THE NEED TO RESTORE THE LAWS AND CUSTOMS RELATING TO ARMED CONFLICTS [1]

by Jean Pictet

1. Law of Geneva and Law of The Hague

Socrates recommended that one should begin a dissertation by defining one's terms.

For some time now, the name, "humanitarian law", has been used to describe the large body of public international law derived from humanitarian sentiments and centred upon the protection of the individual.

The term has both a broad and a narrow sense. In the broad sense, international humanitarian law consists of those rules of international conventional and customary law which ensure respect for the individual and promote his development to the fullest possible extent compatible with law and order and, in time of war, with military necessities. This fundamental principle is the result of a compromise between two conflcting notions: the humanist in us requires all action to be directed towards the welfare of the individual; yet human nature gives rise to painful necessities that justify certain restraints in order to maintain social order and a certain amount of violence in the extreme case of war. Humanitarian law comprises two branches: the law of war and the law of human rights.

[1] This article appeared in *The Review of the International Commission of Jurists*, Geneva, March 1969, No. 1.

Since the law of human rights does not come within the scope of this study, it will be enough merely to mention that its purpose is to ensure that individuals enjoy fundamental rights and freedoms and are protected against social evils. The main distinction between such rights and the law of war is that they are independent of the state of conflict. Two dates are significant in this respect: 1948, when the Universal Declaration of Human Rights was proclaimed, and 1950, when the European Convention on Human Rights was signed.

The law of war also has a broad and a narrow sense. In the broad sense its purpose is to regulate warfare and attenuate its rigours in so far as military necessities permit. Its principle demands that the suffering inflicted by belligerents shall not be disproportionate to the object of war, which is to destroy or weaken the military power of the enemy.

The law of war may also be divided into two branches: the law of The Hague and the law of Geneva.

The law of The Hague, or the law of war strictly speaking, lays down the rights and duties of belligerents in conducting operations and limits the methods of warfare.

This law is, by and large, the result of the Hague Conventions, 1899, revised in 1907. It does not of course include the extremely important rules established at Geneva in 1929 and 1949, concerning the status of prisoners of war, the status of the wounded and shipwrecked in sea warfare, and the status of civilians in occupied territories.

The law of The Hague, however, also includes conventions that do not bear the name of that city, such as the Declaration of St. Petersburg, 1868, prohibiting the use of explosive bullets, and the Geneva Protocol, 1925, prohibiting the use of poisonous gas and bacteriological or similar means of warfare. For its part, the law of Geneva, or humanitarian law in its strict sense, is designed to ensure respect, protection and humane treatment of war casualties and non-combatants.

Since 1949, the law of Geneva has been given concrete form in four Conventions of the same name. This legal edifice is the most recent as well as the most complete codification of rules protecting the individual in armed conflicts. At present it doubtless represents, at least in volume, three-quarters of the law of war.

The Geneva Conventions were drawn up for the direct benefit of the individual and, as a general rule, they do not give States rights against him, as opposed to the laws of war which, though designed for the protection of the individual, often achieve that end by indirect means and are also designed to regulate operations. These laws, therefore, are still based to some extent on military necessities; the Geneva Conventions, on the other hand, ushered in a new era in which the individual and humanitarian principles are paramount.

Although the Geneva Conventions have been carefully revised, developed and adapted to changing circumstances, the law of The Hague has remained in a state of neglect often called chaotic. While techniques of warfare have made gigantic strides in half a century, especially during the two World Wars, most of the rules of war go back as far as 1907, a time at which aviation bombardment was unknown. This is the alarming problem which faces the world today and which must be solved.

2. Origins of the Law of War

Since the birth of life, creature has fought creature. Throughout the centuries men have groaned under the sword and the yoke. The pages of history are stained with blood. Massacres, torture and oppression are to be seen at every turn.

Freud showed that man's two main instincts, that of self-preservation and that of destruction, though apparently opposed, are at times linked. The instinct of self-preservation must resort to aggression if it is to triumph. Man will therefore seek to kill, and to make others suffer as a result, in order to increase by that much more his own chances of survival. In his fellow, man first sees a rival.

Among animals, the strong oppress the weak, just as for thousands of years men obviously did the same. Later, the defence reaction was extended to the group.

To make community life possible, society had to be organized. Since it was impossible to change man's nature, his instincts had to be curbed and be compelled to accept reasonable solutions. The group, by a decisive revolution, thus established a social order based on certain moral rules.

Society also gave authorities power to enforce these rules, which would otherwise have been a dead letter. This is the origin of law and public institutions.

At the same time, however, the power given had to be limited, since the State, though its ultimate objective is the development of the individual, is likely to crush him in the process. Consequently, it was necessary to guarantee the individual certain fundamental rights that he demands for himself and that he may therefore recognize for others. This gave birth to the principle of respect for the individual—respect for his life, liberty and happiness.

This vast and gradual evolution, long confined within the boundaries of each State, eventually reached the level of international relations, where law soon came to grips with war itself. Since it could not stamp out war at one fell swoop, it attempted at least to mitigate its unnecessary rigours. The mutual interests of the belligerents led them to observe, in conducting hostilities, certain " rules of the game ", while philosophers and religions strove to improve morals. These are the origins of the law of war, which forms a very important part of public international law. Needless to say, this conquest was as difficult to achieve in the international as it was in the domestic field. Moreover, it is far from being completed.

In early societies, war was merely the deadly triumph of the stronger. Battles were followed by slaughter. The defeated, including women and children, were at the mercy of the victor, who slew or enslaved them.

