What Does the Future hold for International Humanitarian Law?

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There is a simple reason why it is fitting that the International Committee of the Red Cross (ICRC) has been asked to express itself on the subject of the future of international humanitarian law even in the presence of eminently qualified men and women from this part of the world: the ICRC has been made a servant of that law. Indeed, according to the Statute of the International Red Cross, the ICRC, inter alia, "undertakes the tasks incumbent on it under the Geneva Conventions . . . [and] . . . for the continual improvement and diffusion of the Geneva Conventions".

The ICRC thus does not even have a choice; we are under an obligation to work for the better understanding of international humanitarian law and to prepare for its possible extension. Therefore, we have to be present, to listen and to collect any and all ideas, proposals, questions (both the stated and the unstated). This is indeed what we have done.

But first, a small clarification of the meaning of the term "international humanitarian law". The ICRC has chosen to restrict this notion to those international rules which are specifically intended to solve humanitarian problems arising from armed conflicts. It is certainly not a matter of semantics. It is also not a matter of logic because those who advocate a widening of the term have some very good arguments. Nor is it a matter of ethics or compassion: we all remember with respect that voice from outside which exhorted us to work for peace. No, it is pure and simple realism, mixed perhaps with a trace of resignation that once you squarely shoulder the responsibility of applying or developing humanitarian law, you have to aim narrowly at its original target: the protection of the human being in armed conflict.

It is, in this connection, an irony worth remembering that when Colonel Lieber, at the behest of Abraham Lincoln, developed some of the first rules on humanitarian conduct in an armed conflict in the western world, the armies of the North and South were fighting a war, not least over a human rights issue: the abolition of slavery.

Now what future are we looking at? If I stick to the foreseeable future, we may already discern the following trends:

- — polarisation through political and, in some parts of the world, religious extremism;
- — added external and internal tensions through unemployment and the crisis of the world's economic system;
- — and, lastly, a most interesting phenomenon: "Once more, here and there, we note citizens wielding their unproclaimed power to question the legitimacy of established institutions".

This all leads to the conclusion that there will be further armed conflicts in the future and, I am afraid, rather more so than at present.

Let us turn now to the specifics which the ICRC can discern on the road towards the development of international humanitarian law.

The principal task

It seems to us 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.

In our opinion, attention should in the future still be paid, even more than in the past, to the following.

The existing laws should be *accepted* by States in accordance with the formal procedures laid down by their respective constitutions. I am obviously referring here to the ratification of the 1977 Protocols. We have every reason to be proud of the degree of acceptance found by the 1949 Geneva Conventions, which have been ratified by 152 States. They have become universal law. This is not the case of the Protocols. Today (February 1983), nearly six years after the end of the Diplomatic Conference that produced them, 27 States are bound by Protocol I, 23 by Protocol II. It is not necessary to reiterate here the difficulties that these two texts might pose for those who have to accept and apply them. Let us, nevertheless, sum up in a simple and direct manner: the situation is not satisfactory and it causes the ICRC concern. The ICRC is ready to do everything possible to encourage States to ratify the Protocols, so that they become a law as universally accepted as the 1949 Conventions.

Moreover, the existing law must be *understood.* This is particularly true for the Protocols, as their complexity requires a certain effort in interpretation. This law thus continues to need explanation. Here is an important role for academics and other experts in humanitarian law, including those of the ICRC.

Furthermore, existing law must be known and, even more importantly, it must be *assimilated* by those who ought to respect it. The only way to achieve this goal is the instruction of the members of the armed forces, from the foot-soldier to the Commander-in-Chief, and all those whose work has any bearing on the implementation, in time of armed conflict, of obligations under the Conventions. Unless we can achieve sustained and effective dissemination among all target groups, at all appropriate levels, our deliberations on the enforcement and on the development of humanitarian law conventions become irrelevant in the eyes of the victims we endeavour better to protect.

Finally, existing law must be *respected.* There is no need at all to draw your attention to the breaches of the Conventions and the Protocols, even of their fundamental principles, of which we are all witnesses. This should stimulate our imagination to think of ways of reinforcing existing supervision procedures, and to find other means likely to guarantee a better respect for humanitarian rules.

Here again, with supervision and with enforcement, there are some real limits set for the ICRC. I would remind you of the "Guidelines in the Event of Breaches" which determine the ICRC's activity in case of breaches of international humanitarian law. I remind you also of Professor Max Huber's

words that "once you have decided that you want to serve a victim directly, you will soon find out that you cannot, at the same time, play judge".

