International humanitarian law and the protection of war victims

Hans-Peter Gasser [*]

---

1. Why do we need international humanitarian law?

War is forbidden. The Charter of the United Nations states clearly that the threat or use of force against other States is unlawful. Since 1945, war has no longer been an acceptable way to settle differences between States. So why talk about international rules dealing with armed conflicts (or war) and their effects, if the Charter has banned recourse to force in international relations?

There are three answers of a legal nature to that question - and a sad conclusion:

- The Charter has not completely outlawed the use of force. Indeed, States retain the right to defend themselves, individually or collectively, against attacks on their independence or their territory, in response to a (legal or illegal) use of force.

- The Charter's prohibition of the use of force does not encompass internal armed conflicts (or civil wars).

- Chapter VII of the Charter allows member States the use of force in collective action to maintain or restore international peace and security.

- Finally (and this is not a legal argument!), wars do in fact occur, as we all know, despite their being outlawed by the Charter of the United Nations. Armed conflicts are a sad reality in our contemporary world.

---

[*] Extract from Hans-Peter Gasser, "International Humanitarian Law: an Introduction", Henry Dunant Institute, Geneva / Paul Haupt Publishers, Bern, 1993. Updated by the author in 1998. Also available at: http://www. icrc.org (international humanitarian law).

The conclusion is inevitable: there is a need for international rules which limit the effects of war on people and property, and which protect certain particularly vulnerable groups of persons. That is the goal of international humanitarian law, with the Geneva Conventions and their Additional Protocols as its main expression and an important body of customary law as a decisive supplementary source of law.

2. From Henry Dunant to present-day international humanitarian law

After the shock of seeing the battlefield of Solferino and the agony of so many wounded soldiers lying untended, Henry Dunant suggested action on two levels:

- to establish an organization to assist wounded military personnel: the Red Cross; and
- to conclude an international covenant to guarantee the protection of the wounded on the battlefield: the very first Geneva Convention.

With these two steps, Dunant hoped to ease the suffering caused by war. Only later in his life did he plead for a ban on war itself.

In this article we shall not examine the first of Dunant's proposals, i.e. the creation of the Red Cross, with the International Committee of the Red Cross (ICRC) as its first institution established in 1863 in Geneva. We shall rather discuss his second suggestion, namely the creation of humanitarian law, its substance and some of the problems encountered in its implementation. Let us, however, underline that legal rules alone are unable to cope with the real problems caused by armed conflicts. Nor can any one organization alone deal with the multiple issues raised by war. A combination of international humanitarian law and action by the parties to an armed conflict, by the Red Cross and Red Crescent Movement and by the community of States, by non-governmental organizations and by all persons of good will is needed to bring about better protection for the vulnerable victims of warfare.

Let us now examine international humanitarian law as it stands today, with a brief glance at its history and its development.

The first treaty on the *protection of military victims of warfare* was drawn up and signed in 1864 in Geneva, on the initiative of Henry Dunant, at a Diplomatic Conference convened by the Swiss Government and attended by representatives of almost all States of that time.

In 1899, in The Hague, international protection was extended to wounded, sick and shipwrecked members of armed forces *at sea*, and in 1929 *prisoners of war* were also placed under the protection of the law of Geneva.

In 1949 four Geneva Conventions, which are still in force today, were adopted, each of them dealing with the protection of a specific category of persons who are not, or are no longer, taking part in hostilities:

- *First Convention*: on the care of the wounded and sick members of armed forces in the field
- *Second Convention*: on the care of the wounded, sick and shipwrecked members of armed forces at sea
- *Third Convention*: on the treatment of prisoners of war
- *Fourth Convention*: on the protection of civilian persons in time of war.

The Geneva Conventions of 1949 are a legacy of World War II. Starting from the tragic experience gained in that conflict, they greatly improve the legal protection of war victims, in particular of civilians in the power of the enemy. Today, practically all States are party to the 1949 Geneva Conventions. Accepted as they are by the whole community of nations, they have become truly universal law.

The various treaties that make up what is known as "Geneva law" deal extensively with the fate of persons who have ceased to fight or have fallen into the power of the adversary. They do not set limits to the way military operations may be fought. Concurrently with the development of "Geneva law", States have therefore codified, in various stages, international rules setting limits to the conduct of military operations. The main thrust of what is known as "Hague law", with the various Hague Conventions of 1907 as its main expression, is to limit warfare to attacks against objectives which are relevant to the outcome of military operations. Thus, the civilian population must be immune from military attacks.

