanity and these must be respected by all men at all times. These laws come into being through the same process as domestic laws. First they are customs. Then they become common law. Finally they take the form of written rules (*ibid.*).

Actually, the idea of ‘humanizing’ war is a confusing one. It is more appropriate to speak of ‘limiting the evils of war’, and of ‘attenuating the effects of hostilities’.

There is yet another paradox: Can the law of armed conflict still be justified in our time when we see that it has in no way lessened or outlawed war? It has been said that humanitarian action would make war tolerable by smoothing its effects! This remark, which is certainly becoming increasingly uncommon, arises from a confusion as to the true objective of the law of armed conflicts. The law of armed conflicts (*jus in bello*) does not aim at eliminating war, but at mitigating its effects, as the law against war (*jus contra bellum*) aims at preventing war.

Humanitarian law is characterized by its pragmatic approach which recognizes the realities of our time of violence, without purporting to furnish an explanation of its causes.

The international community’s struggle against war is a specific task assigned to the United Nations. This leads us to another paradox: it is sometimes said that in our time, after World War II, the law of warfare has become superfluous as war has been prohibited by a number of international treaties and particularly outlawed by the UN Charter, according to which the Member

States shall ‘refrain in their international relations from the threat or use of force’ (United Nations Charter, Art. 2.4) and shall ‘settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered (*ibid.* Art. 2.6)’. If war has become illegal, is it then reasonable to focus attention on developing the law of war (*jus in bello*) instead of concentrating efforts on the law against war (*jus contra bellum*)? This point of view was largely presented in the UN International Law Commission in 1949 which subsequently decided not to study the problem of the law of war at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, ‘public opinion might interpret its action as showing a lack of confidence in the efficacy of the means put at the disposal of the United Nations for maintaining peace’ (ILC Yearbook 1949, p. 281). This opinion was surely inaccurate. If States had endeavoured to outlaw war, it did not mean that wars could not be waged in violation of those very obligations that had been assumed. The ‘outlawing of war’ could not be considered as a safeguard of international security.

At the present phase of development of International Law, the ‘outlawing of war’ is neither complete nor universal: not all armed conflicts are considered as illegal.² Further, the fact that armed conflicts are waged illegally does not mean that hostilities cannot be subject to legal rules of warfare. And it is symptomatic that the law of armed conflicts in recent times, under the pressure of public opinion, expands and covers more and more non-international armed conflicts, in spite of the fact that insurrections and coups d’état are unquestionably illegal also under domestic laws.

There is no logical contradiction between the law prohibiting armed conflicts and the law of armed conflicts. The relationships of both sections of international law — the law against war and the law of warfare — are best defined by their respective functions. Both sections of international law aim at the protection of universally recognized values, such as human life and fundamental human

rights. In fact they are two lines of defence; the law against war has an importance which escapes nobody because one is faced with the choice of using weapons of mass destruction, or the humanizing of armed conflict by law which regulates hostilities in order to attenuate their hardships.

These apparent paradoxes are due to the very nature of the law of armed conflicts, the base of which goes beyond law and legal systems, but rests on moral and philosophical, and therefore subjective considerations. Humanitarian law is not mere utopianism, it is deeply in reality, comprising a complex network of rules involving specific obligations. The principles which govern these rules, however, are not mere law, they are superior to written law. As stated by Max Huber:

From a strictly legal point of view, a genuine law of humanity has been created whereby the human person, human integrity and human dignity are protected in the name of a moral principle towering far above the boundaries of international law and politics (Huber undated, p. 55).

2. From Humanitarian Thought to Humanitarian Law

The history of humanitarian law is indissolubly linked to that of mankind; it is a continuous performance of the everlasting struggle between good and evil. This long struggle for the better is but a series of steps forward and steps backward, of progress, of stagnation and setbacks.

Humanitarian law, like other sections of international law, has emerged over centuries as customary law based on religious and moral concepts dominating particular periods of history, such as Christianity and Islam.³

Wars were conducted in a way very far from being humanitarian; war practices were the most cruel possible and war customs did not limit such inhuman practices as the killing or making slaves of civilians and the burning of enemy cities.

