

Traditions, Values, and Humanitarian Action

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Traditions, Values, and Humanitarian Action

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Disregarding the Geneva Conventions on the Protection of War Victims

*Michel Veuthey*¹

The laws of war, that restrain the exercise of national rapine and murder, are founded on two principles of substantial interest: the knowledge of the permanent benefits which may be obtained by a moderate use of conquest, and a just apprehension lest the desolation we inflict on the enemy's country may be retaliated on our own.

Edward Gibbon²

We become the healers, not the killers of our species.

Robert Lifton and Eric Markusen³

Seek to understand the conditions, as far as possible without national prejudice, which led to past tragedies and should strive to determine the great fundamentals which must govern a peaceful progression toward a constantly higher level of civilization.

General George C. Marshall⁴

Since Auschwitz we know what man is capable of.
And since Hiroshima we know what is at stake.

Viktor E. Frankl⁵

The object of war being the destruction of the enemy State, one has the right to kill its defenders only when

they have weapons in their hands; but immediately as they put them down and surrender, thus ceasing to be enemies or agents of the enemy, they at once become ordinary men and one no longer has any right to their life.

Jean-Jacques Rousseau⁶

THE GENEVA CONVENTIONS of August 12, 1949, on the protection of war victims are an impressive body of positive law in force, perhaps the most extensive and universal set of rules of international law, still not fully respected and implemented. The Geneva Conventions certainly have limitations, the most important being their possible application to weapons of mass destruction. The Geneva Conventions are not only positive law. They are the result of history, political experience and wisdom, military honor and interest, and universal ethical standards. The Geneva Conventions are today the core of international humanitarian law, or laws of war, which strikes a balance between military necessity and requirements of humanity.

Laws of war are not always rules of a game between gentlemen of the same club. Even if play and war are no longer synonymous,⁷ restraints agreed upon in treaties should be respected.

The modern total war began with the Napoleonic Wars, where entire nations were pitted against each other. Sherman's march to the sea,⁸ air bombings during World War II,⁹ terror attacks against civilian populations in Africa, Asia, Latin America, and the Middle East were the precursors of today's protagonists of total war. The twentieth century—"the century of mega-death"¹⁰—invented both the terms genocide¹¹ and international humanitarian law. Will the twenty-first century consecrate genocide and discard international humanitarian law? Both the nineteenth and twentieth centuries have been a fertile ground for instruments of international law protecting human dignity even in time of war.¹² Will the twenty-first century start with lawlessness

(*a-nomia*), lack of restraints in the use of force, ignorance of standards and values for the protection of human dignity?¹³

After 9/11, some voices implied that the Geneva Conventions of August 12, 1949, on the protection of war victims were obsolete,¹⁴ that they should they be disregarded in today's global war against terror,¹⁵ that torturing prisoners¹⁶ and attacking civilians should be necessary in order to conduct a successful war against terror.¹⁷

THE "LAW OF GENEVA" IN FORCE

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention of August 12, 1949)¹⁸
2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Second Convention of August 12, 1949)¹⁹
3. Geneva Convention Relative to the Treatment of Prisoners of War (Third Convention of August 12, 1949)²⁰
4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention of August 12, 1949)²¹
5. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (First Protocol)²²
6. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Second Protocol)²³

The Geneva Conventions are the core instruments of international humanitarian law. International humanitarian law is usually defined as the set of principles and rules restricting the use of violence in armed conflicts, to spare the persons not (or no longer) directly engaged in hostilities (wounded, sick, and shipwrecked members of the armed forces, prisoners of war, and civilians). It also aims at limiting the use of methods and means of warfare causing superfluous injury (or excessive suffering, as in the case of "dumdum bullets," or gas warfare),²⁴ severe damage

to the natural environment or betrayal of an adversary's confidence in agreed-upon obligations ("perfidy").

In contemporary written law, the principle of the limitation of armed violence is reflected in the Saint-Petersburg Declaration of 1868,²⁵ as well as in Article 22 of The Hague Regulations of 1907,²⁶ which stipulates that: "The right of belligerents to adopt means of injuring the enemy is not unlimited." This text is taken up again, slightly reworded, in paragraph 1 of Article 35 ("Basic Rules") of Protocol 1 of 1977: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited."

The terminology used to refer to international treaties may vary ("Humanitarian Law,"²⁷ "International Humanitarian Law Applicable in Armed Conflicts,"²⁸ "Laws of War,"²⁹ "Law of Geneva,"³⁰ "Red Cross Conventions,"³¹ "Law of The Hague,"³² "Human Rights in Armed Conflicts"³³), but all seek the same objective—namely, to limit the use of violence in war.

Disregarding the Geneva Conventions is an important issue, larger than its purely legal dimension, which we shall examine along the following lines:

- Is it legally admissible?
- Is it politically advisable?
- Is it militarily advantageous?
- Is it ethically acceptable?

IS DISREGARDING THE GENEVA CONVENTIONS LEGALLY ADMISSIBLE?

