GUERRILLA WARFARE AND HUMANITARIAN LAW

by Michel Veuthey

The Henry Dunant Institute is currently publishing a book in French only under the title Guérilla et droit humanitaire *in its "Collection scientifique."* [1] *The author is Mr. Michel Veuthey, an ICRC collaborator, who, since 1967, has taken part in the work of reaffirmation and development of humanitarian law.*[2] *Mr. J. Pictet, Vice-President of the ICRC, associate professor at the University of Geneva and director of the Institut Henry Dunant, introduces the book with the following preface:*

At last we have a complete work on guerrilla warfare, thus fulfilling a real need. Anyone who wishes to study the subject in detail should have a copy of this book.

Mr. Michel Veuthey has in fact presented us with a valuable work, well thought out, objective, and written with perspicacity, warmth and talent. We should be grateful that he has chosen a subject of such topical interest. It is impossible nowadays to be unaware of this type of conflict, which is known to have produced as many casualties as the Second World War.

Guerrilla warfare can be compared to the retiarius who has only a net and a trident to challenge the Myrmidon clad in armour; it is David's fight against Goliath, or even the eternal antagonism between Cain, the tiller of the land, the sophisticate, and Abel, the simple shepherd. Guerrilla warfare, however, is not the prerogative of one party or ideology: it is in the image of man, both good and evil, liberating his noblest and

[1] Excerpts given here have been translated by the ICRC.

[2] This book, costing Sw. Frs. 54.—, may be obtained at any bookshop or from the Henry Dunant Institute, 114, rue de Lausanne, 1202 Geneva, Switzerland.

basest instincts. If war is the *ultima ratio* of princes, guerrilla warfare is the last resort of desperate people. For, as Sartre said, "all violence is failure".

Nowadays, however, the phenomenon has taken on new proportions, strategies and policies. From the spontaneous act that it started out to be, guerrilla warfare has become organized and premeditated. It is to be feared that its escalation will compromise the application of humanitarian law mainly because it resembles total war. If "all means are permissible", the fairness of the conflict is undermined: if the enemy is everywhere and in disguise, it will be less easy to distinguish between military personnel and civilians and attacks will become more indiscriminate. We would thus slip into a state of uncontrolled violence, anarchy and debasement of law.

There is, however, a legacy from centuries of effort, a common denominator in human conflicts: it is humanitarian law, which remains applicable in all circumstances, even in extreme situations such as guerrilla warfare.

As Mr. Veuthey points out, humanitarian law is a compromise between military requirements and human needs. As these two factors are variable, this law is constantly evolving. This is the crux of the matter. Should we allow the evolution of war techniques to cause the breakdown of law? For example, is the invention of a new weapon of destruction enough to make a whole chapter of law obsolete? Can the mere physical existence of guerrilla warfare have such an effect? The answer is no, otherwise the dividing line between humanity and military requirements would always be shifting in the same direction, that is to say, towards man's decline, since basic humanitarian requirements remain very much the same whereas techniques of warfare are making enormous advances. Principles should remain sacrosanct, whatever the form of the conflicts, whereas the provisions for application and the detailed rules may be altered. This is why law should be periodically revised, as at present. Mr. Veuthey's book has come at the right moment. In his conclusions he outlines the various approaches to the problem and quotes in particular the proposals of the International Committee of the Red Cross, embodied in the draft Protocols currently being studied by the Geneva Diplomatic Conference.

Today it is essential to intensify awareness of the implications of humanitarian law, a purely protective law to be applied wherever there

is human suffering. To add anything of a different nature to the law would be to corrupt it, and as Mr. Veuthey writes at the end of his book: "Emphasis must be laid on the extraordinary nature of humanitarian law, which can qualify neither conflicts nor parties nor even protected persons except in their capacity as human beings."

We give below some excerpts from this book, the importance and topicality of which have been underlined by Mr. Pictet. From the first chapter we reproduce several pages entitled "Towards a fresh conception of humanitarian law":

Humanitarian law as it stands is the outcome of a particular conception, formed during the second half of the 19th century and the first half of the 20th century, of the interaction of forces, both international and internal.

"It now appears necessary to transcend the existing rules of international humanitarian law as being too complex and too restricted not only in the protection they afford but above all in the group of persons to be protected and in their spheres of application."

The concept of humanitarian law has indeed developed since Solferino: it is no longer concerned only with the plight of wounded fighting men and prisoners of war, but with the fate of whole populations, perhaps of the entire human race.

The traditional laws of war were intended to permit a number of state or quasi-state entities to commit acts of violence normally considered criminal and, at the same time, to protect their own members against excessive violence.

What is imperative at present, therefore, is not so much to seek new definitions or to extend them to other situations, entities or categories of persons, as to work out a new protective, rather than restrictive, humanitarian law. This should be concerned less with legal and political considerations in relation to conflicts, territories or even protected persons and property, less with impunity conferred by prestige, than with safeguarding fundamental human rights.

Humanitarian law has been and will remain the result of a compromise between the necessities of war and of public order on the one hand and the requirements of humanity on the other.

The current resurgence of state sovereignty, both in time of peace and in time of armed conflict, can accentuate these necessities: however,

it should not be impossible to rediscover in the present day a host of political, moral and religious considerations requiring in all circumstances respect for the life, freedom and dignity of human beings and protection of the essentials for their survival.

This respect for human beings, their values and essential property, is necessary not only on a personal level within the same civilization and ideology but even more so for the entire human race. Acknowledging the common human nature of every person, even an enemy, in any situation, any kind of armed conflict, confrontations of all types between nations as well as within the same nation, this respect need not depend on any reciprocity; humanitarian law cannot be reduced to a set of rules.