However, even primitive communities had some rules for lessening the horrors of conflicts; these were the embryos of the law of war.[1] Man understood that if he wished to be spared, he would have to begin by sparing others.

He recognized that in life there are more advantages in coming to terms with his fellow men than in mutual destruction. Gradually, under the influence of civilization and moral or religious doctrines, progress was made. Some monarchs set examples by showing clemency.

However, in the Middle Ages the fate of the vanquished and the civilian population was still far from enviable. In 313, the red-letter

[1] Quincy Wright: *A Study of War*, 1942.

day of the Edict of Milan, the Church became a major temporal power overnight. Among its many consequences, this merging of Church and State led the ecclesiastical authorities to justify war. As this attitude disturbed many men who believed that the spilling of blood was a crime, and a crime condemned by the Scriptures, Saint Augustine formulated at the beginning of the fifth century the famous and baneful theory of the "just war" intended to allay men's consciences for a small price by an unedifying compromise between the moral ideal of the Church and its political expediencies: as a result, mankind's advance was checked for centuries. That theory, briefly, was that a war waged by the legitimate sovereign is a war willed by God and that acts of violence committed in its cause cease to be a sin. The adversary, consequently, is God's enemy and his war can only be unjust.[1]

The most serious consequence of this conception is that the "just" could allow themselves virtually any action against the "unjust". Their acts were never crimes but punishment of the guilty. Obviously, however, each party maintained that its cause alone was just. And under the hypocritical cloak of righteousness, both vied against each other in committing massacres. The Crusades—those "just wars" *par excellence*—afford the most lamentable example.

The 16th century saw the rise of "natural law", the advocates of which condemned useless suffering. The Reformation then split Christianity in two. Another principle of unity had therefore to be found for international relations: this was supplied by the law of nations. Grotius, who has been called the "father of the law of nations", maintained that law was no longer the expression of divine justice but of human reason. He did not free himself however of the bonds of the "just war". He still accepted that the entire population of the hostile nation was an enemy and at the mercy of the victor. And at that time, the Thirty Years War unleashed its flood of miseries.[2]

At last the scientific spirit woke. Life was no longer considered a mere stage on the road to the hereafter but an end in itself, and society took its destiny into its own hands. The "enlightenment"

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[1] G. I. A. D. Draper: *The Conception of the Just War.*

[2] Henri Coursier: *Etudes sur la formation du droit humanitaire*, Geneva, 1952.

gave birth to humanitarianism, an advanced and rational form of charity and justice. The aim now was to secure the greatest happiness for the greatest number.

Great strides were then made, at least in Europe, in limiting the evils of war. Cartels—agreements concluded between the heads of armies—established the treatment to which the victims of war were entitled. These were often models of moderation. It was recognized, for example, that the peaceful population should not be molested. The repetition of such agreements created customary law, which received all the support of 18th century philosophers, particularly Jean-Jacques Rousseau. During that enlightened period, kings sometimes gave heed to philosophers.

In a famous passage of his *Social Contract*, Rousseau took to task the ancient sophism of the just war and replaced it at last by the welcome and fruitful distinction, between combatants and non-combatants.

For war is a means—the final means—whereby one State bends another to its will by using the necessary coercion to obtain that result. Any violence not essential to that purpose is useless; it then becomes only cruel and stupid.

These principles were taken up by the French Revolution. At the same time, however, military service became compulsory and men no longer fought only for bread but also for ideas. Mass wars were born, wars in which entire nations, after having mustered all their material and emotional resources, are pitted against each other. The era of "total wars" began, which was to bring a substantial retrogression in human values. The situation of the victims of war was hardly improved during the second half of the 19th century. It was then that Henry Dunant made his moving appeal that led to the birth of the Red Cross in 1863 and the conclusion the following year of the first Geneva Convention for the protection of war casualties.

This Convention had a decisive influence on the development of the law of nations: on that date States agreed to sacrifice part of their sovereignty for the welfare of mankind. The impact of this event led to the conclusion of the other Geneva Conventions and the Hague Conventions. It may even be said that all present efforts to solve conflicts peacefully and outlaw war also spring indirectly from that movement.

Thus it was that Gustave Moynier, President of the Founding Committee of the Red Cross, could say in 1864 about the first Geneva Convention just concluded: "To take this road is to make a decisive step; one step will inevitably lead to another until it will be impossible to stop... future generations will see the gradual disappearance of war. An infallible logic will have it so." Let us accept the omen.

3. The Peace Conferences [1]

Although all humanitarian law springs from the great creative impetus given at Geneva in 1864, the first chapter of what would later come to be known as the law of The Hague was written at St. Petersburg in 1868. Alarmed by the invention of the explosive bullet, Alexander II, the Tsar who abolished serfdom, convened at St. Petersburg a conference for the purpose of "alleviating as much as possible the calamities of war". It resulted, on 11th December 1868, in the Declaration of St. Petersburg, a treaty which is binding, even today, on seventeen States. It abolished "any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances".

What gives a profound significance to the Declaration, however, is that its Preamble formulated straightaway, and with remarkable accuracy, the fundamental principle of the law of war. It reads:

> Considering... that the sole legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
> That for this purpose it is sufficient to disable the greatest possible number of men;
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable;
> That the employment of such arms would, therefore be contrary to the laws of humanity...

Another fact worthy of mention is that the Powers agreed to work together in the future with a view to prohibiting the use of inhumane weapons. It is a fact that might well be recalled today.

