Some Reflections on the Future of International Humanitarian Law [1]

by Hans-Peter Gasser

The four Geneva Conventions of 12 August 1949 for the protection of war victims and the two 1977 Additional Protocols are the written sources of modern international humanitarian law. This monumental work of some 600 articles represents an impressive investment of intellect, arduous political negotiation, financial resources and goodwill. Modern written international humanitarian law is the result of one of the greatest efforts of successive legal codifications we know of. And, of course, customary law supplements the written rules to a substantial extent.

What does the future hold for international humanitarian law? In venturing a reply, I should like to consider different issues of a humanitarian nature to which the ICRC should pay attention, in keeping with its mandate: to work not only *for the faithful application* of humanitarian law but also for its *improvement and dissemination.* At a later stage, priorities will have to be set, goals defined and procedures decided.

The principal task: ensuring respect for humanitarian law

It seems to us, however, that the greatest priority must be given, now and in the future, to the *acceptance of and better respect for existing humanitarian law.* This law has proved its value, and its further development in the 1977 Protocols marks a great step forward, a fundamental improvement of the lot of human beings caught in the turmoil of war.

Attention has to be paid, in the future even more than in the past, to the following objectives:

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First, the existing rules must be *accepted* by States in accordance with the formal procedures laid down by their respective constitution. I am obviously referring here to the ratification of the 1977 Protocols, as we have every reason to be proud of the degree of acceptance found by the 1949 Geneva Conventions, which have been accepted by 154 States. They have become universal law. This is not the case of the Protocols; today, six years after the end of the Diplomatic Conference that produced them, 38 States are bound by Protocol I, 31 by Protocol II.[1] This situation is not satisfactory and it causes the ICRC concern.

Secondly, the existing law must be *understood.* This is particularly true for the Protocols, as their complexity requires a certain effort in interpretation. This law must thus continue to be explained, by academics and other experts in humanitarian law, including those of the ICRC.

Thirdly, the existing law must be *known* and, even more important, it must be *assimilated* by those who ought to respect it. The only way to achieve this goal is and will be the instruction of the members of the armed forces, from the private to the commander-in-chief, his general staff, and all those whose activities have any bearing on the implementation, in time of armed conflict, of obligations under the Conventions.

Fourthly, the existing law must be *respected.* There is no need to draw attention to the breaches of the Conventions and the Protocols, even of their most essentially humanitarian regulations, to which we are all witnesses. A glance at the future leads us to predict a proliferation of troublespots and this should stimulate our imagination to think of ways of reinforcing existing supervision procedures and to find other means likely to guarantee better respect for humanitarian rules.

Like all human endeavours, the Geneva Conventions and the 1977 Protocols are not perfect, nor do they achieve the ultimate goal, namely full protection of helpless individuals against the effects of war. The carrying of humanitarian law a stage further in 1977—in particular, the new provisions limiting the right of belligerents to choose ways and means of conducting military operations, and those on the protection of civilians against direct effects of hostilities—has without any doubt felicitously supplemented the 1949 Conventions and respective customary law. The way we see the situation today makes it seem unlikely that a new attempt at development and codification of such scope is to be expected in the near future. What is likely is that efforts will be directed to making progress in certain particular areas.

[1] Figures as on 31 December 1983.

Indeed, another round in the development of important parts of humanitarian law seems to us not only improbable for some time to come, but even undesirable, for various reasons. For one thing, a look at the international scene reveals that our era suffers from an excess of international legal instruments. Because of this, the value of any new provision tends to diminish, and so does the likelihood of its being accepted.

Secondly, the humanitarian treaties have attained such a dimension and degree of sophistication and complexity that they have become difficult to comprehend and assimilate, not only by the persons who have to work with them, but even by legal experts. That analysis leads us to the conclusion that more efforts have to be made to explain the rules in force than to create new ones. Such endeavours have to focus particularly upon the underlying principles, barely visible in the present law, particularly in 1977 Protocol I.

Development of humanitarian law: scope and limits

Let us now turn to the areas and problems of humanitarian concern which, in our opinion, might require the development of humanitarian law provisions. We intentionally look beyond the limits of international humanitarian law in its strict sense and also intend our analysis to cover some areas on the fringe of that law or squarely outside it. As a lawyer on the staff of the ICRC, I can assure that the ICRC would take an initiative only on those issues which are of direct concern to it. The ICRC has no intention whatsoever of impinging on areas outside its terms of reference. But analysis has to be taken beyond the limits of our own domain in order to see the issues in a broader context.

Three categories of situations demand our attention:

1) Some domains of the law governing relations between States in time of armed conflicts were not taken up by the 1977 Diplomatic Conference (at the suggestion, incidentally, of the ICRC) and remain, therefore, in their pre-1977 state.

