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INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW

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I. Introduction

International humanitarian law, which is an emergency law applicable in international or non-international armed conflicts, is a branch of international law. It is also called the law of armed conflict. Its traditional name was the law of war. International humanitarian law is usually traced to the law of Geneva and the law of The Hague. The expression 'humanitarian law' was suggested by Jean Pictet, who was the Director-General of the International Committee of the Red Cross and is considered as the father of modern international humanitarian law. Accordingly it was first used in the early 1950s by the International Committee of the Red Cross (ICRC) only to mean the law of Geneva put in concrete form by the four Geneva Conventions, 1949 for giving protection and ensuring human treatment to individuals placed *hors de combat*, (i.e. military personnel) as well as persons not taking an active part in armed conflicts (i.e. civilians). Thus the Geneva Conventions, which contain over four hundred Articles, have been drawn up solely for the benefit of the individual and, as such, primacy has been given to the individual and the principles of humanity. For Jean Pictect defined humanitarian law in 1966 as "that considerable portion of international law which owes its inspiration to a feeling for humanity and which is centred on the protection of the individual. This expression of humanitarian law appears to combine two ideas of a different character, the one legal and the other moral. Now, the [relevant] provisions .... are .... precisely a transposition in international law of considerations of a moral order, and more especially humanitarian. This then would

seem to be a satisfactory designation."[1] Therefore, it is evident that the term humanitarian law was not initially used to mean the law of The Hague, or the law of war properly so called, embodied mainly in the Hague Conventions of 1899, revised in 1907, which determines the rights and duties of belligerents in the conduct of military operations and limits the choice of the means of doing harm to the enemy with the ultimate object to mitigate the human sufferings. The laws of war, which are partly based on military necessity, provide that belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy. This law of The Hague, "do not inflict more harm on your enemy than the object of the war demands," replaced the old motto of the rules of war, "do as much harm to your enemy as you can." However, with the adoption of the two Protocols Additional to the Geneva Conventions in June 1977, which extend protection to any person affected by an armed conflict and stipulate that the parties to the conflict and the combatants shall not attack the civilian population and civilian objects and shall conduct their military operations in conformity with the recognised rules and by laws of humanity, it can be said that both the law of Geneva and the law of The Hague have been merged in the two Protocols. Thus "the distinction between the movement of Geneva and that of the Hague appears to be fading away"[2] and the term 'international humanitarian law' is presently used to mean both the law of Geneva and the law of The Hague. As in 1987, the International Committee of the Red Cross, taking into consideration this new development (adoption of the two Protocols), defined international humanitarian law as to mean "international rules, established by treaties or customs, which are specifically intended to solve humanitarian problems

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1. Pictet, Jean, The Principles of International Humanitarian Law, first appeared in the International Review of the Red Cross (Geneva, 1966), 9.
2. Pictet, Jean, Development and Principles of International Humanitarian Law (Dordrecht, 1985), 2.

directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of the 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 the conflict."[3]

Thus the provisions of international humanitarian law are the result of a compromise between two opposed notions: the principle of military necessity to obtain the aims of war and the principle of humanity aiming at to restrain belligerents from committing wanton cruelty and ruthlessness and, as such, to protect as best as possible the individuals who do not or no longer participate in the hostilities. As Hans – Peter Gasser says, "International humanitarian law seeks to mitigate the effects of war, first in that it limits the choice of means and methods of conducting military operations, and secondly in that it obliges the belligerents to spare persons who do not or no longer participate in hostile actions."[4] In short, the aim of the humanitarian law is to humanise war as humanism restrains barbarism. Without such a kind of law, war might degenerate into utter barbarism.

It should be kept in mind that the international humanitarian law is silent on whether a state may or may not have recourse to the use of force. It does not itself prohibit armed conflicts; it is not even concerned with the lawfulness or unlawfulness of such conflict. Thus humanitarian law is often called as the *jus in bello* which deals with facts, with the fact of an armed clash, irrespective of what caused the conflict and whether it can be said to have any

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3. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Yves Sandoz, Christophe Swinarski and Bruno Zimmarmenn, eds., International Committee of the Red Cross (Geneva, 1987) xxvii.

4. Gasser, Hans – Peter, International Humanitarian Law, translated from German by Sheila Fitzerld and Susan Mutti, separate print from Hans Haug, Humanity for All, the International Red Cross and Red Crescent Movement, Henry Dunant Institute (Hauput, 1993), 3.

justification. In humanitarian law only facts matter, the reasons and justification for the war are of no interest and, as such, it is applicable whenever an armed conflict actually breaks out. Thus the international humanitarian law, *jus in bellow, is* different from the rules of international law governing the use of force between States often referred to as *jus ad bellum*.[5]

However, in this paper first an attempt will be made to trace the development of international humanitarin law. In doing so, the principles and contents of contemporary international humanitarian law will also be examined.