It is mostly among peoples sharing certain common values such as history, religion or culture, peoples of the same race or of the same civilisation, that some rules of humanitarian character can be found.⁴

In the Middle Ages, cruel war practices were mitigated to a certain extent through the influence of Christianity and the chivalrous concept of combat.⁵ Nevertheless it should be borne in mind that, also in that period of history, most restrictions in the conducting of war pertained only to conflicts within the so-called medieval 'Christian Family of Nations'.⁶

Islam, in spite of the concept of 'Jihad', respected certain principles of humanity in periods of conflict. The *Viqayet* written around 1280 is a code of the laws of war outlawing the killing of women, children, old people and the sick, etc. But humanitarian norms were only applied to believers, thus reducing the scope of application of humanitarian customs.

During the 16th century, a trend appeared providing for some care to the wounded and sick and even prisoners. This led to the development of a system of cartels and capitulations.⁷ They were treaties concluded between the commanders of opposing armies requiring protection of the wounded and women. More important, however, was the development of new concepts in international relations, due to the formation of modern States and the decline of papal authority. The origin of the customary prohibition of direct attack upon the civilian population in the Western world should be credited to Hugo Grotius who, in his famous book, *De Jure Bellis ac Pacis*, made the basic distinction between civilians and combatants and recommended humane treatment for prisoners of war.⁸

Since the 18th century, under the impact of the ideas of the Enlightenment, a more favourable climate for the development of humanitarian law arose. This development is usually connected with the so-called Rousseau-Portalis doctrine according to which war is a relation between States and not between individuals. Consequently the citizens of belligerent States are only enemies as soldiers, not as men nor even citizens of their country but as its defenders.⁹ As Jean Pictet states: 'Rousseau has gained the signal honour of having stated, clearly and for all time, the fundamental rule of the modern law of war' (Pictet 1985, p. 23).

This new doctrine was to have a considerable impact on the thinkers and writers of the French revolution and later during the 19th century. But with conscription, the conditions of warfare changed considerably. The time had come for confrontations between peoples fighting for ideas and no longer for specific material interests. This period was marked by a terrible setback for humanitarian principles, as during the wars of the First Empire.

Mankind had to wait until the battle of Solferino between the Austrians and the Franco-Italian forces in 1859 — one of the bloodiest battles in history — when a Swiss citizen, Henry Dunant 'seized by horror and pity' advanced a double proposal: To organize a volunteer relief society in every country which would be prepared in peace-time to assist the army's medical service in the event of war and to establish an international treaty adopted by the various States to provide a legal basis for the protection of military hospitals and medical personnel. As a result of this double wish, the Red Cross and the Geneva Conventions were created.

Henry Dunant's booklet 'A Memory of Solferino' greatly contributed to the convening in 1863 of an International Congress where 36 European delegations discussed the treatment of wounded soldiers as well as in the Diplomatic Conference of 1864 which adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, the first Convention of that type with a universal character.

The success of the initiative of Henry Dunant and other Swiss citizens was due to the fact that, in this period, public opinion in many European countries strongly supported humanitarian actions and the reform of traditional law. Among factors influencing public opinion was the development of military technology resulting in increasing casualties during armed conflicts, while the growing level of public education generally favoured progressive and humanitarian ideas and opinions.

Before the 1864 Geneva Convention, during the War of Secession of 1863 in the United States of America, President Lincoln promulgated Instructions drafted by Pro-

fessor Francis Lieber. These instructions represented the first endeavour to codify the law of war inspired by humanitarian ideas:

The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war . . . It disclaims all extortions and other transactions for individual gain, all acts of private revenge, or connivance at such acts. . . . The unarmed citizen is to be spared in person, property and honour, as much as the exigencies of war will admit. . . . The ultimate object of all modern war is a renewed state of peace (Instructions 1863, Arts 11, 22, 29).

Lieber had merely codified in his instructions customary rules of war on land. Furthermore, on the initiative of the Tzars of Russia, Alexander II and Nicolas II, the Conferences in Brussels in 1874 and in The Hague in 1899 marked a new step forward in the codification of laws and customs of warfare on land. The Russian lawyer, Frédéric de Martens, the author of the preamble of the IVth Hague Convention of 1899,¹⁰ was the incarnation of the 19th century humanitarianism:

De Martens' preamble crystallized and summarized the XIXth century development of the humanitarian law of war . . . This is the culmination of the work of Dunant, Lieber, de Martens, during the second half of the century, in establishing the inspiration, the theory and the content of humanitarian law of war inherited by our century (Draper 1985, p. 96).

The law of warfare was born, limiting the evils of warfare and outlawing new weapons. It fixed the rights and duties of belligerents in the conduct of hostilities and especially the behaviour of combatants while limiting the choice of means to injure the enemy.

