

**THE PRINCIPLES  
OF  
INTERNATIONAL HUMANITARIAN LAW<sup>1</sup>**

by J. Pictet

**III**

**3. Principles proper to the victims of conflicts**

**PRINCIPLE OF NEUTRALITY**

**Humanitarian assistance is never an interference in a conflict**

The word "neuter" comes from the Latin *ne-uter*, which means, neither the one, nor the other. Neutrality is an essentially neutral notion. It qualifies above all the abstention of someone who remains outside a conflict who does not openly express an opinion of either side.

In international law, neutrality is the opposite of belligerency. It is the position adopted, in relation to two Powers at war, by a State not taking part in the struggle. The status of neutrality regulated by juridical rules and in particular by the Hague Conventions involves rights and duties. In short, it implies refraining from taking part officially, either directly or indirectly, in hostilities. In the first place, therefore, it is a concept of an essentially military character. However, as a result of a recent evolution in events and thought, some people tend to think that neutrality should also have effect in the economic sphere, in view of its importance today in the war potential of countries.

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<sup>1</sup> See *International Review*, September, October 1966.

The first Geneva Convention contains a great humanitarian idea which goes far beyond its provisions, namely the safeguarding of the wounded. This notion is that lending assistance even to the adversary is always lawful, that it never constitutes a hostile act, nor does violence to neutrality. This moreover is the express meaning of article 27, paragraph 3, of the First Geneva Convention of 1949 which deals with the assistance which an aid society of a neutral country can render a party to a conflict. The Convention stipulates: "in no circumstances shall this assistance be considered as interference in the conflict".

One can now consider the principles of application.

1. *In exchange for the immunity granted to it, medical personnel should refrain from any hostile act.*

Under the terms of the Convention of 1864, ambulances and military hospitals were "recognized as neutral". Medical personnel, for their part, were to "have the benefit of the same neutrality". The expression neutrality made it clearly understood that the wounded were no longer enemies and that those caring for them were removed from the struggle. However, since this word has a more restricted meaning in the legal sphere, it was not suitable for a treaty. In addition, it introduced an ambiguity; one might think that medical formations would lose their nationality, which is not the case. This term was therefore no longer used and mention was made only of respect and protection irrespective of nationality. However, that idea of neutralization has none the less continued to exist and the term itself retains all its value in current speech.

Immunity accorded the establishments and personnel of the Army Medical Service, as well as those of the Red Cross, means that such personnel refrain absolutely from all interference, whether direct or indirect, in hostilities. Considered by the enemy as being "neutral", in the higher interest of the wounded, they are under an obligation to behave as such. Above all, they must guard against committing what the Convention calls "acts harmful to the enemy", that is to say, acts whose object or effect would be favouring or impeding military operations, be of harm to the forces of the adverse party. They may be armed, but solely to maintain order as

well as in their own defence and that of the wounded in their charge against acts of brigandage.

*2. Medical personnel are given protection as healers.*

If doctors and nurses are granted, even in battle, fairly considerable privileges it is not for themselves. It is solely because they give treatment to the victims. Through them one is still aiming at the wounded. Doctors are protected in their capacity as healers and it is moreover the finest tribute one could pay them.

It was also in the interest of the victims laid down in 1864, that medical personnel fallen into enemy hands should be repatriated. Again in the interest of the victims stipulation was made in 1949 in a diametrically opposite sense, justifying the retention in prisoner of war camps of some medical personnel to care for their compatriots in captivity.

*3. No one shall be molested or convicted for having given treatment to the wounded or sick.*

This principle is practically similar to that laid down in article 18, paragraph 3, of the First Geneva Convention of 1949. This clause gives a decisive answer to the painful problems raised during the Second World War and immediately afterwards in many countries ravaged both physically and morally by the conflict. In fact men and women had then been killed, imprisoned or molested for having nursed wounded partisans or parachutists, or for having worked in the Medical Service of the Red Cross Society of an occupying country. Such rigorous measures were absolutely contrary to the spirit of the Geneva Convention and the principle of neutrality.

If the most immediate military interests, which were moreover misunderstood, had prevailed in 1864 it could have been thought that the wounded who could be healed would remain harmful adversaries. Similarly, the Medical Service which helped the military potential by enabling combatants to be "recovered", would not have been protected. There would not then have been the Geneva Convention and those having cared for the enemy would have been considered traitors. This concept, however, did not prevail and States

when signing the Conventions, agreed to forego national interest in favour of the discharge of their conscience. That is the outstanding feature of the Red Cross.