The new Geneva Conventions of 1949 did not develop the rules of "Hague law". In particular, they failed to cover a fundamental issue of international humanitarian law: *the protection of the civilian population against direct effects of hostilities* (attacks on the civilian population, indiscriminate bombardment, etc.). The lessons of Coventry, Dresden, Stalingrad or Tokyo were still to be drawn.

Furthermore, *new technologies* had produced new weapons, i.e. a new potential for destruction, but also new techniques for ensuring the protection of war victims.

Decolonization had more than doubled the number of States and, with new types of conflict (wars of national liberation), some new priorities for humanitarian law had emerged.

Finally, the ever-increasing number of *civil wars* with frequent recourse to guerrilla warfare demonstrated the need to strengthen the protection of victims of non-international armed conflict.

In response to these challenges Switzerland convened a Diplomatic Conference in Geneva. From 1974 to 1977 that conference worked out two new treaties of international humanitarian law, the *Protocols additional to the Geneva Conventions*. They were adopted on 8 June 1977 and, since that date, they have been open for ratification or accession by all States party to the 1949 Geneva Conventions. Today, a clear majority of States are already bound by the two Protocols (or at least by one of them). The ICRC is doing it utmost to encourage the remaining States to accede to the Protocols as well.

3. A look at the substance of the law: humanitarian limits on warfare

Humanitarian law has become a complex set of rules dealing with a great variety of issues. Indeed, six major treaties with more than 600 articles and a fine mesh of customary law rules place restrictions on the use of violence in wartime. Such complexity should not, however, make us forget that the gist of humanitarian law can be summarized in a few fundamental principles:

1. Persons who are not, or are no longer, taking part in hostilities shall be respected, protected and treated humanely. They shall be given appropriate care, without any discrimination.

2. Captured combatants and other persons whose freedom has been restricted shall be treated humanely. They shall be protected against all acts of violence, in particular against torture. If put on trial they shall enjoy the fundamental guarantees of a regular judicial procedure.

3. The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. No superfluous injury or unnecessary suffering shall be inflicted.

4. In order to spare the civilian population, armed forces shall at all times distinguish between the civilian population and civilian objects on the one hand, and military objectives on the other. Neither the civilian population as such nor individual civilians or civilian objects shall be the target of military attacks.

These principles give expression to what the International Court of Justice has called in the Corfu Channel Case "elementary considerations of humanity", and later "fundamental general principles of humanitarian law" (Case concerning Military and Paramilitary Activities in and against Nicaragua). As general principles of international law they are the cornerstones of the protection of war victims through law. They are binding under all circumstances and no derogation is ever permissible.

There is another fundamental idea which deserves to be mentioned here: the rules of international law apply to all armed conflicts, irrespective of their origin or cause. They have to be respected in all circumstances and with regard to all persons protected by them, without any discrimination. In modern humanitarian law there is no place for discriminatory treatment of victims of warfare based on the concept of "just war".

Whereas the general principles mentioned above are common to the law on all types of armed conflict, there are two different sets of specific rules: one for international armed conflicts and another for non-international armed conflicts (or civil wars).

4. Different types of armed conflict

International armed conflicts are conflicts between States. The four 1949 Geneva Conventions and Protocol I deal extensively with the humanitarian issues raised by such conflicts. The whole body of law on prisoners of war, their status and their treatment is geared to wars between States (Third Convention). The Fourth Convention states *inter alia* the rights and duties of an occupying power, i.e. a State whose armed forces control part or all of the territory of another State. Protocol I deals exclusively with international armed conflicts.

Under Protocol I of 8 June 1977, *wars of national liberation* must also be treated as conflicts of an international character. A war of national liberation is a conflict in which a people is fighting against a colonial power, in the exercise of its right of self- determination. Whereas the concept of the right of self-determination is today well accepted by the international community, the conclusions to be drawn from that right for the purposes of humanitarian law and, in particular, its application to specific conflict situations are still somewhat controversial.

A mere glance at the newspapers or a world map reveals, however, that conflicts between States are today the exception rather than the rule. The majority of armed conflicts are waged within the territory of a State: they are conflicts of a non-international character. A common feature of many such internal armed conflicts is the intervention of armed forces of another State, supporting the government or the insurgents.

