

THE FORMATION OF INTERNATIONAL HUMANITARIAN LAW

by Jean Pictet

Introduction

The title of my talk ¹ may appear more than a little ambitious or the subject too extensive. What I intend to do, in fact, is to give here, in no particular order, some of the thoughts and experiences of one engaged in humanitarian law who had the great good fortune to be associated with this fascinating work from the beginning of his career.

This branch of law, it must be said, is not quite like the others. Some legal pundits cast a condescending eye on this branch of international public law, considering that it has been contaminated by a variety of constituents derived from ethics, idealism and even poetry. If it is true that fine feelings cannot produce good literature, can they produce good law?

I believe that it is precisely because it is so closely linked with mankind that this law assumes its real importance. This branch of legal knowledge and no other is the one on which may depend the lives, the well-being and the liberty of a great many people. This is what constitutes its profoundly original nature.

The Geneva Conventions are not dusty tomes, nor are they contracts dealing with more or less base interests, still less a frigid collection of abstract problems and academic case histories. They are texts filled with vitality and human warmth. They are also of intense topicality and affect every one of us. For which of us can be sure that we shall not, one day, be involved in an armed conflict?

¹ Lecture given at the University of Geneva on 16 November 1984.

Don't worry: I am not going to talk about myself. But I would like, in a few words, to pay tribute to those who gave me my training. When I was still at university, two brilliant minds, Georges Scelle and Maurice Bourquin, gave me the taste for international law. Then, when I entered the service of the International Committee of the Red Cross (ICRC) almost half a century ago to work on revision of the Geneva Conventions, it was Paul Des Gouttes who initiated me into the secrets of humanitarian law and who was my guide for many years. He himself had worked closely for seventeen years with Gustave Moynier, one of the founders of the Red Cross and President of the ICRC for forty-seven years. So, from the beginning until today, there has been a direct line of descent in legal matters.

My second teacher had a more profound influence on me. He was Max Huber, President of the International Court of Justice in The Hague, President of the ICRC before and during the Second World War, a most high-minded legal expert and at the same time a man of genuine feeling, with whom I worked very closely.

This is not to say that I always shared his philosophy. He propounded the theory of natural law and considered that legal standards had a transcendental origin. I was more realistic and regarded these standards as arising from the requirements of life in society. But after all, it is not very important whether law, humanity and justice come from above or spring from social facts considered objectively within the limits of experience and reason. What matters is that the law should exist, should be useful to mankind and should contribute to a better life. Like Max Huber, however, I did believe in the sovereignty of law, which is greater than the sovereignty of kings.

After paying homage to my teachers, I would like to express my appreciation of my colleagues and fellow workers, without whom nothing would have been possible. The making of humanitarian law is a collective enterprise and should remain anonymous.

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For the benefit of persons who are not experts in international law, I will explain briefly that humanitarian law is intended to regulate hostilities in order to reduce useless hardships. There are two branches: the law of Geneva and the law of The Hague. The law of Geneva is intended to protect members of the armed forces who lay down their arms (they become prisoners of war), those no

longer capable of fighting (that is, the wounded, sick and shipwrecked) and persons who take no part in the fighting (civilians). The law of The Hague, also known as the law of war, lays down the rights and obligations of the belligerents in the conduct of operations and limits the choice of means of injuring the adversary.

Rules such as these have taken shape gradually within the customary law of nations as soon as they emerged from primitive barbarism, and have grown up in parallel with the rising curve of civilization, in the course of the tremendous struggle waged from the beginnings of society by those who want to safeguard and liberate mankind against those who want to destroy or enslave it.

War is justified only by necessity: it should never be an end in itself. For a State, it is merely a method of subjugating another State. Any form of violence not indispensable for achieving this aim is pointless and thus gratuitously cruel and stupid. Once an enemy has been rendered harmless by wounds or capture, to exterminate him or cause him to suffer is useless and criminal.

If the origin of these rules of humanity is lost in the mists of time, their codification in the form of Conventions—that is, international treaties binding on the signatory States—was begun in 1864 by the conclusion of the first Geneva Convention for the protection of sick and wounded members of armies in the field, a Convention advocated by the founders of the Red Cross and initially urged by Henry Dunant, who had witnessed the tragic sequel to the battle of Solferino, when about 30,000 wounded men died for lack of care.

This Convention was amended several times, up to the present day, then followed by other Conventions on the treatment of prisoners of war and of civilians.

I. The Second World War

In the period preceding the outbreak of the Second World War, the ICRC, aware of the dark clouds gathering in the political sky, intensified its customary efforts to develop humanitarian law. The central problem was to guarantee protection for civilians, for whom until then no legal provision had been made, apart from a few clauses in The Hague Regulations dating from 1907. The First World War had already revealed the tragic inadequacy of these rules, and the ICRC therefore proposed that the treatment of

civilians should be established at the same time as that of the armed forces. For this purpose, the ICRC drew up a draft text for presentation to the Diplomatic Conference of 1929. But the Powers, with a flick of the wrist, removed this item from the agenda. It was thought that such a proposal would not make a good impression at the moment when the young League of Nations was working to establish eternal peace—for that dream was still alive.

