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**Some Thoughts on Ideas  
That Gave Rise to International  
Humanitarian Law**

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**I**NTERNATIONAL HUMANITARIAN LAW APPLICABLE IN armed conflicts has been defined by the International Committee of the Red Cross as “international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.”<sup>1</sup>

One can, of course, refer more concisely to the “law of armed conflicts”—usually divided into two branches, the law of Geneva and the law of The Hague. The Geneva Conventions relating to the protection of victims of armed conflicts are, after the United Nations Charter, the most widely accepted international instruments and constitute an impressive set of legal norms presented in more than six hundred articles.

As we prepare to pass from the second to the third millennium, and in spite of the great progress made in this field, grave violations of the law of armed

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conflict, sometimes degenerating into veritable genocidal feuding between ethnic groups, can still be witnessed. There are even cases involving members of regular armies on peace-keeping missions who fail to respect the rules of humanitarian law. These facts invite us to enquire into the humanitarian ideas that have promoted the development of this set of legal rules, and into the difficulties lying in the way of its implementation.

In this context, it may be of interest to recall one of Plato's famous Dialogues, in which his characters converse as follows:

"And they will conduct their quarrels always looking forward to a reconciliation?"

"By all means."

"They will correct them, then, for their own good, not chastising them with a view to their enslavement or their destruction, but acting as correctors, not as enemies."

"They will," he said.

"They will not, being Greeks, ravage Greek territory nor burn habitations, and they will not admit that in any city all the population are their enemies, men, women and children, but will say that only a few at any time are their foes, those, namely, who are to blame for the quarrel. And on all these considerations they will not be willing to lay waste the soil, since the majority are their friends, nor to destroy the houses, but will carry the conflict only to the point of compelling the guilty to do justice by the pressure of the suffering of the innocent."

"I," he said, "agree that our citizens ought to deal with their Greek opponents on this wise, while treating barbarians as Greeks now treat Greeks."<sup>2</sup>

In other words, proper treatment had to be given to Hellenes in their dealings with each other but needed not be accorded to barbarians. A double standard of conduct in armed conflicts emerges from these lines, one so characteristic of the history of humanitarian law—the dichotomy between the desired and the actual conduct, the norm and the practice—while at the same time reflective of the differences between total and limited wars, or, to put it in a different way, conflicts between systems and conflicts within a system.

The Greek city-States formed a kind of international community—a political system—surrounded by an alien "barbarian" world. In the teachings of Christianity there undoubtedly existed a tendency towards universality—the

Gospel was meant for all—but there was a time when the Roman Catholic Church, organized as a political power, held the view that “*fides non est habenda cum infidelibus*” (promises made to infidels need not be kept). Agreements concluded with rulers outside of Christendom were not binding; the international legal community included only the Christian States. In the sixteenth century it was not an easy task for Francisco de Vitoria to demonstrate that the Indians were also legitimate owners of their land and properties—in other words, genuine subjects of law.<sup>3</sup> It is also true that his teachings generally failed to prevail in the practice of his own time. The lot of the Indians in the wars of the conquistadors was a hard one—either extermination or slavery.

From the works of Hugo Grotius, the greatest figure ever in the science of international law, we get a dark and dismal picture of contemporary rules of warfare: “Such persons therefore may be slain with impunity in their own land, in the land of an enemy, on land under the jurisdiction of no one, or on the sea. . . . How far this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity, and that this is included in the law of war. . . . Not even captives are exempt from this right to inflict injury.”<sup>4</sup> Following Horatius, Grotius admits that a prisoner may be killed, but he qualifies the rape of a woman as a violation of the law of nations. “It is not strange,” he stated, “that the law of nations has permitted the destruction and plunder of the property of enemies, the slaughter of whom it has permitted.”<sup>5</sup> Also, “[b]y the law of nations not merely he who wages war for a just cause, but in a public war also, any one at all becomes owner, without limit or restriction, of what he has taken from the enemy.”<sup>6</sup> As a result of the authority he attributed to Greek and Roman authors of antiquity, Grotius still considered this to be lawful, a conclusion likewise supported by the practice of the Thirty Years’ War, which was raging when his book was published. But at the same time he expressed the opinion “that many things are said to be ‘lawful’ or ‘permissible’ for the reason that they are done with impunity, in part also because coercive tribunals lend to them their authority; things which nevertheless either deviate from the rule of right (whether this has its basis in law strictly so called or in the admonition of other virtues) or at any rate may be omitted on higher grounds and with greater praise among good men.”<sup>7</sup> Grotius warned against undertaking wars rashly even for just causes, and referring to criteria of justice, morality, and equity, also made noble attempts to convert the long-standing practices of belligerents into a more humane form of conduct.

