

# The Swing of the Pendulum

A hundred years in the development  
of humanitarian law—1874-1973<sup>1</sup>

by J. Pictet

*We publish below the text of an address delivered at the formal centenary commemoration of the Brussels Declaration of 1874 concerning the laws and customs of war. This celebration took place in Brussels on 12 December 1974.*

The concept that man must be protected against the ills of war is not a recent one. It may be likened to a clear spring gushing out from time immemorial, increasing gradually in volume as it surges forth until its swollen waters are borne down upon us today. The sum of efforts that idea has aroused has grown, parallel to the rise of civilization with which it is indissolubly linked.

The course of every civilization is marked by leaps and bounds; at times, there is a sudden quickening in the pace of its advance, which may be followed by periods of stagnation and temporary regression, like milestones, some white, some black, on the long road of mankind. One could imagine life on our planet as if it were under the sway of a gigantic, relentless pendulum, oscillating from one extreme to another. A similar phenomenon may be observed in the evolution of war, and again in the long series of successes and set-backs in the age-long struggle undertaken for the protection of the human person against the dangers of hostilities. These are but episodic engagements in the battle waged since the dawn of time between those who wish to preserve, to unite, to liberate and their opponents who wish to dominate, to destroy, to enslave, and may be

---

<sup>1</sup> The historical facts in this article were obtained mainly from the excellent work by the late Pierre Boissier: *Histoire du Comité international de la Croix-Rouge*, Paris, 1963.

seen as aspects of the eternal opposition between the instincts of "Eros" and "Thanatos", of preservation and of destruction.

The history of Europe provides several instances of this dichotomy. In the Middle Ages, our life on earth was viewed as only a stage on our journey to the great hereafter; the value attached to life was not so great that its span on earth was considered to be worth prolonging. More importance was given to the saving of souls than of bodies and it was not the business of society to change the fate of human beings. While the religious orders set admirable examples of self-denying devotion, the masses remained cold to the afflictions suffered by their fellow-creatures.

The alliance of Church and State, on which the Edict of Milan set its seal in 313, gave birth to the medieval theory of the just war. This formidable myth, which introduced an emotional and esoteric element in the art of war, put a brake on the progress of humanitarianism for centuries. It led belligerents to pursue their combat to the point of utter exhaustion, as, in their zeal to have right on their side at all costs, they sought to vindicate their deeds by invoking faith, morality, justice or honour. It was on the basis of this article of faith that they justified all the many crimes committed during that period. The Crusades provided the most horrible instances of such acts.

In those times, wars were decided upon the issue of a single battle, after which those who had been thrown into the fight like pawns were forsaken. Happy the prisoner whose life was spared on payment of a ransom! The civilians were not treated more kindly and were thrown upon the mercy of the victors. As for the wounded, they were abandoned to a cruel fate, unless they were dispatched by a blow with a mallet.

Towards the end of the fourteenth century, there was a swing marking a turning-point in military history: the appearance of firearms made the dwarf a match for the giant. The new invention revolutionized the art of war and at the same time it caused a radical change in the social order. Cannons were dear and only monarchs could afford to have them made. Thus it came about that armies belonged to the king and consisted of mercenaries. The feudal system was succeeded by state power, and private wars and serfdom gradually disappeared. The release of prisoners on payment of a ransom became common practice; the wounded were taken care of and medical services worthy of the name were set up. The founders of natural law — Vitoria, Suarez and later Grotius — met with attention and their influence was deeply felt.

In the sixteenth and seventeenth centuries, however, armed conflict gradually degenerated into total war: blood flowed freely in a Europe ravaged by the wars of religion and the Thirty Years War. Living on pillage, in the territory of friend or foe, soldiers massacred the peasants, who were avenged when the tide of battle turned. To mention but one instance, the population of Bohemia in those sombre times fell from three million to seven hundred and fifty thousand.

But the spirit of scientific invention was stirring in the west. Man was probing the laws of physics which governed his universe and his own person. Life was becoming an end in itself, and from then onward, society took its destiny into its own hands. The "Age of Enlightenment" was dawning, and humanitarianism, the perfected and rational form of charity and justice, was slowly being evolved. Philosophers refused to accept that poverty was in the hands of Fate. Their goal was to gain the greatest sum of happiness for the greatest possible number. Jean-Jacques Rousseau uttered in 1762 those incontrovertible words: "war is a matter between States whose subjects are only their instruments. Once they have laid down their weapons, they are again men and no one may have any claim on their lives". The Genevese philosopher substituted for the ancient sophistry of the just war a concept which was to bear fruit: the distinction which has to be made between combatants and non-combatants, the foundation on which the law of contemporary conflicts has been erected.

