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L. C. Green

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LES DIMENSIONS INTERNATIONALES DU DROIT HUMANITAIRE DROIT HUMANITAIRE ET CONFLITS INTERNES

par L.C. GREEN*

It has become increasingly popular of late for many writers to confine the term international humanitarian law to that part of the law of armed conflict which is concerned with the protection and treatment of those who are *hors de combat* in the widest sense of that term. This is the view propagated by the International Committee of the Red Cross and popularized by the 1977 Protocols on Humanitarian Law in Armed Conflicts. The collection of essays published under the title *Les Dimensions Internationales du Droit Humanitaire*[1] opens with the bald statement by the former Vice-President of the I.C.R.C. and President of the Institut Henry Dunant, Jean Pictet, that «Le droit humanitaire est cette portion considérable du droit international public qui s'inspire du sentiment d'humanité et qui est centrée sur la protection de la personne en cas de guerre»[2]. Regardless of the respect that Pictet's name conjures up, there is much to be said for arguing that humanitarian law embraces within its orbit not only the humanitarian aspect of the law of armed conflict, but also human rights in their widest sense. The fact that the Diplomatic Conference which sat from 1974 to 1977 and gave birth to Protocols I and II described itself as one «sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés» does not really validate the statement that «L'expression de droit international humanitaire, bientôt adoptée par la majorité de la doctrine, est aujourd'hui devenue quasi officielle»[3]. Instead, this choice of title merely confirms that, whatever else may be the case, part of international humanitarian law relates to the law of armed conflict, and finds its source in the Hague and Geneva Conventions. Pictet points out that «le droit de Genève, ou droit humanitaire proprement dit, tend à sauvegarder les militaires hors de combat, ainsi que les personnes qui ne participent pas aux hostilités. ...Le droit de La Haye, ou droit de la guerre proprement dit, fixe les droits et devoirs des belligérants dans la

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*. University professor and Honorary professor of law at the University of Alberta.

1. G. Abi-Saab, *Les Dimensions Internationales du Droit Humanitaire*, Paris, Pedone for Institut Henry Dunant, 1986.
2. *Ibid.* at 13.
3. *Ibid.*

conduite des opérations et limite le choix des moyens de nuire»[4]. He goes on to assert that «la législation des droits de l'homme ... [a] pour objet de garantir en tout temps aux individus des droits et libertés fondamentaux et de les préserver des fléaux sociaux»[5]. To reserve, in view of this, the title of humanitarian law merely for the law of armed conflict is, it is submitted, merely semantic.

The first group of essays in this collection are devoted to expounding «les idées humanitaires à travers les divers courants de la pensée et des traditions culturelles» and cover the issue from the African, Asiatic, Socialist, Islamic, Latin-American and Western standpoints. In view of the fact that so much of all these is owed to the Judaic and monotheistic origin, it is a little surprising that neither Dr. Rosenne nor Professor Dinstein was asked to contribute a paper discussing the Jewish contribution to the growth and development of humanitarian law. What is interesting in examining this group of essays is not merely the commonality of approach that one finds, but that humanitarian principles are not nearly as modern as is sometimes suggested, nor the monopoly of any particular or religious ideology. This collection of «regional» papers should be read in conjunction with Professor Draper's contribution on the development of international humanitarian law, in which he rightly points out that, in the specialist sense in which the term is used here, his topic really covers the history of the law of war, starting at latest with the concept of «just war» in the seventeenth century[6], though some would find evidence of aspects of humanitarian law in the Old Testament. He reminds us of the fact that in his *Social Contract* Rousseau propounded the new concept that war is not a relation between man and man but between states, with the ordinary individual involved only to the extent that he is a soldier[7]. With the modern emphasis on conscription and the citizen army and the development of total war, we have reverted to the earlier idea that in war all men become enemies and, as Rousseau suggested, defenders of the state. For Draper, it is Rousseau who in this way has opened the way for the development of humanitarian law with its introduction of methods of ameliorating the processes of war[8], for it is easier to regulate the behaviour of states *inter se* than it

4. *Ibid.* at 14.
5. *Ibid.* at 15.
6. *Ibid.* at 89-90.
7. *Ibid.* at 91.
8. *Ibid.* at 91-92.