At the same time, historical research reveals not only a great deal of cruelty, devastation, and destruction in armed conflicts but also many efforts designed

to reduce suffering and assist the victims. King Cyrus of Persia, when taking Babylon in 538 B.C., strictly obliged his soldiers to show respect for the sanctity of shrines and to treat the vanquished peoples humanely. The Code of Manu in India, dating from the first century B.C., forbade the use of fiery arrows and poisoned spears, as well as the killing of wounded or sleeping men.<sup>8</sup> The Romans held the view that the use of poison in war should be forbidden: "*Armis bella non venenis geri debere.*"<sup>9</sup> When Alaric took Rome in A.D. 410, his Goths respected the Christian churches and spared the lives of those taking refuge there.<sup>10</sup> Still more examples may be found. The Lateran Council of 1139 declared the use of bows and arrows illegal.<sup>11</sup> The prohibition of the use of various weapons and the designation of days on which it was forbidden to wage war were matters of controversy at that time; so too were the rules of knightly warfare, and even the treatment of prisoners of war.<sup>12</sup> The principal duty of certain orders of chivalry, such as the Order of St. John of Jerusalem (otherwise called the Hospitallers),<sup>13</sup> was precisely to redeem Christian prisoners from pagan captivity.

Similar ideas and conceptions are found not only in the community of the Christian feudal States taking shape amid the ruins of Roman civilization, but also in the Islamic world,<sup>14</sup> the great civilisations of Asia,<sup>15</sup> and elsewhere.<sup>16</sup> What is more, if one continues with these historical investigations it is possible to discern, in addition to sometimes exaggerated but never unfounded information on the havoc wreaked by war, signs of the efforts made by every people in every age to reduce that devastation. For example, Diallo and others who explored the humanitarian traditions among the peoples of sub-Saharan Africa demonstrated that when engaged in armed conflicts they displayed, in several respects, both moderation and clemency to their enemies.<sup>17</sup>

However, neither these rules—however respectable—for conduct prevailing within a limited space, nor the customs of peoples who had no State organization at the time, can justifiably be included in the body of international law of armed conflicts as giving protection to victims; one cannot begin the history of that law with data taken from the remotest times. The examples cited above are only elements, building blocks which contributed to the emergence of an international custom over the course of long centuries; they cannot qualify as international law in the strict sense of the word. Their application in inter-State relations was not binding, an indispensable criterion of the rules of international law. Moreover, they drew no support from an underlying idea that protection is extended equally to every man, by virtue of his being a man. Finally, they did not pretend to universality, which is one of the essential

characteristics of our international law protecting the victims of armed conflicts.

What are the origins of these principles? From where and how did the ideas that inspired their content emerge? Is it possible to deduce from human nature any rule stipulating that during armed conflicts the civilian population has to be protected and certain groups of the population accorded special care, or that those who belong to the armed forces, but because of injury, sickness, or other reasons have become unfit for combat or unable to fight and have surrendered require protection of their lives, health, and human dignity, without discrimination based on origin, race, nationality, cultural affinity, or other criteria?

The classic authors on the theory of international law, such as Grotius, his predecessors, and his followers, were inspired by a natural law approach. The essence of the natural law approach was that there are rights and duties preceding positive law or superior to it which can be deduced from nature by the intellect of man. The positive—"the laid down"—rules of existing legal orders are valid and have to be applied insofar as they correspond to the higher norms of natural law. The school of natural law played a very important role in the development of international law, one which was necessary, even indispensable, to the search for a theoretical basis on which to vindicate a system of law whose existence and legal nature were far from unquestionably evident to, or generally accepted by, people living at the time. It is for this that we have to appreciate and respect the work of this school of thought.

However, it now seems unnecessary to point out that the laws of human nature and those of human societies—and more particularly the concepts formed about them—were quite different in the various periods of history. There were times when slavery and serfdom were considered to correspond to the rules of natural law, the slave trade was widely practised, and equality of the equal rights of men, not to mention the equality of races, was hardly accepted.