II. Development of International Humanitarian Law

From the very beginning of life, human beings opposed each other. 'War is as old as life on the earth'. War is a rot to humanity and involves most brutal and arbitrary violence. In all ages, men have suffered under the sword and the yoke. Even so, some norms or rules were developed in the hoary past for the purpose of limiting the consequences of war. In the words of Jean Pictet, "... the laws of war are as old as war itself"[6]. The laws of war are to be found in leading religions, practices of warlords, writings of philosophers, customary rules of warfare and multilateral treaties concluded mostly in Geneva and The Hague in the 19th and 20th Centuries

(i) Leading Religions and International Humanitarian Law

The provisions limiting the right of the parties to armed conflicts to use the methods and means of warfare of their choice or protecting persons or property during or after the conflicts are to

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5. The Charter of the United Nations prohibits war; it even prohibits the threat to use force against the territorial integrity or political independence of any State, (para. 4, Art. 2). The Charter does not, however, impair the right of a State to resort to force in the exercise of its right to individual or collective self – defence (Art. 51). These rules governing the use of force may de described as *'jus ad bellum'*.

6. Pictet, Jean, supra note 2, 6.

be found in various leading religions, e.g. Hinduism, Buddhism, Christianity and Islam, of the world.

a) Hinduism and International Humanitarian Law

The oldest texts of the Hindu religion, e.g. Manu Smriti, *Ramayana,* and *Mahabhrata,* contain provisions concerning means of combat, military targets, persons wounded and sick in the battlefield and prisoners of war, which may well be described as the humanitarian regulation of warfare.

Regarding the use of weapons in warfare, the Manu Smriti (codified in 200 B.C.) says: "Let not the king strike with concealed weapons, nor weapons which are barbed, poisoned or the points of which are blazing with fire"[7]. Mahabharata also contains this rule in Santi Parva : "poisoned or barbed arrows should not be used", both *Lakshmana* in *Ramayana* and *Arjuna* in *Mahabharata* were asked not to use hyper-distinctive weapons of *Brahmastra* and *Pasupathastra* respectively as these could have caused indiscriminate loss of lives of combatants and non-combatants alike especially when the enemy had not used such weapons and the war was limited to conventional weapons.

The *Manu Smriti* and the *Mahabharata,* by providing for the rules concerning individuals who could and could not be attacked during war, laid down the basis of distinction between combatants and non-combatants, which has become one of the fundamental principles of modern international humanitarian law. The *Manu Smriti* imposed the following restrictions on every soldier which he must keep in mind while fighting his foes in the battle-field:

> "He should not strike when he is on his chariot, one who is on the ground; he should not strike a person who is an eunuch, or who has surrendered or in fleeing from the battle-field or one who is sitting or accepts defeat. Nor one who is sleeping, nor one who has lost his armour, nor one who is naked, nor one who is only a spectator, nor one who is

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7. Quoted in Jois, M. Rama, 1 Legal and Constitutional History of India, 663

> engaged in fighting with another. Nor one whose weapons are broken, nor one who is afflicted with sorrow, nor one who is grievously wounded, nor one who is in fear."[8].

Similarly, *Mahabharata* provides that a warrior should never attack a chariot driver, animal yoked to the chariot, or pages bringing weapons, or drummers or buglers who announce a battle, he would not kill a woman or a child or an aged man or a warrior deprived of his chariot and in a sad plight with his weapons broken.

Since a warfare, as a rule, confined to combatants only, the target of military attack was the combatant force alone wherever it existed and, as such, according to *Agni Purana,* fruits, flower gardens, temples and other places of public worship could not be molested during war or when armies were on march.

The *Santi Parva* of *Mahabharata* contains the practice regarding prisoner of war, sick and wounded soldier: "Enemies captured in war are not to be killed but are to be treated as one's own children." Although a male prisoner could be kept as a slave with his consent, he was to be freed after one year. If a female prisoner declined to marry person of the conqueror's choice, she was duly sent back to her residence with a proper escort.

In a similar manner, the sick and wounded soldiers were treated : they were sent back home after they were cured having received proper treatment.

b) Buddhism and International Humanitarian Law

The Buddha renounced a princedom, spent a long life time in the ceaseless search for an end to human sorrow and established Buddhism in 600 B.C. which propounded a mission of compassion, advocating pity as a spur to mutual assistance. Although Emperor Asoka, who accepted Buddhism as his religion, invaded Kalinga in 225 B.C. and became victorious, he was disgusted by the horrors of war. The bleeding consequences sensitised the victor

8. 8, Id., at 663-664.

Emperor to renounce war itself which accentuated H.G. Wells to pay him the highest tribute thus:

> "Amidst the tens of thousands of names of monarchs that crowd the columns of history their majesties and graciousnesses and serenities and royal highnesses and the like, the name of Asoka shines and shines almost alone a star .... More living men cherish his memory today than have ever heard the names of Constantine of Charlemagne."[9]

c) Christianity and International Humanitarian Law

Christianity influenced the development of humanitarian law in the medieval period. According to the Judeo – Christian religion, all men were created in the image of God Jesus Christ, preaching love and compassion, elevated human consciousness into a divine principle. Since human love was a reflection of divine love, it should be extended to everyone, even to one's enemies. Christ himself made no pronouncement on war or how it should be conducted. But it is to be found that some passages in the Bible asked the Israelites not to kill enemies who surrendered, to show mercy to the wounded, to women, children and old people. Bible speaks of "the peace of God which passeth all understanding".