For all those who still wish that the ICRC had more teeth to enforce the Conventions and Protocols, let me add another quote from our President of forty years ago. The spirit of the mission of the ICRC, as he perceived it, has probably much more relevance than we are willing to concede. I quote from Max Huber's *The Good Samaritan:*

> "If the ICRC is able to fulfil its tasks as the helping link between belligerents, this is thanks to a curious paradox: its weakness is its strength; it floats untethered in the free atmosphere of trust; helpless and ineffectual; save through the confidence placed in it by the governments and Red Cross [and today we would add: Red Crescent] Societies with which it must co-operate, especially those at war . . . . Far from being bestowed once and for all, this moral credit must be won anew each day by what the institution does and what its workers are . . . the delegates all over the world. . . . The International Committee stands unprotected politically and financially. . . . The International Committee's whole work and being reveal themselves as an adventure in faith. Such an institution is a foreign body in the world's system."

Like all humanitarian works, the 1949 Geneva Conventions and the 1977 Protocols are not perfect, nor do they achieve the ultimate goal, namely, the protection of the unarmed individual against the effects of war. The recasting of humanitarian law in 1977 and, in particular, the regulations limiting the right of belligerents to choose ways and means of conducting hostilities, have without a doubt felicitously supplemented the 1949 laws. The way that we look at the problem today makes it seem unlikely that a new attempt at codification of such scope is to be expected soon. It is more a question of making advances in the law in certain particular areas.

Indeed, for various reasons, a new comprehensive codification would not really be desirable. For one thing, the internationalists tell us that our era suffers from a plethora of international legal instruments. Because of this, the value of any new law tends to diminish, and thus the likelihood of its being accepted also diminishes. All efforts at large-scale codification encounter this problem.

The four Geneva Conventions of 1949 and the 1977 Protocols are a monumental work of some 600 articles representing an impressive investment of intellectual effort, arduous political negotiation, financial resources — and good will. But the law has attained a dimension and a degree of sophistication such that it has become difficult to comprehend and assimilate, not only by the persons who should apply it but even by the experts. This analysis leads us to the conclusion that it would be better to draw up various, and more simple, sets of regulations limited to expressing the essence of humanitarian norms, than to write new, detailed rules. These regulations would, as it were, be superimposed on positive law which would remain totally in force. It should be stressed that the goal would be to have codes of conduct that would be intelligible to all, and that contain what, at first sight, is lacking in the present law, in particular the 1977 law: evidence of humanity, evidence of its justice and of its intrinsic logic.

Let us now turn to the areas and problems which, in our opinion, could justify a development of humanitarian law.

Some specific areas for new codification

If we want to do justice to the issues confronting us, we will have to look in our analysis also beyond humanitarian law proper: i.e. at areas at the fringe of that law. Three types of situations would seem to demand our attention.

(a) Some areas, such as the law of naval warfare, were not developed by the 1977 Protocols, the Diplomatic Conference having chosen (at the suggestion, incidentally of the ICRC) not to go into the mater.

(b) There is technological progress (for example, where signalling is concerned). The law must keep pace with these developments, which otherwise will run roughshod over it.

(c) Humanitarian law is only a small part of the whole of public international law. It is directly related to many areas, such as human rights, the rights of refugees, international penal law, etc. Changes in these areas could have repercussions on humanitarian law. It is consequently also necessary to keep pace with what is going on elsewhere, to defend the attainments of the Geneva Conventions and the Protocols and, if necessary, to try and influence the codification procedure in other areas of public international law in accordance with the goals of humanitarian law, and, possibly even, ultimately to adapt the humanitarian rules.

Without giving an opinion on the priority to be accorded to each problem, we can mention several areas which should be on the agenda for future legislative development. A good many of these areas extend beyond the range traditionally covered by the rules of humanitarian law. But, as a representative of the ICRC, I must again emphasize that in any event the ICRC will only deal with those areas of law which have a clear humanitarian bearing.

Thus, lawmaking could be developed further in the following areas.

The written regulations governing *armed conflict at sea* date back to 1907. They were drafted before the appearance of submarines and military aircraft. Only the Second Geneva Convention, as supplemented by Protocol I, deals adequately with the condition of wounded, sick and shipwrecked members of armed forces at sea. The state of customary law is uncertain. Are there grounds for looking at, and working towards, a recasting of this law? Opinions differ, but now that work on a new law of the sea has reached a successful conclusion, the time might be considered ripe to open a debate on ways and means of better safeguarding humanitarian interests in naval warfare.