But the ICRC is never discouraged. It succeeded in having the text of its draft adopted by the Fifteenth International Red Cross Conference in Tokyo in 1934, and received from it the mandate to prepare, together with the Swiss Government, a Diplomatic Conference to be convened to ratify the "Tokyo Draft", as it was called.

The Swiss Federal Council immediately gave its support to the undertaking, and sent the Draft to the States as a basis for discussion. But the replies to Switzerland's invitation were slow in coming, with the same culpable unconcern as in 1929, and it was not until 1939 that the date of the Diplomatic Conference was fixed, for the beginning of 1940. It was too late: the storm broke before then.

The agenda for this aborted conference had also contained a draft revision of the Convention on "sick and wounded", another for a Convention applicable to war at sea, and new provisions on medical aircraft and hospital zones. So many hopes destroyed!

In the midst of the anguish of war, the ICRC at once became absorbed by a multitude of vital and urgent activities forced upon it by this most terrible of conflicts. The weakness of the legal foundation afforded by the Conventions of that time meant that the International Committee was obliged to conduct most of its activities outside the already existing law. But it was able to draw some degree of strength from this very weakness: since it was not bound by law, its independence was not threatened and its work retained all the necessary flexibility.

The 1929 Convention, fortunately, contained an article which stated that its provisions would not constitute any obstacle to the humanitarian activities the ICRC may undertake with the consent of the Parties concerned. The ICRC sets great store by this clause, modest as it is, acknowledging its right of initiative. This was the foundation sustaining its work.

Nevertheless, the ICRC never lost sight of the aim of developing humanitarian law still further. Indeed, it became a "hive of legal industry". However, it worked, not by means of codification, a

process suspended for many years, but through multilateral *ad hoc* agreements concluded in a simplified form, apart from positive law, the ICRC contenting itself with assembling concordant replies from the States.

From the first few days of the conflict, the ICRC proposed that the belligerent Powers should put into effect, as a *modus vivendi*, the text of the Tokyo Draft, which had been left in abeyance, as we saw. The lack of enthusiasm for this proposal led the International Committee to suggest that the provisions of the 1929 Geneva Convention on the treatment of prisoners of war be applied, by analogy, to civilians on enemy territory at the start of hostilities and subject to internment. The Powers agreed to this and consequently 160,000 civilians were saved from arbitrary action and received acceptable treatment. This was a partial success, but not a negligible one.

Meanwhile, civilians in occupied territories remained without protection. Many of them were deported to camps, to suffering and death. It was not until 1949 that an effective Convention was concluded for the protection of civilians.

For the time being, with the war continuing, the ICRC was forced to innovate in every respect. Its first concern was to extend the activities of the Central Tracing Agency, hitherto devoted only to members of the armed forces, to include civilians.

In this context, and mindful of the ban on correspondence between civilians in opposing countries, it created for them a comprehensive system for the transmission of news, using a standard form enabling a message of 25 words to be sent and the reply to be written on the back. This system was accepted by the countries at war, subject to censorship, and a total of 24 million personal or family messages were exchanged.

For prisoners of war, the 1929 Convention had codified the system for monitoring its application, a system that had sprung up spontaneously during the war of 1914-18, when ICRC delegates had visited POW camps to organize the distribution of relief; they had got into the habit of looking around them and reporting to Geneva what they had seen of the conditions of detention.

In 1929, official monitoring was entrusted to the Protecting Powers—those neutral States responsible for representing the interests of a belligerent State to its adversary¹—and the Convention

¹ It should be noted that during World War II Switzerland was the Protecting Power for 35 countries!

stipulated systematic visits by the Protecting Powers' representatives to places of detention. But nothing was set down in this respect concerning inspection by ICRC delegates, although their work had given rise to the whole procedure. However the ICRC plays a subsidiary role, though of major importance, in the plan for monitoring and replaces the Protecting Powers when these are lacking, a situation which has become increasingly frequent. It was therefore imperative to obtain the same prerogatives, in practice, for the ICRC representatives.

This requirement was accepted, and so it was on the basis of a tacit agreement outside the Convention that the ICRC delegates made approximately 11,000 visits to POW camps, talking without witnesses to prisoners and their elected representatives. Each visit was, and still is, followed by a written report on the situation as noted by the delegates; a copy of the report was and is sent to each of the two adverse States. This system is the best means so far discovered to hold in check any arbitrary action by the Detaining Powers and to improve, by reciprocal concessions, the treatment of the prisoners. It is also a strong deterrent to reprisals, since it informs the prisoners' Power of origin about them and thereby averts the retaliatory measures which the latter is sometimes tempted to take when it is left in ignorance about the prisoners' fate and fears the worst, and the general deterioration in the situation which is bound to follow.