Saint Augustine, a great personality in the history of Christianity, elaborated at the beginning of the 5th century the doctrine of "just war" which had been enunciated by the Romans and Stoic Philosphers (Stoic School was founded by Zeno shortly after 310 B.C. in Greece). Since the end justifies the means, acts of war carried out for the cause of the sovereign are exempted from sin. The war is declared to be a just war; it is a war desired by God; the adversary is, therefore, the enemy of God, and cannot possibly wage any but an unjust war."[10] According to Saint Augustine, "When a just war is waged, it consitutes a struggle between sin and justice, and any victory, even if it is gained by sinners, humbles the

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9. Wells, H.G., "The Outline of History", 402.
10. Pictet, Jean, supra note 2, 13.

vanquished who, by the judgement of God, suffer the punishment and penalty due to their evil deeds."[11] The Church acknowledged the right to kill enemy captives and to take them as slaves, including the women and children.

d) Islam and International Humanitarian Law

Islam is the religion of peace, goodwill, mutual understanding and good faith. Therefore, an ordinary war, which may be fought for temporary benefits of this world, e.g. for territory, revenge, military glory, is condemned in Islam. The just war in Islam is the "jihad" (holy war) in accordance with strict conditions under a righteous Imam, purely for the defence of faith and Allah's Law. The Holy Qur'an contains provisions concerning the treatment of prisoners of holy war. The verse 67 of Sura Anfal, which was revealed with reference to seventy prisoners of the Battle of Badr (the first battle between Muslims and the Makkan infidels fought in the second year of the Hijra) when the Prophet (S.) decided to take ransom for them in accordance with the advice of the majority of His Companions, the Qur'an disapproved receiving ransom for the release of prisoners thus:

"It is not fitting
For an Apostle
That he should have
Prisoners of war until
He hath thoroughly subdued
The land. Ye look
For the temporal goods
Of this world; but Allah
Looketh to the Hereafter."[12]

Later on, the matter (release of prisoners of war) has been dealt with in Sura Muhammad thus:

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11. Id. at 14.
12. Verse 67, Sura VIII : Anfal.

"Therefore, when ye meet
The Unbelievers (in fight),
Smite at their necks;
At length, when ye have
Thoroughly subdued them,
Bind a bond
Firmly (on them) (i.e. prisoners may be taken) : thereafter
(Is the time for) either
Generosity or ransom:
Until the war lays down
Its burdens. Thus (are ye
Commended)."[13]

Thus once the fight (Jihad) is entered upon, it shall have to be carried out with utmost vigour, and blows must be made at the most vital points, the neck of the enemy. When an enemy is taken as a prisoner of war, generosity (i.e. release of prisoner without ransom) or ransom is recommended to free him.

The Holy Qur'an also contains provisions concerning the fate of the non-combatant population. It has been stated in Sura Baqara that:

"Fight in the cause of God
Those who fight you,
But do not transgress limits;
For Allah loveth not transgressors."[14]

It is evident from the above verse that holy war is permissible under well-defined limits which must not be transgressed. The verse speaks of fight against "Those who fight you" which means women, children, old and infirm men (i.e. non-combatant/civilian

13. Verse 4, Sura XLVII : Muhammad.

14. Verse 190, Sura II : Baqara.

population), should not be molested, nor trees and crops cut down. As Prophet (S.) gave directives to his lieutenants before going to battle : "Go to war in the name of Allah and follow his path : fight the infidels, but do not deceive, do not betray, do not mutilate and do not kill any children."Hazrat Abu Bakr, the first Caliph of Islam, also issued almost similar directives to three of his generals before the conquest of Syria : "Do not attack children, women or elders; and you will find people who have sought seclusion in towers, (i.e. monks) leave them to devote themselves to what they are seeking." On another occasion, he gave ten commandments to one of his generals : "Do not kill any women, children, elders or wounded. Do not burn them. Do not destroy inhabited place. Do not have cows or sheep drowned. Do not be guilty of cowardice, and do not be inspired by hatred."

Islam does not approve mutilation, torture and drowning of combatants whether they are dead or alive. After the enemy retreated from the Battlefield of Uhud, Prophet (S.) found his very affectionate uncle Hamza lying on the battlefield who had been disemboweled and whose liver had been crushed (by Hind, mother of the future Caliph Muawiya) which caused him to shout: "By Allah, if He gives us victory over them, I shall punish them as no Arab has ever done." In this context, it was revealed in Sura Nahl of the Holy Qu'ran:

"And if you catch them out,
You are not entitled to strike a heavier blow
than ye received:
But if ye, show patience,
That is indeed the best (course)
For those who are patient"[15]
"And do thou be patient,
For thy patience is but

15. Verse 126, Sura XVI; Nahl.

From Allah; nor grieve over them:
And distress not thyself,
Because of their plots"[16]
For Allah is with those
Who restrain themselves,
And those who do good"[17]

Therefore, it is evident that Islam has made substantial contribution to the development of international humanitarian law by providing for provisions concerning the treatment of prisoners of war, non-combatant (civilian population) and combatant.

(ii) Warlords and International Humanitarian Law

In the European Middle Ages, Chivalry or Knighthood, which was originally a Germanic institution and brought together into an elite corps men (nobility) who had the right to bear arms and fight on horseback, adopted strict rules relating to the declaration of war, banning of certain weapons, and the status of those who used to carry a flag of truce. It was recognised that like the game of chess, there should be rules in war and that one does not win by overturning the board. But the rules were only applicable to the Christians and even then indeed to the benefit of Chivalry alone. Only a captured nobleman had to have his life spared and he could purchase his freedom. The crusades (in the eleventh century) constituted the historic epoch in which Christianity as well as Chivalry converged to face Islam as their adversary, but did not succeed.