"Neither can humanitarian law be considered as a legal or philosophical abstraction, a set of idealist norms, divorced from current political and military reality."

Humanitarian law *is* political both in its very essence—which is to protect people and peoples as well as the entire human community—and in its necessary insertion into the reality of human societies.[1]

Even military necessity and the general requirements of state sovereignty, far from hindering the application of humanitarian law, demand that it be respected, even in guerrilla warfare.[2]

In fact the important thing in theory as in practice is to merge the humanitarian, idealist approach with the political, realistic approach, to benefit from the experiences of the past, especially of the 20th century and more particularly since 1949 in conflicts outside Europe, without fostering too many comforting illusions on the perfectibility of human nature but rather by taking into account new forms of war and new forces at work in the present international community in order to lay down humanitarian laws which fulfil today's needs for justice and protection.

Before drawing up additional rules, it would be necessary to outline the main principles of the conception of humanitarian law in present-day society. As Pictet in fact wrote:

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[1] This does not mean, however, that respect fot humanitarian norms and principles may be subordinated to questions of political expediency: indeed, this would be a very bad policy, a short-term view rather than the long-term outlook implicit in legal obligations, especially those of a humanitarian character.

[2] See below, IX. Instruments and factors of application, and, in particular, 3. Military effectiveness.

"In international humanitarian law, as in every other juridical sphere, principles are of capital importance. They motivate the whole, enable the respective values of the facts to be appreciated and also offer solutions for unexpected cases. They contribute towards filling gaps in the law and help in their future development by indicating the path to be followed. As a summary they can be easily assimilated and remembered." [1]

In a nutshell, the important thing, as Richard R. Baxter recently stated, is to "put more matter and less art into the current conception of humanitarian law" [2] or, to paraphrase Pierre Vella, to transcend the extreme concern for security, for exact wording, for maintaining the established legal structures and instead to draw on the dynamism, the generosity, the broad vision and the firm judgement of the policy-makers.[3]

We now give an extract from chapter IX, which bears the general heading. "Agencies and factors of application." In the first part of this chapter, the author deals with legal procedures, i.e., (a) the responsibility of the High Contracting Parties, (b) the action of the protecting Powers, (c) the role of the ICRC, (d) the intervention of other bodies such as the National Societies of the Red Cross and of institutions to promote respect for human rights. The extract which we reproduce below relates to those factors of application which are not of a legal nature.

As has been seen, guerrilla warfare upsets many traditional legal patterns, such as categories of conflicts, of belligerents, of combatants, of civilians, treaty rules.

Legal procedures for the application of humanitarian principles have likewise been upset and their success has varied. Even in cases where one or other has been applicable, it must be admitted that their role would have been even more limited if other, non-legal, factors had not made the parties to guerrilla warfare realize that they should observe certain humanitarian limitations.[4]

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[1] Pictet, *Principles of International Humanitarian Law*, pp. 25-26.

[2] Baxter R. R., "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law", *The Harvard International Law Journal*, Vol. 16, No 1, Winter 1975, p. 25.

[3] Vellas, P., *Droit international et science politique*, Paris, 1967, p. 9.

[4] See Falk, R. A., in his introduction to the book, *The International Law of Civil War*, Baltimore, 1971, p. 79 "There is little evidence that governments shape their response to civil-war adversaries by reference to legal rules and procedures but rather shape policy mainly on the basis of calculation of prudence and military necessity."

These factors seemed to us to be as follows: reciprocity, public opinion, military effectiveness, economics, return of peace, ethics.

In fact, even if the likening of guerrilla warfare to total war, and the dissymetry of parties on the ideological, military and legal level, have occasionally convinced some people of the lawlessness of guerrilla warfare and of the impossibility of applying to it any sort of norms, even humanitarian ones,[1] we could not bring ourselves to endorse this negative judgement. Even in conventional warfare, it would be wrong to think that one legal mechanism alone, such as the institution of the Protecting Power—assuming that it works—is sufficient in itself to ensure the implementation of humanitarian norms.[2]

Extra-legal or para-legal factors, in fact, play a larger part in implementing humanitarian rules and principles, than do the traditional procedures provided for by international humanitarian instruments,[3] thereby ensuring the relevance of humanitarian law to guerrilla warfare.

1. Reciprocity

Despite the fact that, since the Geneva Conventions of 1949 [4] and the Vienna Convention of 1969 on the Law of Treaties,[5] reciprocity has not been a legal condition for the application of humanitarian rules,

[1] Telford Taylor, *Nuremberg and Vietnam*, New York, 1970, p. 173 reiterates the opinion of Colonel William C. Corson (*The Changing Nature of War*, 1970) who writes: "There are no agreed 'rules of land warfare' between antagonists (...) when one (..) is a regular force (..) the other includes old men, women and children as well as guerilla troops (...) And it is doubtful such rules can even be written."

See also Stanley Hoffmann, "International Law and the Control of Force", in *The Relevance of International Law, Essays in Honor of Leo Gross*, Cambridge, Mass., 1968, p. 43: "Conventional wars are to a large extent symmetrical; unconventional war is not. It is an absolute war in the sense of ends—a fact that always condemns regulation to fragility."

[2] G.I.A.D. Draper, "International Law and Armed Conflicts", *International Affairs*, January 1972 (Vol. 48, No. 1), pp. 46ff, reviews the system of the Protecting Power (pp. 46-49), reprisals (pp. 49-51) penal procedures (pp. 51-54), training and instruction (pp. 54-58) to conclude (pp. 58-59): "No one mechanism of ensuring the regular observance of international humanitarian law is likely to succeed unaided."