Another example of the work of the ICRC: it was requested to set up a vast relief operation for prisoners of war in Europe. In order to organize, over a number of years, the transport of consumer goods, the value of which exceeded 3,000 million Swiss francs for prisoners in Germany alone, the Committee was obliged to create a merchant fleet of 30 ships. These vessels, marked with the emblem of the red cross and lit up at night, went back and forth across the submarine-infested seas of the world. Under the terms of the agreement between the belligerents, these protected ships had to adhere to an allotted timetable and sail a specific route, carrying neutral commissioners aboard. There were few losses among this fleet.

Here an explicit agreement was necessary, as treaty law did not recognize the immunity of ships except for hospital ships restricted to transporting sick, wounded and shipwrecked persons and medical material. It may be imagined how arduous it was to arrive at such agreements: not only were there material obstacles to be overcome, such as the acquisition of ships and goods in the middle

of a war, but the blockade had to be lifted and this involved removing military and political prohibitions and gaining the confidence of all parties.

Not all attempts were successful, however. In March 1940, for example, foreseeing that aerial warfare was about to assume devastating proportions, the ICRC issued a fervent appeal to the arbiters of the world's destiny, proposing that they should reach agreement on a few principles capable of safeguarding what could still be saved. The main proposal was to guarantee general immunity to the civilian population and to declare that only military targets would be the legitimate object of attacks. It was a simple and reasonable proposal to which anyone could agree. But the ICRC received only lip service in reply, and was obliged to look on, powerless, as "total war" grew and spread, causing unprecedented ravages.

These principles were taken up in the Additional Protocols of 1977, like many other texts that had had to be "put on ice" during the harrowing years of war. So we see that, in the development of humanitarian law, no work is entirely lost.

The activities I have outlined, and many more, carried out on a voluntary basis, will become the law of the future.

II. The Diplomatic Conference of 1949

The Second World War was responsible for more suffering and destruction than any other. Once the nightmare was ended, the first reawakening was that of law. On the one hand, peace was being organized under the aegis of the United Nations, with legislation being prepared on human rights. On the other hand, following a course which, though similar in many respects, remained distinct, was the work of revising the Geneva Conventions.

The moment the guns were silent in the west, the ICRC, which had pioneered this work from its beginning, took up the task once more. It proceeded in the same way as for the earlier undertakings, which took place on average every twenty-five years, or once in a generation.

To embark on such an undertaking, it is necessary to make first an act of faith, then an act of will: as the English proverb says, "Where there's a will there's a way". Lastly, as Henry Dunant did with such spirit at the outset, it is necessary to win the approval of those in power, not the easiest of ventures.

After that, detailed documentation has to be gathered concerning experiences during the conflict. So, for over a century, action and law have moved forward in parallel, first one, then the other. There must be strict observance of the facts, otherwise the work will be useless, unconnected with reality. Consideration is also given to the initiatives taken by humanitarian organizations, which have established new standards in the relief of suffering.

The second stage is for the ICRC to produce draft Conventions, with the help of international experts meeting in preparatory conferences. For it is vital to associate governments with the work from its inception, in order to win them over and prepare them to adopt the new diplomatic instruments. The ICRC must also know how far it can urge the claims of humanity, since revising such fundamental texts is always a leap in the unknown. The drafts are also submitted to the International Conference of the Red Cross.

Thereafter comes the codification of principles and custom, in the form of international conventions. On these solid, thenceforth firmly established foundations, the Red Cross will then expand its activities and undertake new work. The cycle begins once more, with the two elements—fact and law—in equilibrium, succeeding each other and giving mutual support.

In the conclusion of international treaties, all naturally depends on the States which, by their signature and their ratification, accept solemn obligations to which they are expected to align their legislation and, it is hoped, their conduct. The adoption of certain key articles, therefore, constitutes for the States a delicate decision with weighty consequences. There must be understanding for this, but also for the fact that, in consequence, the ICRC is not responsible for the final text, at least not in its entirety.

Thus we see that humanitarian law consists largely of concessions obtained from the States, especially the major Powers. In order to persuade them, the support of small and medium nations, of moral authorities and public opinion plays a part. Realism is required, moreover, in the proposals presented. Sometimes the Powers show reluctance, and it is then that all the weight of sovereign might manifests itself. For example, we have seen how they did not wish to be bound by provisions relating to “political detainees” or by clauses on nuclear weapons of mass destruction.

Some people have even expressed doubt whether the States, which are abstract entities—“frigid monsters”, in Nietzsche’s

phrase—are able to express humanity, since only creatures of flesh and blood can do so. Perhaps this is not wholly false, but the State is shown in its representatives, who are human beings and often warm-hearted people.

In point of fact, most delegates to the Diplomatic Conference proved to be men and women of good will, not without ideals. Unfortunately, however, although they are called plenipotentiaries, they do not have unlimited power of decision. In the past, in the time of people such as Frédéric de Martens and Louis Renault, the long discussions had their full purpose, since there was a reasonable hope of convincing those to whom the arguments were addressed. But nowadays delegates are acting on instructions and constantly consult their Governments by telephone. So they are first and foremost protecting the interests of the powers that be and are not always free to rise to the level of the general interest, still less to study the demands made by a different “side”. This, incidentally, is the unhappy state of all existing political activity and of the major international organizations.