2) Other areas are constantly presenting us with new challenges, due to technological progress. The law must keep pace with these developments, which otherwise will run roughshod over it.

3) As part of public international law, humanitarian law is directly related to many other fields of law, such as human rights, refugee law, international penal law, etc. Changes in these areas could have repercussions on humanitarian law. It is consequently necessary to keep pace with what is going on elsewhere, to defend the attainments

of the Geneva Conventions and the Protocols and, if necessary, try to influence the development of public international law in other fields, in accordance with the goals of humanitarian policy.

Without giving at this stage an opinion on the priority to be accorded to each problem, we can mention several areas which should be on the agenda for future development of humanitarian law.

Possible areas for further development

Law on armed conflict at sea

The written regulations governing armed conflict at sea date back to 1907; they were drafted before the appearance of submarines and the large scale use of aircraft in naval operations. Only the Second Geneva Convention of 1949, as supplemented by 1977 Protocol I, develops adequately one important part of that law, i.e. the rules on the protection of the condition of wounded, sick and shipwrecked members of armed forces at sea. The state of customary law, on the other hand, is uncertain. —Are there grounds for looking into, and working towards a recasting of, the international rules on naval warfare?

Opinions differ among lawyers and diplomats. We should, however, take into account that efforts to bring about a new law of the sea have finally succeeded. What are the effects of the 1982 Law of the Sea Convention on the law applicable in armed conflicts, especially on humanitarian issues? A fine analysis is necessary. The results of that analysis, coupled with the experience of the conflict in the South Atlantic (1982), may produce enough elements to permit a decision on whether a thorough debate on ways and means of better safeguarding humanitarian interests in armed conflicts at sea should be held. Quite obviously, the ICRC will focus its interests only on humanitarian issues, such as better protection of hospital ships, improvement of the lot of civilians caught in hostilities at sea, etc. The tremendous economic interests which would nowadays be at stake in a war on the high seas are beyond its scope.

Law of neutrality

Like the law on armed conflicts at sea, the law of neutrality was not on the agenda of the 1974-1977 Diplomatic Conference, and this quite deliberately so. The sources for the rules governing the rights and duties of neutral States during an armed conflict are to be found in the Vth and XIIIth Hague Conventions of 1907, to a very limited extend in the 1949 Geneva Conventions, and in customary law. It could hardly be claimed that the law, as it stands, meets present-day demands. Moreover,

governments' notions of neutrality are not necessarily now what they were at the beginning of the century. Any attempt to make proposals for the future of the law of neutrality would be premature, however, as there has been hardly any discussion by experts on this subject recently. Some issues will have close links with those covered by the law of armed conflict at sea, especially the protection of the shipping interests of neutral countries. It is clear that under this heading we are touching also upon highly political interests. First of all, we have therefore to single out those issues which are primarily of humanitarian concern.

Rules on means and methods of warfare

1977 Protocol I reaffirms two paramount rules of international humanitarian law, namely that "the right of the parties to the conflict to choose methods or means of warfare is not unlimited" and that "it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" (Article 35, paragraphs 1 and 2). Other provisions of this Protocol and of the 1980 Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons have already developed those general principles into specific prohibitions which are directly applicable. More work remains to be done: the basic tenet that there are limitations on the resort to means and methods of warfare has to be translated into operational rules. In particular, the constant development of armaments demands that efforts continue, consistent with the 1980 Convention, to examine other types of weaponry with a view to prohibition or restriction of their use. Should action be taken in areas outside the scope of that Convention? The question is open—for what is at stake warrants continuing reflection on this subject.

Medical transport

Along the same lines, close attention should be paid to all developments, technical or otherwise, likely to improve the protection of medical transport by land, sea or air, and of hospitals and medical personnel engaged in searching, transporting and caring for the wounded, sick and shipwrecked. Experience gained in a recent conflict has demonstrated to us the extreme importance of using available techniques for the identification of medical aircraft, in particular helicopters. We have to follow closely the progress of modern technology in this field. Of course, Protocol I lays down a procedure for the periodic revision of its Regulations Concerning Identification, thereby permitting advantage to be taken of technical developments for humanitarian concerns.

Improved protection of the individual

We are more than ever aware today of the overlapping of international humanitarian law and other areas of public international law with regard to the protection of the individual. Recent and future developments of the human rights law, the international instruments concerning refugees, major parts of international penal law and others may have a direct bearing on humanitarian law. Many projects are under way, all within the United Nations, or are in a preliminary phase of discussion. Suffice it to mention the work on a draft Code on Crimes against Peace and the Security of Humanity, the Draft Conventions on Torture and on Mercenaries, the proposals for improved physical protection of refugees in conflict situations, the discussion on movements of people, etc.