[3] For a good summary of the implementation procedures provided for by the Geneva Conventions, see in particular Volume II ("Measures intended to reinforce the implementation of the existing law") presented by the ICRC at the first session of the Conference of Government Experts (Geneva, 1971), and also F. Siordet, *The Geneva Conventions of 1949. The Question of Scrutiny*, Geneva 1952, 82 pp. For a more general treatment, see Berber, F., *Lehrbuch des Völkerrechts*. Volume II, *Kriegsrecht*, Munich 1969, pp. 228 ff, Chapter 10, "Die Garantien des Kriegsrechts".

[4] The Geneva Conventions do not deal with reciprocity, except in the third paragraph of article 2 (common to each Convention), by providing for the non-renunciation of rights (art. 7 of the First, Second and Third Conventions; art. 8 of the Fourth Convention) and by prohibiting reprisals (art. 46 of the First Convention, 47 of the Second Convention, 13 of the Third Convention, 33 of the Fourth Convention). See in particular on this subject: Pictet, *Commentary I*, p. 25, Pictet, *Red Cross Principles*, p. 88. Pinto, R. "Les règles du droit international concernant la guerre civile", *Recueil des Cours*, vol. I, 1965, p. 530. Scholsem, J. C. "L'application des Conventions de Genève", *Annales de droit international médical*, December 1968, No. 18, p. 31. Schwarzenberger, G., *The Frontiers of International Law*, London, 1962, p. 267. See also the appeals made by the ICRC in October 1973 to the parties to the Middle East conflict (published in press releases 1180 dated 28 October and 1182 dated 6 November 1973).

[5] Art. 60, par. 5. See Reuter, P., *La Convention de Vienne sur le droit des traités*, Paris 1970, p. 47.

it is nevertheless a real factor which has played a vital role in implementing humanitarian law in general [1] and which has acquired new significance in guerrilla warfare: reciprocity and, frequently, reprisals [2] have as a rule led to better treatment of prisoners [3] but worse treatment of civilians. [4] Given the lack of balance between the opponents, reciprocity becomes both relative and generalized in guerrilla warfare: the treatment of prisoners by one side affects the treatment of prisoners by the other side (whatever their status): air raids are made in reply to the throwing of hand grenades; and attacks on civilians by air force or commando units have a decided influence on the treatment awaiting captured pilots and guerrilla fighters, such treatment in turn sometimes resulting in fiercer attacks against civilians. [5] Therefore, while it must be stressed that reciprocity in guerrilla warfare plays a significant part in implementing humanitarian law, the limits of such reciprocity should be noted and the relevant conclusion drawn: reciprocity, as the ICRC underlined in 1969, is a *de facto* element not to be ignored; it would however be very dangerous to accept it as a legal principle in applying humanitarian law. [6] As several experts pointed out in 1971, "reciprocity did not mean that respect for the rules would have the same complexion on one side as on the other; it was necessary to take into account the possibilities on either side. What was important was that there should be the greatest possible measure of reciprocity, and that it should be applied in all good faith." [7] Later on the same experts considered that any regulatory control of the activities of guerrilla fighters should conform to the principle of reciprocity, of a comparative reciprocity,

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[1] See also in particular: Berber, *op. cit.*, pp. 66 and 230. Frei, *loc. cit.*, pp. 17-21; Giraud, *loc. cit.*, p. 619; Kunz, *loc. cit.*, p. 879; Lauterpacht, H. "The Limits of the Operation of the Law of War", *BYIL*, 1953, p. 212; Pictet, J., *Red Cross Principles*, Geneva, 1955, p. 89; Proudhon, P. J., *La guerre et la paix*, Paris, 1927, p. 265; Pufendorf, S. de, *Le droit de la nature et des gens*, Amsterdam 1706, p. 426 (Book III, chap. VI, par. VII); Schelling, T.C., *Arms and Influence*, New Haven, 1968, pp. 24 and 139; Stone, J., *Legal Controls of International Conflict*, London, 1959, p. 353; Werth, *op. cit.*, p. 712; Zorgbibe, C., "La guerre civile", *Annales de la Faculté de droit et des sciences économiques de Clermont*, 1969, Vol. 6, pp. 76-77, 162, 169.

[2] See above, 5.5 "Reprisals".

[3] See above, 7.2.3 "Interferences (Prisoners).

[4] See above 8.2.4. "Interferences" (Civilians).

[5] On this problem, see Duff, P., "Prisoners of War in North Vietnam", *Vietnam International*, Vol. V, Nos. 1/2, pp. 23-24; Pinto R., "Hanoï et la Convention de Genève", *Le Monde*, 28-29 December 1969, p. 5. In this second article, entitled "Un problème de réciprocité", Pinto suggests in conclusion: "Les uns ne peuvent-ils envisager d'arrêter leurs raids de bombardiers géants sur la totalité du territoire vietnamien; les autres, de renoncer au terrorisme urbain et d'accorder le statut de prisionners de guerre aux pilotes — poursuivis ou non"?

[6] ICRC, *Reaffirmation*, p. 96.