is of men! This paper provides a bird's eye view of the trends and developments between the time of Grotius and the adoption of the Geneva Protocols in 1977. It may be felt, however, that a couple of pages might have been devoted to earlier contributions made by national military regulations going back to the eleventh or twelfth century, especially in the field of respect for agricultural necessities or agreements regarding medical activities which preceded the establishment of the International Red Cross consequent upon Henry Dunant's pamphlet *Un Souvenir de Solferino.*

Six papers are concerned with the application of the law during international armed conflict and to a great extent they are explications of the content of the materials that consitute both the Hague and Geneva law, each of the papers being concerned with a specific issue: behaviour of combattants and conduct of hostilities, the Hague Law (Baxter); means and methods of combat (Blix) which draws attention to some of the problems which arise when documents have more than one official language (see the discussion on «unnecessary suffering» and «maux superflus»[9]); protection of the wounded and sick (Rezek), prisoners of war (Pilloud), civilians (Umozurike) and cultural property (Nahlik). This section of the collection relating to the law of armed conflict concludes with two papers on non-international conflicts. The first by Professor Georges Abi-Saab is primarily concerned with the significance of Protocol II of 1977, which he regards to a great extent as spelling out in greater detail the significance of Article 3 common to the four Geneva Conventions of 1949[10]. Then there is a paper by Dr. Eide of the Oslo International Institute for Peace Research dealing with the problems of internal conflicts which are not covered by Article 3 or Protocol II. He points out that, regardless of these provisions, such internal disturbances are not completely lawless. The international conventions and agreements in the field of human rights remain valid even during such turmoil[11], as may be seen from the decision of the European Court of Human Rights in the Anglo-Irish case, which, however, he does not mention. He closes his discussion with the remark: «Le droit international présente des lacunes en matière de répression des violations au niveau international. Plusieurs propositions visant à créer des tribunaux pénaux internationaux ont été rejetées, mais le développement des droits de l'homme permet de penser qu'ils seront

9. *Ibid.* at 166.
10. *Ibid.* at 276.
11. *Ibid.* at 282.

institués, mais dans un avenir qui paraît encore lointain»[12].

Finally there are two papers on the application of international humanitarian law. One by Dr. Sandoz of the International Committee of the Red Cross, is concerned with the various issues that relate to the actual operation of humanitarian law with particular reference to the role of the I.C.R.C. The remaining article by Professor Blischenko deals with the fundamental problem of responsibility for breaches of international humanitarian law during armed conflict. What is interesting in his paper is the reminder that most military codes regard the commission of offences against the law of war as breaches of their own military law rendering the offender liable to court martial. He points out that between 1965 and 1973 there were 36 court martials of American personnel for offences against the Uniform Code of Military Justice, 20 of which resulted in a guilty verdict[13]. He discusses the problem of command responsibility under Protocol I and examines the problem of lawfulness of an order, reminding us that there is no article in the Protocol which actually deals with the superior orders issue[14].

One of the most important developments in the law of armed conflict since 1945 has been the realisation that most recent conflicts do not constitute «war» in the traditional sense. Concomitant with that ralisation has been recognition of the need to formulate rules to govern non-international conflicts. Here Dr. Rosemary Abi-Saab has served a useful function in providing an account of the «origines et évolution de la réglementation internationale» under the title of *Droit Humanitaire et Conflits Internes*, reminding us in her preface that we are here dealing with a question which historically is par excellence one touching state sovereignty[15], even though at times what passes as an internal conflict is in fact a «war by proxy» between the great powers[16]. She points out that the effects of an internal and of an international war are virtually the same, in that both involve «opérations militaires, entraînant des victimes, combattantes et civiles, blessés, prisonniers, destructions souvent

12. *Ibid.* at 295.
13. *Ibid.* at 333-34.
14. *Ibid.* at 343.
15. R. Abi-Saab, *Droit Humanitaire et Conflits Internes*, Paris, Pedone for Institut Henry Dunant, 1986 à la p. 1.
16. *Ibid.* at 7.