Two key ideas emerge from the irregular movement of humanitarian thinking towards the codification of humanitarian law; the first consists in limiting the effects of hostilities and regulating the combatants' behaviour and the conduct of military operations, the second aims at developing and extending the protection of victims of armed conflicts. What was to be called the Law of The Hague and the Law of Geneva respectively contain provisions related to these two key ideas;

both laws followed a parallel itinerary marked by successes, failures and gaps before getting nearer to each other and being practically integrated in 1977 with the adoption of the Protocols Additional to the Geneva Conventions. If the 'accidents of History' have contributed to the progress of humanitarian law, the weight of State sovereignty as well as the influence of politics have successively been determining factors of the strong and weak points of humanitarian law.

3. *The Laborious Conquests of Humanitarian Law*

3.1 *The Weight Exercised by States*

Humanitarian law in the last part of the 19th century, as codified by the Brussels Conference of 1874 and in the Hague conferences of 1899 and 1907, is directly inspired by the Rousseauist conception according to which wars are inter-state conflicts. Only international conflicts were regulated. No rule had been adopted as to the conduct of hostilities in civil wars. The struggles led by rebels were subject to the rules of internal penal law (unless the State concerned accorded the rebels the status of legitimate combatants). Legitimate combatants were classified, their status covering members of regular armies, militia, and volunteer corps fulfilling a number of conditions.¹¹ This showed considerable progress, especially for States which had no or very small regular armies.

Further progress was made as far as the *means of combat* was concerned. In 1868 the Declaration of St. Petersburg proclaimed that the only legitimate purpose of war was to *weaken* the military forces of the enemy. The employment of arms which uselessly aggravated the suffering of the already disabled combatants was not only unnecessary in order to attain that purpose, but was also contrary to the law of humanity. In the spirit of these general rules, the Declaration specifically prohibited the employment of 'any projectile of a weight below 400 grammes which is either explosive or charged with fulminating or inflammable substances'.

This specific prohibition is no longer of

great practical significance, but the principle which lies behind it is of paramount importance, as it means that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited. Thus the admittedly barbarous undertaking of waging war was governed by a rule which set objectives.¹²

Another aspect of the rule concerns the different prohibitions of specific weapons. The St. Petersburg Declaration's prohibition of small explosive projectiles was reaffirmed and developed by The Hague Regulations of 1907: Article 23 of The Hague Regulations laid down the prohibition 'to employ arms, projectiles or material calculated to cause unnecessary suffering' (which was later expressed as 'to cause superfluous injury or unnecessary suffering' in Art. 35 of Protocol I).

As a corollary to these rules, another basic tenet of the law of armed conflicts was expressed at that time, according to which distinction shall be made at all times between the civilian population and combatants. In Europe, that rule was accepted in the 19th century as part of customary law.

It should, however, be mentioned that this international regulation of means of combat served in the interests of States. Most of these rules were vague and we know what immeasurable suffering the failure to respect the inviolability of the civilian population brought upon millions of civilians during World War II, civilians who were in no way involved in military operations.

Perfidy, the killing of enemies having dropped their arms, refusing quarter etc. were outlawed as methods of combat. But rules related to the conduct of belligerents in zones where civilians were living remained vague and gave poor protection to the civilian population. The concept of a non-defended city, for example, was not defined. The Hague rules were particularly weak at the level of the *supervision* of the respect of humanitarian norms in the conduct of military operations: no third party, no special institution was given any supervisory function. All sanctions like reprisals, penal punishment and payment of indemnities were enforced in a unilateral manner. Another weakness was that the Conventions

included the *si omnes* clause which provided that all belligerents were to be contracting Parties, so if one belligerent was not a Party to the Conventions, those instruments did not apply to relations between all Parties to the conflict!

Only the most elementary rules of customary law were applicable to any conflict. The First World War showed the weaknesses and gaps of this minimalist humanitarian law as The Hague Regulations were no longer adapted to the new forms of fighting, for instance air warfare and the use of toxic gases. In the inter-war period only limited progress was achieved. One of the reasons was that States in connection with the creation of the League of Nations focused their attention mostly on the development of the law against war.

3.2 *The Weight of Events*

No law is more influenced by events than humanitarian law, especially when it concerns the protection of victims of armed conflict.