Nevertheless, the Diplomatic Conference of 1949 showed a unanimous urge to heal the immense ills so recently inflicted upon the world. This was what made it possible to achieve results in a single session lasting four and a half months. Some of the delegates, moreover, acting as chairmen of commissions or as rapporteurs, or proposing amendments, did outstanding work.

It is not the ICRC which convenes diplomatic conferences; it is more orthodox if this is done by a public authority. From the beginning it has been the Swiss Government, true to its tradition and to the support it has always given to the Red Cross, a fine embodiment of its ideal of neutrality and peace. The ICRC therefore works closely, from the start of any conference, with the Swiss authorities and more specifically with the Foreign Affairs Department; and this co-operation, which has always proceeded in an excellent atmosphere, is an important ingredient in the success of the undertaking. A striking proof of the Swiss Government’s enthusiasm for this extremely deserving cause was its appointment of two Presidents of the Swiss Confederation, Max Petitpierre and Pierre Graber, as chairmen of the latter two Diplomatic Conferences. Since 1977, Switzerland has been the official custodian State of the Geneva Conventions.

As soon as the preparatory work was begun, a major question of method arose: should the draft text be very detailed or should it formulate general and flexible principles? We definitely tended

towards the latter solution for, as every jurist knows, though it may be paradoxical, the attempt to regulate everything is limiting, since it leads to formalism and hence rigidity. To codify is to immobilize. There are always unforeseen cases, which thus remain outside the law. If one keeps to simple principles, clearly and concisely stated, they will enable new cases to be regulated by extrapolation, that is, by extending the lines of the basic standards.

But the formalist conception won the day, as the national representatives were chiefly preoccupied with the particular evils suffered by their own countries and which, understandably, they wished to prevent from recurring. This is why the Geneva Conventions have a total of more than 400 articles, some of them extremely long, while the first Convention, dating from 1864, contained only 10 short articles.

Naturally, the legislators of 1949 were reproached with having "prepared for the last war", in other words, with having produced texts too much occupied with the past and not enough concerned with anticipating the future. There is some truth in this, as history does not repeat itself, but I do not see what else could have been done. It is impossible to draw up plans except on the basis of known facts. It would be very dangerous to plan on the basis of predictions, since the things predicted do not always happen, or at least not as expected. I believe that the texts adopted in Geneva are a reasonable compromise between past experience and prudently assessed, future probabilities.

At each Conference, progress is made in methods of codification. In 1949, for example, we learned, to our chagrin, that it was better to opt, by a majority vote, for a simple and practical solution than to take time and trouble in seeking a compromise which in the end would satisfy nobody.

The retention in POW camps of captured medical personnel, so that they could provide care for their wounded and sick comrades, was a question fiercely debated. It was finally laid down that such doctors and nursing staff should not be deemed prisoners of war but should nevertheless benefit from the provisions of the Convention relative to prisoners of war. As Edmond Rostand's *L'Aiglon* would put it, they were to be "not-prisoners-but". Then when the final vote was taken, the delegation for which all these contortions had been undertaken, in the hope of obtaining a semblance of unanimity, voted against the said provision.

Four Conventions emerged from the Diplomatic Conference of 1949. Three of them—the one relative to the "wounded and sick",

the adaptation of this text to war at sea, and the one relating to prisoners of war—were revised versions of earlier Conventions. The fourth, however, was a new and long desired Convention for the protection of civilians. Here it was the French delegation which went ahead and did what the ICRC had not yet dared to do, by presenting a complete first draft to the preliminary conference of Government experts. The draft was too detailed and had to be pruned, but it provided a large part of the framework for the diplomatic instrument which was to emerge and which represented the major achievement of the Conference. An addition to the score was the appearance of a provision revolutionary in international law, Article 3 common to all four Conventions, intended to bring into non-international armed conflicts some rudiments of humanity.

Internal conflicts are fiercer and more cruel than clashes between nations, for—to be cynical—in such conflicts hatred erupts among people who know each other very well, which is certainly not the case in international wars. Insurrections, moreover, have usually been put down in a welter of blood, except when the army has sided with the rebels.

“Domestic strife” is as old as society, and one of the reasons why no attempt at codification was made for so long was that any such attempt was a frontal assault on the cyclopean stronghold of sovereignty, the other reason being that international law is not really a satisfactory method of settling a problem essentially national in character. The Conventions are treaties whereby the States regulate common affairs among themselves. In internal conflict, the true relationship is that between a State and an unidentified group of its nationals. But no better method has yet been found.

Experience has shown that domestic law is incapable of solving such problems satisfactorily, even when a state of belligerence is acknowledged, a rare occurrence in any case and applying only to extremely severe conflicts.

At the end of the Second World War, nobody imagined that international law would be able to settle situations of this kind. But a few “madmen” did believe it could, and went ahead accordingly. And so was hatched that rare specimen, Article 3 common to all four Conventions, which has been described as a “mini-Convention” and which, though only a fledgling, has nevertheless rendered great service more than once.