Of all these fields, we would like to draw particular attention to the problems which arise when internal conditions in a country can neither be qualified as an internal conflict falling under international humanitarian law relating to non-international armed conflicts (Article 3 common to the 1949 Conventions, Protocol II), nor, quite clearly, as peace. These situations of internal disturbances or tension, sometimes with civil war aspects, are often characterized, for example, by a declaration of a state of emergency, accompanied by martial law, by severe limitations on individual liberties and by a large number of detainees, deprived of their freedom because of the prevailing circumstances. Although such states of emergency by definition should be of a transient character, experience shows that harsh reactions to a crisis situation have the tendency to stay.

The approach taken by the two systems—human rights and humanitarian law—to such situations is quite different: the universal and regional conventions on human rights allow a government under certain circumstances to suspend the guarantee of human rights, with the exception of some fundamental rights (hard core). Humanitarian law on the other hand quite simply does not apply to this type of situation but it is well known that the ICRC may carry out its humanitarian activity on behalf of so-called "political" or "security" detainees, with the consent of the government concerned, on a case by case basis.

Do the applicable rules of public international law give adequate protection to those adversely affected by such a situation?—It has been said by many that the list of those human rights which may not be suspended, even in time of emergency threatening the life of the nation, is too short, that the number of non-derogable rights is insufficient, especially in the "older" treaties. A close examination of this problem

is under way in the United Nations. Those interested in improved protection of the individual in situations close to internal armed conflicts will follow the outcome of these discussions with the utmost interest.

It has also been pointed out that the borderline between situations of internal disturbances not covered by international humanitarian law on the one hand and non-international armed conflicts on the other is sometimes difficult to determine. Governments may, moreover, be unwilling to acknowledge the existence of a state of internal armed conflict, for obvious political reasons. What remains applicable, under the worst circumstances of a de facto internal armed conflict, is the non-derogable core of rights under the various human rights instruments, inadequate as the protection they confer may be. The situation is even less satisfactory if the State is not a party to any of the human rights instruments. The government may feel itself legally free to derogate from almost all of the human rights usually guaranteed by the major conventions, as their status under customary law is not always acknowledged. It has been suggested that a declaration of basic non-derogable human rights should be drafted and be applicable in all internal emergency situations characterized by violence, irrespective of their legal qualification by the government.

We believe that such efforts are meritorious and should be encouraged. Indeed, basic humanitarian concerns have to be met even if the legal qualification of the acts of violence disrupting the normal life of a country is disputed.

How to develop the law ?

This issue raises an interesting question of a general nature which deserves to be mentioned (if not answered) in this context: What is the right way to develop the law—to draft new legal provisions in the form of a treaty binding on the parties or to work out a (non-binding) declaration of general principles whose applicability is proclaimed as a matter of course ?—The approach based on a general declaration has proven its merits as a preliminary stage for the eventual elaboration of a legal instrument. The issue is however slightly different, it is submitted, when a situation is already covered by legal provisions, even if inadequately. What will then be the value and the effectiveness of a declaration which runs into competition with binding legal provisions ?—Everything has to be done in order to avoid the weakening of existing law, with its elaborate provisions geared to specific issues and with its implementation machinery. Whether a general declaration may not tempt governments to move away from their specific and concrete obligations under treaty

law and to embrace general principles which necessarily leave much more room for governmental discretion, is a question to be studied carefully. Are not general principles much more easily pushed aside than law with effective implementation procedures? Is there not a danger that governments may hide behind general principles—which are more easily respected due to their general character—in order to evade specific treaty obligations?

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The ICRC observes developments in all these neighbouring areas with great attention. It would welcome improved protection of the suffering human being in all circumstances. The ICRC nevertheless keeps in mind that it has to preserve what the humanitarian law conventions have already achieved for the protection of war victims. Any adverse encroachment on it has to be avoided.

Conclusions

As long as there are armed conflicts, the development of international humanitarian law should aim at improving the lot of their victims.

Any initiative to make new law has to be judged, it is submitted, according to the following criteria: Does the proposal significantly reinforce the protection of the human being caught in the turmoil of war? Does the proposed rule improve the effectiveness of humanitarian policy?

To return to what I said at the beginning: any new measure that succeeds in better guaranteeing compliance with existing humanitarian law by the parties to a conflict would under present circumstances be the most urgent and most beneficial contribution to humanitarian policy. The task for us all is and remains the promotion, perhaps, of the law as such, but even more important is that of ensuring its respect by governments.

Hans-Peter Gasser

Legal Adviser,
International Committee of the
Red Cross