The natural law concept prevailing in the sixteenth and seventeenth centuries could not afford a solid basis for the inception and expansion of a real humanitarian law, but it must be said that the natural law schools of later periods manifested a great deal of flexibility and a capacity to adapt to the needs and exigencies of their times. In the new formulations of this doctrine, natural law increasingly became a set of moral norms accepted in a given age and expressing what was considered to be good and just by members of the society. In this sense, natural law theories had a great impact on international humanitarian law. Professor Jean Pictet, an eminent authority on the theory of this law, has pointed out that humanitarian law is said to be the offshoot of

natural law. However, he himself can hardly be counted among the adherents of the school of natural law, since he takes a sceptical view of the existence of that law and is willing to recognize only the notion of a higher ideal order: “*Nous définirons . . . le droit naturel, source du droit humanitaire, comme l’ensemble des droits que chaque homme revendique pour lui et qu’il est en même temps prêt à accorder aux autres.*”<sup>18</sup>

The unquestionable merit of the teachings of the natural law school—that of Vitoria, Gentili, Grotius, and others—is that it expressed and promoted the conviction that there is a law of war, a “*jus in bello*,” and that even during armed conflicts parties have to obey some particular rules of conduct. The forms of restraint that they must manifest in combat situations and the groups of persons to be protected have changed over time. To explain this, we have to go beyond the natural law concept to discover the underlying social structure, the relations between the various social classes and strata and their struggle for wealth and power. Indeed, natural law notions include a great many sociological elements, more than would generally come to mind today. What the authors of yore wrote about the sociability and companionship of perfect communities is institutionalized by the concept of interdependence and given numerical expression by the share of foreign trade in the national income. In order to give an adequate expression to the social reality underlying these concepts, we have therefore to translate the sociological elements and standpoints into the language of today’s social science. The emergence of human rights has to be explained in terms not of the law of human nature, but rather of social conditions which have raised the value of the individual.

Before sketching out some of these conditions, we have to consider another aspect of the problem. In the past, clemency was shown during military operations only to members of other human groups that belonged to the same race or community. In conflicts between political entities with similar social and economic systems and hence a number of similar features with respect to legal order and culture, adversaries showed more mercy to each other’s people and their property than did States and nations with different systems or at different levels of development. The reason was in all probability that belligerents having similar features could more easily adapt to each other’s social organization; the established order of values of the parties in conflict were identical or at least similar, so they did not strive to destroy the opponent’s existing order or change it radically. In the course of history when groups of such States constituted a “political system” (e.g., the Greek city-States or Christian States of feudal Europe), their members felt linked in solidarity in the face of attacks from outside the system. The wars waged inside

the system, judged by the standards of the period, were less destructive and less ruthless than were those waged against States and peoples outside it. But as for barbarians, aliens living outside the same system, their form of civilization had either to be annihilated or rendered harmless forever.

However, we have to guard against oversimplification. Even within one period we can find many examples of divergent practice, e.g., in the struggles between knightly troops or in the behavior of knights fighting against heretics or peasants in revolt. In accordance with the idea just discussed, these latter conflicts ought to be regarded as wars between systems, even if they took place within the boundaries of a single State; for example, peasant revolts attacked the foundations of the feudal system and were aimed at changing that system. The hatred and thirst for revenge that predominated during such wars and the accompanying misconceptions and preconceptions—i.e., subjective factors—prevented the recognition of objective interests. The attainment of rapid and decisive military success, and the seeking of momentary advantage clashed more than once with the remoter, higher interests of the State participating in the armed struggle.

The military campaigns of Genghis Khan's armies brought with them massacres and the destruction of prosperous towns and irrigation works. Such cruel methods of warfare undoubtedly contributed to their initial successes, but ultimately deprived the mongols of the fruits of their victories. The massacres and devastation impeded economic development and caused general misery, with dire consequences felt even decades and centuries later.

Generally speaking, the political systems of earlier periods were scarcely able to establish mutual contacts with other systems or their members, and they were unable to integrate them into their own system while respecting their particularities. The pre-Columbian civilizations of the Western Hemisphere were completely destroyed by Spanish colonization—to cite but one well-known example. A great deal of time and a sustained evolution were needed to attain the openness and the flexibility that enabled the international community of States (originally confined to the European continent) to become truly universal, united in diversity and integrating different nations, civilizations, and cultures.

Returning to the emergence of human rights, the most convincing explanation may be found in the social and political evolution of certain European States—first in the Low Countries and later in England and several other countries where new social structures appeared that gradually led to the abolition of feudal privileges. The burgher or commoner, in addition to his economic wealth, attained some measure of political power and influence and

tried to develop new political theories and practice. In this development, great significance has to be attributed to the intellectual current of the Enlightenment.