Another achievement of the 1949 Diplomatic Conference arose from the fact that a large number of prisoners of war had been refused the benefit of the 1929 Convention, their captors claiming that there was no war as defined in international law or denying that their adversary was a State, that it was at war or even that it existed. This unhappy circumstance produced common Article 2, which stipulates that the Conventions shall apply not only to all cases of declared war but also to any other armed conflict, even if the state of war is not recognized.

This means that the law must apply whenever there are victims, the only humane criterion. The ICRC, however, does not seek to exacerbate the situation by claiming that all armed clashes are wars. For example, the recent conflict between Great Britain and Argentina, in which the Conventions were applied to a remarkable extent, took place without the state of war being recognized. In such cases the ICRC says to the Parties involved: If there is no war, then you must treat the victims of events better than if there were a war, since the treatment fixed by the Conventions represents only a minimum.

A further success has been to obtain for resistance fighters the same status by analogy as that of members of the armed forces, provided that they fulfil the traditional requirements, which are fairly restrictive: carrying arms openly, having a visible distinctive sign, being commanded by a person responsible for his subordinates, and conducting their operations in accordance with the laws of war.

Certain States, as we know, with imagination worthy of a better cause, do their best to discover loopholes in the law of armed conflict and thus circumvent it, while the legislators of international law try to prevent them from doing so by erecting new barriers here and there. For instance, since the 1949 Conventions were signed, some Governments have attempted to make their application subject to political or military conditions which have nothing to do with the humanitarian sphere, or to diplomatic or pseudo-legal conditions relating for example to the definition of the conflict. We are aware of the incalculable harm caused by such fabrications, hollow shams claimed as the basis for so much in today's world, and yet impregnated with death.

A definite gain for the 1949 Conventions was that they became universal, which previous Conventions never did.

III. The Diplomatic Conference of 1974-1977

In 1967 the ICRC set out on a further stage in the development of humanitarian law, with two major imperatives: the protection of the civilian population against the dangers of war, chiefly aerial bombardment—a subject taken from the law of The Hague and allowed to lie fallow since 1907—and the improvement of Article 3, concerning internal conflicts, which so far represented only an initial step. The other subjects merely required to be brought up to date.

Was it necessary to rewrite humanitarian law from the beginning? No. The ICRC rejected this idea from the outset, to avoid damage to the existing structure, still sound despite a few cracks. It was to be feared, in fact, that in a world grown more impervious the States would behave with less generosity than in 1949 and that they might take advantage of any rediscussion of the law to regress. It was therefore decided to proceed by means of Protocols additional to the existing Conventions. The two Protocols, in their own terms, “supplement” the 1949 Conventions. In fact, in several places they modify and revise the Conventions to quite a considerable extent.

As early as the preparatory conference of Government experts, the Norwegian delegation put forward a radical proposal: that a single Protocol should be drafted, to apply equally to wars between nations and to internal conflicts. It was a generous gesture but over-optimistic; and in spite of Norway’s stubborn resistance the project was dropped.

Another question to be settled in advance was whether the undertaking should be left to the United Nations. Since its foundation, the great intergovernmental organization had peremptorily repudiated this branch of law, considering that since it had just banned war, it could not possibly regulate it. The same sophistry recurs.

However, from 1968 onwards, the United Nations took a renewed interest in the law of armed conflicts and the UN Human Rights Division was even thinking of joining the ranks. But it was felt that the best chance of success lay in dealing with the subject on neutral ground, literally and figuratively and, as far as possible, apart from politics. So the traditional procedure was followed, in which the ICRC provides the working mechanism and Switzerland acts as the diplomatic agent. The International Committee agreed with this attitude, not in order to defend a prerogative, but for the

good of the cause. The United Nations General Assembly is a political meeting, which is entirely normal. But very frequently, when controversial issues are debated, we find the representatives of the "family of nations" vilifying one another from the first session, and it is not long before the whole climate of debate becomes polemical. It was vital to avoid such a thing in discussing the Protocols. But the United Nations gave the undertaking its full support, which was a valuable asset.

It cannot be said, however, that the Geneva Conference completely escaped politicization. From the first session of the preparatory conference of experts, there were some attempts to give it a flavour of fundamental contestation. Indeed, it was a tempting opportunity to examine the alleged breaches of the Conventions since 1949, and thence only a short step to condemnation of those responsible. But such attempts were stifled at birth.

Politics nevertheless tried to insinuate itself into the Diplomatic Conference proper. There were some attempts to revive the old idea of a just war, maintaining that aggressor nations should not be permitted to lay claim to humanitarian law, which should apply only to their victims. The entire structure of the law was in jeopardy. Fortunately, it escaped unharmed. On the other hand, provisions were enacted on the international character of wars of liberation and on the exclusion of mercenaries from the status of prisoner of war, matters which it would have been preferable to discuss in their natural setting, that of the United Nations, as the two items were closer to the *jus ad bellum* than to the *jus in bello*.