In the eighteenth century, war became a matter fought out between professional armies consisting of a relatively small number of professional soldiers: civilians were no longer involved, because the troops were provided for by a quartermaster-general's department and looting was prohibited. War was an art, in which tactical manœuvres and strategy took the place of wholesale killing; ideally, the object was to gain a victory without causing any victims. It became a contest with its own set of rules, and though violations did still occur, they were more the exception than otherwise. The fate of prisoners was decided by "cartels", which were models of common sense and moderation, concluded between enemy commanders. Perfidious and cruel acts were banned, for it was considered they would be a provocation to the adversary. In short, war was kept under control by man's will.

On the evening of the Battle of Fontenoy, all the wounded, from both sides, were cared for by a well-organized medical service. If Henry

Dunant had lived then and had turned up at Fontenoy instead of Solferino, he would not have found anything to comment upon and still less would he have proposed the creation of the Red Cross.

The same ideas were taken up by the men of the French Revolution, who proclaimed that "prisoners of war are under the shield of the nation and protected by its laws", in exactly the same way as French citizens. But here it would seem the pendulum had reached the farthest point of its swing. Attacked by half the countries of Europe, France introduced compulsory military service for all its subjects. Wars acquired, because of conscription and technical developments, "unbridled ferocity", to paraphrase Marshal Foch's expression: "allure déchaînée de la guerre". Whole nations were set against each other. As this was not accompanied by advances in the organization of medical services, the death rate in the wars of Napoleon I was truly frightful. The prospect behind all the outward glory was grim. Cartels sank into oblivion.

In the second half of the nineteenth century, there was no improvement at all in this grievous situation. During the campaigns in the Crimea and in Italy, sixty per cent of the wounded did not survive.

But history once again was to witness a change. Sense prevailed in the nineteenth century! It turned out to be a great period in world history and was to see the abolition of slavery and the birth of the movement towards social consciousness, of universality and of the Red Cross.

It was thus that the time was ripe for Henry Dunant, as the witness of the mournful aftermath of one of the most murderous battles of that period, to make his moving appeal: a soldier who is disabled is no longer an enemy; he is just an ordinary man losing blood, and the blood that flows in every man's veins is always red; he and those who go to his assistance ought to have the benefit of "neutrality", to use the expression of the time; and Dunant's brilliant idea was that assistance ought to be organized in peace-time. The Red Cross and the Geneva Conventions blossomed from this seed; the protective emblem was created.

Though at first the Red Cross was concerned only with wounded soldiers, it gradually spread its protective mantle to other victims of conflicts: the shipwrecked, prisoners of war and civilians. In addition, the Red Cross Societies, finding it irksome to remain idle in between hostilities, turned their attention to good works in time of peace: the care of the sick, hygiene, aid in cases of natural disasters. In a relatively short

time, the activities of the Red Cross were to encompass relief of nearly all the forms of human suffering.

Similarly, the first Geneva Convention of 1864 for the protection of wounded soldiers gave impetus to the whole of humanitarian law, as well as to the law of war, codified at The Hague. It was even, in some measure, at the origin of the powerful movement for the settling of conflicts by peaceful means and the maintenance of peace, undertaken first by the League of Nations and today by the United Nations. With the Geneva Convention, the States relinquished, for the first time at international level, a part of their sovereignty for the benefit of private individuals. For the first time, the use of arms yielded to the rule of law. Henceforth, war would no longer mean the unleashing of unbridled violence.

The first conflict during which the Convention was fully applied was the Serbo-Bulgarian war in 1885, which consisted nevertheless in a number of fierce engagements. In the early stages, the Serbian Army penetrated into Bulgaria, but then was forced to retreat as a result of a military movement which has since become famous. In the retreat, numerous wounded were left on the field, but the medical detachments remained behind with them, the victims were cared for without distinction, and medical personnel were allowed to cross the lines. The death rate of the wounded fell to two per cent. It should perhaps be added that the Red Cross and the Convention were not alone responsible for this low figure, for thanks to Pasteur's discoveries, aseptic treatment had just been introduced. But States had come to understand that humanitarian law was to the advantage of all, and henceforth this was no longer disputed by anyone. In 1906, a Diplomatic Conference conferred upon the Geneva Convention its full satisfactory form.