It would be fascinating to analyze in detail the way in which those ideas led to a radical transformation of political thinking, but the present article can mention no more than a few outstanding steps in this evolution. The Declaration of Independence of 1776 stated solemnly that:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>19</sup>

Human beings were no longer the humble and obedient servants of the ruling sovereigns but rather citizens of their States, with inalienable rights. This was the time of the first declarations of human rights on American soil, as well as on the European continent, where the French declaration of 1789 became the best known and exercised the greatest influence. The individual, with his intrinsic value and fundamental, inalienable rights, has to be respected and protected even in the midst of a war—an idea that had far-reaching consequences for the concept of the law of armed conflict.

A gradual development, confined to relations between European States, could be observed especially during the eighteenth century. The commanders in chief of the parties at war against each other began increasingly to conclude agreements for the exchange of the wounded and sick. The treatment of prisoners of war also improved. Jean-Jacques Rousseau wrote in his *Contrat Social* that:

War . . . is something that occurs not between man and man, but between States. The individuals who become involved in it are enemies only by accident. They fight not as men or even as citizens, but as soldiers; not as members of this or that national group, but as its defenders. A State can have as its enemies only other States, not men at all, seeing that there can be no true relationship between things of a different nature. . . . This principle is in harmony with that of all periods, and with the constant practice of every civilized society. . . . Even when war has been joined, the just Prince, though he may seize all public property in

enemy territory, yet respects the property and possession of individuals, and, in doing so, shows his concern for those rights on which his own laws are based. The object of war being the destruction of the enemy State, a commander has a perfect right to kill its defenders as long as their arms are in their hands: but once they have laid them down and have submitted, they cease to be enemies, or instruments employed by an enemy, and revert to the condition of men, pure and simple, over whose lives no one can any longer exercise a rightful claim.<sup>20</sup>

Equally remarkable is the assertion of the Swiss Emerich de Vattel, who says in this connection that "as soon as the enemy has been disarmed and surrendered, nobody has the right to take his life. It must be kept in mind that the prisoners of war are persons and as such they are innocent."<sup>21</sup>

The influence of these ideas on international practice is illustrated in a letter from Talleyrand, the French foreign minister, sent to Napoleon on 28 November 1806. In it he faithfully echoes Rousseau's statements:

As a consequence of the precept that war is an interrelation not between man and man but between State and State in which individuals are adversaries only by accident, the law of nations does not permit that the law of war and the right of conquest deducible from it be extended to peaceful and unarmed citizens. . . . This law, offspring of civilization, has promoted the advance of progress. To it Europe has to be grateful for the preservation and expansion of her prosperity in the midst of wars frequently occurring and dividing her.<sup>22</sup>

This practice was a logical consequence of the fact that previous wars had been fought primarily for dynastic purposes, for the maintenance or restoration of the balance of power in Europe, which did not affect the foundation of the continent's social and political order. They were all conflicts within the existing political system. It is true that Napoleon tried to transform the European community of States under the hegemony of his French Empire, but with his final defeat this community and with it the balance of power was restored.

Nonetheless, in the nineteenth century the international community of States was no longer restricted to Europe. As a consequence of the first great wave of decolonization, not only the United States in North America but also the newly independent countries of Latin America became members. The process was slow and not without difficulties and conflicts. The wave of decolonization was followed by a new period of colonization, which extended the rule of the European powers to Africa and some parts of Asia. Their technical civilization, with all its merits and faults, came gradually to conquer the globe. Nevertheless, the example was there: former colonies could

successfully attain their independence and become members of an enlarged community of States, with equal rights. The existing international system, with its manifest tendency toward globalization, transformed former conflicts between different systems into conflicts within the system. In this sense, it constituted an important step towards the universality of the international community, and it had profound consequences for the rule of law in international relations.

However, we have gone too far forward and now have to return to the mid-nineteenth century. Besides the modification of the place and role of the individual in society, and in addition to the broadening of the international community, a third important element has to be taken into consideration. This element can be defined as the awareness of the magnitude of dangers threatening both soldiers and civilians on account of the destructive power of new weapons. With regard to organization, the size of armies increased greatly. In 1066, the battle of Hastings, which decided the fate of England for centuries, was fought by between five and six thousand men on each side, and even though (as shown on the famous Bayeux tapestries) the battle must have been very ferocious, loss of life remained within tolerable bounds. In the Napoleonic wars, armies of a hundred thousand men clashed, and the numbers of dead and wounded soldiers increased accordingly. Developments in weaponry and its destructive power during the nineteenth century made the proportion of the victims of armed conflicts grow ever higher.