One point remains to be examined. Are prisoners of war neutralized? We would say no, or not completely.

Indeed, their lives are saved because they have laid down their arms. They can only be obliged to undertake work outside the war effort, so as not to make turn-coats out of them. They cannot be used to render certain places safe from military operations.

On the other hand, they remain soldiers still belonging to their countries of origin, more often than not they wear uniforms with badges of rank. Above all, if they escape and are recaptured they undergo only disciplinary punishment. It is for the Detaining Power to take effective guard measures. It is not considered illegal for a prisoner to seek to escape. In this connection a characteristic provision is article 87, paragraph 2, of the Third Convention of 1949, which lays down, as regards penalties incurred by prisoners of war for infractions committed: "... the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will".

However, we could not disapprove more of the tendency recently shown in certain military circles of considering the prisoner as remaining a combatant of his own army of origin and that he has a duty to do all he can to harm the Detaining Power. This cannot but result in weakening the status of the prisoner and encroaching on the protection which humanitarian law has so painfully achieved for him after centuries of effort.

#### PRINCIPLE OF NORMALITY

**Protected persons must be able to lead as normal a life as possible.**

This notion proceeds from a reasonable compromise between humanitarian aspirations and the necessities of war. From this derives a principle of application.

*Captivity is not a punishment, but only a means of keeping an adversary from being in a position to do harm. Any rigorous measure exceeding this object is unnecessary.*

The prisoner of war is therefore not a slave. Captivity is not infamous, nor does it imply any *capitis diminutio*. We have already seen that the prisoner's civilian capacity can only be reduced in so far as captivity demands. Constraint is justified to the extent required for the maintenance of discipline. Its use would be inadmissible for the purpose of extracting information from a captive.

Prisoners will be released and repatriated as soon as the reasons for captivity have ceased, that is to say, at the end of active hostilities.

As regards the civilian population, it should, in occupied territory, be able to live normally. Civilians can only be interned for imperious reasons of security. In such case, they will benefit from treatment similar to that of prisoners of war, taking their civilian status into account.

In enemy territory, civilians, except for security reasons, will be authorized to leave the country. If they remain, they will be treated like all other aliens.

#### PRINCIPLE OF PROTECTION

**The State must ensure the protection, both national and international, of persons fallen into its power.**

Its principles of application are as follows:

1. *The prisoner is not in the power of the troops who have captured him, but of the State on which these depend.*

2. *The enemy State is responsible for the condition and upkeep of persons of whom it has guard and, in occupied territory, for the maintenance of order and public services.*

3. *The victims of conflicts shall be provided with an international protector once they no longer have a natural protector.*

The first two principles are self-evident. As regards the third, it should be pointed out that the natural protector is the State of origin and that the international protector is the protecting Power

and, to a subsidiary extent, the International Committee of the Red Cross, which undertakes the neutral control of the Geneva Conventions' application. Prisoners and internees have the right to address their complaints to the controlling bodies, whose delegates are authorized to visit camps and talk with the prisoners without witnesses.

Should, for some reason or other, the victims not benefit from the activity of a protecting Power, the detaining State must resort to the services of a substitute, such as the International Committee of the Red Cross.

#### **4. Principles proper to the rules of war**

We now come to the principles governing the law of The Hague and which owe their origin to the great principle of the law of war, already discussed above and according to which "the right of belligerents to adopt means of injuring the enemy is not unlimited". It should at once be pointed out that these precepts are not all included in the Hague Conventions. In fact, they date from 1907, whilst the first bombardment from the air took place in 1911. We have therefore given completion to their substance by means of the customary rules and general principles in law.

From this important principle three others are derived:

##### **PRINCIPLE OF THE "RATIONE PERSONAE" RESTRICTION**

**Belligerents will leave non-combatants outside the area of operations and will refrain from attacking them deliberately.**

From the concept of the necessary balance between the aims and methods of warfare one has arrived at the fundamental distinction between combatants and non-combatants, the "evil doers" and the "innocents" according to Suarez. Whilst the former are necessarily the object of a war and constitute the essential factor of resistance to overcome, the latter should not be involved in hostilities, all the more since they have no right to take part in them. This general immunity of the civilian population has not been

clearly defined in positive law, but it remains, in spite of many distortions, the basis of the laws of war.