massives»[17], so that intrinsically there is no reason why humanitarian law should not apply equally whether the conflict is international or not. In fact, the Canadian delegation at the Geneva Conference which produced the two Protocols in 1977 sought to achieve this end, but was unsuccessful in its efforts. One might, in fact, question the humanity of those state representatives who were unwilling to introduce humanitarian principles into non-international conflicts and who were concerned with raising the threshold to an extent that Protocol II would only apply to those conflicts which measured up to what have always been regarded as civil wars, leaving rebellions, revolutions, guerrilla campaign and the like virtually uncontrolled. As Dr. Abi-Saab points out, «Dans la plupart des cas, tout au moins au début d'un conflit interne, le gouvernement en place ne reconnaît pas facilement l'applicabilité des principes humanitaires, pour garder les mains libres dans la répression de la rébellion par les moyens qu'il juge appropriés. Il sera par conséquent réticent à accepter l'intervention d'un organisme humanitaire (comme le CICR) dans un conflit qu'il juge relever de son domaine de compétence exclusive»[18], and third states are unwilling to exercise any form of control in such circumstances. While Protocol II seeks to introduce some measure of legal limits[19], it is perhaps too early yet to say whether its provisions will prove in any way effective in practice, particularly as there is no reference in the Protocol to methods of enforcement or punishment, despite the moderate efforts that were made during the Conference to ensure some limited measure of supervision and control[20]. The author in these comments shows the manner in which the Conference retreated from any attempt to provide «teeth» to Protocol II and it is interesting to look at her synoptic table of the draft prepared by the International Committee of the Red Cross and the final text adopted by the Conference[21]. No wonder the author is able to state «cette étude met en évidence le rôle toujours primordial des Etats qui se refusent à abandonner un pouce de leur souveraineté, même en faveur de la protection humanitaire des victimes. Autrement dit, on met ici en évidence la lutte toujours plus réelle entre les principes d'humanité et l'arbitraire politique»[22].

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17. *Ibid.* at 9.
18. *Ibid.* at 10.
19. *Ibid.* at 153-90.
20. *Ibid.* at 182-86.
21. *Ibid.* at 218-80.
22. *Ibid.* at 11.

Dr. Abi-Saab points out that to all intents and purposes the terms «non-international conflict» and «internal conflict» are synonymous, although this disregards the fact that Protocol II does not apply to those «internal conflicts» in which the anti-government authorities are not in possession of part of the national territory. She suggest that «l'expression "guerre civile" n'a pas le même sens que ces deux premiers termes. Elle recouvre en effet seuls des conflits armés caractérisés, de haute intensité»[23]. But this distinction ignores the high threshold that has been adopted before Protocol II can come into opereation. She does make an interesting and important observation when she states that humanitarian law, in its narrow sense, has subsumed the distinction between the Hague and Geneva law insofar as the law of armed conflict is concerned. This blurring of the distinction was first evident in the 1929 Geneva Convention on the rights of prisoners of war, was intensified in 1949 and is clearest in the 1977 Protocols[24].

After providing an historical account of early efforts to develop international humanitarian law, followed by a description of the improvements to be found in the 1949 Conventions, especially Article 3 common to all four, she goes on to a detailed analysis of the debates from 1974 to 1977 that culminated in the adoption of the two Protocols. While such an account is of interest and enables one to trace the political and ideological issues that often proved more important than those of a humanitarian character, it means that readers will often find it difficult to put her arguments into the context of the final text, for Protocol II was very different from the draft proposed by the I.C.R.C. and the various amendments put forward by individual delegations. For this reason, perhaps the most important section of her work is the conclusion. Here she points out that *in fine* the Protocol only applies to a high intensity conflict when the antagonists control part of the national territory[25], a statement which tends to contradict her earlier definitions. At the same time she explains that the dropping of the term «parties to the conflict» satisfied those delegations which were concerned that the Protocol might give insurgents legal respectability, but it also served as an excuse for removing many of the provisions

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23. *Ibid.* at 13.
24. *Ibid.*
25. *Ibid.* at 191.

that related to material protection and the means of combat[26].

Perhaps the most important statement in *Droit Humanitaire et Conflits Internes* is one that most commentators carefully avoid making: «En effet, l'interdiction des maux superflus, de la perfidie, des représailles, de la peine de mort pour une infraction commise en relation avec le conflit armé, la sauvegarde de l'adversaire hors de combat, sont toutes des dispositions qui, bien qu'essentiellement humanitaire n'ont pas été dans le texte "simplifié" au Protocole. *Les dispositions adoptées ne vont ainsi pas beaucoup plus loin que les principes humanitaires essentiels, qui figuraient déjà dans l'article 3 commune*»[27].

The two works, *Droit Humanitaire et Conflits Internes* and *Les Dimensions Internationales du Droit Humanitaire* complement each other. The former provides a useful background to two chapters of the latter, while *Les Dimensions* provides an overview of the topic as it stands today. Students of the law of armed conflict will find both works of great value.

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26. *Ibid.*
27. *Ibid.* at 191-92 (italics added).