In 1859, at the battle of Solferino, thirty-eight thousand soldiers were killed or wounded in the course of a few hours. The majority of the wounded died for lack of proper medical care and attention. Theirs was "unnecessary suffering," because being *hors de combat* they were unable to fight against the enemy. Four years later, at Gettysburg, the best infantry divisions of the Confederacy perished under the murderous fire of Union artillery. The appearance of new destructive weapons induced governments to prohibit the use of at least some of them. In 1868, a Declaration renouncing the use in time of war of explosive projectiles under four hundred grams in weight was signed at St. Petersburg. It was followed in 1899 by the Declaration concerning asphyxiating gases and by the Declaration on expanding bullets, signed at The Hague.

I shall not continue with this list, which is long and passes through this century to our day. What I must point out, however, is that a Geneva businessman, Henri Dunant, sought an audience with Emperor Napoleon III and thereafter followed him to the theater of operations in Northern Italy. As a result he witnessed the battle at Solferino and the sufferings of the tens of thousands of soldiers lying wounded on the battlefield. It was under the

influence of this distressing experience that he wrote his work, *A Memory of Solferino*. The book had considerable impact throughout Europe. In it Dunant proposed that during peacetime relief societies should be established in all countries to support the medical services of the armed forces in time of war, and that States should conclude an international convention in support of the operation of such societies. The first proposal led to the birth of the Red Cross movement, and the second became the starting point for the first Geneva Convention. In 1864 the Swiss Federal Council convened a Diplomatic Conference which led to the signing of the first Geneva Convention on 22 August—this being a relatively short convention aimed at improving the condition of the wounded in armies in the field.

Its limited number of articles, some of which became obsolete with the passing of time (e.g., the “neutrality” of ambulances, military hospitals, and their personnel) constituted the starting point of the Geneva Law on the protection of victims of armed conflicts. Despite its shortcomings it was an initiative of historic importance and gave birth to a considerable part of the system of international law in force today. The protection of the victims of international conflicts has since 1864 raised countless problems, whose solutions have diverged in details from those originally contemplated. However, the fundamental objective of the regulation—the protection of distressed and suffering man and respect for the life and dignity of the human person—has remained the same. Moreover, it has been reinforced by the inclusion within the ambit of the Law of Geneva of situations and groups of persons that had not yet come to the fore during the previous century, or at least not with such prominence as to call for immediate regulation.

Article 9 of the Convention attained great significance:

The High Contracting Parties have agreed to communicate the present Convention with an invitation to accede thereto to Governments unable to appoint Plenipotentiaries to the International Conference at Geneva. The Protocol has accordingly been left open.

Historians of international law say that the Geneva Convention of 1864 was the first “open” treaty in international law, for it paved the way for the codification of international law and recognition of the universal validity of many of its rules.

At the same time that Henri Dunant was trying to convince the monarchs of Europe and influential citizens of Geneva of the need to endorse his ideas about helping wounded and sick soldiers, on the other side of the world, in the middle of the American Civil War, an outstanding legal expert, Francis Lieber,

systematically described the customary rules of land warfare as they were applied in Europe. Lieber's work was issued by President Abraham Lincoln, under the title "Instructions for the Government of the United States Armies in the Field" as Army General Orders No. 100. The "Lieber Code" served as a preparatory text at the Brussels Conference of 1874, convened to codify the laws and customs of warfare. The Conference did not attain this goal—the draft prepared was not adopted—but it paved the way for The Hague and contributed to the success of the 1899 Conference. Solferino and Gettysburg, Henri Dunant and Francis Lieber, Geneva Law and Hague Law, were landmarks along two different paths leading in the same direction, towards humanity in the midst of armed conflicts. Today, as mentioned above, the two are considered to be united branches of law and are referred to as international humanitarian law in the broader sense of the term.

The question we are interested in is essentially the following: how and why, and under the influence of what factors, do moral norms of a given age become legal norms? That is, how and in what manner have the humanitarian ideas aimed at the protection of suffering man become so strong that they could be promulgated in international treaties—and thereafter extended and further confirmed? What caused Henri Dunant's initiative to have such a resounding success?