The substantive rules of humanitarian law governing *non-international armed conflicts* are much simpler than their counterparts governing international conflicts. They are derived from one main source, namely Article 3 common to the four Geneva Conventions of 1949, which enjoins the parties to an internal conflict to respect some basic principles of humanitarian behaviour already mentioned above. It is particularly important to note that common Article 3 is binding not only on governments but also on insurgents, without, however, conferring any special status upon them.

Additional Protocol II of 1977 supplements Article 3 common to the Geneva Conventions with a number of more specific provisions. This is a welcome contribution to the strengthening of humanitarian protection in situations of internal armed conflict. Protocol II has, however, a narrower scope of application than common Article 3. It applies only if the insurgent party controls part of the national territory.

5. Humanitarian law and human rights

Article 3 common to the Geneva Conventions deals with internal armed conflicts, i.e. with matters pertaining to the internal affairs of States. As the regulation of internal affairs is basically the prerogative of the sovereign State, the decision taken in 1949 to include Article 3 in the four Geneva Conventions was a great event. It must be remembered, however, that one year earlier, in 1948, the United Nations General Assembly had adopted the Universal Declaration of Human Rights. That document reflected growing international concern about an important aspect of the internal affairs of States. Indeed, international rules on the protection of human rights oblige States to recognize and respect a number of basic rights of the individual and to ensure that they are upheld. Humanitarian law does the same in times of armed conflict. It enjoins the parties to a conflict to respect and to preserve the lives and dignity of captured enemy soldiers or of civilians who are in their power. What, then, distinguishes humanitarian law from human rights law? Or are they the same?

The goals of human rights law and humanitarian law overlap. Both humanitarian law and human rights are designed to restrict the power of State authorities, with a view to

safeguarding the fundamental rights of the individual. Human rights treaties (supported by customary law) achieve this objective in a comprehensive way insofar as they cover almost all aspects of life. Their rules must be applied to all persons and be respected in all circumstances (although a number of rights may be suspended in time of emergency). Humanitarian law, however, applies only in time of armed conflict. Its provisions are formulated in such a way as to take into account the special circumstances of warfare. They may not be abrogated under any circumstances. Usually they apply "across the front line", i.e. the armed forces have to respect humanitarian law in their dealings with the enemy (and not in the relations with their own nationals). In internal armed conflicts, however, human rights law and international humanitarian law apply concurrently.

In other words, humanitarian law is a specialized body of human rights law, fine tuned for times of armed conflict. Some of its provisions have no equivalent in human rights law, in particular the rules on the conduct of hostilities or on the use of weapons. Conversely, human rights law covers several domains which are outside the scope of humanitarian law (e.g. the political rights of individual persons). Despite their overlapping, human rights law and humanitarian law remain distinct branches of public international law.

6. Implementation and scrutiny

Parties to a given humanitarian treaty have to comply with obligations arising out of that treaty, whereas all States have to respect provisions that are part of customary law. This is of course the case for all international law rules. Indeed, States have to respect their international commitments and have to take all measures necessary to facilitate implementation of the law. If a party fails to do so, the State may be held responsible for a wrongful act.

The Geneva Conventions and the Additional Protocols require the States party to adopt a number of measures in order to assure compliance with these treaties. Some of these measures have to be taken in peacetime, others in the course of an armed conflict. In this short overview, only three such obligations will be mentioned, as examples:

- *Instructions to and training of the armed forces*: the complex set of obligations arising out of the Conventions and the Protocols must be translated into a language which is clearly understandable to those who have to comply with the rules, in particular the members of armed forces, according to their ranks and their functions. Good manuals on humanitarian law play a decisive part in effectively spreading knowledge of that law among military personnel.

Rules which are not understood by or remain unknown to those who have to respect them will not have much effect.

- *Domestic legislation on implementation*: Many provisions of the Geneva Conventions and of their Additional Protocols imperatively require each State Party to enact laws and issue other regulations to guarantee full implementation of its international obligations. This holds particularly true for the obligation to make grave breaches of international humanitarian law (commonly called "war crimes") crimes under domestic law. In the same way, misuse of the red cross or the red crescent distinctive emblem must be prosecuted under domestic law.

- *Prosecution of persons who have committed grave breaches of international humanitarian law*: Such persons must be prosecuted by any State party under whose authority they find themselves. That State may, however, extradite the suspect to another State Party which is willing to prosecute him. Individuals accused of violating humanitarian law may also be tried by an international criminal court. The United Nations Security Council has established two such courts: the Tribunals for the former Yugoslavia and for Rwanda. On 17 July 1998, a Diplomatic Conference convened by the United Nations in Rome adopted the Statute of the International Criminal Court. For the first time in history a permanent international court has jurisdiction over crimes committed not only in the course of international armed conflicts but also during non-international armed conflicts. The Court's jurisdiction does not affect the obligation of States Parties to prosecute war criminals in their own domestic courts.