The other key area of humanitarian law — the protection of victims of armed conflicts — continuously developed after 1864 under the thrust of conflicts, the changes in international relations and the creation of new instruments of destruction, but also thanks to the ICRC which was the instigator and linchpin of the successive developments of humanitarian law.

The first to be protected in the 1864 Geneva Convention were those whose condition Henry Dunant wanted to improve after the terrible scene he had witnessed at Solferino, namely the wounded and sick soldiers. Because there were large gaps in protection during sea battles in the early 20th century, a Convention was adopted in 1906 extending the protection to the wounded, sick and shipwrecked members of the armed forces at sea.

The First World War revealed a very large gap as far as the condition of prisoners of war was concerned. Although Henry Dunant had already raised this problem in the 1860s, it took about 60 years before the adoption in 1929 of a special Convention relating to the Treatment of Prisoners of War.¹³

After World War II, the main concern of States was to promote a more efficient system of protection of the victims of conflicts, and more especially the civilian population. Upon the initiative of the ICRC, the parts of the law of armed conflicts aiming at ensuring protection to the victims of conflicts were developed with the four Geneva Conventions adopted in 1949, a landmark in the development of humanitarian law.

In order to ensure more efficient protection to the victims of war, the Conventions were based on certain principles which were different from those on which the traditional law of warfare was based:

- (a) The principle according to which humanitarian law is applicable not only 'to all cases of declared war' but also in 'any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them' (Art. 2, par. 1 common to all Geneva Conventions).
- (b) The principle that humanitarian law is applicable 'to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance' (Art. 2, par. 2 common to all Geneva Conventions).
- (c) The suppression of the *si omnes* clause: 'although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations' (Art. 2, par. 3 common to all Geneva Conventions).

Thus for the first time the four Geneva Conventions constituted a corpus of 'genuine law of humanity' providing extended protection to the victims of armed conflicts (Bedjaoui 1986, p. 9).

During and after World War II, new categories of combatants appeared such as partisans, resistance movements, principally active in European countries occupied by Nazi Germany. These combatants were not legitimized by the existing law and the conditions required by the law of The Hague were not fulfilled. There was therefore a growing awareness that resistance move-

ments acted for political reasons and certain experts thought that they should be accorded a certain legitimacy.

The nature of conflicts also changed with the appearance of wars of national liberation against colonial territories and guerrilla warfare. In 1974 the process of decolonization was almost terminated, though war was still raging in the Portuguese colonies. The international physionomy, as represented at the UN, showed several blocks which tended to confront one another on very significant issues, but with some success as far as the extension of protection was concerned. Law had fairly 'entered into politics'!

3.3 *The Weight of Politics*

Efforts aimed at further development of international humanitarian law were continued in the 1950s and 60s by the ICRC, which organized Conferences of Experts. The Diplomatic Conference on the Reaffirmation and the Development of International Humanitarian Law Applicable in Armed Conflict, held in Geneva from 1974 to 1977, adopted two additional Protocols to the Geneva Conventions which constitute a further important phase in the development of humanitarian law. Among the most important innovations introduced in Humanitarian Law by the Protocols are:

- (a) The extension of the concept of an international conflict: in accordance with Art. 1 of Protocol I, international armed conflicts in which the Geneva Conventions and Protocol I are applicable included 'armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .'. This assimilation of wars of liberation to international conflicts was a typical example of the influence of political blocks and in this particular case, those of the Third World and of the Socialist countries.
- (b) The extension of the definition of the lawful combatant which took into account guerilla warfare. In 1974, guerrilleros were defined as legitimate combatants, having the right to the status of prisoners of war even if they did not fulfil

all the conditions fixed by international customary law. The compromise reached provided that the combatants had to distinguish themselves from the non-combatants.

- (c) The reinforcement of the protection of the civilian population against the effects of hostilities. Fundamental principles were reasserted: war was to be directed only at the military forces of the enemy State, and not at individuals, distinctions had to be made at all times between the civilian population and combatants and between civilians objects and military objectives. The population must not be attacked, it was specified, and terror, indiscriminate and reprisal bombings were outlawed. Starvation was prohibited as a method of warfare as well as reprisals against civilian populations. Additional provisions covered precautions necessary to prevent harm to the population and it became necessary to identify military objectives before attacking them. Even if it was admitted that 'precautions' and the 'principles of proportionality' were rather vague terms or likely to misinterpretation, the Protocols put forward a significant limitation to indiscriminate military power. However, progress was far more limited as concerned the problem of indiscriminate weapons affecting at the same time both civilian populations and military forces. Certain States wanted the 1974 Conference to take up the matter of the prohibition or limitation of specific weapons, but the nuclear powers opposed this proposal and the Protocols of 1977 did not deal with this question.¹⁴
- (d) The provisions of Protocol II extended the protection of the victims of non-international conflicts as first defined in Article 3 common to all Geneva Conventions. Here a paradoxical situation can be seen, as many States which had supported the movements of national liberation and promoted their wars to the status of international armed conflicts, adopted an opposing attitude towards those who did not conform to