These political intrusions should not surprise us too greatly. The Conference participants were sovereign States, and in treaties among States the humanitarian component is not always "chemically pure"¹: while the protection of victims is a humanitarian act, the means of doing so are also involved with the preservation of the State. It is thus impossible to escape tension between the humanitarian requirements, on the one hand, and military and political necessity, on the other, this tension, as we will see, being the very essence of the law of armed conflicts.

The Diplomatic Conference was held in four sessions, one each year, from 1974 to 1977. It is not surprising that it was long and difficult. It was dealing with subjects more delicate than those discussed in 1949 and with matters which the previous Conference

¹ The phrase is borrowed from Mr Jean-Luc Hiebel.

had decided not to discuss since they involved coming to grips with war itself, as in the regulation of aerial bombardment, or trying to scale the battlements of national sovereignty, as in the rules governing internal conflicts.

There was one trump card to be played. The state of the world at present is so tense that the Powers are virtually unable to agree on political or even economic questions. Worse, they are incapable of solving the problems facing the whole earth—the arms race, overpopulation, protection of the environment. The only area in which they are still potentially able to reach agreement is precisely that of humanitarian law.

The Conference was the setting for a remarkably universal assembly: it was attended by 700 or so delegates from 120 countries. While in 1949, for example, only three African countries were represented, there were thirty at the 1974-77 Conference. In the past it had been said that international law was made by Europeans for Europeans. It was no longer true.

It was possible, even, to gauge the strength of the coalition which grew up among third-world States and which was responsible for the adoption of the set of provisions relating to “freedom fighters”, also, at the last minute, for the massive cuts in Protocol II concerning non-international conflicts. Without a doubt, the somewhat spectacular entrance on the world stage of vigorous young energies, with at times a fresh conception of international law, upsets a good many traditional ideas. The adjustment has to be made.

As things are, it is reassuring to find that national representatives of all political tendencies, from every part of the world, are able to meet to discuss something other than money or oil—the survival of the human race; to ignore their divergences for a time, overcome political and ideological antagonisms, speak the same language, and even join hands. Someone has said that people of all races have some blue reflected in their eyes when they raise them to heaven.

Between 1949 and 1974, the working methods of diplomatic conferences had undergone profound changes. Far more meetings were now held, under the auspices of the United Nations, and it was the methods of this organization which became predominant, influenced by the formal rules prevalent in Britain and the USA and stamped with the mark of an increasingly complicated and over-organized world affected by accelerating technical advances. This was not necessarily a bad thing: it enabled us, for instance, to

proceed by *consensus*, that is, to have a text adopted without taking a vote if nobody is formally opposed to it, while allowing divergent opinions to be expressed. Under the Conference Rules of Procedure, articles had to be adopted by a two-thirds majority, which did give us cause for anxiety. Yet of the 150 articles contained in the two Protocols, only 14 were put to the vote; all the others were adopted by *consensus*.

But the new methods of holding international conferences were also to thank for the verbose, complicated and obscure style of address which flourishes nowadays and which is compounded by the large number of working languages used. Some diplomats have been quick to see the advantage to be derived from this lack of clarity, like tanks on the battlefield putting out a smokescreen. To turn to formalism and ambiguity is to take the easy way out and to obscure the fundamental issues. The great danger is that the form will take precedence over the substance. And if the texts become incomprehensible there will be a temptation to set them aside. In any case, the tendency towards obscurity seems irreversible, and we must learn to live with it.

After four years of intensive discussion, and thanks to the assiduous help of a large number of delegations, two additional Protocols were produced. The first—which was the principal achievement—contains an impressive collection of rules for protecting the civilian population and regulating aerial bombardments. It begins with a welcome definition of the civilian population and civilian objects, as opposed to the members of the armed forces and military objectives, which are the only legitimate targets. It goes on to confirm explicitly the general immunity to be afforded to civilians, stating that they must never be the object of attack and that bombardment for the purpose of spreading terror is prohibited, as are indiscriminate attacks or those carried out by way of reprisals. These provisions represented a tremendous advance.

One article banned starvation of civilians as a method of warfare, prohibiting attacks on agricultural areas, livestock, drinking water and other objects indispensable to survival. Another article concerns protection of the natural environment, this too a major innovation. Other provisions prohibit the destruction of works and installations containing dangerous forces, such as dams and nuclear power stations.

A significant section is that relating to the conduct of combatants, which brings up to date and expands the Hague Regulations of 1907. The stumbling block was the phenomenon of guerrilla

warfare, which had to be tackled. The solution finally reached, somewhat nebulous like all compromises, was to define more exactly what were the armed forces, then to expand the category of combatants by relaxing the famous conditions of the Hague Regulations. Guerrilla fighters were no longer expected to carry arms openly except when actually fighting or when taking up positions immediately before an attack.

A most welcome success was the reintroduction of immunity for medical aircraft, made possible by highly technical modern signalling systems.