(iii) Writings of European Political and Legal Philosophers and International Humanitarian Law

In the 17th and early 18th centuries, some European political and legal philosophers, e.g. Hugo Grotius, Montesquieu, Jean Jacques

16. Verse 127, id.
17. Verse 128, id.

Rousseau, expressed their views about the laws of war.

Hugo Grotius in his famous treatise *De jure belli ac pacis* (1625) did not rule out war, but wrote, "In war we must always have peace in mind." "The conduct of war is subject to legal restraints." He insisted that violence beyond what was necessary for victory was not justified, that civilians and even combatants should be spared whenever military needs made this possible. Thus "The *temperamenta in* bello, or constraints on the waging of war, which he then expounded in his book as requirements of a higher moral order, are similar in many respects to the rules of humanitarian law which we know as the positive law of our day."[18]

In the 18th century, Montesquieu in his book, "The Spirit of Laws" (1750) wrote that the only right in war that the captor had over a prisoner of war was to prevent him from doing harm. Later on, Jean-Jacques Rousseau stated the basic principles of the modern international humanitarian law in the Social Contract (1762) : "War is in no way a relationship of man with man but a relationship between States, in which individuals are only enemies by accident, not as men, but as soldiers ..." He further said that, soldiers may only be fought as long as they themselves are fighting. Once they lay down their weapons "they again become mere men," their lives must be spared.[19]

Thus the intellectual foundation for the development of international humanitarian law in the 17th and 18th Centuries was laid down by the European legal and political thinkers.

(iv). Conclusion of Treaties of Friendship and Peace and International Humanitarian Law

History also at times witnessed the humanisation of war and a world of violence was punctuated by the conclusion of certain

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18. Kalshoven, Frits, Constraints on the Waging of War (Geneva, 1987) 4.
19. Rousseau, Jean – Jacques, A Treatise on the Social Contract, Book I, Chap. IV.

treaties of friendship and peace in the 17th and 18th Centuries. The Treaty of Westphalia, 1648, which concluded the Thirty years War, provided for the release of prisoners without ransom and, as such, is generally considered in the Western World as marking the end of the era of widespread enslavement of prisoners of war. Later in1785, the "Treaty of Friendship and Peace," arrived at between Frederick the Great and Benjamin Franklin, stipulated that "in case of conflict the parties would abstain from blockades and that enemy civilians would be allowed to leave each country after a certain time. Prisoners of war would be fed and lodged in the same manner as the soldiers of the detaining power and a man of confidence would be allowed to visit them and provide them with relief."[20]

(v) Customary Laws and International Humanitarian Law

In course of time, the practices to spare the lives of captured enemies, treat them well, spare the enemy civilian population, protect the prisoners of war and exchange them without ransom, and treat the sick and wounded soldiers gradually developed into a body of customary rules relating to the conduct of war which may be summed up as follows:

"1. Hospitals shall be immunised and be marked by special flags, with identifying colours for each army.
2. The wounded and sick shall not be regarded as prisoners of war; they shall be cared for like the soldiers of the army which captured them and sent home after they are cured.
3. Doctors and their assistants and chaplains shall not be taken as captives and shall be returned to their own side.
4. The lives of prisoners of war shall be protected and they shall be exchanged without ransom.
5. The peaceful civilian population shall not be molested."[21]

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20. Supra note 2, 21.
21. Id., at 22.

The customary law of war was reflected in the work of Professor Francis Lieber, an international lawyer of German origin, who had migrated to America. In April 1863, he prepared 'Instructions for the Government of Armies in the Field', popularly known as the Lieber Code, to be followed by the American Army during the Civil War (1861-1865). The Lieber Code contains detailed rules relating to the conduct of war proper, protection of the civilian population, decent treatment of specified categories of persons such as the prisoners of war, wounded, doctors, nurses, and chaplains and protection of hospitals. Based on the Lieber Code, President Lincoln promulgated "Army Order No. 100" entitled "Instructions for the Armies of the United States in the Field." Although Lieber Code was a national document prepared keeping in mind the American Civil War, it was used as the basis for the first attempted codification of the customary law of warfare at the Brussels Conference of 1874. The Conference failed to adopt a treaty in this regard, but it adopted a declaration which is very similar to The Hague Conventions of 1899 and 1907. In fact, the Lieber Code served as the principal basis for the codification of the laws and customs of war, and provided for the basis of the development of the Hague Conventions of 1899 and 1907 which in turn exerted tremendous influence on subsequent developments. Thus Professor Francis Lieber made significant contributions to the concept and contents of contemporary international humanitarian law.

The process of codification of the customary rules of warfare started after the middle of the 19th Century with the conclusion of multilateral treaties which provided certainty to the customary rules of warfare. This codification led to the emergence of two distinct trends in the law of armed conflict, namely, the Geneva trend (law of Geneva) which more particularly concerned with the condition of war victims and The Hague trend (law of The Hague) relating to the conduct of war proper and permissible means and methods of warfare.

(vi) Humanitarian Conventions : Law of Geneva

In the middle of the 19th Century, two wars – Crimean War, 1854 and the Battle of Solferino, 1859 – exposed the vulnerability of, and witnessed the disregard to, the customary rules of warfare.

