The international challenges facing humanitarian law today, 125 years after its creation

As part of its activities to mark the 125th anniversary of its foundation on 4 February 1864, the Belgian Red Cross has been taking stock of its work to date and future possibilities for Red Cross action in various domains.

From 15 to 22 April 1989, the French-language Community of the Belgian Red Cross held a series of one-day symposiums in which Society volunteers and officials as well as many outside individuals and associations took part.

A number of very interesting lines of thought were developed at the symposium devoted to fundamental issues of principle, the law and the image of the Red Cross.

The International Review of the Red Cross *is pleased to print the exposé presented by* ***Mr. André Andries,*** *First Attorney-General at the Military Court in Brussels and Chairman of the Belgian Red Cross (French-language Community) Commission on the Dissemination of Humanitarian Law, on the international challenges facing that law today.*

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Observers of animals in the wild have noted that a stag battling for supremacy in the herd never makes a surprise attack on the unguarded flank of his rival. Instead, he engages in a ritual to provoke the other stag into a clash of antlers which ends when the weaker of the two takes flight, defeated but uninjured.

The works of Konrad Lorenz have done much to increase our knowledge of animal behaviour and have shown that such an inhibitive mechanism operates throughout the animal kingdom to ensure that

struggles between members of the same species do not seriously threaten that species' survival.

The initial phases of human evolution were still profoundly marked by highly ritualized behaviour related to cosmic phenomena and procreation.

Thus, the feeling that there was a cosmic equilibrium which must not be disturbed and the desire to protect mothers and their offspring was reflected in all cultures by this fundamental ritualized matching of contestants.

In human conflict, from the earliest wars fought with sticks and stones to the advent of gunpowder, custom dictated that part of the male population on each side would be armed and that the losers, determined by the fortunes of battle and recognizing that fate had decided against them, must yield before they were dealt the mortal blow.

It may therefore be wondered why international humanitarian law —which is, after all, the law governing armed conflict—is said to be only 125 years old if the customs of war are indeed as old as mankind itself.

To divide mankind into peoples, tribes and clans once seemed perfectly natural in an unchanging world with fixed horizons and little exchange and communication between groups. The customs of war essentially protected the interests of the groups observing them. The treaties and alliances that introduced codified international law in this area were bilateral, conditional on reciprocity and subject to abrogation. Moreover, in the heyday of customary law, the weapons of war had a very limited range.

True humanitarian law, the dimensions of which this article will attempt to define, first appeared in 1864.

The growing notion of human rights was evidenced by the British Bill of Rights of 1689—whose tricentenary has not been marked to the extent it deserves—the United States Declaration of Independence of 1776 and the French Declaration of the Rights of Man and the Citizen. These were all steps forward in affirming the fundamental freedoms of the *individual* in his dealings with the group hierarchy. But this growing tendency was confined to the framework of the nation-state, seeking essentially to change the structures of the state and replace authoritarian systems by internal democracy. The national character of these ideals enabled systems based on the principle of representative government to co-exist with imperialism, colonialism and racism.

The concept of universal humanity did not emerge until well after the French Revolution. The present meaning of the word "humanitarian" appeared only around 1830. Although the philosophers

of the Age of Enlightenment had urged an end to intolerance, torture and slavery, the term still lacked emotive content; the modern idea of humanity had not yet taken root in people's minds.

Humanitarian law became possible when a human being realized that his suffering at the sight of any wounded or tortured human was due to the fact that he recognized them as his fellows, and identified with them in their suffering.

Henry Dunant's genius lay in his ability to conceive of a permanent, worldwide institution guaranteed by international law to ensure at least a minimum of humanity in armed conflicts.

Unlike human rights, humanitarian law is set squarely in the realm of international relations. It is not intended to change state structures but to limit arbitrary actions by states in their external policies.

What caused Dunant's initiative to transcend all previous accomplishments was the underlying concept of humaniarian law as a universally applicable system of law. In her book on the ICRC, Isabelle Vichniac, a correspondent for the French daily *Le Monde*, notes that:

Without humanitarian laws, the ICRC could not exist. At most, it would be a large welfare society of limited scope and duration. As the initiator of this body of law and guarantor of its development and its subsequent implementation by the states, the ICRC has been able to become what it is today because it brought the first multilateral treaty of international humanitarian law into being—the Geneva Convention of 1864.

The Red Cross movement's very identity lies in being the driving force in the development of that law, with all the obligations of self-scrutiny that such a role implies. For it is only by respecting the law oneself that it is possible to ensure its respect by others. This presents considerable difficulty in the short run, but it is the only way for the international community to accomplish any lasting change for the better.

Thus, 125 years of humanitarian law means more than just an anniversary to mark the advent of a key institution; it also evidences the permanence of that institution's vocation.

Humanitarian law is in the forefront of the civilizing process. It penetrates the last and most fearsome areas of lawlessness, those of violence between states. Humanitarian law has brought together various branches of law created for the defence of the common values of humanity. By assuming this international dimension, human rights have become above all the peacetime complement of humanitarian law.