What was the situation in the meantime on "great Neptune's ocean"? Progress was slower, for conditions at sea were stern. The founders of the Red Cross had realized that there was a need to adapt to naval operations the principles of the Geneva Conventions. But this idea was rejected by the 1864 Diplomatic Conference, because it was felt that adequate information on the form naval warfare might take in the future was wanting. The navy was just going through the greatest changes in its history, and warships were being equipped successively with steam, the propeller and armour-plating.

The lack of clauses relating to naval operations became tragically apparent at the battle of Lissa in 1866, which could be likened to a

“maritime Solferino”. The International Committee of the Red Cross (ICRC) decided to prepare a draft containing additional articles to the 1864 Convention, concerning more particularly the navy, and these were submitted to a Diplomatic Conference convened in Geneva in 1868. However, the text was not ratified, and the new provisions, embodied in one of the Hague Conventions, did not enter into force until 1899, the year after another disaster, a naval engagement off the Cuban coast during the Spanish-American War of 1898. The articles on naval warfare then took their rightful place in international law.

This brings us to the question of the law of war properly so called, also known as the Law of The Hague. But its first chapter was written at St. Petersburg in 1868. It was here that, in connection with the prohibition of explosive bullets, its basic principles, which are still in force today, were laid down. Its second chapter was drafted at Brussels, in the course of the memorable Conference which we are commemorating today.

The ground having been cleared and the way opened by such eminent persons as Francis Lieber, Gustave Moynier and Jean Gaspard Bluntschli, the first Peace Conference, as it was called, met at The Hague in 1899 at the invitation of Tsar Nicholas II. The loftiest hopes were raised: there was talk of general disarmament and of a new era in the history of mankind. But there were some who thought that these ideas were but vain dreams.

In addition to prohibiting weapons which might have come straight out of the pages of science fiction, like “projectiles discharged from balloons” and asphyxiating gases, it was decided to ban dum-dum bullets, which were certainly quite real and caused ghastly wounds. But the Conference’s main task was to draft the “Regulations respecting the Laws and Customs of War on Land”, which drew extensively on the Declaration of Brussels and the Oxford Manual. The scope of the Regulations should not be under-estimated and the conduct of military operations is still governed by a good number of their provisions. Some of these have retained even today their significance, for example, those relative to the opening and end of hostilities, the status of combatants, surrender, the respect of “open towns”, the prohibition of certain weapons. Tribute should be paid to the foresight of statesmen like Frédéric de Martens, whose rightly celebrated “clause” would alone have been sufficient for his name to be kept alive.

The Hague Regulations also contained the essential rules concerning the treatment of prisoners of war, for whom Henry Dunant had devoted praiseworthy efforts and for whose benefit the ICRC had set up during the 1870 war the first Central Prisoners of War Agency. There are, too, some provisions in the Regulations on the protection of civilian inhabitants of occupied territory. In 1929 and 1949, both these questions were included in the Law of Geneva.

But just as the pendulum had risen to its highest point, it started to swing back. Science, coupled with technology, placed in the arms of Mars the resources of industry increased tenfold and unprecedented means of destruction. The armaments race was intensified by the mobilization of all the means available in each country.

The two episodes of the world war, separated by a twenty-five year interval, caused more suffering and destruction than any other conflict. Amid apocalyptic scenes of horror, the end of our world might have seemed to be drawing near.

When the bells rang out at last for peace, in the midst of ruins, it took a long time for humanity's wounds to heal. Abominable doctrines had kindled man's disregard for man; there lay that fiendish venom for something was bound to remain, even in peaceful minds. Men had got accustomed to violence; death was a commonplace occurrence and was nothing more than an item in vital statistics.

The rule of law was quick to lift its head after the nightmare of the war. Under the banner of the United Nations, the organization of peace was set in motion and the legislation relating to human rights began to be developed. The years 1948, 1949 and 1950 are shining milestones in contemporary history. The year 1949 marked the meeting of the Diplomatic Conference which shaped and expanded the Geneva Conventions to their present form. Following a holocaust of unprecedented dimensions, it was felt it was essential to revise and supplement the fundamental charters of humanity in the light of recent experience. The ICRC therefore took up the challenge, following the method it had already used, which consisted in gathering a vast amount of material and then drawing up draft rules with the aid of international experts. The question was whether detailed codification was better than the formulation of general and flexible principles. The ICRC was in favour of the second solution but it was the first which was eventually adopted, because the plenipotentiaries were thinking of specific cases where their own

country had suffered and wished to see those cases dealt with explicitly.