When the Crimean War broke out in 1854, the medical service of the Franco – British expeditionary corps was virtually non-existent; 83,000 sick armed personnels died in unspeakable conditions and mortality rate among the amputees was 72 percent. Florence Nightingale (Lady of the Lamp), a 26-year-old English nurse, could not keep silent seeing the bleeding chaos in the war – torn cosmos. She successfully reduced the toll of death and misery of the soldiers during the war period (1854 – 1855).

In the Battle of Solferino, fought in Northern Italy between the Austrians and the Franco - Italian Forces in June 1859 in which Austric was defeated, about 38,000 men were killed or wounded in 15 hours. In course of the battle, all customary rules of warfare were put to dust. Field hospitals were shelled. Doctors and stretcher bearers in the field were subjects to fire. Whoever (wounded soldier, combatant or medical and auxiliary personnel) fell into enemy hands, was taken as prisoner.[22]

Henry Dunant, a young swiss businessman, who had arrived at nearby town by Castiglione shortly after the battle, was horrified seeing the uncountable wounded soldiers abandoned on the battlefield. For days, he and a few other volunteers did what they could to treat the wounded and alleviate the sufferings of the dying. Deeply affected by the misery he had witnessed, he retired for a while from active life and described his experiences in a book entitled *Un Souvenir de Solferino* (A Memory of Solferino) which was published in 1862 and profoundly aroused public opinion throughout Europe particularly in Switzerland. In this book, Dunant made two proposals: the first was to establish in every

22. Draper, G.I.A.D., 1 The Geneva Conventions of 1949, (1965) 64.

country a volunteer relief society to train and prepare itself in peacetime to assist the army's medical service in time of war; and the second proposal was that the various States should meet in a congress and adopt an inviolable international principle, guaranteed and sanctioned by a convention, to provide a legal basis for the protection of military hospitals and medical personnel.

Within one year of the publication of the book, "A Memory of Solferino", Gustave Moynier, who read the book and was the President of the Geneva Public Welfare Society, convened a meeting of the Society to study Dunant's proposal with a view to translate it into action. A Commission was first appointed and then a five – member Committee consisting of Dunant, Moynier, General Dufour, Doctor Appia and Doctor Maunior. At its first meeting on 17 February 1863, the Committee established itself as a permanent institution under the name of the International Committee to Bring Relief to the Wounded.[23] In 1880, it adopted the name of the International Committee of the Red Cross.[24] Its seat was established in Geneva with its membership confined only to Swiss nationals. Although it is national in composition, the Red Cross is international in character and activity and is now deeply established in humanity's conscience as a lighted candle of love amidst the encircling gloom of terror and horror. The soul of the Red Cross is alleviation of suffering, national or international. Dunant is, therefore, generally recognised to day as the founder of the Red Cross movement.

The second proposal of Hanry Dunant was implemented (within two years of the publication of his book titled A Memory of

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23. Dunant, Andre, History of the International Committee of the Red Cross (Geneva, 1985) 6.

24. All brances use the symbol of the Red Cross on a white ground, except Muslim branches which use the Red Crescent. The Diplomatic Conference, convened in Geneva in 1929, recognised the right of Muslim countries to use a red crescent in place of a red cross. But Iran first used a Red Lion and Sun as the symbol which it abandoned in 1980 in favour of the red crescent.

Solferino) with the adoption of the (First) Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field on 22 August 1864. The Convention, which was adopted by the Diplomatic Conference convened by the Swiss Federal Council at the request of the Geneva Committee in which 26 official delegates representing 16 States were present, was the starting point for the whole of humanitarian law. It provided first the legal basis for the neutralisation and the activities of army medical units on the battle field as proposed by Henry Dunant. The Convention, which contains only ten articles, has four important features:

In the first place, in war on land, ambulances and military hospitals would be recognised as neutral and, as such, protected and respected.

Secondly, the hospital and ambulance personnel would have the benefit of the same neutrality when on duty.

Thirdly, civilians coming to the assistance of the wounded were to be respected; wounded and sick combatants, to whatever nation they may belong, shall be collected and cared for.

Finally, hospitals, ambulances and evacuation parties would be distinguished by a uniform flag bearing a red cross on a white ground.

Thus the 1864 Convention, which provided for the first legal base to international humanitarian law and principally meant to protect wounded soldiers during the war on land, was accepted in an exceedingly short time by all the then independent States, and by the United States in 1882. In 1906, the first revision of the Geneva Convention of 1864 was made on the recommendation of the International Committee of the Red Cross increasing the number of articles (from ten) to thirty-three. The amended Convention of 1906 explicitly stated that the wounded and sick were to be respected which had been implicit (mentioned in articles 1 and 6) in the original Convention of 1864.