It should be mentioned that the XXth International Conference of the Red Cross, meeting in Vienna in 1965, formulated, amongst the rules applicable to civilians in conflicts, the following principles: "it is prohibited to launch attacks against the civilian population as such" and "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".

From this first notion two principles of application are derived.

*1. Only members of the armed forces have the right to attack the enemy and to resist him.*

This then is the corollary to the general rule, namely, that States and not individuals wage wars for their own political ends and if non-combatants are spared, it is because they remain outside the struggle.

On the other hand, it is at their own risk and peril that civilians reside in places where military operations take place and it is quite certain that these risks have greatly increased with the development of the methods of warfare. However, as Vitoria once said, the deaths of innocent people, if these occur, will always be accidental and will never be sought deliberately. From this follows that:

*2. Belligerents will take all precautions to reduce to a minimum the damage to which non-combatants will be subjected in actions directed against military objectives.*

Such precautions will consist, for example, in carefully selecting military targets from which the civilian population will be removed, directing attacks with utmost precision, refraining from bombing zones and encouraging measures of civil defence.

#### PRINCIPLE OF THE "RATIONE LOCI" RESTRICTION

**Attacks are only legitimate when directed against military objectives, that is to say whose total or partial destruction would constitute a definite military advantage.**

A distinction has always been made between the zone of hostilities and the rear. Such distinction has a purely technical origin, the theatre of hostilities having been determined by the advance of troops and the carrying of fire-arms. Until the appearance of bomber aircraft, rear areas were in point of fact sheltered from hostile action. It is on this old concept that was founded the conventional laws of war, principally articles 25 to 27 of the Hague Regulations. Where mention is made in these texts of bombardments, these were "bombardments of occupation", whereas since then, aviation has given rise to "bombardments of destruction" which aim at targets located behind the lines. Nowadays all belligerent territory can be considered as being the theatre of military operations. The Regulations of 1907 still apply to the fighting areas; they are no longer applicable to the rear. They therefore require drastic revision in the light of the general principles and the spirit of the laws of war.

The Geneva Conventions have foreseen the possibility of creating "safety zones" to shelter those elements of the population most deserving of protection, such as the wounded, the sick and children. However, their clauses have made this optional rather than obligatory. A great deal has been said about such zones, but in point of fact one can find practically no examples of their ever having been established. If one were once to broach this subject on the level of practical realization, one would have to make sure of avoiding the undeniable danger which this idea would entail: that of decreasing the safety of other parts of the territory. In fact, if one were to say that such zones were protected, some belligerents might deduce that the remaining enemy territory is less protected. Here, as elsewhere, one should not drop the substance for the shadow.

There are still two more principles of application to be formulated:

1) *Belligerents will spare, in particular, charitable, religious, scientific, cultural and artistic establishments, as well as historic monuments.*

This stipulation has its origin in the Geneva Conventions as regards the safeguarding of military and civilian hospitals, and in



the Hague Regulations as well as the Convention concluded in The Hague in 1954, under Unesco auspices, concerning the protection of cultural property.

2) *It is prohibited to attack localities which are undefended.*

This is the rule of article 25 of the Hague Regulations which has long been considered as the basis of the law of "classical" warfare. The subsequent development of war aviation has rendered such a concept illusory as regards rear areas in which the notion of military targets has replaced it. It is however still valid in zones of land fighting. When localities offer no resistance to the enemy and can be occupied by it without combat, it is in the primary interest of the population to avoid all unnecessary fighting and destruction.

It has been established custom to declare as "open towns" all urban centres deprived of any military character and which will not be defended should the enemy arrive in the area.

3) *Looting is prohibited, as is unjustified destruction or seizure of enemy property.*

Only imperious necessity connected with the course of military operations can justify destruction or seizure. Looting is prohibited in all its forms and in all circumstances.