The monumental work represented by the 1949 Conventions consisted of four diplomatic instruments. The first was none other than the "parent Convention" relative to wounded soldiers, adapted to suit contemporary trends. Some critics pointed out that from a humanitarian viewpoint it was a step backward, and they indicated that it confirmed the retention of medical personnel, that it abandoned the principle of the restitution of vehicles and material, and that it restricted the use of medical aircraft. They were not entirely wrong. However, what may have appeared, in absolute terms, to be a regression must be occasionally viewed, in the context of the evolution of the methods of war, as a relative advance. The Conference wished to take a realistic stand and was on its guard against utopian wishful thinking.

The provisions of the Second Convention, relative to armed forces at sea, for the first time had their counterpart in the First (land forces) Convention, and the articles followed each other in a strictly parallel order. A number of points, which formerly had been somewhat obscure, were clarified. Some people may even consider the Second Convention to be more humanitarian than the First, since the principle that medical personnel were exempt from capture was retained to a greater extent than on land, in view of the special conditions prevailing at sea.

The Third Convention dealt with prisoners of war. At this point, we should go back a little. The Hague Regulations contained only seventeen articles on prisoners of war, and provided that information regarding prisoners of war would be communicated to the government to which they belonged only after the conclusion of peace! No one had thought of their families and of the state of mind they would be in.

When the First World War broke out in 1914, the ICRC, without the support of any legal authority, set up the Central Prisoners of War Agency and thus familiarized people throughout the world with the "International Red Cross", as it had already become known at the time. This was followed by sending neutral delegates to the camps to distribute comforts. The delegates made it a practice to describe in their reports what they saw in the camps every time they brought parcels. Gradually this developed into regular inspections of places of detention and was found to be best method to curb the absolute authority of the detaining

Powers. It could be said that control over the application of the Conventions came into existence spontaneously.

All these improvised operations provided a framework for the Geneva Convention of 1929, which laid down the rules relating to captivity in wartime in all its different aspects. It was the 1929 Convention which governed the condition of millions of prisoners during the Second World War. Its effectiveness may be gauged from the fact that, where it was enforced, the death rate did not exceed the normal ten per cent throughout the conflict, while in those camps for prisoners of war or political detainees where legal protection was lacking it varied between forty and ninety per cent.

The 1949 version did not greatly differ from the preceding one. The main improvement lay in the extension of the category of persons who, when captured, would have the right to claim prisoner-of-war status. That was the intention of Article 4, which is very much the key to the Convention. It solved, at least partially, the difficult problem of "partisans", who thereby enjoyed treaty protection provided they met the well-known "Brussels conditions" applied until then to militias and volunteer corps. The provisions regarding work and penal sanctions were extended, and repatriation of prisoners was no longer to take place after the conclusion of peace but "without delay after the cessation of active hostilities".

We now come to the Fourth Convention of 1949, which was an entirely new text. The First World War had exposed the glaring inadequacy of the rules for the protection of civilians. The ICRC had proposed in 1929 to lay down the status of civilians at the same time as that of prisoners of war. But objections were raised that the time was inappropriate and even—rather hypocritically—that action of this sort would constitute a betrayal of the cause of peace!

Soon after, the ICRC prepared a draft Convention which was adopted in 1934 at Tokyo by an International Red Cross Conference. But the Diplomatic Conference that should have accorded it official sanction was convened only for 1940. It was too late: in the meantime, war had broken out. Millions of persons were under the threat of deportation, atrocities of the most ruthless type, and death.

In 1945, the work of revising the Geneva Conventions was overshadowed by the urgent need to extend their protection to civilians. This was to be a much more difficult undertaking: it was no longer a question

of grouping under one definition a limited, organized and clearly ordered class of persons like the army; one was now dealing with a shapeless mass of civilians spread over the whole territory. Besides, it was not enough to protect the victims of conflicts; what was required was to prevent these persons from becoming victims. As Max Huber put it, "we were coming to grips with war itself, since it was no longer a case of alleviating suffering, but of removing its causes at their source". Furthermore, unlike the wounded and prisoners of war, civilians in most cases were not incapable of causing mischief.

Under the new Convention, the internment of civilians could be ordered by the appropriate authority only in the case of imperative security requirements, and the decision had to be periodically reviewed. All persons deprived of their liberty were to benefit from a status similar to that enjoyed by prisoners of war, and their camps were to be open to visits by representatives of the protecting Power and of the ICRC. The inhabitants of an occupied country were to be allowed, as far as possible, to continue to lead a normal existence. Deportations and the taking of hostages were strictly forbidden. But it must be admitted that the Convention, despite its title, could protect civilians only against the abuse of authority by the enemy Power and not against the use of weapons.