Belgium was prompt to act on Dunant's appeal for the creation of societies for the relief of wounded soldiers and ratified the Geneva Convention as early as 14 November 1864. Less than three months later, on 8 January 1865, Parliament approved the creation of a National Society. The 10-article Convention was restricted to improving care for wounded soldiers in armies in the field. The revised and enlarged Conventions of 1906 and 1929 broadened the scope of humanitarian law, resulting in a greater number of provisions and hence a lengthier ratification process.

The most recent Conventions, those of 1949, are of course four in number:

— the First, on the condition of wounded and sick soldiers in the field;

— the Second, on the condition of wounded and shipwrecked members of armed forces at sea;

— the Third, for the protection of prisoners of war;

— the Fourth, for the protection of civilians in time of war.

In all, these Conventions contain 429 Articles. Belgium ratified these Conventions on 26 September 1952, that is, three years and one month after their adoption. But even as they were being signed, the Red Cross movement was already conscious that they were insufficient, for the constant change and increasing sophistication of methods of warfare had not been taken into account.

The Second World War ended with one side sworn to all-out war and the provocation this implied, and the other side using a weapon virtually able to wipe out civilization. From that time on, mankind has known that war could lead to its collective demise.

In 1949, the bombing of Dresden and Hiroshima was still too fresh in people's minds to obtain a prohibition of direct attacks on the civilian population. In elaborating the four Geneva Conventions, the Diplomatic Conference was able to address only some of the problems encountered in the recent war: the taking of large numbers of prisoners of war and the submitting of the civilian population to long periods of foreign occupation.

Only after the Vietnam war did it become possible to carry out the necessary changes in humanitarian law. This was the first time that a nuclear power had to realize that military victory at all costs is not politically acceptable when it must be won in a strategic relationship of certain mutual destruction.

In June 1977, after four years of work, a new Diplomatic Conference finally adopted the two Additional Protocols, which come to grips with the two main deficiencies in humanitarian law:

— the absence of protection for the civilian population against the methods and means of warfare, and

— the lack of provisions covering guerrilla warfare in which the combatants do not distinguish themselves from the civilian population.

Humanitarian law was now no longer peripheral to the law of war, but made itself felt in rules governing the very methods and means of warfare. This time, eight years and ten months of consultations at national and international level were necessary before Belgium ratified the Protocols, though they contained a total of only 130 articles (not counting the annexes).

From the very beginning, in 1864, the Geneva Conventions required the states to take action already in peacetime and, from 1906, contained the obligation to disseminate knowledge of their contents.

What has the Belgian National Society done to implement humanitarian law in peacetime? Before the Society was divided to reflect the different cultural communities, dissemination work was somewhat sporadic: pamphlets, talks at universities by ICRC delegates, day-long information campaigns, etc.

The Belgian Red Cross (French-language Community) Commission on the Dissemination of Humanitarian Law was formed in January 1981 following the said Community's first Congress, held in Liège on 1 and 2 March 1980. So far, the Commission has set up a programme of nine lectures to train local officials in humanitarian law. It has further organized an annual humanitarian law competition for university and secondary school students. Finally, it took part in a nationwide campaign to have the Additional Protocols ratified and a law passed for the repression of grave violations of the Geneva Conventions.

When the Protocols came into force in Belgium, the National Society organized a national symposium on the internal measures that implementation of the Protocols would require. The government responded to the Society's appeal by creating an interdepartmental commission made up of representatives of all the Ministries concerned and Red Cross legal experts. The Commission's first task was to draw up a list of those measures. This completed, it is now monitoring and co-ordinating the tabling of the necessary legislation in Parliament and

the various other measures in administration, education and government regulations.

With this considerable undertaking, Belgium has become a pioneer in the peacetime implementation of international humanitarian law. Among the initiatives, some of the more striking examples are the assignment among the armed forces of advisers on the law of war, recognition of the competence of the International Fact-Finding Commission and the drafting of a Bill for legislation to repress grave violations of humanitarian law, an obligation which Belgium has had since ratifying the 1949 Conventions.

The national forum on humanitarian law that we are organizing on 8 May 1989 to mark the 125th anniversary of the original Geneva Convention will itself, we hope, be marked by the announcement of humanitarian gestures from the Ministers who have agreed to take part. We are hoping that it will be at once a political forum, an opportunity for media publicity and a general "brain-storming" session.

The 1977 Additional Protocols provided a detailed reply to criticism that the law of war had become obsolete. Similarly, their content and the way they were drawn up counter criticism that it had become unrealistic.

But in recent years the Red Cross movement has had to face more fundamental criticisms from those who advocate new forms of relief work. These critics question the very principle of humanitarian law.

In his book *Le piège* (The Trap), published in 1986, Jean-Christophe Rufin argues that humanitarian action comes within the scope of politics, not of law, claiming that in reality it acts as an extension to politics by being a sort of complement to war. According to Rufin, it constitutes a domain unto itself in which the various political forces continue to fight it out. Humanitarian action, he says, depends on the goodwill of states, which are just as free to break commitments under international law as they are to make them; neutrality by virtue of the law is therefore entirely dependent on the price paid to the state. National Societies, he maintains, are generally kept under a tight rein and the ICRC remains a hostage of the states with only the leeway they choose to grant it; everything depends on the extent to which respect for the law is in their own interest.