The First World War began fifty years after the adoption of 1864 Geneva Convention. This War was a serious test for the law of Geneva. The Diplomatic Conference, convened in 1929 in Geneva, revised the text of 1906 Geneva Convention taking into account the experience of the First World War. This (amended) 1929 Convention contains provisions concerning medical aircraft, and the extension of the use of the emblem to the peace time activities of the Red Cross Societies. The Conference also added a new Convention to the law of Geneva i.e. the Convention on the Treatment of Prisoners of War, which provided for the better protection of the prisoners of war. The newly adopted Convention introduced a categorical ban on reprisals against prisoners of war.[25]

The Second World War was a macro-scale disaster with scenes of savagery which no eye had seen before, no heart conceived ever, and no human tongue could describe the desperate theatres of terror. Fifty million persons were killed, of which, as it was estimated, 26 million were members of the armed forces and 24 million were civilians. Not only combatants and non-combatants were killed, they were tortured, interned, deported and subjected to systematic inhuman treatment. The existing humanitarian law proved to be incomplete and ineffective during the Second World War and the global holocaust had a seminal impact of awakening human kind to the urgency and adequacy of forbidding and punitively dealing with belligerent barbarity in the name of human dignity and peaceful progress of all peoples. The three Geneva Conventions (one of 1907 and two of 1929) in force had to be revised and a convention for the protection of civilians, the absence of which had led to grievous consequences, to be adopted.

The Diplomatic Conference for the Establishment of International

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25. It should be kept in mind that the treatment of prisoners of war was at that time (in 1929) governed not by the Geneva Convention but by the Regulations annexed to the Hague Convention of 1907 (No. IV).

Conventions for the Protection of Victims of War, convened by the Swiss Federal Council, as trustee of the Geneva Conventions, was held in Geneva from 21 April to 12 August, 1949. Of the sixty-three Governments represented at the Conference, fifty-nine had sent plenipotentiaries; four sent observers only. Representatives of the International Committee were invited to participate in the capacity of experts.

After four months of continuous debate on 12 August 1949, the Geneva Conference adopted four new Conventions, for the protection of the victims of war. These Conventions were the result of lengthy consultation which the ICRC had undertaken on the strength of its experiences during the Second World War. They were the work not only of legal experts and military advisers, but also of representatives of the Red Cross movement. The newly adopted four Geneva Conventions substituted the earlier three Conventions providing improved versions of many existing rules and filling lacunae The law of Geneva was enriched by an entirely novel Convention (i.e. the Fourth Geneva Convention) on the protection of civilian persons in time of war. Thus the four Geneva Conventions deal with the wounded and sick on land; the wounded, sick and shipwrecked at sea; the prisoners of war; and the civilians.

The four Geneva Conventions of 1949 began to show shortcomings during the course of year. The two Additional Protocols to the Geneva Convention were adopted in June 1977 in the Diplomatic of Conference held in Geneva for the protection of victims of international armed conflicts (Protocol 1) and of the victims of internal armed conflicts (Protocol II).

(vii) Humanitarian Conventions: Law of The Hague (the Law of War)

The Law of The Hague not only includes the law of war adopted in the Hague but also the law not bearing the name of the Netherlands city, such as the St. Petersburg Declaration of 1868, prohibiting the use of certain projectiles in time of war and the

Geneva Protocol of 1925 condemning asphyxiating, poisonous or other gases and bacteriological methods.[26]

The St. Petersburg Declaration, adopted in the Conference convened by the Russian Tsar in St. Petersburg, prohibited the use of explosive projectiles in time of war weighing less than 400 grammes. Although these explosives projectiles were not more effective than ordinary rifle bullets, it caused far graver wounds and, as such, greatly aggravated the sufferings of the victims. The motivation for the prohibition of the use of explosive projectiles during war stemmed from the notion of what was perceived as civilised. As it was mentioned in the preamble to the Declaration: "considering that the progress of civilisation should have the effect of alleviating as much as possible the calamities of war." The importance of the Declaration also lies in the fact that it obliged, as it was stated in the preamble, the belligerents to limit the use of force in meeting a legitimate military objective : "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."

In 1899, the Convention with respect to the Laws and Customs of War on Land, with annexed Regulations, was adopted in the First Peace Conference held in The Hague. It was adopted, as it was mentioned in the preamble to the Convention, "Animated by the desire to serve ... the interests of humanity and the ever increasing requirements of civilisation ..." The Hague Regulations of 1899 prohibited the use of poisonous gasses in war. The Conference, convened by the League of Nations in 1925, adopted the Protocol prohibiting the use of poisonous gasses and bacteriological methods of warfare, which has become a rule of customary international law and is therefore binding on all States.

Of the 13 Conventions adopted at the Second Peace Conference held in 1902 in the Hague, the most important for the development of international humanitarian law was the Hague Convention No.

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26. Supra note 1, 11.

IV of 1907 concerning the laws and customs of war on land, with annexed Regulations, which was, in fact, a revision of the Convention and Regulations of 1899. The preambular paragraphs to the Hague Convention No. IV contain one sentence which speaks of balancing military necessity against the requirements of humanity and, as such, forms the basis of the Convention and makes it one of unique importance.

The (Frederic de) Martens Clause, so called after the Russian representative in the Conference who was a Professor of International Law at the University of Petersburg, stipulates that in cases not covered by the rules of law, "the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established by the civilized peoples, from the laws of humanity, and the dictates of public conscience." The Martens Clause constitutes a "legal safety net" : where there are loopholes in the rules of positive law, then a solution based on basic humanitarian principles must be found.

The Hague Regulations respecting the Laws and Customs of War on Land codified the law of war and contains particularly rules on the treatment of prisoners of war, on the conduct of military operations – with an important chapter on the "Means of Injuring the Enemy, Sieges and Bombardments" - and on occupied territory. In its judgment of the major Nazi war criminals, the Nuremberg Tribunal considered that these Regulations had become part of the international customary law and were therefore binding on all States[27], which remains true even to this day.