The question is all the more justified because, as has been seen, humanitarian ideas were also encountered in remote ages, but these teachings of ancient philosophers and founders of religions remained mostly dead letters amidst the storm of armed conflicts.

Max Huber, then president of the International Committee of the Red Cross, in a lecture on 2 July 1939, shortly before the outbreak of World War II, raised the question of why this impact had not been felt earlier. He stated in this context that the reason—as for other historical events—was the encounter between an individual human person, a fulfilling genius, and a set of social and spiritual circumstances whose origin and nature could be analyzed and understood. The thought, he said, was metaphorically "in the air." "Democratic and socialistic ideas, beginning to gain a foothold in Europe, helped to put a higher price on human life. . . ." He was referring to the development of medical science in the care of wounded and sick persons and to the influence of a true Christian mentality which was taking shape outside the churches. Yet according to Huber, all these factors could help the humanitarian idea to victory only if appropriate personalities stood up and played their part in bringing such a victory about.<sup>23</sup>

I do not think we in any way detract from the merit of Dunant and his associates if in seeking an explanation we lay emphasis neither on the abilities of individual persons nor on irrational factors but instead on the evolution of society. It was the process of social evolution which raised the value of man ever higher while simultaneously increasing awareness of his worth. In the social formations that have succeeded one another, man has always been the most important factor in production, but it is beyond question that in the process of that evolution he has risen ever higher above the level of the other means of production. Is it necessary to insist that the free worker and peasant enjoyed a more favored place in society than did the slaves or serfs of previous ages? Naturally, one cannot simplify matters by regarding everything as always being under the total influence of economic factors and on that basis finding a direct connection between man's place in production and the humanitarian ideas of the Geneva Law. The interrelationship is too complex to be described precisely in a few lines, so as to be able to explore the sociology of international humanitarian law with convincingly exhaustive accuracy. But it would hardly be mistaken to say that a given society or State which in its own best interest develops social legislation, a system of social insurance, and which deems it to be its duty to create lives worthy of man and security for its people cannot remain indifferent to war casualties. It is of prime importance for such a society or State to reduce human losses during armed conflicts to the lowest possible level. The principal source of the well-being of nations and States is the intelligence, skill, and diligence of their citizens. Therefore, it is to them, to the totality of the individual citizens, that protection must be granted in the first place, as well as to the material goods indispensable to their existence and to their moral and cultural values. This implies a need for the protection that has so far proved most expedient and, relatively, most effective: establishing international rights and obligations through the conclusion of international conventions.

It is by no means the task of this short paper to describe the evolution of humanitarian law, but it must be stressed that as Max Huber noted in his lecture, since its first days this law has been in constant evolution. Its impact on various fields of armed conflict has grown, and the protection it has afforded has been transmitted to new categories of victims of such conflicts. The factors which promoted the birth of humanitarian law have likewise contributed to its development. The history of this branch of law is incomprehensible without taking into account the development of human rights, the universality of the international community, and last but not least, the frightening danger of new means of warfare, or rather the growing consciousness of the dangers they

represent. If one takes into account not only the legislative work but also the practical implementation of the principles and rules of the law in situations of armed conflict, it is impossible to describe the path of international humanitarian law as a continuous and straightforward movement. Yet although peace and progress have been interspersed with periods of barbarism and relapses into primitive and cruel methods of warfare, it is undeniable that there has been progress.

The Declarations of Human Rights to which reference has been made constituted only one—and by no means the last—chapter in the development of human rights. After the attainment of political and civil rights, the political struggles in many States concentrated on securing economic, social, and cultural rights—the so-called “second generation” of human rights. The various socialist movements laid special weight on those rights considered essential if all human beings are to be afforded an adequate and worthy place in society. Not only the rights to life and personal freedom but the rights to work, education, health, social security, and others were seen as necessary and fundamental to the achievement of that aim. At present, ever more is being said about a “third generation” of human rights, particularly by representatives of the Third World.

In parallel with these political campaigns there have been efforts aimed at widening protection given to victims of armed conflicts. Not only did (and do) the lives of soldiers *hors de combat* have to be protected, but so too their dignity, health, and religious beliefs. They have to be protected against humiliating and degrading treatment and against discrimination founded on sex, color, religion, and so forth. Since the adoption of the Charter of the United Nations, human rights have occupied a highly important place in international politics and legislation. Its preamble reaffirmed the faith of the United Nations in “fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. . . .” One of the purposes of the United Nations was and is “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Several treaties and conventions have been concluded in order to achieve this aim.