Like the law of naval warfare, the *law of neutrality* was not on the agenda of the 1974–1977 Diplomatic Conference. The sources for the law of neutrality are to be found in the Hague Convention of 1907, to a very limited extent in the 1949 Conventions, and in customary law. It could hardly be claimed that this law, as it stands, meets present-day demands. Any attempt to make proposals for the future of the law of neutrality would be premature, however, as there has been no recent thorough discussion by experts on this subject. But it is likely that such proposals would have close links with any future work on the law of naval warfare, since protection of the shipping interests of neutral countries is a central element of both of these laws.

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 superflous injury or unnecessary suffering" (Article 35).

Other clauses of this Protocol and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons have already pinpointed certain aspects of the limitations on the means and methods of warfare. Other, more detailed regulations must follow. In particular, the constant development of armaments demands that efforts continue with regard to methods and means of warfare, as was moreover envisaged by the 1980 Convention. Should action be taken also in areas outside the scope of that Convention? The intentionally general nature of the prohibitions mentioned in the Protocol should prompt us to continue work on spelling out this principle in more detail so as to make it more operational, with specific regulations governing its application.

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 techniques for the identification of medical aircraft and, in particular, helicopters (Protocol I lays down a procedure for the periodic revision of its Regulations Concerning Identification).

We are more than ever aware today of the overlappings of international humanitarian law and other areas of public international law. Humanitarian lawyers cannot be indifferent to the development of such fields as the law of human rights, the rights of refugees, major parts of international penal law (to mention but a few).

Of all these fields, we would like to draw your particular attention to the problems which arise when internal conditions in a country can be classified neither as internal conflict falling under the international humanitarian law relating to civil wars, nor, quite clearly, as peace. This type of internal trouble or tension is often characterized by the introduction of martial law, by the severe limitation of individual liberty and by a large number of detainees, deprived of their freedom because of circumstances.

While in such situations the international conventions on human rights allow for the temporary abrogation of these guarantees, with the exception of some fundamental rights (the hard core), humanitarian law quite simply does not apply. Nevertheless, in these situations, the ICRC carries out its activity of protection on behalf of so-called "political" or "security" detainees, although it has no grounds for doing so in international law. The ICRC has a right of initiative in these circumstances which is recognized by the international community, and this allows it to offer its services to the authorities of the countries concerned, who are free to accept or refuse the offer. How well this relationship of trust works can be illustrated by the fact that since World War II the ICRC has visited some 300,000 security or political detainees in 72 countries under the conditions of: "visit without witness"; repeated visits; visits to all detainees of the category covered by the agreement. It is of some interest to note that no State has ever complained that its security was compromised by such visits.

The question remains: what further protection could be given to such detainees? The ICRC does certainly not intend to suggest that countries should be obliged to accept its offer of service in the event of internal troubles or tensions. Nevertheless, we have the right to ask how the individual victim of such a situation of internal crisis may be better protected against abuse of power. This additional protection could consist of a body of fundamental regulations which have to be respected at all times and under all circumstances.

As said above, this problem is not within the field of humanitarian law. Any development in the direction indicated would, however, be of direct interest to humanitarian law and the ICRC. How many times has the ICRC been confronted with a formal refusal to recognize the applicability of Article 3 common to the four Geneva Conventions, although objectively the criteria of application were without any doubt met? All that then remains is a "safety net" of regulations recognized as being applicable in any situation. The humanitarian lawyer thus finds himself confronted in a very direct way with the problems of protection which, legally speaking, are within the jurisdiction of human rights, the rights of refugees and humanitarian law.

The ICRC observes developments in all these peripheral or neighbouring areas with great attention. In particular, it always endeavours to preserve what the humanitarian conventions have achieved for the protection of war victims.

Conclusion

Firstly, as long as there are armed conflicts, the development of international humanitarian law should aim at serving the victims of these armed conflicts. Secondly, any initiative should be judged according to the reply to the following question: does the proposal reinforce the protection of the human being caught up in the turmoil of war?

To return to what I said at the beginning, it seems to me that any new measure that succeeds in better guaranteeing the effective application of existing humanitarian law by the parties to a conflict would be by far the most urgent and most beneficial contribution to the conventions in force.

We should only think of promoting new laws on the basis of the respect of existing laws.

In concluding I cannot but express my admiration and gratitude to all those who contributed so generously to this symposium. Foremost in my mind are the Australian Red Cross, the Australian National University and the Henry Dunant Institute.

But what would the long hours of deliberations have been without the active presence of all these illustrious women and men drawn together by that one aim: "the protection of the human being in armed conflict".

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