III. Principles and Contents of International Humanitarian Law

The historical development of international humanitarian law shows that it is consisted of Conventions, Declarations, Regulations

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27. XXII, Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 497.

etc. adopted mainly in Geneva and The Hague, agreements between States and customary law. Although the UN (established in 1945) showed the same indifference as the League of Nations towards the further development of the international humanitarian law, in 1946 the General Assembly of the United Nations reaffirmed in Resolution 95(1) the principles contained in the London Agreement (August 1945) for the prosecution and punishment of major war criminals, as reformulated by the International Military Tribunal in its judgment (and therefore usually referred to since as the "Nuremberg Principles"), generally valid principles of international law.[28] Later, the principal progressive step taken was the adoption, through an International Conference held in 1954 at the Hague under the auspices of the UNESCO, of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts. Cultural property of perpetual value is a global asset which shall not be a prey to the ravages of war. The UNESCO has been given the charge to implement the provisions of the Convention. Since the existing humanitarian law didn't provide for restrictions concerning the use of certain conventional weapons, a special Conference of the UN adopted, on 10 October 1980, the Convention on *Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects,* and its three protocols, on the basis of preparatory work done by the ICRC. It aim is to limit the use of certain particularly grim weapons. The General prohibition of the law of The Hague and of Article 35 of Additional Protocol to the Four Geneva Conventions

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28. Kalshoven, Frits, supra note 18, 18-19. The Charter of the International Military Tribunal defined three categories of war-crimes, namely, crimes against peace, war-crimes, and crimes against humanity. It also stated the principle of individual criminal liability, notably that the official position of the defendants would not be considered as freeing them of responsibility or mitigating punishment. It was also stated that the plea of superior orders would not free a defendant from responsibility but might be considered in the mitigation of punishment if the Tribunal determined that justice so required.

of 1949 is thereby given concrete form and made into specific prohibitions that can be applied in practice. The protocols deal with incendiary weapons, mines and non-detectable fragments.

Thus these two Conventions – the Hague Convention for the Protection of Cultural Property and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons – also constitute an important part of international humanitarian law.

The United Nations, in its sweeping concern for human rights, in the course of time has also shifted its focus from human rights in times of peace alone to human rights in times of peace as well as war. The United Nations has found justification for this shift in the Charter of the United Nations whose madate is the protection and promotion of human rights without any distinction as to peacetime and wartime. The shift in the focus of the United Nations has conferred the status of human rights on international humanitarian law which applies in the event of armed conflicts. In December 1968, twenty years after the adoption of the Universal Declaration of Human Rights, the General Assembly adopted a resolution entitled "Respect for Human Rights in Armed Conflicts" and invited the Secretary-General to carry out studies in consultation with ICRC in this regard. This close interaction between the UN and the ICRC is a strong foundation for the humanitarian law of armed conflicts in contemporary circumstances.

However, it should be mentioned that the four Geneva Conventions of 1949 and its two Additional Protocols of 1977, which contain more than 600 Articles, no doubt represent, at least as far as size is concerned more than three quarters of the law of war in existence today. The four Geneva Conventions are:

I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August, 1949.

II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces

at Sea, of 12 August, 1949.

III. Geneva Convention relative to the Treatment of Prisoners of War, of 12 August, 1949.

IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August, 1949.

The first three Conventions cover well-known topics, namely protection of the wounded and sick on land; the wounded, sick and shipwrecked at sea; and prisoners of war. The Fourth Geneva Convention, however, breaks a new ground in that it protects two categories of civilians in particular; enemy civilians in the territory of a belligerent party and the inhabitants of occupied territory; categories of civilians, that is, who as a consequence of the armed conflict, find themselves in the power of the enemy. The purpose of the new provisions was, to some extent, to prevent civilians from becoming the direct victims of war. The Fourth Geneva Convention is the evidence that the international community had learned from the failure since it is common knowledge that the worst crimes during the Second World War were committed against civilian persons in occupied territory.

Thus the Fourth Geneva Convention is a constructive contribution in the humanitarian dimension to international law. This new Convention is an elaboration which runs into several Articles and prohibits in particular:

(a) "Violence to life and person, in particular, torture, mutilations or cruel treatment.

(b) The taking of hostages.

(c) Deportations.

(d) Outrages upon personal dignity, in particular humiliating or degrading treatment, or adverse treatment founded on differences of race, colour, nationality, religion, beliefs, sex, birth or social status.

(e) The passing of sentences and the carrying out of executions

> without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees recognised as indispensable by civilised peoples."

The 1949 treaties also led to a further extremely important development: the extension of the protection under humanitarian law to the victims of civil wars. The Geneva Conventions are, in fact, founded on the idea of respect for the individual and his dignity. Persons not directly taking part in hostilities and those put out of action through sickness, injury, captivity or any other cause must be respected and protected against the effects of war; those who suffer must be aided and cared for without discrimination. In particular, Article 3 common to the four Geneva Conventions stipulates that those persons who do not take part directly in the hostilities be treated with humanity in all circumstances. It also prohibits threats to their lives, their physical integrity and their dignity. In addition, international humanitarian law prohibits the forced displacement of civilians.