[1] The author here is indebted to the work of Pierre Boissier: *Histoire du Comité International de la Croix-Rouge*, Paris, 1963.

A few years later the Russian Government submitted to the other governments a "Draft International Convention concerning the Laws and Customs of War" and invited them to send delegates to a meeting at Brussels on 27th July 1874. The main problem was to define combatants by determining who is entitled to take part in the fighting. Here the Brussels Conference drew up its famous four conditions that were later to be incorporated, word for word, in the Regulations respecting the Laws and Customs of War. In relation to bombardments, the Brussels Declaration stipulated that undefended towns or villages should not be attacked; this was the future basis of the Hague Convention. The Brussels Declaration, however, has never had the force of law since no State ratified it.

It is a well known fact that such eminent men as Francis Lieber, Johann Bluntschli and Gustave Moynier had a decisive influence on the development of the present-day law of nations. Moynier wrote the "Manual of Laws of Land Warfare", which the Institute of International Law adopted at Oxford in 1880 under the name of the "Oxford Manual". This manual, which formulates the principles of the law of war with unprecedented logic and clarity, has been a model for many national military regulations.

In August 1898, a piece of news came like a thunderclap: Nicholas II, continuing the tradition, proposed an international conference for the purpose of "putting an end to the incessant armaments and seeking ways of preventing the disasters which threaten the entire world". This programme was so vast that it raised great hopes and there was already talk of a new era in the history of mankind. A further Russian note restored matters to their proper proportions: the idea was not to achieve general disarmament but only to check the arms race and to prohibit new weapons.

The ground work having been prepared by the newly-formed Inter-Parliamentary Union, the Conference opened at The Hague on 18th May 1899. Though it soon abandoned the attempt to limit armaments, it did lay down three prohibitions: against projectiles launched from air-borne balloons, poisonous gas and expanding or flattening ("dum-dum") bullets. The first two means of warfare, moreover, were merely forerunners of worse to come.

The main task of the first Peace Conference, however, was the establishment of "Regulations respecting the Laws and Customs of

War on Land", which was based largely on the Brussels Declaration and the Oxford Manual. In this respect, the Conference introduced little that was not already contained in the military regulations of the major Powers. As Professor A. de la Pradelle has pointed out, difficult and controversial questions are often evaded and an easy agreement reached on matters that have long been settled in practice. The value of the efforts made at The Hague towards codification, however, should not be underestimated as they have had considerable influence on the development of the law of nations.

In its final Act, the assembly recommended that a second Peace Conference should be held in order to complete the work begun, particularly in the field of sea warfare. This Conference was held eight years later, on 15th June 1907, also at The Hague, this time on the initiative of the President of the United States.

The three existing Conventions were revised, particularly the first relating to the peaceful settlement of conflicts, and a draft procedure for their prevention—arbitration—was introduced. Two of the three declarations were retained: those concerning dum-dum bullets and balloon-launched projectiles. Of the new Conventions, one related to the commencement of hostilities and another to the rights and duties of neutrals. The other eight were devoted to sea warfare, which was the main work of the Conference. Another significant accomplishment was the famous *Marten's clause* in the Preamble to Convention IV, which states that "until a more complete code of the laws of war can be drawn up... the inhabitants and the belligerents remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience". This declaration shows that the Hague rules were first of all the expression of customary law, the value of which goes beyond the letter and places them, in a sense, outside time.

It had always been intended to hold another diplomatic conference in order to develop the Hague Conventions and adapt them to current needs. But two World Wars, with their interminable wake of suffering, took place without the plenipotentiaries having met for that purpose. Who will take the initiative to convene the third Peace Conference? Who will take up the torch?

4. Protection of the Civilian Population Against the Dangers of Indiscriminate Warfare

The International Committee of the Red Cross (ICRC) was the body responsible for promoting and maintaining the law of Geneva and not that of The Hague, although it was the first Geneva Conference of 1864 that gave the initial impetus to the overall work, while Dunant and particularly Moynier contributed to the establishment of the Hague rules.

However, in the face of the enormous dangers to which civilian populations were exposed because of the considerable developments in means of warfare and seeing that neither governments nor the League of Nations were taking any action, the ICRC raised its voice here too and made proposals for the prevention of such dangers. In doing so, it stepped outside the framework of the Geneva Conventions. It did so deliberately because of the fundamental human interests at stake and it believes that in so doing it remained faithful to its duty.

As early as the end of the first World War, it submitted to the first Assembly of the League of Nations a series of suggestions for outlawing certain methods of warfare that had been used in 1914-1918. It recommended, in particular, that the use of poisonous gas as well as aviation bombing against the civilian population should be prohibited and that the notion of " undefended localities " should be defined so as to ensure stricter observance. In 1921, the 10th International Conference of the Red Cross invited governments to conclude agreements on these lines in order to complete the Fourth Convention of The Hague. A Commission of Jurists of The Hague, set up by the Washington Conference, drew up a code for limiting air-raids, but it was not ratified by the Powers. Therefore, from 1928 to 1931, the ICRC held meetings of four commissions of international experts, jurists and scientists, whose task was to find ways of protecting the civilian population against chemical and biological warfare and against air warfare in general. In 1931, the ICRC submitted the conclusions of those commissions to the first Conference for the Reduction and Limitation of Armaments convened under the auspices of the League of Nations. It addressed an appeal to that Conference requesting the prohibition, pure and simple, of air-raids against populated areas.