Protocol II is entirely devoted to non-international conflicts and develops Article 3 common to the four 1949 Conventions. It is a simplified version of Protocol I, adapted to the specific conditions of this type of warfare. The price paid for the adoption of a detailed document was restriction of its field of application: it is applicable only to armed conflicts of great severity. The adoption of the final text, moreover, was preceded by a sensational turn of events at the last moment, as a result of which the Protocol was slashed by over half of its provisions (15 substantive articles instead of 33), owing to the inflexible demands of a small number of delegations and the complicity of most of the others. No further effort was possible and, as one of the delegates remarked, "half an egg is better than an empty shell".

In the end, I believe that the ICRC successfully met the challenge made to it, to solve at least some of the urgent problems raised by conflicts in our time. Even if the Protocols at times have the shortcomings of compromise solutions, they are capable of saving many lives. But if they are to take effect everywhere, they must have massive ratification by the States. And to date scarcely fifty States have carried out this procedure, while the two "super-powers" are still hesitating over their accession. For this reason, no chance should be lost to make the large nations face their responsibilities, so as to give the peoples of the world real protection, to which they have a most legitimate right. In the meantime, the work of codification has already taken on full importance as the tangible embodiment of custom.

IV. Conclusions

In ending, I would like to express some more general thoughts.

We know that all of international humanitarian law results from the balance struck between the principle of humanity—that is, the imperative which drives a human being to act for the good of fellow beings—and the principle of necessity—that is, the duty of public authorities to preserve the State, defend its territorial integrity and maintain order. It is the perpetual confrontation of Creon and Antigone.

The demand of the Red Cross is that the conduct of hostilities and the maintenance of public order do not ignore the respect due to the human person. In its work to promote law, the ICRC has always advanced along the knife-edge boundary separating these two worlds. It must constantly seek the true dividing line, know how far to go in its demands for the benefit of individual human beings. The angle of approach, between asking too much and asking too little, is very narrow, as narrow as for cosmonauts bringing their spaceship back into the earth's atmosphere—only a little higher or a little lower and everything is lost.

I will give two examples of the ICRC's methods. When the Red Cross was founded, Henry Dunant, the visionary, who listened only to his enthusiasm, wanted the treatment of prisoners of war to be dealt with at the same time as that of the wounded. But his colleagues, who were more cautious, made him accept the method of "one step at a time". The first Geneva Convention, in 1864, was therefore concerned only with the sick and wounded in armies in the field. But it was signed and observed. The other Conventions then followed.

After the Second World War, when the ICRC, basing its work on the distressing observation put forward by experts, that the massive bombing of population centres had not "paid" off from the military viewpoint, drafted a set of "rules" to protect the civilian population against the dangers of war, the Powers made haste to bury it, since it contained an article which would have curbed their potential use of atomic energy.

Besides the balance between humanity and necessity, there is a very similar antithesis, the age-old opposition of Don Quixote and Sancho Panza, of idealism and practicality. In the preparation of humanitarian law, as in any great undertaking, nothing can be done without idealism, which is beyond comprehension. Though nothing but a spark in the darkness, idealism will kindle the fire which will become a blaze.

For the work to be successful, the secret is to keep it realistic. This is the lesson taught by our predecessors, men like Gustave

Moynier, Paul Des Gouttes and Max Huber. Thanks to their wisdom, the Geneva Conventions have kept their high repute and their authority, and in spite of many transgressions, they are generally observed. If the States agree to be bound by legal texts, it is because such texts correspond with their reciprocal and well understood interests. Nothing is more dangerous than "unbridled humanitarianism" acting from the best intentions but remote from reality, the very picture of "wishful thinking". It may well produce some fine writing, and perhaps a few gilded castles in the air, as evanescent as they are impressive.

What is more, a law which lacks realism will inevitably be violated. And a law violated even only in part will become a contested law, threatened with erosion followed by collapse. In the end, it is the very authority of law which is threatened. Briefly, in order to codify successfully, take two drops of dreams, one drop of madness and one hundred drops of realism, and blend thoroughly before serving. I make you a gift of the recipe.

The Geneva Conventions proceed from a concern for humanity, of course, but also, for many people, from common sense. To demonstrate this, in my seminars, I have suggested to my students, who still knew nothing about the Geneva Conventions, to think what ought to be laid down to regulate the conditions of captivity in wartime. At the end of the exercise they found, with some astonishment, that they had produced, in general outline, the whole of the 1949 Convention on the treatment of prisoners of war.

Likewise, humanitarian law has no hope of being accepted unless it is based on universal values and supported by principles which are really the underlying common ground of the human race. Since the time of Pascal and Montaigne we have known that morality is relative and that it can vary from one side of a mountain range to the other. The temptation to introduce professions of faith, whether philosophical or religious, into the Conventions is bound to lead to failure.

The opposing claims of humanity and necessity pose another problem: does the "progress" made in techniques of waging war, does the invention of new weapons bring the achievements of humanitarian law into question? In other words, will the dividing line of which I spoke be changed?