PRINCIPLE OF THE "RATIONE CONDITIONIS" RESTRICTION

**Weapons and methods of warfare likely to cause excessive suffering are prohibited.**

The standard here is of another nature. It is no longer a question of only sparing persons not participating in hostilities, but one also of avoiding for the combatants unnecessary losses or suffering which exceed those required to place the enemy hors de combat. To this end, certain weapons and methods of warfare must not be employed. These are:

a) *Weapons causing unnecessary harm.*

The Hague Convention and the St. Petersburg Declaration prohibited the use of barbed or poisoned arms, explosive projectiles

or those which spread throughout the body (dum-dum bullets). One may ask whether napalm and darts of high velocity should not be included in this category.

b) *Indiscriminate weapons.*

This concerns weapons which not only cause great suffering but do not allow sufficient precision in their use, or whose effects risk spreading in an uncontrollable manner in time and space. These weapons were aimed at in the Conventions of The Hague and the Geneva Protocol of 1925, such as delayed-action bombs preventing all relief work, floating mines and above all bacteriological and chemical methods.

However, the major problem is raised with the discovery of atomic power. Are nuclear weapons lawful or not? Opinion is divided on this point. But those who answer in the affirmative are, as if by chance, nationals of countries which possess such arms.

The employment of atomic energy for warlike ends is not expressly prohibited in the texts, for these are prior to its discovery. This is not, however, sufficient to legalize such employment for, in the laws of war, one should make appeal to the general principles to regulate unexpected cases.

One should differentiate between strategic weapons, such as a bomb of great power, and tactical arms, as gun projectiles. If one considers the nuclear bomb, one sees that a difference of kind and not only of degree separates it from classical projectiles, for it has not only mechanical but also thermonuclear effects and in the present state of science, radio-active and perhaps even genetic effects, as yet uncontrollable. The damage it causes is certainly out of all proportion to the object of the war, since it annihilates everything living over a wide area. The suffering it causes is certainly excessive, since it inflicts atrocious burns and condemns those it has not killed outright to a slow death.

As regards tactical nuclear weapons, if one can direct these with precision and they are employed only against military targets and their effects remained limited in time and space, then one cannot see by virtue of what they should be prohibited.

However that may be, it should be stressed that if resort is never made to the atomic weapon, under one form or another,

those who assume the right to employ it and for which they will take heavy responsibility, should at least respect the principles we have mentioned, namely not to direct attacks against populated centres, but only against military objectives and take every precaution to limit damage and risks to which the population may be exposed.

This certainly coincides with what the XXth International Conference of the Red Cross, meeting in Vienna in 1965, proclaimed: "the general principles of the laws of war are applicable to nuclear and similar weapons". One can surely assess the full significance of this declaration.

c) *Methods of total warfare.*

It is not sufficient to condemn blind weapons, since classical arms can be used in such a manner as to render them as dangerous for the population as forbidden weapons. This applies to bomb "carpets" and incendiary projectiles.

It appears to us that it is more by prohibiting methods of total war threatening the civilian population than by interdicting any particular weapon that results favourable for humanity will be achieved.

Mention should now be made of a principle of application: *Warlike acts founded on treason or treachery are forbidden.*

To regulate the conduct of war presupposes a certain respect for the adversary. If he no longer has confidence in the enemy's good faith, the "rules of the game" are no longer possible. Since the age of chivalry, the laws of war have demanded that these be respected by combatants. This does not of course exclude resort to the ruses of war.

## **5. Principles proper to Human Rights**

We have already said that, amongst the general principles, the one which characterizes Human Rights according to which "every-one shall at times be guaranteed the exercising of his fundamental rights and freedoms, as well as conditions of existence favourable to the full development of his personality".

From this principle are derived two others belonging only to that great branch of humanitarian law, apart from the common principles we have already quoted.

PRINCIPLE OF LIBERTY

**Everyone has the right to have his individual freedom respected.**

Like beauty, happiness or art, freedom is one of these notions which escapes all definition, but which common sense reveals fairly clearly to each one.

When the various Declarations of Rights say “human beings are born free”, it is obviously a manner of speaking. For the newborn infant in his cradle is, on the contrary, entirely dependent. Left to itself it would not take long to perish. Moreover the exercise of free will has in no way been proven. All we know of man’s life is that his behaviour is largely determined by his surroundings, heredity and psychic complexes.

We mean to say that, generally speaking, man should not be subjected to more constraint than justified by the structure of society.

It is not necessary to emphasize the importance of freedom which has led to so much heroism and made so many martyrs.

The content of this notion follows from its principles of application. It is above all a question of protecting the individual against abuse of power on the part of the State, by ensuring for him the exercising of these fundamental freedoms without which he would lose his *raison d’être*. The exigencies of public order are naturally reserved.