this category. Rules covering a conflict between the legal government and rebels do not guarantee to the letter the status of legitimate belligerents, and once captured, they do not benefit from the status of prisoners of war. The progress made concerns the protection of non-combatants during civil wars, especially the civilians who do not take part in hostilities. The methods of combat are only regulated to spare the civilians, but in fact there is no real limit imposed on the war between governmental authorities and rebels.

- (e) As far as supervision is concerned, mechanisms such as 'Protecting Powers' established by the 1949 Geneva Conventions¹⁵ and reaffirmed with more precision by Protocol I provide the theoretical means to ensure the observance of humanitarian law. But experience showed that the system of Protecting Powers has hardly been used, particularly because of the difficulty of finding a neutral State acceptable to both belligerent States. Even the use of the ICRC as a 'substitute' for the Protecting Power proved to be cumbersome.

The 1970s thus combined the law of The Hague and the law of Geneva: the conduct of hostilities and combatants and the protection of victims of armed conflicts. The Protocols did not constitute a new set of rules, they merely reaffirmed, developed and made more precise the humanitarian rules of the Geneva Conventions. They updated the law under the weight of circumstances — of new types of participants, new forms of conflict and new means of destruction. In brief, they emphasized the fact that requirements had to be carefully defined to prevent States from abusing them.

4. *The Nature of Humanitarian Law*

It is customary to say that humanitarian law is a compromise or a balance between the requirements of humanity and military necessity (see Rousseau 1982, p. 21). For George Abi-Saab, humanitarian law is the 'dialectical relation between these two forces, in the light of historical experience

which determines the contents, contours and characteristics of the law of war at any moment of time' (see Abi-Saab 1984, p. 265). This assertion is worth being discussed as it will enable us to identify the specific elements of humanitarian law which make it different from the other branches of International Law.

4.1 *Humanitarian Law: a Compromise?*

Already in 1864, the St. Petersburg Declaration emphasized the 'technical limits to which the necessities of war ought to yield to the requirements of humanity'. The 1907 Hague Convention similarly is 'inspired by the desire to diminish the evils of war, as far as military requirements permit'. These provisions define the principle that the right of the Parties to the conflict to choose means and methods of warfare is not unlimited. This principle is reaffirmed in Protocol I of 1977 which states that 'it is prohibited to employ weapons, projectiles and material methods of warfare of a nature to cause superfluous injury or unnecessary suffering' (Art. 35). The non-use of weapons or their prohibition can be manifestations of State interests. In the 13th century Pope Innocent III proclaimed that the prohibition of the cross-bow could serve the interests of the knights whose armour was not proof against the penetrating force of this weapon! The military necessity of using or not using a weapon has often been determined by the interest of States or of certain elite, or more decisively by the military balance between the parties concerned.

The use of nuclear weapons has been declared illegal by the General Assembly of the United Nations in several resolutions, especially Resolution 1653 (XVI), adopted on 24 November 1961 with 55 votes in favour, 20 against and 26 abstentions. The vote showed that there was no consensus on this issue, or *opinio juris* as a support for this decision.

Despite continuing efforts to put restrictions upon the means whereby warfare is conducted, progress has been slow. The possession of, and ability to use if necessary, the most horrendous weapons have been seen by States as the only safeguards against

their use by other States.¹⁶ It is, however, the well understood interest of belligerents to respect some rules based on reciprocity and the prohibition of certain methods of warfare. In this case, the so-called compromise between military necessity and humanitarian considerations cannot be considered as a fully satisfactory explanation. The outlawing of certain methods of combat is rather achieved as the result of decisions taking into account the political, economic and military interests of belligerents.¹⁷

Another difficulty in enforcing the restrictions on warfare concerns the way in which some of the proscriptions are formulated. Article 23(e) of The Hague Regulations outlaws the employment of 'arms, projectiles or material calculated to cause unnecessary suffering'. The limits of 'necessary' suffering were never satisfactorily defined and even the 1977 Protocol I throws no light on the question.