On the failure of these attempts, the ICRC redirected its efforts towards the possibility of creating "hospital and safety zones and localities". In 1938, the 16th International Conference of the Red Cross appealed to governments to limit their bombardments. The same year, at last, the Assembly of the League of Nations adopted a resolution condemning international bombardment of the civilian population and recalling the precautions to be taken to spare non-combatants in attacks against military objectives. Regrettably, that resolution was to remain a dead letter.

For shorty after, the second World War broke out. Foreseeing the disaster that was about to befall defenceless populations, the ICRC addressed a solemn appeal to governments on 12th March 1940, asking them, in particular, to confirm general immunity for peaceful populations, to define their military objectives, and to refrain from indiscriminate bombardments and reprisals. Although fourteen Powers, including the principal belligerents, endorsed that appeal, none applied it in practice. It was followed by another on 12th May 1940 and by reminders on 23rd July and 13th December 1943, also without success.

The ravages caused by the second World War left the world stunned. While the first World War had caused 10 million deaths, including half a million civilians, the second killed 50 million persons—26 million combatants and 24 million civilians. Of that number, according to the most cautious estimates, a million and a half civilians were killed in air-raids, not counting the great number disabled for the rest of their lives. Men had looked on helplessly while death and destruction were rampant, and the means of warfare irreversibly became more and more "total"—starting with conventional bombardments, going on to blitzkriegs and the V2 rockets, and ending with the terrifying explosion of the atomic bomb, in a second changing the face of the world.

It is realized now, somewhat late, that the massive bombardments of cities did not "pay" from the military standpoint. Such bombardments were not justified either morally, legally, or even from a practical point of view. Most jurists now consider that the use of the atomic bomb is contrary to law.

On 5th September 1945, shortly after the nightmare of Hiroshima, the ICRC sent a circular letter to National Red Cross Socie-

ties drawing their attention to the alarming questions created for the world by that unprecedented event. It was thus the first international institution to raise its voice against nuclear weapons.

In August 1949, government delegates signed four Geneva Conventions. One of them, the fourth, was entirely new and filled a great gap, the painful effects of which had long been felt: the protection of the civilian. It must be noted, however, that the Fourth Geneva Convention protects civilians only against abuses of power by the enemy authority. It does not come within the sphere of the law of war and the use of weapons, with the important exception of the provisions protecting hospitals against all attacks.

Moreover, since the War nuclear physics has steadily pursued its alarming discoveries. At present, a single thermonuclear bomb would annihilate a large city, and the major Powers possess enough to wipe out life on earth. Although demolished cities have been rebuilt, governments have done nothing to re-establish the rules of The Hague, many of which are buried under those ruins.

As early as 5th April 1950, immediately after the new Geneva Convention had been signed, the ICRC requested governments to make every possible effort to prohibit the use of atomic and indiscriminate (" blind ") [1] weapons. The governments remained silent, however, and the ICRC, with the help of experts, drew up " Draft Rules to Limit the Risks Incurred by the Civilian Population in Time of War ". This draft Convention, which was submitted to the 19th International Conference of the Red Cross at New Delhi in 1957, no longer aimed at prohibiting a specific weapon but at outlawing means and methods of warfare that unduly hit non-combatants. It led to a noteworthy publication of the ICRC.

The Conference, at which governments were represented, merely gave its basic approval of the draft Convention and asked the ICRC to transmit it to the various governments. These, however, having received it, proved unwilling to conclude on that basis a Convention with the force of law.

Undiscouraged, the ICRC submitted the question again to the 20th International Conference of the Red Cross held at Vienna in 1965. That Conference recognized at least certain principles that

[1] See annex to this article.

should always be observed in order to ensure innocent populations a minimum of protection. In this connection, it adopted an important resolution earnestly requesting the ICRC to carry on its efforts to guarantee the protection of the civilian population.

Encouraged by this significant success, on 19th May 1967, the ICRC sent a circular to all States parties to the Geneva and Hague Conventions, together with a memorandum suggesting that every effort should be made to secure official approval of the four principles which formed the basis of the Vienna resolution.

In a more general context, the memorandum then went on to raise the question of restoring the law of war:

> The observance of rules destined, in case of armed conflicts, to safeguard essential human values being in the interest of civilization, it is of vital importance that they be clear and that their application give rise to no controversy. This requirement is, however, by no means entirely satisfied. A large part of the law relating to the conduct of hostilities was codified as long ago as 1907; in addition, the complexity of certain conflicts sometimes places in jeopardy the application of the Geneva Conventions.
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> No one can remain indifferent to this situation which is detrimental to civilian populations as well as to the other victims of war. The International Committee would greatly value information on what measures Governments contemplate to remedy this situation and in order to facilitate their study of the problem it has the honour to submit herewith an appropriate note.

The "note" was a *summary review of the international law rules concerning the protection of civilian populations against the dangers of indiscriminate warfare*—a kind of stock-taking of the rules still in force. Since the questions dealt with would undoubtedly form the main part of a programme for reaffirming and developing the laws and customs relating to conflicts, the Note is reproduced in an annex to this article.

However, the ICRC circular of 19th May 1967 did not produce the reactions from governments that were hoped for. Nevertheless, the idea is in the air, as is evidenced, even outside the Red Cross, by the appeal made by the International Commission of Jurists [1] and

[1] *Editor's Note:* see Press Release of the International Commission of Jurists on "Human Rights in Armed Conflicts: Vietnam" of 7th March 1968.

by Resolution No. XXIII of the International Conference on Human Rights held at Teheran in May 1968.[1] This is a source for new hope.