[7] ICRC, *Conference of Government Experts. Report on the work of the Conference*, Geneva, 1971, par. 343, p. 64 (remark made about "freedom fighters").

without however benefiting one of the parties.[1] This is what Max Huber wrote in 1944:

" Les règles du droit international ne sont en général appliquées que sur la base de la réciprocité. Cependant, pour obtenir un résultat pratique, la réciprocité seule ne suffit pas; il faut encore qu'il y ait une certaine équivalence dans les intérêts en jeu. Il se peut que la réciprocité repose sur des intérêts différents mais simultanés. " [2]

The equivalent nature and simultaneous existence of interests should not be left to chance or to the insight of the belligerents: even in guerrilla warfare, opposing combatants may become aware of a common interest, although it is clearly no longer the mutual respect, as between the members of a trade or guild, that the mercenaries of Machiavelli's time felt for one other. [3] Yet over a period, even enemies whose ideologies and methods of combat are totally opposed develop a mutual respect leading to some degree of solidarity which tends to limit the atrocity involved in violence.[4]

" Trop souvent toutefois, la réciprocité n'est qu'un facteur d'escalade et de dégradation de la violence, et ce n'est que trop tard, ou partiellement, que s'établit cette prise de conscience. Aussi, pour exclure les formes anarchiques de la réciprocité faudrait-il retrouver l'aspect positif de la réciprocité en établissant des limitations et des garanties équilibrées soulignant l'intérêt pour les deux parties à la guérilla de respecter le droit humanitaire. " [5]

Lastly, it must be emphasized that the observance of humanitarian rules and principles is not and cannot be the monopoly of one party alone: it is a task that belongs to every person in command and to every combatant.

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[1] *Ibid.*, par. 365, p. 76.

[2] Huber, M., *Principles Tasks, and Problems of the Red Cross in International Law*, Geneva 1944, p. 31.

[3] See also Harding, I., *The Origins and Effectiveness of the Geneva Conventions for the Protection of War Victims*, Geneva 1969, p. B-2, 19; Machiavelli, *Le Prince*, Paris, 1963, pp. 85-93, chapter XII ("Combien il y a d'espèces de gens de guerre, et des soldats mercenaires"); Schwarzenberger, G., "From the Laws of War to the Law of Armed Conflict", *Journal of Public Law*, 1968, vol. 17, p. 63.

[4] See also: Baldwin, *loc. cit.*, p. 30 (on the "Kommandobefehl"); Buchheim, H. (*et al.*), *Anatomie des SS-Staates*, Munich, 1967, vol. II, p. 148 (concerning the "Kommissarbefehl" felt by certain senior German officers in Russia to be an attack on this mutual respect, as was the "Kommandobefehl" by Rommel in Africa); Chaliand, G., *Lutte armée en Afrique*, Paris, 1967, p. 105, on the fight between the PAIGC and Portuguese troops in Guinea-Bissau; Fontaine, A., *Le Monde* of 18 October, 1973, p. 5 (concerning the Middle East conflict); Giraud, E., "Le droit international public et la politique", *Recueil des cours*, vol. 110, 1963, p. 788 ("Les relations concernant la guerre"); Montgomery, *op. cit.*, p. 547.

[5] Meyrowitz, H., *Le principe de l'égalité des belligérants*, Paris, 1970, puts it very well, p. 251:

"Indépendamment de son fondement de justice, la réciprocité constitue le résultat et l'expression permanente d'une vérité d'expérience: les normes du droit de la guerre n'ont de chance d'être observées que si les sujets des normes ont le même intérêt à s'y soumettre."

2. Public opinion

One political factor in the implementation of humanitarian law, which is of particular importance given the essentially political nature of guerrilla warfare, is public opinion. The representative of the Democratic Republic of Vietnam at the second session of the Diplomatic Conference on Humanitarian Law, His Excellency Ambassador Nguyen Van Luu, made a statement, based on the experience of his own country, to the effect that public opinion was the very source of humanitarian law.[1] Clearly, at a moment when public opinion has been roused by atrocities committed by one side or another, and can therefore tip the scales in the vital area of combat, namely, the political arena,[2] the domestic or international image is a determining factor.

It would however be going too far to consider recourse to public opinion as a cure-all, a universal substitute for all legal factors of implementation. President Woodrow Wilson of the United States intended to use public opinion as a lever for the application of sanctions based on collective security to ensure the repression of acts contrary to international order.[3] In point of fact, public opinion can sometimes play a negative role: Victor Hugo recounts in his *Choses Vues* that the excitement of the crowd would determine the execution of hostages by the Commune; in the same way, a population subject to indiscriminate attacks, or whose loved ones are being tortured, will pressure political and military leaders into taking reprisals.[4] The taoist proverb "He who knows speaks not; he who speaks knows not",[5] is often borne out by the information given to the public, who are, in any case, more inclined to believe in the enemy's atrocities than in those of their own side [6] if they are not sunk into total indifference, their sensitivities blunted, their

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[1] CDDH/I/SR.17, p. 14. Commission I, Friday morning, 7 February 1975.

[2] See above 2.3. Characteristics of guerrilla warfare; also Millis, W. *War and Revolution Today*, Santa Barbara, 1965, p. 2:

"The course of military operations is less important than the reactions of public opinion—not only in the local area concerned but in the great, stable areas of the world."

Hooker, W. S., and Savasten, D. H., "The Geneva Convention of 1949: Application in the Vietnamese conflict", *Virginia Journal of International Law*, 1965, Vol. 5, No. 2, p. 264:

"The power of informed public opinion could be a serious deterrent to the mobilization of popular support for the use of inhumane methods of warfare by national leaders bent on destroying any threat to their power."

[3] Guggenheim P., "L'organisation de l'opinion publique dans la communauté internationale", *Annales d'études internationales*, Geneva, 1970, p. 155.

[4] See 5.3 (Raids): 5.5 (Reprisals): 5.6 (Terrorism): 5.7 (Torture)

[5] Lao Tseu, *Tao Te King*, Paris 1973, p. 80, No. 56, first paragraph.