If an armed conflict occurs, both sides may decide to undertake illegal activities in retaliation against alleged use by the other. During World War II, recourse to the bombing of civilian populations, although illegal,¹⁸ was largely used, either in retaliation for enemies' attacks¹⁹ or 'to secure a strategic advantage by terrorisation of the people'.²⁰ More recently, such reciprocal illegal acts took place during the Vietnam War. The government of the then Democratic Republic of Vietnam, considering that the conflict was a war of aggression led by the United States, declared that American pilots captured were to be considered as war criminals, and consequently could not benefit from the provisions of the Third Geneva Convention. The bombing of both combatants and civilians by the other parties to the conflict was considered by several authors as a measure of retaliation (see, for instance, Freymond, p. 89), although the US Government stated that its policy was to attack military objectives only.

A further example is the protection of civilian populations in territories occupied by Israel. Israel did not consider itself as occupying these territories and refused to apply *de jure* the Fourth Geneva Convention. Certain Israelis advocated recognition

of the applicability of the Fourth Convention in order to strengthen the moral position of their country, but the majority opinion was in favour of a solution of a political nature, giving priority to the safeguarding of the borders. Political considerations thus prevailed over humanitarian ones.

This intermingling of humanitarian concepts and military considerations makes it impossible for humanitarian law to prevent States in a conflict situation from making war. 'Humanitarian law', according to Meyrowitz, 'restrains belligerent States from making war as they would like, and as they could do it' (Meyrowitz 1984, p. 428), but we can, in the words of Cassese 'hope that law will moderate some of the more dreadful manifestations of war' (Cassese 1986, p. 232).

Beyond its apparent paradoxes and compromises, humanitarian law appears as a body of law the principles of which transcend the rules which compose it. It exists because it is necessary, and if it is necessary, it is because it is a manifestation of the safeguard of humanity. Again, Meyrowitz states: 'In humanitarian law, States, peoples, men, humanity "lay in a stock of humanity", in the expectation of inhumanity, of "the scarcity of humanity", inherent in war' (Meyrowitz 1984, p. 430). Thus are summarized the specificities of International Humanitarian Law.

4.2 *The Specificities of Humanitarian Law*

4.2.1 *Towards Universal Application*

Since the 19th century, humanitarian law has become applicable to the widest possible number of States and situations of conflict. In 1949 the *si omnes* clause was eliminated from all the Geneva Conventions by common Article 2, paragraph 3.²²

Article 1, common to the four Conventions, provides that 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. This provision is taken up again in the Protocols Additional to the Geneva Conventions. As a consequence, these legal instruments are not subject to reciprocity for their implementation (see

Abi-Saab 1984, p. 266). This was corroborated by Article 60.5 of the Vienna Convention on the Law of Treaties of 1969 which stipulates that the provisions specifying the conditions of termination or suspensions of the operation of a treaty as a consequence of its breach 'do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.

This trend towards universality can be understood through a set of principles and rules which appear fundamental for the respect of the human being and the elementary considerations of humanity.

4.2.2 *Humanitarian Law: An Absolute Involvement*

Humanitarian law is therefore no longer based on reciprocity, but has become an absolute and universal commitment. It has been accepted as one of the great charters of humanity having a declaratory value. The Nuremberg Trial judged that humanitarian rules contained in the Hague Convention of 1907 and in the Geneva Convention of 1929 were so ingrafted in men's conscience that they had to be considered as a part of customary international law (Bedjaoui 1986, p. 11). A significant proof is the fact that States which were legally allowed to denounce the Geneva Conventions never did so.

As a consequence, humanitarian law underlines the *erga omnes* character of its obligations. Each State party has a *locus standi* to protect against violations of the Conventions and to demand their cessation, even if it is not directly concerned. It is the defence of the superior common interests of humanity.

4.2.3 *Humanitarian Law: an Imperative Law*

Certain provisions of international humanitarian law are of a peremptory character (*jus cogens*). These rules are aimed at protecting interests going beyond the individual interests of States, and consequently they cannot be derogated from.