5. Domestic Conflicts

Another major problem remains to be solved: how to ensure that the rules of the law of nations, or at least their essential principles, will be applied in conflicts that are not international, i.e. in civil wars and internal disorders.[2]

This is an urgent humanitarian need. Civil wars proportionately cause more suffering than international wars because of their desperate nature and because of the hatred they engender. Those engaged in the struggle know the men they are fighting against and have personal reasons for bearing them ill-will. In struggles between foreign nations, on the other hand, how many soldiers know the men they are sent to kill? Certainly very few.

The attitude underlying civil wars could hardly be described better than by quoting Vitellius's dreadful remark on the battlefield of Bedriac, reported by Suetonius. When one of his soldiers remarked that the bodies of the enemies, having remained for days without being buried, smelt bad, Vitellius replied: "The body of an enemy always smells good and it smells even better when he is a fellow-countryman!"

In reality, no one thought until comparatively recently that the law of nations would have to be applied in revolts against the established order, which were regularly bathed in blood.

It was Vattel, a jurist of the 18th century from Neuchâtel, who put forward for the first time, and very timidly at that, the notion that humanitarian principles should be applied to rebels. Less than twenty years later a great hope was born: during the American war of independence, both parties observed legal and humanitarian rules. Unfortunately, that hope was short-lived: other civil wars were branded by atrocious massacres. Despite the deadly nature of the American Civil War, law was not entirely ignored because of two

[1] The Resolution of 19th December 1968 was adopted unanimously by the General Assembly. This embodies the Teheran Resolution and restates the broad principles set forth by the XXth International Conference of the Red Cross at Vienna in 1965.

[2] See Jean Siotis: *Le droit de la guerre et les conflits armés d'un caractère non-international*, 1958.

outstanding men, Abraham Lincoln and his legal adviser, Francis Lieber. But during civil wars that followed, men once again resorted to cruelty and slaughter.

It was then that the Red Cross entered the lists. For it, there are no legitimate or illegitimate wars: there are only victims to be helped. Blood is the same colour everywhere and always.

After considerable resistance, it was finally acknowledged that the Red Cross had a duty to intervene in such conflicts. The most typical case was the Spanish Civil War of 1936-1939, when the ICRC was able to alleviate some of the suffering caused by the struggle.

This led to the idea of introducing into the Geneva Conventions a bold and paradoxical provision under which a purely national situation would be subject to international law.

There were serious difficulties, however, since such a notion ran counter to the sacrosanct principles of the State's sovereignty and security. Government representatives considered that if a State were obliged to apply humanitarian law in civil war, it would encourage revolts and would be helpless to repress criminal acts of subversion.

After months of discussion, a Diplomatic Conference of 1949 adopted the now famous Article 3, of all four Geneva Conventions, which is a "miniature convention" in itself. It provides that in non-international conflicts all parties must observe a number of essential humanitarian principles, concerning respect for non-combatants, the prohibition of torture, the taking of hostages, and unlawful sentences and executions. These provisions have already enabled the ICRC to intervene in many conflicts.

This is only a first step, however. The Geneva Conventions, moreover, do not cover the entire field of human suffering nor all sectors of the law of war. Modern times are characterized by the rise of political ideologies that aim at subordinating everything to their ends. At the same time, subversive movements that aim at changing the established order, also by violence, have flourished. The result has been extreme tension between States, sometimes called the cold war, and, within States, the existence of factions struggling for one another's destruction. Very often besides, citizens are subject in their own country to emergency laws, deprived of freedom merely because of their opinions, disposed of arbitrarily

and, in the last analysis, treated worse than enemy soldiers captured with weapons in their hands.

In the course of history, law first developed inside human communities. Attempts were then made to extend some of its elements to international wars and afterwards to civil wars. By a strange and surprising reversal, the safeguards afforded to the individual by the law of war now need to be applied in time of peace and to the domestic affairs of nations!

Consequently, there is a growing tendency to consider that the purpose of international law is to ensure a minimum of safeguards and humane treatment for all men in time of peace as in time of war, regardless of whether the individual is in conflict with a foreign nation or with the society to which he belongs. This development will no doubt continue, the ultimate goal being to achieve a uniform status for political prisoners established according to international rules.

Meanwhile, the ICRC is working for the extension to such victims of the principles of the Geneva Conventions. On three occasions already, it has held meetings of internationally known experts, who have drawn up certain fundamental rules for the treatment of political prisoners and established the bases on which the Red Cross may take action for their protection.

In this field, the action of the ICRC goes hand in hand with that of organizations specializing in the protection of human rights. There must not be a no-man's-land in humanitarian action.

6. Other Problems

Since the end of the first World War, the international community has concentrated its efforts on ensuring collective security, maintaining peace and, by prohibiting violence, outlawing war. These efforts, which in 1928 had led to the Briand-Kellogg Pact, found their consecration in the Charter of the United Nations. This is certainly welcome; but a high price has been paid for success. States, though they still war against one another, no longer admit that they are at war and refuse to recognize that the rules of humanitarian law apply although the objective conditions for their application obtain. They thus abuse their discretion, which is far too wide,

to determine the nature of a conflict. It is useless to entertain illusions. Not only is the use of force still legally possible in certain cases but, unfortunately, it is constantly the practice. This is abundantly demonstrated by the fact that the means of warfare are forever being improved and large-scale armies are everywhere maintained. Although men for a long time refused to face this fact, today it cannot be denied; and the General Assembly of the United Nations itself has affirmed, by its resolution of 1967 reminding nations of the prohibition of atomic weapons and chemical warfare, that civilization has a stake in the strict observance of the rules of international law on the conduct of hostilities. It is thus recognized that, until such time as an end has finally been put to war, it must be governed by the Rule of Law and the dictates of humanity. It is in this spirit moreover that UNESCO, as a specialized agency of the United Nations, sponsored the work that led, in 1954, to the Convention relating to the Protection of Cultural Property.

