

# The formation of international humanitarian law

by Jean Pictet

*To mark his seventieth birthday, Jean Pictet, Honorary Vice-President of the ICRC, gave a lecture at the University of Geneva on 16 November 1984 entitled "The formation of international humanitarian law".*

*A remarkable summary of the development of humanitarian law in the twentieth century,<sup>1</sup> it concludes with remarks which go well beyond the original subject. They express his thoughts about the difficult relationships between humanitarian imperatives and military and political necessities and between idealism and pragmatism; reference is also made to everyone's responsibility to disseminate and apply a law which stems not only from humanity but also from common sense.*

*Ten years later, these words are still highly relevant today. They take on special significance in view of the steadily increasing violations of the law. They are also an appeal, especially to young people, to uphold humanitarian law and ensure that its influence is maintained.*

*We felt that they should be published again in this edition for the 125th anniversary of the **Review**, which both revives memories of the past and looks to the future. The thoughts and ideas of Jean Pictet, who has done so much for humanitarian law, are always well worth consideration.*

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<sup>1</sup> The full text of this lecture was published in the *Review* (No. 244, January-February 1985, pp. 3-24).

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

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

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

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

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

For the work to be successful, the secret is to keep it realistic. This is the lesson taught by our predecessors, men like Gustave Moynier, Paul Des Gouttes and Max Huber. Thanks to their wisdom, the Geneva Conventions have kept their high repute and their authority, and in spite of

many transgressions, they are generally observed. If the States agree to be bound by legal texts, it is because such texts correspond with their reciprocal and well understood interests. Nothing is more dangerous than “unbridled humanitarianism” acting from the best intentions but remote from reality, the very picture of “wishful thinking”. It may well produce some fine writing, and perhaps a few gilded castles in the air, as evanescent as they are impressive.

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

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

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

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

I think that major changes in combat methods will inevitably entail, sooner or later, a revision of the legal provisions precisely because the balance between necessity and humanity has been upset. On the other hand, the major principles of protection, which have become “customary in the second degree”, that is, having an absolute value valid even for non-signatory States, will remain intact. What will happen, therefore, is no

more than an adjustment of the mechanisms, of the methods of application.

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

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

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

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

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

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

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

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

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

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

The abundance of information, of course, brings with it the risk of saturation, of "immunization". At the start of a conflict, each report of a death is distressing; after a few days, the list of victims is no more than a set of statistics, especially when the conflict is in a far-off country. The public interest wanes and indifference sets in.

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

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

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

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