4.2.4 *Humanitarian Law: A Law for the Individual*

The evolution of humanitarian law clearly shows that the protection of the individual is its ultimate aim. In 1949 the ICRC played an important role by initiating a stronger protection of the individual, such as Article 7 common to the first three Conventions, and Article 8 of the fourth Convention, stating that 'Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention . . .'. Article 7 also provides that 'No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them'.

A decisive step was taken in 1949 with the adoption of Article 3 to all four Conventions. The State was no longer authorized to treat as it wished citizens who revolted against it. The real commitment of States in internal conflicts is made by each State vis-à-vis any group of its people rising against it. Moreover, the most important provisions of Protocol II institute guarantees for all persons not taking part in hostilities, especially women and children, and humane treatment of persons deprived of their liberty.

5. *Conclusion*

The basic premise of humanitarian law is the existence of conflicts. Its aim is to limit the effects of hostilities and to alleviate suffering. Thus it contributes to the promotion of a spirit of peace springing from its humanitarian intervention to prohibit unnecessary suffering and acts which are not dictated by military necessity.

It is true, however, that the apparent paradoxes and contradictions linked to humanitarian law can be detrimental to its credibility; it is also true that the body of humanitarian norms is a complicated one and may be prejudicial to its understanding and practical application.

Moreover some experts regret its gaps and deficiencies, like its failure to deal with the nuclear issue or situations of internal disturbances and tensions which are excluded from its field of application. Others rather underline that the stumbling-blocks of

humanitarian law are the lack of control and enforcement as the present mechanisms are now subject to State consent.

Humanitarian law, as a compromise between the principle of humanity and military necessity — or rather, as we tried to show, State sovereignty and interests — is a mixture of both idealism and realism. It is constantly struggling for survival between these two extreme views, trying to avoid useless suffering if not violence itself. 'It is a policy of lesser evil which ultimately pays dividends since humanitarian and political concerns are not incompatible' (Cassese 1986, p. 256).

In the future, the evolution of international relations, changes in strategies and combat methods, and the invention of new weapons may again upset this balance between humanism and necessity. But as humanitarian law is based on universal values and supported by principles which are really the underlying common ground of the human race, the major principles of protection which have an absolute value will remain intact. The real challenge will be to adjust the mechanisms of application.

Finally, it is important to emphasize that the legal rules of humanitarian law introduce a minimum of humanism in States' behaviour, and to quote Cassese again, 'they represent a moral and political parameter in the hand of public opinion, to appreciate the conduct of States' (ibid).

And after all, is not humanitarian law, which is said to proceed from a concern for humanity, simply common sense?

NOTES

1. See *International Review of the Red Cross*, No 221, March–April 1981, p. 76.

The concept of International Humanitarian Law often calls for the use of the following terminology: *International humanitarian law applicable in armed conflicts*: this is the current expression, used by the Diplomatic Conference held in Geneva from 1974 to 1977, which adopted the two Additional Protocols to the 1949 Geneva Conventions; *Law of war*, or *Law of warfare* or *Law of armed conflicts* or *Law of The Hague*: these terms are still used in military circles and also by lawyers who want to put emphasis on the rights and duties of belligerents in the conduct of military operations; the *Law of Geneva* used by some authors in references to the

1949 Geneva Conventions; the Law of Geneva tends to safeguard military personnel placed 'hors de combat' and persons not taking part in hostilities; *Human Rights in Armed Conflicts*: this expression has been used by the United Nations at the Teheran Conference on Human Rights in 1968 and thereafter at each session of the UN General Assembly. All these expressions refer to one common concept from different approaches; they will be equally used in the present paper.

2. United Nations Charter, Art. 51 related to the right of individual or collective self-defence; Art. 42 related to actions by air, sea or land forces taken by the Security Council to maintain or restore international peace and security.
3. For Christianity, Christ had preached love for one's neighbour. Human love should be a reflection of divine love, absolute and without motive and be extended to everyone, even to one's enemies. This doctrine, however, was to be deformed under the influence of Saint Thomas Aquinas and of the Casuist school, by providing believers in God with a justification for war. If a war was desired by God, the adversary was therefore the enemy of God and could not possibly wage any but an unjust war.
4. For instance, the member States of the amphictyony, a union of Greek cities for the protection of religious sanctuaries, promised under oath not to poison waters during wars.
5. Popes and ecclesiastical Councils prohibited the conduct of hostilities during certain periods (*Treuga Dei*) or against certain categories of persons like priests, merchants and students.
6. The resolution adopted by the Second Lateran Council in 1139 had prohibited on pain of excommunication the use against Christians of 'the art of bringing death in the form of shooting devices and bows', while the Third Lateran Council of 1179 prohibited on pain of excommunication the selling of Christian prisoners of war as slaves.
7. Between 1581 and 1864, no fewer than 291 agreements were concluded — Pictet, *op. cit.*, p. 19.
8. Grotius was really one of the great figures at that time as he stated that law was no longer the expression of Divine Justice but of Human Reason. Whilst he did not abandon the idea of 'just war', he felt that a just cause authorizing a State to resort to war did not abolish the duty of belligerents to observe the law of war.
9. 'The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms, but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men whose lives no one has any right to take'. Pictet, *op. cit.* p. 23.
10. 'Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, 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 civilized