[6] Orwell, G., *Homage to Catalonia*, Harmondsworth, 1966, pp. 228-229.

alertness deadened, saturated with pictures and descriptions of horrifying events.[1] It is nonetheless true to say that recourse to public opinion, hailed by several jurists as an important factor guaranteeing respect for international law,[2] has been able to play a considerable role in guerrilla warfare in reducing indiscriminate attacks against civilians [3] and the execution and torture of prisoners.[4] In guerrilla warfare, "home-front" public opinion certainly carries as much weight as international public opinion if not more.[5]

3. Military effectiveness

Military effectiveness is compatible with the observance of humanitarian principles, in conventional warfare and in guerrilla warfare [6] in which, despite apparent differences which we shall mention later, military efficiency as well as humanity demands respect for and protection of civilians and their essential goods. It is equally necessary in guerrilla warfare not to alienate or antagonize the civilian population by indiscriminate attacks,[7] but to win them over by social and political measures. Sparing the lives of enemy combatants and guaranteeing them humane treatment and the prospect of release are means to encourage surrender.[8] Likewise, an important factor in the observance of humanitarian law,

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[1] Duverger, M., "L'indifférence", *Le Monde*, 8 July 1972, pp. 1 and 8.

[2] See also Ago, R., *La phase finale de l'œuvre de codification du droit international*, Geneva, 1968, p. 17; Berber, *op. cit.*, p. 230; Bierzanek, R., "Towards More Respect for Human Rights in Armed Conflicts", *Studies on International Relations*, 1973, No. 1, p. 84; Greenspan, M., *The Modern Law of Land Warfare*, Berkeley, 1959, p. 11; Spaight, J. M., *War Rights on Land*, London, 1911, p. 6.

[3] See also Fanon, *op. cit.*, pp. 38-39; Hastings, A., in *The Times*, London, 10 July 1973, p. 1.

[4] Fraleigh, "The Algerian Revolution" in Falk, R. A. (Ed.), *The International Law of Civil War*, Baltimore, 1971, p. 194.

[5] On home-front public opinion, see also Berber, *op. cit.*, p. 66; Escarpit, R., "Le regard", *Le Monde*, 26 November 1969, p. 1; Lebjaoui, M., *Vérité sur la révolution algérienne*, Paris, 1970, p. 82; Oliveira, H. de A., *A Batalha de Certeza*, Lisbon, 1966, p. 57; Sulzberger, C. L., "A New Kind of War", *IHT*, 14, 16, 19 May 1969. On international public opinion, see in particular: Berber, *op. cit.*, p. 65; Buchheim, *op. cit.*, p. 193; Grosser, A., "Nuremberg en notre temps", *Le Monde*, 3-4 October 1971, p. 3; Harding, *op. cit.*, p. B 2-18; Sulzberger C. L., "The African Vietnam", *IHT*, 28 April 1971.

[6] See particularly: Baldwin, G. B., "A New Look at the Law of War: Limited War and Field Manual 27-10", in *Military Law Review*, March 1959, p. 10; Boissier, P., *Histoire du Comité international de la Croix-Rouge*, Paris, 1963, p. 478; Giraud, E., "Le respect des Droits de l'homme dans la guerre internationale et dans la guerre civile", in *Revue du droit public et de la science politique en France et à l'étranger*, July-August 1958, p. 635; Kunz, J. L., "The Laws of War", in *The Changing Law of Nations*, pp. 873-874; Pictet, J., "La restauration nécessaire des lois et coutumes applicables en cas de conflit", in *Revue de la Commission Internationale des juristes*, No. 1, March 1969, p. 41; Royse, W., *in* ICRC, *La protection des civils contre les bombardements. Consultations juridiques*, Geneva, 1930, p. 114. For guerrilla warfare in particular, see: Loverdo, C. de, *Les maquis rouges des Balkans*, Paris, 1967, p. 194; Majumdar, B. N., *The Little War*, New Delhi, 1967, pp. 167 and 170.

[7] See above 8.2 "Treatment of civilians (persons and property) in guerrilla warfare".

[8] See above 7.2 "Treatment of prisoners in guerrilla warfare".

even in the midst of guerrilla warfare,[1] is the maintenance of discipline in troops by not allowing them to kill and destroy indiscriminately, or to commit atrocities against the enemy, and soon to turn against their own leaders. To this end, only training and credible instruction will instil knowledge of and respect for humanitarian law in people's minds; [2] the simplicity of these rules will facilitate their dissemination and thus their implementation,[3] especially if they are coupled with a system of *penal sanctions*[4] guaranteeing the observance not only of humanitarian law but also of discipline in general.

4. Economic considerations

Economics is another factor conducive to the implementing of humanitarian law: in ancient times, according to Montesquieu, the law of nations required prisoners of war to be made slaves, to prevent their being killed; [5] in the same way, conquering nations eventually found it more profitable to enjoy the fruit of their conquests rather than to lay waste and plunder their enemies' countries.[6] In guerrilla warfare too, it is obviously more costly to strike indiscriminately than to limit one's

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[1] See also: Berber, *op. cit.*, pp. 230-231; Ducasse, A., *La Guerre des Camisards*, Paris, 1970, pp. 100-101; Farer, T., "The Laws of War 25 Years after Nuremberg" in *International Conciliation*, No. 583 (May 1971), p. 46; Reed, J., *Insurgent Mexico*, New York, 1969, p. 132; Siotis, J., *Le droit de la guerre et les conflits armés d'un caractère international*, Paris, 1958, p. 213; Werth, A., *Russia at War*, London, 1965, p. 865, and, for comparison, the affair of the "private air war" of General John D. Lavelle (*Newsweek*, 26 June 1972, pp. 7-8 "The Private War of General Lavelle"); *IHT*, 10 October 1972, p. 6 ("The Lavelle Case").