The diplomatic Conference attended by the representatives of 102 States on the Reaffirmation and development of International Humanitarian Law applicable in Armed Conflicts, held in Geneva from 1947 to 1977, adopted the two Protocols additional to the Geneva Conventions on 8 June 1977. The two Additional Protocols, which have supplemented are:

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

The Additional Protocols extend this protection to any person affected by any international or non-international armed conflict.

The injunctions imposed by international humanitarian law on the civilian and military authorities are numerous and specific.

Common Article 3 and Additional Protocol II expressly prohibit twenty-three different acts, ranging from murder and torture to the threat of indecent assault. Types of behaviour other than those expressly prohibited can also be considered to implicitly forbidden by the general obligation of human treatment set forth in both instruments.

The four Geneva Conventions of 1949 entered into force on 21 October, 1950. They have almost received universal ratification: the number of State Parties to the Geneva Conventions is 188. Out of 185 State Members of the United Nations, only three States – Urethra, Marshall, Nauru – are not parties to the 1949 Geneva Conventions. The 1977 Protocols entered into force on 7 December, 1978. The numbers of State Parties to the Additional Protocol I and Additional Protocol II are 150 and 142 respectively. Bangladesh, which became State Party to the four Geneva Conventions on 4 April 1972, is the first SAARC country to become the State Party to the Protocols on 8 September 1980. The only other SAARC country which followed the path of Bangladesh is Maldives which became State Party to the Protocols on 3 September 1991. But unlike India, the Parliament of which passed the Geneva Conventions Act, 1960 to enable effect to be given to International Conventions done at Geneva on twelveth of August 1949," Bangladesh has not yet adopted any law to fulfil its obligations. Under the four Geneva Conventions, the High Contracting Parties are obliged, *inter alia,* to:

- respect and to ensure respect for the Conventions in all circumstances;[29]
- enact legislation necessary to provide effective penal sanctions "for persons committing or ordering to be committed any of the grave breaches" of the Conventions as defined under the Conventions;[30]

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29. Art. 1, common to all the four Conventions.

30. Art. 49 of the First Convention, Art. 50 of the Second, Art. 129 of the Third and Art. 146 of the Fourth Convention.

- take measures necessary "for the suppression of all acts contrary to the provisions" of the Conventions other than grave breaches;[31]
- take measures necessary "for the prevention and suppression, at all times, of the abuses" of the emblems – the red cross, the red crescent and the red lion and sun.[32]

However, the entire body of written and unwritten international humanitarian law is anchored in a few fundamental principles by a group of legal experts from the ICRC and the Federation of Red Cross and Red Crescent Societies, which form part of the foundation of international law. Those principles do not, however, take precedence over the law in force, nor do they replace it. Rather, they highlight guiding principles and thereby make the law easier to understand. These fundamental rules of humanitarian law applicable in armed conflicts are:

"1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.

2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat.*

3. The wounded and sick shall be collected and cared for by the party to the conflict which has then in its power. Protection also covers medical personnel, establishments, transports and *materials.* The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity,

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31. Para 3, Id.

32. Art. 54 of the First Convention and Art. 45 of the Second Convention.

personnel rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and property. Neither the civilian population nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.[33]

IV. Conclusion

The foregoing discussion reveals that international humanitarian law was mostly developed in Geneva and it was developed at a time when recourse to force was not illegal as an instrument of national policy; when there was no disgrace in beginning a war. The religions values, writings of political and legal thinkers, and customary rules of warfare laid down the basis on which this branch of international law developed. The aim of the international humanitarian law is to protect and safeguard the dignity of the human beings in extreme situation of armed conflicts. The motivation for restraint in behaviour during war stemmed from notions of what was considered to be honourable and, in the 19th

33. International Review of the Red Cross (1978) 248-249.

century in particular, what was perceived as civilised. Although the objective of humanitarian law is to protect combatant as well as non-combatant in armed conflicts, what baffles international community today is its implementation.

The main question at issue in humanitarian law is to balance humanity against military necessity which we have failed to achieve to a great extent. Ironically there are numerous examples of violations of international humanitarian law in conflicts around the world. Ever increasingly the victims of warfare are civilians. So many people have not been saved. However, there are important cases where international humanitarian law has made a difference in protecting civilians, prisoners, the sick and wounded and restricting the use of barbaric weapons. Undeniably, countless people have received protection under the Geneva Conventions. Geneva Conventions have become now bulwark against the harshness, hardship and horror of war. The Humanitarian Conventions have been tuned to the current needs of a warring world with no holds barred and adapted to defend bleeding mankind victimised by victory through massacre. The finest hour of Humanitarian Law of the four Geneva Conventions, which are central to international humanitarian law to defend human dignity in war and among the most widely ratified treaties in the world, will arrive when, in the field of human conflict or calamity, the sick and wounded, the innocent civilians and helpless victims of armed conflict, find a source of justice and a means of rescue and hope. The Conventions do not contain the last words in the field of international humanitarian law. On the contrary, it is essential that this body of law should benefit from the new experience gained during each armed conflict and should take into account weapons developments and humanitarian problems of modern times. Let us "call upon the living for them to break the thunderbolts of war and tyranny". Our goal is human survival in war and the protection of human dignity, a cherished goal to be achieved in years to come.