Four years after the San Francisco Conference, in 1949, the Geneva Conventions were adopted, to which—with rare exceptions—all members of the international community acceded. Instead of a single convention protecting the wounded and the sick soldiers of armies in the field, there are four Conventions. They give protection not only to victims serving in such armies but also to wounded, sick, and shipwrecked members of armed forces at

sea, while regulating the treatment of prisoners of war (beyond that of the 1929 Geneva Convention), and providing for the protection of civilian persons in time of war, first of all the civilian populations of occupied territories. If the individual human being has to be protected, the protection must be general, extended to all, and varying only according to the dangers threatening various groups of persons in time of war.

It should be pointed out that the common Article 3 of the four Conventions concerns not only victims of international armed conflicts but tries to establish rules of conduct for armed conflicts not of an international character. The second Additional Protocol of 1977 enlarged and developed those rules to a considerable extent. Since Article 2, paragraph 4, of the Charter forbids the threat or use of force in international relations, States no longer have the right to resort to war to solve their international disputes, and the regulation of other kinds of armed conflicts has come to the fore. Difficulties abound and sometimes seem almost overwhelming, but at least the world is now aware of them and has the means to deal with them.

What about the universality of the international community of States, seen as transforming all kinds of armed conflicts by bringing them inside the system? The international community now has an organized structure, in the form of the United Nations. At the San Francisco Conference of 1945, forty-nine delegations were present, and the organization was founded by fifty States. Now its membership amounts to 185, a spectacular degree of development. The development of humanitarian law has occurred more or less in parallel with the broadening of the international community.

At the first Geneva Conference, delegations of only sixteen European States were present (the United States acceded to the first Geneva convention in 1882). At the subsequent conferences, the number of the participating States grew steadily. In 1906, there were thirty-five, in 1929 forty-seven, and in 1949 fifty-nine—coming from different continents. The 1974–1977 Diplomatic Conference was attended by more than a hundred delegations. Growing numbers of participants made the conferences last longer. The first, in 1864, went on for just two weeks; the second, in 1906, for four weeks; and that of 1949, for four months. The two Protocols Additional to the 1949 Geneva Conventions had to be worked out during four sessions, lasting together over nine months. The instruments became longer and more complicated, because they had to take into account the positions of many States having different concerns and different domestic legal orders.

The threat of deployment of modern means and methods of warfare has had a consistent impact on the evolution of humanitarian law—or to be precise, an

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awareness of the need to reduce their effects on the numbers of victims and their suffering. It seems superfluous to mention all the relevant examples. The armies deployed in the two world wars numbered several millions. It is well known that air warfare, and especially strategic bombing, constituted a great danger for the civilian population of the States engaged in armed conflict and that the number and proportion of civilian victims, as compared to the total number of victims, increased steadily. The first Additional Protocol of 1977 attempted, among other important objectives, to reinforce the long-standing fundamental principle of distinction between civilians and combatants, and civilian and military objectives—that is, between protected, and therefore prohibited, objects of attack and legitimate targets. There is a general hope that the rule requiring a distinction to be drawn between them will not be put to the test in the future.

Article 36 of the Additional Protocol I provides that:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

The Protocol makes no express mention of nuclear weapons. The Diplomatic Conference of 1974–1977 did not deal with this problem, even though it was always present in the minds of the delegates. It was clear that until such time as it is solved, the legal protection of the victims of armed conflicts will remain profoundly unsatisfactory, but the delegates knew well that if it were put on the agenda of the conference, the attainment of other aims would be impaired.<sup>24</sup>

Apart from the Protocol, do the previous rules of international law applicable in armed conflicts prohibit the employment of nuclear weapons? Is international law and especially humanitarian law able to give a clear answer to this question?

The General Assembly, in Resolution 49/75K of 15 December 1994, asked the International Court of Justice to render an advisory opinion on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The Court, after a lengthy deliberation, rendered its opinion on 8 July 1996, and together with replies given unanimously or by large majority, stated by seven votes to seven (with the president’s casting vote) that:

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular to the principles and rules of humanitarian law;

However, in view of the current State of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

This part of this advisory opinion has been and will be criticized for many reasons, but the framework of the present paper does not permit me to deal with the questions raised by this operative paragraph.<sup>25</sup> It is noteworthy that all the Members of the ICJ appended either a declaration, a separate opinion, or a dissenting opinion to the Advisory Opinion of the Court. The deep division of the Court generally reflects the difficulties encountered by international law when confronted by the mere existence of weapons of mass destruction for the whole of mankind—like nuclear weapons—and by the implications for the whole of mankind of any use of such weapons. This is certainly the most important and most difficult problem that humanitarian law has to solve. It is fitting then that this paper conclude with a quotation from the last operative paragraph of the Advisory Opinion of the Court :

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

The paragraph was adopted unanimously.