The outlawing of war has had another consequence. The theory of the "just war" has been revived in another form. Basing their stand on the notion of aggression, some would maintain that the victim of aggression is not bound by the same rules of war as the aggressor. Such an attitude must be rejected as far as the rules for the protection of the individual are concerned, for it is essential that humanitarian law should be applied by both sides in every armed conflict. For the same reasons, the emergency forces of the United Nations must also respect the law of war.

It has also been thought that the existence of weapons of mass destruction and "the balance of terror" between the major Powers would contribute to preventing war. And in fact the existence of such weapons has profoundly modified the nature of international relations and has certainly checked the Powers on the road to nuclear war. It is certain, too, that the clouds threatening the world are so dark that every effort made by the United Nations and the Disarmament Commission to prohibit the use of atomic energy for the purposes of war is to be welcomed. But until such time as that is achieved, and that time may still be far distant, the so-called minor and localized conflicts continue to proliferate and to cause countless victims. As a result, it is becoming increasingly clear that, although a nuclear war would seem by its very nature to elude any rules and

regulations, the other forms of war that still exist demand, now more than ever, the reaffirmation of the laws to limit their ravages.

As far as the matters to be dealt with in restoring these laws are concerned, mention has already been made of the most important questions—the protection of civilian populations against the dangers of indiscriminate warfare, the prohibition of the use of certain weapons (even against armed forces) civil wars and guerrilla warfare. These questions, however, do not exhaust the field to be covered.

Despite the difficulties involved, the categories of persons who may commit belligerent acts must be so redefined as to prevent the confusion, repressions and hardship caused by uncertainty. Such a study is essential at a time when partisans, saboteurs and irregular troops take part in ill-defined struggles (guerrilla movements). It is also necessary to reaffirm and define certain essential humanitarian rules that the belligerents must observe in conducting hostilities, such as protection of the enemy who surrenders, the question of giving quarter, the treatment of parachutists, blockades and pillage.

The rules of protection for the inhabitants of occupied territories were already considerably developed in the Fourth Geneva Convention. Similarly, the rights and duties of neutrals were expanded by the Third Geneva Convention, when it established that its provisions were to apply to prisoners of war interned in neutral countries, without prejudice to any more favourable treatment that might be given to them. As for the numerous rules on sea warfare, at times disputed or forgotten, it would be appropriate for experts to examine those that should be reaffirmed or developed in the light of the humanitarian ideals of our times.

Lastly, measures to ensure observance of the law are extremely important. In this respect, reprisals, if they cannot be completely prevented, must at least be limited and checked or irremediable disasters will follow. Machinery should also be provided, in particular, to sanction offenders [1] and to ensure that effective control is exercised by the Protecting Powers.

What conclusions are to be drawn from all this? An essential feature of contemporary times is the upheavals and conflicts that

[1] In this connection, it would be well to refer, in particular, to the *Nuremberg Principles* formulated in 1950 by the International Law Commission of the United Nations.

have led to demographic and technological expansion, precipitated the clash of profoundly different ideologies, and brought about the emergence on the world scene of many new States. International "morals", as hitherto conceived, have been weakened as a result, and a large part of the law of nations has been called into question. Although the 20th century has had the merit of proclaiming human rights, it has also witnessed the return of massacres, torture and brutality that mankind, in its hope of progress, had believed were forever banished from the face of the earth. Hatred and fanaticism have shown their face again.

To yield to this "neo-barbarism" would be to abdicate. In reality, although the laws of war are partly inadequate and outdated because they are no longer adapted to present facts, their principles remain valid because they are the expression of an abiding truth. Today as yesterday, certain acts of war must give way to the requirements of humanity. Reason must be master of the inventions of science, and law, although it cannot ignore them, must not exonerate but dominate their effects.

Acts which violate humanitarian principles are not, as they are sometimes presented, ineluctable necessities of war but often expedient solutions that do not pay in the long run and that the parties to the conflict could dispense with without jeopardizing their cause.

Revision of the law of war is urgent. It should be the constant and pressing concern of all men who wish to work, each in his own field and to the best of his ability, towards reconstructing the world in the image of man. Everyone knows that the ICRC, with its long experience, is prepared to assume and devote every effort to that task. No one doubts that public opinion will throw all its enthusiasm into the scale. If the peoples of the world, weary of being manipulated by the blind forces that threaten them, raise their voices and set in motion a ground swell that cannot be stemmed, governments will be forced to sit up and listen. And the battle will be won.

One thing is certain. The law to be built will be accepted and prevail only to the extent that it is founded upon the aspirations of all nations, that it finds within the world community common denominators—in a word, to the extent that it is placed on a universal basis. It depends for its force on its consistency with the

mutual and clear-cut interests of the various nations. What is useful to the majority inevitably triumphs in the end. As Saint-Exupéry said: " In life, there are no solutions. There are forces on the march: they have to be created and the solutions will follow."