- peoples, from the laws of humanity, and from the dictates of the public conscience', 'De Martens clause' of the Preamble to the 1907 Hague Convention No IV.
11. 'To be commanded by a person responsible for his subordinates; to have a fixed distinctive emblem recognizable at a distance; to carry arms openly; to conduct their operations in accordance with the laws and customs of war'. And for the category of inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms, without having had time to organise themselves, they were regarded as belligerents provided that they carried arms openly and if they respected the laws and customs of war — Art. 1 and 2 — Regulations respecting the laws and customs of war on land — Annex to Convention No. IV of 1907.
 12. The rule found expression in Art. 22 of the Regulations annexed to The Hague Convention concerning the Laws and Customs of War on Land adopted in 1899 and 1907 by the two Hague Conferences.
 13. Let us mention the creation by the ICRC of a central Agency for Prisoners of War during World War I. This measure relieved the anxiety of a great number of families; it also led to the inspection of internment camps by neutral delegates.
 14. But the Diplomatic Conference recommended that another Conference be called to deal with this matter. This Conference met under the auspices of the UN in 1979 and 1980 and adopted the 'Convention on Prohibitions or Restrictions on the use of certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects'.
 15. A Protecting Power is a neutral or any other State which is not a party to the conflict, and which has agreed, after having been designated by a party to the conflict and accepted by the adverse party, to carry out the functions assigned to a Protecting Power under the Conventions (Art. 8,8,8,9 of the 1st, 2nd, 3rd and 4th Conventions) and Protocol I (Art. 5). Its role is to attend to the treatment of prisoners of war and civilian internees, by assuming liaison functions between the Parties to the conflict, bringing relief supplies and undertaking the supervision of such relief activities, in conjunction with the ICRC.
Since 1949, the only Protecting Power designated under the Geneva Conventions has been Switzerland in the conflict between India and Pakistan in 1971–72.
 16. For instance, in the case of a significant number of the Parties to the Geneva Protocol of 1925, there are reservations stipulating that the Protocol should cease to be binding 'in regard to an enemy State if such State or any of its allies fails to respect the prohibitions laid down'. On this point, see Greig (1985, pp. 46–85).
 17. *Ibid.*, p. 54 — As Pictet said: 'To avoid the enforcement of humanitarian law, "Military necessity" has often been cited as a justification for disregarding it'. General Eisenhower, commander of Allied Forces in Europe during World War II, said, however, in a Christmas message to his troops: 'I do not wish the expression "military necessity" to mask slackness or indifference; it is sometimes used where it would be more exact to say military convenience or even personal convenience'.
 18. In September 1938, the League of Nations Assembly had adopted a resolution which recognized, among the principles it regarded 'as a necessary basis for any subsequent regulations', one stating that the 'intentional bombing of civilian populations is illegal'.
 19. The use of air attacks against centres of population was considered in evidence before the Nuremberg Tribunal in 1946. Commenting upon the bombing of London and other English cities, the defendant Goering stated that those attacks were commenced in retaliation for British attacks on German cities. Quoted by Greig, *op. cit.*, p. 59.
 20. The defendant Kesselring was closely examined on the bombing of Rotterdam on the day of the Dutch surrender. According to him, the purpose of the raid was to secure a strategic advantage by terrorization of the people. Quoted by Greig, *ibid.*, p. 58.
 21. Fourth Geneva Convention, Art. 23: '... The obligation of a High Contracting Party to allow the free passage of the consignments... is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:
 - (a) that the consignments may be diverted from their destination,
 - (b) that the control may not be effective, or
 - (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.'
 22. 'Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof', Art. 2, par. 3 common to the four Geneva Conventions.

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