Under the guise of down-to-earth idealism (or humanitarianism filtered through cynicism, as Rufin himself puts it), this view is based on two false premises, specious arguments which threaten to discredit the very foundations of the Red Cross and Red Crescent Movement:

— the states are above international law;

— only humanitarian action outside the law can effectively help those in distress.

This opinion is widely held. It is a supposedly realistic but in fact completely erroneous view of the relationship between the state and the law. It does not stand up to scrutiny, for law is not made by states but by peoples. It is the electorate of a country—not those they have chosen to represent them—who hold sovereign power. And on the international political scene, all states draw their justification from the claim that they represent their people. In Belgium the Head of State, his Ministers, civil servants, magistrates and army officers swear an oath that they will observe the laws of the Belgian people. The very uniform worn by soldiers is nothing other than a symbol indicating that they bow to the fundamental rule of the law of war that a distinction must be made between combatants and non-combatants.

Constant references to the failings of the system of international law tend to legitimize an absolutely illegitimate situation. They nourish the imposture upon which the dictatorships in some states are founded and prevent their people from being able to make a correct or simply honest appraisal of international law. The notion that international humanitarian law is dependent on the goodwill of the governments is categorically refuted by the 1960 Vienna Convention on the Law of Treaties. Articles 53 and 60 confer on certain provisions of international law, including the humanitarian law of armed conflict, the status of imperative rules *(jus cogens),* i.e. retorsion—suspending the implementation of law in retaliation for failure to observe it by the other side—is prohibited and any instrument of international law containing contrary provisions is nul and void.

It is not true that the power, prestige and grandeur of the states prevail over all else, including the people who live in them. The physical integrity of those people is infinitely more important than "reasons of state". This is precisely what the judgments at Nuremberg and the European Convention and Human Rights are based on.

It is not the rights of the states but the rights of people which are violated when attacks are made on the civilian population. International law is the sole joint creation of the peoples of the world, the only domain in which divergent particular interests and conflicting reasons of state are reconciled.

Founded on the common aim of mankind's survival and formulated in terms adopted by common consent, the law of war is an objective

standard, set in peacetime, for the conduct of governments, peoples and individuals in time of war.

Only when action is in accordance with that body of law can it lay claim to the impartiality and universality which enable it to assist all the victims of war. Conversely, those in the field of humanitarian assistance who profess the right to work outside the law will sooner or later find themselves at loggerheads with one party or another to a conflict and will then themselves become partisan, fuelling conflict by their assistance rather than contributing to its settlement.

The law of armed conflict is a standard of civilization, both in the passive sense (it mirrors the civilization on which it is founded) and in the active sense (it is a norm which humanity must strive to live up to). But for humanitarian law to remain an effective standard of civilized behaviour, it must constantly serve as a model for the public conscience from which it stemmed. Given the barbarity of certain states, the people themselves are the only ones left to curb the politicians in their disregard for human life.

Public opinion is a force to be reckoned with. Its reaction to atrocities, in Algeria and Vietnam for example, has hastened the end of more than one conflict. But public opinion can be manipulated. By imparting knowledge, ideas and a sense of commitment, teachers and journalists therefore have a very responsible part to play in transforming public opinion into a true public conscience. If teachers and journalists know humanitarian law, when giving reports and comments on events they can simultaneously denounce violations of it.

National Society members should be especially active not only in promoting knowledge of humanitarian law, since that is only the first step, but in working for its implementation. The "International Law 1990" Research Fund, set up last year in Paris and Geneva, put it this way:

The relief work of the Red Cross tends to make observers of the international scene, the public and the governments themselves forget that the National Societies also have other duties. One of the most important of these is to contribute to respect for international humanitarian law in all circumstances. When international organizations such as the UN and the ICRC denounce the violations of that law by certain States, the following questions arise:

a) What should the National Societies do, particularly when the ICRC makes a public appeal?

b) *What can each individual do, mainly within the framework of his or her National Society, to ensure that the provisions of international humanitarian law are indeed respected?*

In his foreword to the first volume of his training material for local officials of the Belgian Red Cross, Mr. Valère Bleiman has already provided a clear reply:

The ultimate goal of the work done to promote knowledge of international humanitarian law is to foster, by extensive familiarization with its principles and the rights and duties it defines, a true humanitarian conscience which will govern the conduct of people in conflict situations, not only demanding that the law be observed but also censuring any violations of it.

Moreover, do we contribute to a healthy upbringing of our children by letting them just sit there and watch on television as Lebanese children are blown to pieces?

Before thinking about new activities, these symposiums to mark the 125th anniversary must first see to preserving the essential foundation of the Red Cross, namely the implementation of existing international humanitarian law, thereby helping to build a world in which it would be a less formidable task to help people simply because less suffering is inflicted upon them.

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