Jean PICTET
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ANNEX

Summary review of international law rules concerning the protection of civilian populations against the dangers of indiscriminate warfare

The basic rule is laid down in article 22 of the Regulations concerning the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of October 18, 1907, namely: " *the right of belligerents to adopt means of injuring the enemy is not unlimited* ". From this principle, still valid and confirmed by the XXth International Conference of the Red Cross, the following rules are derived.

1. Limitation for benefit of persons

Whilst combatants are the main force of resistance and the obvious target of military operations, non-combatants shall not be subject to and shall not participate in hostilities. It is therefore a generally accepted rule that *belligerents shall refrain from deliberately attacking non-combatants.* This immunity to which the civilian population by and large is entitled—provided it does not participate directly in hostilities—has not been clearly defined by international law, but in spite of many examples of blatant disregard for it, it is still one of the main pillars of the law of war.

In 1965 the International Conference of the Red Cross in Vienna formulated (in its Resolution XXVIII) the following requirement as one of the principles affecting civilians during war and to which governments should conform, viz: "...distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."

A major rule deriving from the general norm quoted above is that *bombardments directed against the civilian population as such, especially*

for the purpose of terrorising it, are prohibited. This rule is widely accepted in the teachings of qualified writers, in attempts at codification and in judicial decisions; in spite of many violations, it has never been contested. The XXth International Conference of the Red Cross, moreover, did not omit to re-state it.

International law does not define the civilian population. Of course, any sections of the population taking part in hostilities could hardly be classified as civilian. The view is general that civilians staying within or in close proximity to military objectives do so at their own risk. But when such people leave objectives which may be attacked and return to their homes they may no longer be subject to attack.

Another rule deriving from the general norm is that *belligerents shall take every precaution to reduce to a minimum the damage inflicted on non-combatants during attacks against military objectives.*

This latter rule is perhaps less widely admitted than those previously mentioned. However, in an official resolution of September 30, 1938, the League of Nations considered it fundamental and it has been given effect in the instructions which many countries have issued to their air forces.

The precautions to which allusion is made would include, for the attacking side, the careful choice and identification of military objectives, precision in attack, abstention from target-area bombing (unless the area is almost exclusively military), respect for and abstention from attack on civil defence organizations: the adversary being attacked would take the precaution of evacuating the population from the vicinity of military objectives.

As can be seen, the obligation incumbent on the attacking forces to take precautions depends in part on the "passive" precautions taken by the opposite side, or, in other words, the practical steps taken by each belligerent to protect its population from consequences of attacks. What is the extent of such an obligation? In some attempts at drafting regulations it has been suggested that bombing attacks should not be carried out if there is strong probability of indiscriminate effect causing the population to suffer. The International Committee of the Red Cross, for its part, proposed, in its appeal of March 12, 1940, that belligerents should recognize the general principle that *an act of destruction shall not involve harm to the civilian population disproportionate to the importance of the military objective under attack.* On a number of occasions, and recently by qualified writers, by experts and by some army manuals of the laws and customs of war, this rule has been re-stated.

2. Target limitation

In this connection, the accepted rule is that *attacks may only be directed against military objectives, i.e. those of which the total or partial destruction would be a distinct military advantage.*

There has always been an accepted distinction between the fighting area and the zones behind the lines. This distinction is purely technical in origin, the theatre of operations depending on the ground gained by the advancing troops and the range of weapons. Until the advent of air raids, areas behind the firing lines were in fact immune from hostilities.

This out-dated concept was the basis for the law of conventional warfare, i.e., in the main, articles 25 to 27 of the Regulations annexed to the IVth Hague Convention of 1907. In those articles the word "bombardment" must be construed to mean "shelling"; since that time the aeroplane has made air bombardments possible well behind the lines.

Nowadays, a belligerent's whole territory may be considered a theatre of hostilities. The 1907 rules are still applicable to the fighting area at the front. So far as areas well behind the lines are concerned, they are in part out of date.

Although during the Second World War indiscriminate bombardments wrought widespread havoc, no government has attempted to have the practice recognized as lawful. The contrary has in fact been the case. States have shown a marked tendency to justify their air bombardments as reprisals against an enemy who first had recourse to this method, or, as in the case of the atomic bomb, as an exceptional measure dictated by overriding considerations, such as the saving of human lives by putting an end to the war quickly.

Our first rule of target limitation is not contained in treaty law, but its validity is founded on many official statements, made particularly during the Second World War and the wars of Korea and Vietnam. It has been evolved progressively by analogy with a provision contained in the IXth Hague Convention of 1907; this authorizes naval shelling of certain important military objectives, even if these are situated in undefended towns. The 1949 Geneva Conventions and the 1954 Hague Convention contain several references to the concept of military objective.

Several documents, such as the draft issued by the Commission of government jurists who met in The Hague (December 1922-February 1923) and the Draft Rules drawn up in 1956 by the International Committee of the Red Cross, have suggested definitions or lists of military objectives. It is generally admitted *that an objective is military only if its complete or partial destruction confers a clear military advantage.* It is held, also, *that any attacking force, before bombing an objective, shall identify it* and *ascertain that it is military.*

There are buildings which cannot under any circumstances be considered as military objectives; they are given the benefit of special immunity under the Geneva Conventions (I, art. 19, IV, art. 18), the Hague Regulations of 1907 (art. 27), and the 1954 Hague Convention relating to the protection of cultural property (art. 4), namely *belligerents will in particular spare charitable, religious, scientific, cultural and artistic establishments as well as historic monuments.* In addition, under the Fourth Geneva Convention, *belligerents may, by special agreement, set up safety*

or neutralized zones to shelter the civilian population, particularly the weaker members thereof, in order to provide them, under such agreement, with special protection against the effects of hostilities.