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Notes

1. GASSER, *LE DROIT INTERNATIONAL HUMANITAIRE* 17 (1993); *see also* UNESCO, *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* xxi (1988).
2. PLATO, *THE REPUBLIC* 499–501 (Eng. trans., vol. 1, Harvard U. Pr., 1953).
3. FRANCISCO DE VITORIA, *DE INDIS ET DE JURE BELLI RELECTIONES* 267 (Nys ed., 1917).
4. GROTIUS, *DE JURE BELLI AC PACIS*, bk. III, pp. 647–49 (Eng. trans., Clarendon Pr., 1925).
5. *Id.* at 658.
6. *Id.* at 664.
7. *Id.* at 716.

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8. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 3–4 (1954); *THE LAWS OF MANU* 230 (Buhler trans., 1889).

9. Quoted by Grotius with reference to Valerius Maximus, in *DE JURE BELLI AC PACIS*, bk. III, ch. IV/XV, p. 462 (Amstelaedami: Apud Ioannem Blaev, 1646).

10. “. . . [T]o exercise clemency the barbarians selected the temples most filled with people, where they killed no one, from where they dragged out no one, where the merciful enemy brought many people in order to spare them, from where not even the most ruthless enemy could carry anyone into captivity.” AUGUSTINUS, *DE CIVITATE DEI* [The City of God] 60 (Hung. transl., vol. 1, 1942).

11. NUSSBAUM, *supra* note 8, at 18.

12. G.I.A.D. Draper, *L'évolution du droit de la guerre: l'influence du christianisme et de la chevalerie*, 1965 *REVUE INTERNATIONALE DE LA CROIX-ROUGE* 1–24 (for rules of Knightly Warfare).

13. NUSSBAUM, *supra* note 8, at 26–27; Fischer, *The Sovereign Order of Malta Today*, 166 *INT'L REV. RED CROSS* 3 (1975) (for the Hospitallers).

14. Ereksoussi, *Le Coran et les Conventions Humanitaires*, 1969 *REVUE INTERNATIONALE DE LA CROIX-ROUGE* 12; Sultan, *The Islamic Concept*, in *INTERNATIONAL DIMENSIONS*, *supra* note 1, at 29–39.

15. Adachi, *The Asian Concept*, in *INTERNATIONAL DIMENSIONS*, *supra* note 1, at 13–19.

16. Ruda, *The Latin American Concept*, in *INTERNATIONAL DIMENSIONS*, *supra* note 1, at 41–58.

17. DIALLO, *TRADITIONS AFRICAINES ET DROIT HUMANITAIRE* 16 (1976) (for Diallo and others). The question is dealt with in more detail in BELLO, *AFRICAN CUSTOMARY HUMANITARIAN LAW* 157 (1980), who at the same time discusses the negative features of tribal wars in Africa. See also Ngoya, *The African Concept*, in *INTERNATIONAL DIMENSIONS*, *supra* note 1, at 5–12.

18. PICTET, *LES PRINCIPES DU DROIT INTERNATIONAL HUMANITAIRE* 14 (1966).

19. The Declaration of Independence contains some harsh words on the Indians, “whose known rule of warfare is an indistinguished destruction of all ages, sexes and conditions.”

20. Rousseau, *Social Contract*, in *ESSAYS BY LOCKE, HUME AND ROUSSEAU* 249–251 (Cumberlege ed., 1947).

21. III VATTEL, *TRAITÉ DU DROIT DES GENS* 8 (1758, Eng. trans., 1916).

22. II LACOUR-GAYET, *TALLEYRAND* 200 (1930).

23. HUBER, *ROTES KREUZ: GRUNDSÄTZE UND PROBLEME* 144 (1941).

24. The United States—among others, notably the United Kingdom—declared on signature of the Protocol:

It is the understanding of the United States of America that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

25. The International Review of the Red Cross dedicated a special number—January–February 1997—to the Advisory Opinions, with articles by outstanding experts on humanitarian law.