1. *Freedom of thought, expression, association and religion is guaranteed for each one.*
2. *Everyone has the right to speak his own language.*
3. *No one can be arbitrarily arrested, detained or exiled.*
4. *No one can be reduced to slavery.*

Slavery as defined in the 1926 and 1956 Conventions denouncing this shameful institution also covers similar practices, such as servitude, forced labour, servitude for debt, forced marriage, the transfer of children. To which one should add the white slave traffic, that is to say the forcing into prostitution, which has also been the subject of other provisions in international law.

*5. Everyone has the right to circulate freely, to leave his own country and to return to it, and to seek a country of asylum.*

Such is one of the provisions of the Universal Declaration which one could doubtless qualify as being exaggerated. In fact, a State would appear to be entitled to restrict, on its own territory, the free circulation of foreign nationals. Similarly, one does not see very well what would happen if all nationals of certain countries were to emigrate together to wealthier countries. The world economy would all at once become unbalanced.

One should here draw attention to the distressing problem of refugees. It is known that their status has been the subject of a special Convention concluded in 1951 under the auspices of the United Nations. It marks an important step forward in the question.

*6. Everyone is entitled to the free exercising of his political rights.*

In this sphere, the Universal Declaration goes a very long way, as it affirms that the will of the people is the foundation of the authority of public powers and that this will should be expressed by universal suffrage, according to a procedure ensuring the freedom to vote. In this case the Declaration is not humanitarian only, but political, since it gives preference to a particular regime.

#### SOCIAL WELL-BEING PRINCIPLE

**Everyone has the right to favourable conditions of life.**

We now find ourselves in a different field, that of economic and social rights. It is no longer a question of protecting the individual against encroachments by the State, but rather of measures which the State should take in order to improve its population's standard of living. These rights, the individual cannot enforce on the legal level. They are therefore without sanction.

When one considers that barely a half of mankind eats sufficiently, to say that each one has the right to an adequate standard of living might seem somewhat bitter irony. Therefore it should be regarded as a wish which it is hoped will not remain a pious one.

To this right there would appear to be a correspondingly important duty, that of stabilizing population figures by birth control. There is, however, much prejudice still to overcome in this sphere.

By the terms of the Universal Declaration and we take it as a principle of application—*everyone has in particular the right to work, to just and favourable conditions of work, to the social services, free education, the cultural life and to share in the benefits of scientific advancement.*

Consideration of the problem of slavery leads one to pose the following question: The hard conditions of work to which the proletariat is in many cases constrained, are these not in modern form as hateful as servitude? To take one example in history, one can think of a French law at the beginning of the XIXth Century forbidding night work in the mines for children under twelve years old!

This question was raised by a dressmaker apprentice in a letter published in “The Times” at the time of the arrival in London of Mrs. Beecher-Stowe, author of “Uncle Tom’s Cabin”, that powerful book which struck at the roots of slavery. One finds this sentence in the letter, cutting like the lash of a whip: “the dress ordered by the famous visitor is in the process of being made up, piece by piece, in the foulest slums of London by unfortunate white slaves, worse treated than the black slaves of the American plantations.”<sup>1</sup>

One should therefore here mention the considerable work being carried out by the International Labour Office, instituted in Geneva by the League of Nations and whose undertaking is being continued under the auspices of the United Nations. Its purpose is to regulate working conditions in the world equitably and thus free man from constraints which overwhelm him and do harm to his development.

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We shall conclude by quoting the words of Pasteur: “Two laws are struggling against each other today: a law of blood and death, which by each day inventing new methods of fighting, obliges

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<sup>1</sup> Henri COURSIER, *L'évolution du droit international humanitaire*, Geneva, 1960.

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people to be always prepared for battle, and a law of peace, of work, of salvation whose only thought is to deliver men from the scourges which beset it.

The one only seeks violent conquests, whilst the other aims only at relieving mankind. The former would sacrifice hundreds of thousands of lives to one man's ambition; the latter sets one human life above all victories."

Such is this international humanitarian law, to which we have wanted to give as motto the words we have placed in the heading, those very words which Schiller had engraved in bronze on the Bell sounding: *vivos voco, mortuos plango, fulgura frango*, "I call upon the living, I cry for the dead, I break thunderbolts". One should understand this to mean: "I call upon the living for them to break the thunderbolts of war and tyranny".

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