[2] The four Geneva Conventions of 1949 contain provisions by virtue of which the High Contracting Parties undertake to disseminate as widely as possible, in time of peace and time of war, the text of the Conventions in their respective countries, and in particular to incorporate the study of them in the military and, if possible, civil instruction programmes in such a way that the principles become known to the population as a whole (Articles 47 of the First Convention, 48 of the Second Convention, 127 of the Third Convention, 144 of the Fourth Convention). The Third and Fourth Conventions moreover stipulate that the authorities who assume responsibilities towards protected persons must have a copy of the Conventions and be given special instruction in their provisions. See in this connection J. de Preux, *Diffusion des Conventions de Genève de 1949*, Geneva, 1955, 32 p. Many instructions given to guerrilla movements and their adversaries have been mentioned in Part 3 above. With regard to efforts by both parties to guerrilla warfare to disseminate humanitarian principles, and the special difficulties involved, see particularly Fanon, F., *Sociologie d'une révolution*, Paris, 1958 p. 5, on the Algerian FLN, and the Russell Tribunal, *Le jugement final*, Paris 1968, p. 105 (Statement made by an American soldier in Vietnam).

[3] *Cf.* Frei, *loc. cit.*, p. 25.

[4] Even in guerrilla warfare, it is necessary and possible for both a guerrilla movement and its enemies to penalise violations of humanitarian law. See also Reed, *op. cit.*, p. 132, quoting Pancho Villa's policy: "There is no case on record where he wantonly killed a man. Anyone who did so he promptly executed."

[5] Montesquieu, *De l'esprit des lois*, Book XV, Chapter II (in *Œuvres complètes*, Paris, 1856, p. 202). See also Buchheim, *op. cit.*, pp. 164-165, who writes that it was only in the spring of 1942 that the use of Russian workers for forced labour, to meet the needs of the German war economy, brought about a slow improvement of living conditions for prisoners of war and the cessation of large-scale executions. For earlier historical examples, see Davie, M. R., *La guerre dans les sociétés primitives*, Paris, 1931, pp. 242, 296-297, Farrer, *op. cit.*, p. 112 and Fuller, J. F. C., *L'influence de l'armement sur l'histoire*, Paris 1948, p. 239, note 35.

[6] Fuller, *ibid.*, p. 215. See also Baldwin, *loc. cit.*, pp. 8-9. Lemercier—Quelquejay, C., *La paix mongole*, Paris 1970, p. 26.

attacks to military objectives; it is better, for forces intent on liberating or conquering civilians, not to endanger their very survival by completely disorganizing their economic life, by creating more "refugees" than can be sheltered and fed. Likewise, certain guerrilla organizations will limit their attacks in order to continue levying taxes, not to mention receiving external economic aid,[1] so as not to compromise their economic future after the conflict.

5. Restoration of peace

Another important political factor, more durable and far-reaching than is often imagined, is the respect for humanitarian limitations shown in the refusal to debase and overthrow the moral values of combatants, thereby avoiding a powerful corrosive effect on the behaviour of combatants who have returned to civilian life and on Society as a whole, corrupted by a wave of violence.[2]

Just as respect for humanitarian law facilitates the keeping of domestic peace, so the restoration of peace between belligerents will be greatly aided by humane gestures, which sow the seeds of peace and leave an opening, however small, for dialogue and reconciliation.[3]

As Bindschedler writes, "the law of armed conflicts is clearly not a substitute for peace. But it does offer a last modicum of restraint and

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[1] For example, according to J. F. Chavel on Radio Suisse Romande on Thursday 27 September 1973, at 7.55 p.m., the leading Palestinian resistance organizations are supposed to have taken the political decision in 1972 to carry out no more indiscriminate attacks, one of the reasons being that they did not wich to deprive themselves of economic aid from other Arab countries. This analysis is confirmed by the annoyance of the PLO, as well as of Saudi Arabia and Kuwait, the major financial backers of the movements, at the hijacking of an aircraft during the 1973 Algiers Conference of non-aligned countries (*IHT*, 10 September 1973, p. 1).

[2] For this factor, which is of prime importance in guerrilla warfare since this is concerned with forming or preserving nations, see in particular the following authors: Baldwin, *loc. cit.*, p. 13. Clergy and Laymen Concerned about Vietnam, *In the Name of America*, New York, 1968, pp. 11-12 and 26; Constant, B., *De l'esprit de conquête*, Neuchâtel, 1942, p. 98; Erasmus *Dulce bellum inexpertis*, Brussels, 1953, pp. 25-26; Escarpit, R., "Balles perdues", *Le Monde*, 18 May 1972, p. 1; Graham, H., and Gurr, T., *Violence in America*, New York, 1969, pp. 62 and 519; Hersch, S., "The Investigation of Son My", *The New Yorker*, 29 January 1972, p. 71; Julien, C., *Le Monde diplomatique*, January 1973, p. 1; Pax Christi, *Guerre révolutionnaire et conscience chrétienne*, Paris 1963, p. 3; Servan-Schreiber, J. J., *Lieutenant en Algérie*, Paris, 1957, p. 244; Shannon, William V., "US Military under Fire", *IHT*, 15 August 1973, p. 6; Sully, F., *Age of the Guerrilla*, New York, 1970, pp. 38-39: Taylor, *op. cit.*, pp. 40-41; Toynbee, *op. cit.*, pp. 57 and 117.