I think that major changes in combat methods will inevitably entail, sooner or later, a revision of the legal provisions precisely because the balance between necessity and humanity has been upset. On the other hand, the major principles of protection, which

have become "customary in the second degree", that is, having an absolute value valid even for non-signatory States, will remain intact. What will happen, therefore, is no more than an adjustment of the mechanisms, of the methods of application.

To give an example: the invention of bomber aircraft brought into question Article 25 of the Hague Regulations of 1907, which prohibited the bombardment of undefended localities, but only those in the rear, which had until then been inaccessible. The article, however, remained valid for areas reached by the front and which advancing troops had to respect. Today the new rules, established in 1977, permit the bombardment of military objectives but stipulate that the civilian population must be spared.

This is why the Powers, facing the vital problems raised by the discovery of nuclear energy, should waste no time in meeting around a table to pass comprehensive and definitive laws on the subject. There is no alternative if the world is to be spared the ultimate disaster.

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We have been told: instead of making rules for the conduct of war, you would do better to prevent it. This brusque statement is as old as humanitarian law, but it acquired fresh vigour with the ban on war and the definition of aggression. It is such a sophistry that I will not waste your time in discussing it. In a word: although the international community has outlawed war, the nations, alas, still wage it as much as ever. As long as the States, in arming themselves to the teeth, demonstrate that they have not really given up the idea, even in self-defence, then we have the inescapable duty to work for the protection of its victims if by misfortune war should break out. It is logical to attenuate the blows of a scourge until it has been eliminated. To tell the truth, simultaneous efforts should be made to regulate war and to abolish it, in each case using the means at disposal.

No doubt it was a good idea to proclaim the abolition of war, but it should be realized how much this spectacular gesture has cost. Since aggression has been condemned, nobody wants to put themselves in the wrong by declaring war, and some States even deny for long periods that they are in conflict. And of course the States in question are reluctant to apply humanitarian law, fearing that if they do so it will be taken as proof of their belligerence.

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Some people have said to us: what use is it to develop law when in so many places it is trampled underfoot? It is true that humanitarian law is not always respected. But this ill also attacks other branches of law. Has not society created a huge apparatus of judges, courts and police solely in the expectation that the law will be violated? There is the additional factor that the media are more eager to report what goes wrong than what goes right, and therefore mainly report on transgressions of the law.

Even so, humanitarian law has tackled war directly with bare hands. Now war puts the very existence of States in jeopardy: engaged in a pitiless struggle, they think only of breaking any limitations. It moreover upsets the exercise of justice and tends to conceal offences against law, the more so as, unlike the process of national law, the system of penalties in international law is still in an embryonic state.

This law is consequently more difficult to put into effect than any other. But at least it has the merit of making clear to everyone what must be done and what must not be done in time of conflict. In the past many things were accepted which are now considered inadmissible. The law also makes it possible to define each person's responsibilities.

It is all the more remarkable in that it has saved many lives and mitigated a great deal of distress. But what will it be like in the future, in a world increasingly ruthless? This is the fearful question which haunts us.

States, it is true, often see only their own immediate interests and find it difficult to lift their gaze to world level. Combat, it is true, is conducted with fanaticism and it is a commonplace that the fiercer the fighting, the less respect for the rules. Violence, it is true, is now steadily growing, with outbursts of barbarity, and some people giving the name of war to terrorist outrages which strike at innocent people and which are in fact wholly criminal.

But in every age there have been exactions. If we think that nowadays they are more numerous, it is mainly because we hear about them more than people did in the past. In countries where there is freedom of information, abuses are publicly denounced, and fortunately so, since the pressure of public opinion acts as a brake on some of the excesses.

The abundance of information, of course, brings with it the risk of saturation, of "immunization". At the start of a conflict, each report of a death is distressing; after a few days, the list of victims is no more than a set of statistics, especially when the conflict is in a

far-off country. The public interest wanes and indifference sets in.

Another danger is that, knowing the force of public opinion, the State's information services may go beyond all bounds in manipulating it, fomenting hatred between opposed nations not at all inflamed against each other. And once a war breaks out, massacres and tortures are systematically denounced, events are exaggerated or, if the need is felt, invented. In the end, suffering becomes a weapon used in the struggle, to such an extent that the ICRC has been reproached for moderating strong feeling by visiting prisoner-of-war camps and showing the falsity of some alarmist reports. Political detainees have even been known to exaggerate their misfortunes, or to refuse to improve their plight when given the means to do so, in order to give their comrades in the struggle an extra moral weapon against a regime they abhor.

Where are we going? Will the world finally know fraternity and peace, or will civilization destroy itself? Are we facing the "years of bloodshed" foreseen by Henry Dunant, or the Golden Age?

Probably neither one nor the other. But I am convinced that the victory of law over force offers the greatest hope for the survival of the human race. Remember, therefore, that this humanitarian law is in your hands. Make sure that it lives on, that it saves lives, that it spreads far and wide. I am speaking now above all to the young people, who will have the heavy responsibility of building tomorrow's world. All that we know of them gives us confidence in the future.

Jean Pictet