These Conventions stipulate that it is the duty of the authorities to indicate the presence of such buildings and zones by special signs.

Mention must also be made of article 25 of the Regulations annexed to the IVth Hague Convention of 1907, considered for years as one of the fundamentals of the law of war namely: " *The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited*". The subsequent development of air warfare has vitiated this provision so far as areas behind the fighting lines are concerned; it is a provision which has been supplanted by the military objective concept. It is nevertheless still valid for ground fighting. When localities offer no resistance, an enemy who is able to take them without a fight shall, in the interest of the population, abstain from attack and useless destruction.

It has become customary to declare towns " open " if it is not intended to defend them against an enemy who reaches them.

3. Limitations on weapons and their use

In this respect the basic rule is article 23 (e) of the Regulations annexed to the IVth Hague Convention of 1907, namely: " *It is forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering.*"

Its characteristic is that its aim is not only to spare non-combatants, but also to avoid any suffering to combatants in excess of what is essential to place an adversary hors de combat. This implies that weapons and methods as described below should not be used. Due to the nature of modern war, this field of law no longer concerns only combatants, but also civilian populations.

(a) *Weapons inflicting needless suffering*

The Conventions of The Hague and St. Petersburg prohibit the use of "*Poison or poisoned weapons*" (Hague Regulations, art. 23, a), "*any projectile of a weight below 400 grammes which is either explosive or charged with fulminating or inflammable substances*" (St. Petersburg Declaration, 1868) and so-called "dum-dum" bullets "*which expand or flatten in the human body*" (Hague Declaration, 1899).

It might well be asked whether such new weapons as napalm and high velocity rockets should not be included in this category. They have not so far been expressly prohibited, but they do cause enormous suffering and the general prohibition which forms the sub-heading to this section seems applicable to them.

Mention must also be made of a clause in the St. Petersburg Declaration to the effect that parties thereto reserve the right to come to an

understanding whenever a precise proposition shall be drawn up concerning any technological developments in weapons, with a view to maintaining the principles they have established and reconciling the necessities of war to the laws of humanity. It is unfortunate that States have not followed up this suggestion which today is as valid as ever.

(b) " *Blind* " *weapons*

These weapons not only cause great suffering but do not allow of precision against specific targets or have such widespread effect in time and place as to be uncontrollable. They include, for instance, chemical and bacteriological weapons, floating mines and delayed action bombs, whose insidious effects are such that they preclude relief action.

The Geneva Protocol of June 17, 1925, *prohibiting the use in war of asphyxiating, poisonous and other gases and of bacteriological methods of warfare* has replaced older prohibitions (the 1899 Hague Convention, the Treaty of Versailles) and shall be considered as the expression of customary law. In an almost unanimous resolution on December 5, 1966—which affirms that the strict observance of the rules of international law on the conduct of warfare is in the interest of maintaining the accepted norms of civilisation—the United Nations General Assembly called for strict observance by all States of the principles and objectives of this Protocol, and condemned all actions contrary to those objectives. This very brief Protocol is in the nature of a Declaration subject to ratification by the Powers and binding them in the event of conflict with any co-signatories. This formula seems to have been well chosen and remarkably successful; only one violation has been recorded. It should be pointed out, however, that almost eighty States are not participants.

Unanimous agreement on the interpretation of this prohibition has not been achieved by qualified writers. The Protocol mentions not only asphyxiating gases but also "other" gases. Does this mean all gases or only those which are a hazard to life and health?

The major problem however has been set by nuclear weapons.

In a resolution adopted on November 24, 1961, the United Nations General Assembly stated that the use of nuclear and thermo-nuclear weapons, which exceed even the field of war and cause uncontrollable suffering and destruction to humanity and civilization, "is contrary to international law and to the laws of humanity". It must be added, however, that this resolution was not adopted unanimously, did not cover the case of reprisals and, what is more, it envisaged at some future date the signing of a Convention on the prohibition of nuclear weapons, and it also requested the United Nations Secretary-General to hold consultations with governments on the possibility of convening a special Conference for that purpose.

Until such a Convention has been drawn up and widely ratified—it is still not yet known when this special Conference will meet—the fact must

be faced that qualified writers differ on this question. It is not our aim here to decide this important controversy. We would state merely that the use of atomic energy in war has not been expressly forbidden, for the conventional law on the conduct of warfare dates back to a time when atomic energy was unknown. However this does not justify its use: in the implementation of the law of war, as any other law, general principles must apply to cases not previously foreseen. It is in fact these very principles which the present survey reviews, i.e.: no attack on the civilian population *per se*, distinction between combatants and non-combatants, avoidance of unnecessary suffering, only military objectives to be targets for attack, and even in this latter case, the taking of every precaution to spare the population.

This view was proclaimed by the XXth International Conference of the Red Cross which met in Vienna in 1965. The Resolution No. XXVIII then adopted postulated certain essential principles of protection for civilian populations and added that "*the general principles of the Law of War apply to nuclear and similar weapons*". This does not imply that the Conference intended to make any decision on the legitimacy of using such weapons; it merely made it clear that in any event nuclear weapons, like any others, were subject to these general principles until such time as governments came to an understanding on measures for disarmament and control with a view to a complete prohibition of the use of atomic energy in warfare.