[3] For this interdependence between peace and respect for humanitarian law, see Baldwin, *loc. cit.*, p. 18; Camus, A., *Actuelles III*, Paris, 1958, p. 128; Fontaine, A., "Justice et politique", *Le Monde*, 30 December 1970; Giraud, *loc. cit.* Guelle, J., *Précis des lois de la guerre sur terre*, Paris 1884, p. VI. Huber, M., *Das Völkerrecht und der Mensch*, Saint-Gall, 1952, p. 54; Kant, E., *Projet de paix perpétuelle*, Paris 1948, pp. 8-9, art. 6; Lieber, F., *Instructions for the Government of Armies of the United States in the Field*, Washington 1863, art. 16, *in fine;* Lossier, J.-G., *La Croix-Rouge et la Paix*, Geneva, 1951, p. 23; Oliveira, *op. cit.*, p. 65; Patrnogic, J., "Les droits de l'homme et les conflits armés" in *Institut international de droit humanitaire, Les Droits de l'homme, base du droit international humanitaire*, Lugano, 1971 p. 156; Rousseau, C., *Droit international public*, Paris 1970, p. 334; Vanderpol, A., *La doctrine scolastique du droit de guerre*, Paris 1919, p. 91, quoting Ayala, Lupus, Gentili and Victoria; Zorgbibe C., "Pour une réaffirmation du droit humanitaire des conflits armés internes", in *Journal du droit international*, 1970, No. 3, p. 682.

human values, a residue of human solidarity, amid the outbursts of violence and passion." [1]

6. Ethics

All these factors, legal, military and political, traditionally and still applicable in conventional warfare, and sometimes—and increasingly—in guerrilla warfare, show that the observance of humanitarian limitations even in situations as difficult as guerrilla warfare is not a theoretical but a realistic proposition in keeping with the necessities of fighting and with the aspirations common to all men whose clashes of arms and ideas and whose seemingly contradictory statements do not succeed in disguising the true situation, often recognized too late.

This merging of interests, by adversaries, going beyond their differences, in fact reveals a universal humanitarian code of ethics [2] which should make possible the drafting of up-to-date humanitarian rules which could be instrumental in avoiding the repetition of the same tragic and useless experiences in one conflict after another; [3] a code of ethics, the basic principle of which would be to regard adversaries as human beings,[4] enemies for a moment but always interdependent,[5] and, in Camus' words, fighting for a truth but being careful not to kill it with the same weapons with which they are defending it.[6]

Just as this code of ethics is a basic principle of international humanitarian law, it is the conviction of its reality, its credibility—not only among jurists, philosophers or philanthropists, but, much more, among fighting men and militants—which will ensure that humanitarian law is known and applied in guerrilla warfare as in every situation.

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[1] Bindschedler, D., *Reconsidération*, p. 113 (conclusions).

[2] See Huber, M., "Ethos, Internationales", in Strupp-Schlochauer, *Wörterbuch*, I, pp. 444-448.

[3] Vidal-Naquet P., *La torture dans la République*, Paris 1972, p. 174, where he challenges "the inexorable evolution of the rules of revolutionary warfare":

"Nothing in history is ever inevitable: it is always possible for men, even burdened with a repressive task, to show imagination. It is just that the easiest, most elementary and most repetitive reactions are nearly always the most likely".

[4] Bollardière, Général de, *Bataille d'Alger, bataille de l'homme*, Paris, 1972, p. 16; Lossier, J.-G., *Les civilisations et le service du prochain*, Paris, 1958, *La Croix-Rouge et la Paix*, Geneva, 1951, p. 23; Pax Christi, *op. cit.*, p. 242.

[5] Bollardière, *op. cit.*, p. 20, writes as follows:

"J'avais aussi compris que cet étranger si proche et si loin de moi, mon ennemi, avait un double visage: tendu de violence et de haine quand il se dressait brandissant ses armes, mystérieusement identique au mien quand il gisait à terre, brisé et pitoyable."

See also Lossier, J.-G., *Solidarité, signification morale de la Croix-Rouge*, Neuchâtel, 1948.

[6] Camus, A., *Actuelles III*, p. 24. See also Fanon, *op. cit.*, pp. 6-7 on guerrilla warfare and on anti-guerrilla warfare; Schlesinger, A., "The Necessary Amorality of Foreign Affairs", *Harper's Magazine*, August 1971, pp. 67-77, in which the author refutes the title of his study.

The author thus reaches some very general conclusions, from which we give below some excerpts of significance in relation to the evolution of humanitarian law.

Reality and relativity of the notions of humanitarian law and guerrilla warfare

The notions of humanitarian law and guerrilla warfare, and even war as such, are extremely confused at present and it is difficult to give a strict definition of them, due in part to the great number of terms describing them and in part to their evolutionary nature: in guerrilla warfare, for example, there are different phases and each conflict is of a particular nature; while humanitarian law has a variety of cases in which it is applicable, and is under constant scrutiny with a view to its reaffirmation and development.

Humanitarian law has often been considered as an extreme, if not marginal, form of international law and of law in general. Its implementation in the difficult conditions—de facto and de jure—of guerrilla warfare has seemed utopian, at the best challenging. By taking examples from actual conflicts, the numerous stands taken by parties to existing guerrilla warfare, and the opinions of jurists, we have tried to show, as concretely and objectively as possible, the reality of humanitarian law, its necessity and its possibility, even in guerrilla warfare.

To paraphrase a definition by Pictet, humanitarian law in the broad sense of the term should be understood to be all those legal provisions, national or international, written or unwritten, which aim to ensure respect for the individual and his fulfilment, so far as is compatible with public order and, in time of armed conflict, with military requirements.

Humanitarian provisions are to be found in international humanitarian law as such (Geneva Conventions and The Hague Conventions for example), in the *international instruments of Human Rights* (Universal Declaration, Covenants, European Conventions, etc.) and in the *municipal law* of each State (constitutional and procedural guarantees), as well as the internal directives of most guerrilla movements.