Returning to the question of implementation of humanitarian law by parties to an armed conflict, it should be emphasized that States do not exist in a vacuum; they are part of the community of all States party to the humanitarian treaties. States not involved in an armed conflict have a legitimate interest in seeing that the Geneva Conventions or the Protocols (to which they are party) are respected by the parties to that conflict. One may even go a step further and argue that States have an obligation to work for respect for those treaties by the parties to a given armed conflict. Article 1 of the four Geneva Conventions and Protocol I suggests such an interpretation: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". The message seems to be clear. Its political implications, on the other hand, have not yet been fully understood.

The Conventions furthermore require that each party to an international armed conflict designate a third (neutral) State as a *Protecting Power*. A Protecting Power is a State which safeguards the interests of one party in its relations with the other party to the conflict. As such, Protecting Powers have to ensure that the belligerents fulfil their humanitarian obligations.

Recent practice shows that for various reasons States are no longer prepared to appoint Protecting Powers. An institution of a special nature has stepped into the breach: the *International Committee of the Red Cross (ICRC)*. Founded in 1863 as a charitable organization on the instigation of Henry Dunant, the ICRC has over the years maintained its character as a private institution anchored in Swiss law, with Swiss citizens making up its governing body. Thus, the ICRC is not an international organization with States as its constituents (such as the United Nations or the International Labour Organization), and governments have no direct influence on ICRC activities. Yet the International Committee's mandate is international, and the whole world is its field of action. The ICRC works through its delegates. Its funds are provided by voluntary contributions from States party to the Geneva Conventions, from National Societies and from private donors. To underline its special role States have granted the ICRC observer status at the United Nations General Assembly.

Although a private institution, the ICRC has an important role to play in the implementation of humanitarian law by the parties to an armed conflict. Unlike a Protecting Power, the ICRC does not act on the instructions of a party to the conflict. The ICRC acts in its own name, as a neutral intermediary between the two sides. Its scope of action is also much broader than the tasks of a Protecting Power. Moreover, in its approach to governments, the ICRC chooses the course of confidential diplomacy, an approach which incidentally enables its delegates in their contacts with belligerents to use words as tough and clear as circumstances require. Only if confidential representations have no further chance of bringing about the intended result will the ICRC appeal publicly to States. In the course of more than 125 years the ICRC has acquired considerable experience in persuading States and other parties to armed conflicts to respect humanitarian law in international conflicts and in civil war.

Under the Geneva Conventions, parties to an international armed conflict are under an obligation to accept visits by ICRC delegates to all prisoner-of-war camps, to all places where civilians of enemy nationality may be detained and to occupied territories in general. In other situations, where the delegates have no such general right of access, the ICRC may "offer its services to the parties to a conflict". In other words, the ICRC will negotiate the right to discharge its humanitarian mandate on the territories of all the warring parties. This is generally the case in non-international armed conflicts.

In the same way, parties to armed conflicts have to allow relief operations in favour of those in need, be they detainees, especially vulnerable groups of civilians or the general population, including in occupied territories. ICRC delegates ensure that medical services or food aid are provided according to needs and that strict impartiality is observed.

The method of verifying respect for humanitarian law differs considerably from the procedures espoused by human rights treaties. The latter provide, *inter alia*, for a system of formal complaints to a supranational body, and in some cases, to a supranational court. Such complaints may originate from individuals or from States. In contrast to this well- structured system, humanitarian law relies much more on informal procedures. Their aim is not primarily to state the law and to redress a wrong but rather to convince the wrongdoer to change his behaviour and thus to prevent further violations, for the benefit of all persons affected by the conflict.

7. Final remarks

The objective of international humanitarian law is to limit the suffering caused by warfare and to alleviate its effects. Its rules are the result of a delicate balance between the exigencies of warfare ("military necessity") on the one hand and the laws of humanity on the other. Humanitarian law is a sensitive matter and it suffers no tampering. It must be respected in all circumstances, for the sake of the survival of human values and, quite often, for the sheer necessity of protecting life. Each and every one of us can do something to promote greater understanding of its main goals and fundamental principles, thereby paving the way for better respect for them. Better respect for humanitarian law by all States and all parties to armed conflicts will do much to help create a more humane world.