But the most significant improvements in the 1949 texts were in connection with their general provisions. It was first necessary that the Conventions should be applicable not only in cases of regularly declared wars, but as soon as there were *de facto* hostilities. Cases of "peaceful occupation" also had to be covered. This was achieved by means of Article 2.

There was a still more difficult problem: how to ensure the application of humanitarian law, or at least its essential provisions, in conflicts not of an international character, that is to say, for the most part, in civil wars? The matter was of paramount importance and would suffer no delay, for the Conventions so far had been silent on this point, even though these conflicts, where personal hatreds were let loose, caused more suffering than others. But, needless to say, there was strong opposition from States, basing themselves on the principle of national sovereignty. After several months of discussions, the Diplomatic Conference adopted common Article 3 which, in itself, could be likened to a "Convention in miniature". It provided that, in non-international conflicts, all parties must apply unconditionally the great principles of humanity: the respect

of persons placed *hors de combat* or those not taking part in the struggle, the prohibition of torture, of the taking of hostages, and of sentences and executions without fair trial. But there was nothing to prevent the trial of those who took up arms to overthrow the Government. Three further points should be mentioned: the parties to a conflict were invited to enter into agreements laying down provisions in excess of the minimum stated; the ICRC could offer its services, and, as a necessary sop to the susceptibilities of States, the "application of these provisions shall not affect the legal status of the parties to the conflict". Such was this article which was truly revolutionary in relation to classical international law, and which has rendered signal service in numerous internal conflicts.

The great innovation in the 1929 Convention relative to the treatment of prisoners of war had been the organization of the control of its application. This was entrusted to "Protecting Powers", namely, to those neutral States whose duty it was, in accordance with customary law, to represent the interests of a belligerent in its adversary's country. The choice was judicious, because two essential conditions were united: neutrality and officiality. This control was supplemented by the provision for visits by ICRC delegates to prisoners' camps.

The Protecting Powers greatly contributed to the improvement of the condition of prisoners during the Second World War. But the dreadful truth must be stressed, that seventy per cent of the prisoners of war were without the services of a Protecting Power. The existence of such a Protecting Power was subject to the approval of the State on whose territory it was to discharge its mission and to the recognition by that State of the mandatory Power. But in many cases approval was not granted, and it was the ICRC which tried to fill this very serious gap.

It was therefore vital, in 1949, to pay attention to the eventuality of a substitute for a Protecting Power which would not be able to function, for any reason whatsoever. The Conference provided that, in such case, the detaining Power should have recourse to a substitute, such as the ICRC.

It should be mentioned that in most of the conflicts that have broken out since those instruments were signed, no Protecting Powers were designated. This did not mean that the system was not a good one, for the fact is that the majority were internal conflicts while in the others the States did not make any attempt to designate a Protecting Power for political reasons, for instance because they were unwilling to recognize their adversary, an apprehension which would appear to be unwarranted.

Such is the version at present in force of the Geneva Conventions, which remain worthy of the tradition on which they repose. But, despite their extension in 1949, they do not yet fully cover the whole field of human suffering, besides which twenty-five years have since elapsed and shortcomings have been detected. Furthermore, while the Law of Geneva has been carefully developed, the same cannot be said of the Law of The Hague, for most of its rules go back to 1907, when air bombing had not yet been contemplated. The ICRC, with the support of the entire Red Cross and of those governments and private circles working towards a better protection of the human person in time of conflict, therefore undertook to initiate a new stage in the development of humanitarian law. The first Diplomatic Conference was held this year; a second session is scheduled for the next.

There are therefore good reasons to be hopeful. But there are also reasons for misgivings. Too often nations take into account their own immediate interests and remain incapable of raising their outlook to world level and to the true maintenance of peace. The world of today is characterized by a more rigid mentality and by a decadence in international morality. Struggles are waged with hatred and fanaticism; the more passion enters into conflicts, the less is the rule of law applied. A frightful escalation of violence is developing. Acts of terrorism, committed against innocent persons, which are nothing but crimes, are labelled acts of war by some. And even in time of peace, it may happen that citizens who oppose a political regime are treated worse than captured enemy soldiers, are summarily detained, and are at times tortured or executed without trial. Finally, developments in nuclear physics have completely revolutionized military considerations. Scientists are dispassionately studying the means of destroying whole cities in one single blow, just by pressing a button!

Whither now, and in what direction will the fateful pendulum's swing take it? Shall the world make the rule of law predominate, or will our civilization destroy itself? That is the dilemma before us. It is for us to decide.

**Jean PICTET**  
Vice-President  
of the ICRC