Humanitarian law in the broad sense thus comprises international humanitarian law, the international instruments of Human Rights and the national internal legislation intended to provide fundamental guarantees for the protection of the individual.

The diversity and abundance of terms, the numerous definitions and subtle distinctions too often mask the reality of humanitarian law; the parties to the conflicts, and particularly guerrilla fighters, are thus denied a simple approach to a legal system which at present includes several hundred provisions contained in more than twenty instruments, to mention only the international instruments now in force.

In its traditional conception, still to be found in many international instruments, humanitarian law was essentially a law of war.

Guerrilla warfare, however, is by its nature an "unconventional war" which does not fit into the pattern of traditional warfare, either in the theoretical or the material sense, nor, consequently, into the framework fixed by the Hague Conventions in 1907 and the Geneva Conventions in 1949 (with the exception, in part perhaps, of article 3 common to the four Geneva Conventions).

Readjusting humanitarian law to the reality of conflicts

Many obstacles must be overcome before this vital prospect can be opened up and the common denominator of the human condition redefined. Yet past conflicts and the threat of more to come make clear the pressing need for such measures.

In spite of its name, guerrilla warfare is no longer a "small war": its universality, its ancient origins, the way in which it was ignored in Europe in the second half of the 19th century when the law of war was being drawn up, its present growth in the context of decolonisation and the struggle against occupation and oppression, its increasing likeness to regular warfare—all these factors mean that it can no longer be ignored in contemporary humanitarian law-making.

The unsuitability of positive humanitarian law to contemporary guerrilla warfare has been recognized by:

— parties to guerrilla warfare, conscious of the need to implement the principles, but also to revise the texts, which reflect a western "Atlantic" conception of military tactics and organization;

— other bodies, in particular the International Conference on Human Rights (Teheran 1968), the XXIst and XXIInd International Confer-

ences of the Red Cross, which met in Istanbul (1969) and Teheran (1973) respectively, and the Conference of Government Experts held in Geneva in 1971 and 1972, as well as a large section of legal opinion.

The reasons for this unsuitability are:

— a degree of legal inflexibility: positive law of war has scarcely been revised since the compromise made in 1874 between the Great Powers of the time, confident in the strength of their regular armies, and the small countries, ready to defend their freedom and their independence even at the price of a popular insurrection and a guerrilla war: it was the latter who surrendered at The Hague in 1907. To wish to retain the law in its present discriminatory form as regards guerrilla warfare, in defiance of the facts, would be virtually to put an end to humanitarian law, in the tradition of Molière's doctors, who preferred people to die under their treatment rather than to recover without it;

— the dissymetry of the parties to a guerrilla war; their inequality in material resources and legal status may mean that both parties have not an equal interest in applying humanitarian law, that the traditional reciprocity inherent in the law of conventional warfare is lacking.

Because its present provisions are inappropriate to guerrilla warfare, humanitarian law hardly applies to this form of conflict, which is subject only to the self-imposed limitations or the arbitrary judgement of the parties. At best this would entail empirical limitations, but much more often it leads to the reciprocal escalation of violence.

The *material need* for the application of humanitarian law in guerrilla warfare is made abundantly clear by the past and present development of guerrilla fighting and the likelihood of its continuing existence.

Not only would it be futile to claim to enact rules which would disregard the changed nature of conflicts, and especially guerrilla warfare, but it would be a dangerous misapprehension to believe that the retention of discriminatory legal provisions would discourage recourse to guerrilla warfare, when guerrilla methods have been so consistently adopted by regular troops.

Humanitarian necessity follows from what has been said above: the material development of guerrilla warfare has increased the number of victims; yet, as in any other type of conflict, it is in the interests of the parties to prevent suffering and useless destruction.

The essential objective in formulating humanitarian law, as in actual humanitarian activities, seems to be to establish the fundamental similarity of humanitarian interests of the parties and the humanity they share, beyond the divergences and differences that make them adversaries.

In the current attempts to reaffirm and develop humanitarian law, every effort must be made to avoid a plethora of legal provisions, a "padding" of the clauses, which could result in reducing the substance, diminishing its force by making the law so complex and legally arcane as to be accessible only to a limited coterie of experts.

The prime object should be to steer the present deliberations on the reaffirmation and development of humanitarian law towards simple, comprehensible texts applicable to all conflicts, with no political preferences.

Another objective would be a common body of humanitarian law made up of basic humanitarian principles and accepted by the States in an international legal instrument. These principles would apply in all circumstances, whether in time of peace or in time of armed conflict; as they are by nature brief, they should be supplemented by the various branches of humanitarian law in the broad sense, that is, the national, constitutional, legal and other provisions, and international instruments of human rights and the law of armed conflicts.

Mr. Veuthey sums up his ideas in a final comment:

Whatever the solution and the wording finally adopted in the texts currently being drafted, the main thing is to encourage awareness of the reality and necessity of humanitarian law: more than the shortcomings and difficulties of the texts, it is the absence of political determination which has unfortunately meant that too often the law has been brought into play against the interests of humanity, the letter against the spirit of humanitarian law.

Ideally, at the end of the present work of law-making, we should be able to repeat Mirabeau's claim in his speech to the French Constituent Assembly on 17 August 1789, concerning the Declaration of the Rights of Man and of citizens:

"We have tried to find a popular form of wording which will remind people, not of what has been studied in books or in abstract meditation, but of what they have themselves experienced. An ideal declaration of rights would contain axioms so simple, so self-evident and so abundant in inferences that it would be impossible to deviate from it without becoming absurd."