The four 1949 Geneva Conventions and their two 1977 Additional Protocols are the main instruments in force of international humanitarian law. Their provisions embody the major development and reaffirmation of the legal restraints to violence in war of the twentieth century. Disregarding the Geneva Conventions would cause a great loss for a body of international law

that has reached an exceptional level of universal respectability. The Geneva Conventions are universally ratified.³⁴

Loss of Humanity

Disregarding the Geneva Conventions would entail, from a legal point of view, the weakening or even the disappearance of a landmark of humanity³⁵ in international humanitarian law, fruit of the international community's efforts of the last two centuries³⁶—if not longer,³⁷ if we consider early efforts to extend the benefit of international law to all human beings, regardless of their race, religion, civilization, or nation.

The Geneva Conventions have a long history in all civilizations.³⁸

Francisco de Vitoria (1480–1546), a member of the Dominican Order, is often mentioned as one of the founders of Western international law. He believed in *jus gentium*, a “law of nations”—considered universally valid—established on the basis of natural law. Living at the time of the conquest of the Americas, Vitoria developed his teaching partly in the context of the discussions of his contemporaries on the appropriate treatment of the native peoples of the Americas.³⁹

Supported by Vitoria, Bartholomew de Las Casas (1474–1566) devoted himself to the defense of the indigenous peoples of the Americas against the ruthless exploitation and ferocious cruelty that they suffered from the Spanish conquerors.⁴⁰

The four Geneva Conventions expanded from the original ten articles of the First Geneva Conventions in 1864—protecting only military personnel wounded in the field in land warfare—to nearly six hundred provisions protecting members of the armed forces as well as the entire civilian populations of countries at war.

Every step of the codification of international humanitarian law was marked by a pattern involving the following steps:

- Witnessing the needs for additional protection in the field, as did Henry Dunant on the battlefield of Solferino,⁴¹ the Interna-

tional Committee of the Red Cross (ICRC), and other organizations of medical doctors amputating limbs of antipersonnel landmine victims in Afghanistan, Angola, Cambodia, and so many other places

- Consulting private military, political, and legal experts on a personal capacity⁴²
- Convening experts from the Red Cross and Red Crescent National Societies⁴³
- Convening a conference of government experts⁴⁴
- Proposing draft instruments—based on the previous consultations—to a diplomatic conference convened by the Swiss government, as the state depositary of the Geneva Conventions⁴⁵
- Campaigning for the ratification⁴⁶ and the adoption of national legislation for the implementation of the Geneva Conventions⁴⁷
- Negotiating with belligerents on the applicability and implementation of the new instruments⁴⁸

Contemporary international humanitarian law is the moving balance between two dynamic forces: *the requirements of humanity* and *military necessity*.⁴⁹ It is also a sum of tragic real-life experiences that need not be repeated: wounded and shipwrecked members of the armed forces—and the humanitarian personnel caring for them—must be rescued and respected; prisoners of war must be humanely treated and released at the end of active hostilities; and civilians should not be killed nor harmed.

Each stage of the codification of international humanitarian law was the result of a post-war shock wave among public opinion and governments, a collective painful learning process.

These humanitarian codifications occurred as follows:

- The Battle of Solferino (1859),⁵⁰ between Austrian and French armies in Lombardy, was the impetus for the First Convention, in 1864, protecting military wounded on land⁵¹
- The Naval Battle of Tsushima (1905),⁵² between Japanese and Russian fleets, prompted the adjustment of the Convention on war at sea, in 1907,⁵³ extending protection to military shipwrecked⁵⁴
- World War I brought about the two 1929 Conventions,⁵⁵ including a much broader protection for prisoners of war

- World War II led to the four 1949 Conventions,⁵⁶ an extensive regulation on the treatment of civilians in occupied territories and internment
- The Vietnam War and struggles for decolonization in Africa preceded the two 1977 Additional Protocols,⁵⁷ which brought written rules for the protection of civilian persons and objects against hostilities⁵⁸
- A worldwide campaign promoted by governments, United Nations agencies, the Red Cross and Red Crescent Movement,⁵⁹ and a coalition of nongovernmental organizations (NGOs),⁶⁰ that stressed the human suffering and socio-economic costs caused by antipersonnel mines resulted on the total ban in antipersonnel landmines signed in Ottawa on December 4, 1997

Humanitarian law has evolved from rules protecting only certain categories of privileged individuals (from medieval knights to today's prisoners of war), to a set of provisions ensuring fundamental human rights guaranteeing the survival of civilian populations in wartime. This evolution was not only brought by the codification of new instruments and *ad hoc* negotiation, but also by the practice of states as well as by the decisions of International Tribunals.⁶¹

Among other significant developments, the International Tribunals on the former Yugoslavia⁶² and on Rwanda⁶³ broke down the distinction between international and non-international armed conflicts regarding the prosecution of war crimes.⁶⁴

Loss of Humanitarian Standards

Disregarding the Geneva Conventions would also entail the disappearance of the universality of humanitarian standards, ratified by practically all countries, that have acquired customary character, and whose fundamental provisions have even been recognized as nonderogable (*jus cogens*).⁶⁵

The 1907 Hague Regulations, which establish laws for conducting war on land, are considered a part of international customary law since the International Military Tribunal of Nuremberg de-

clared, on October 1, 1946, that these Regulations were declaratory of the laws and customs of war.⁶⁶

The four 1949 Geneva Conventions are universally ratified. The two Additional Protocols are widely ratified, but still lack ratification by the U.S.A. and some other countries. Most of their provisions have customary character.⁶⁷

As Dietrich Schindler wrote in 1999:⁶⁸

The International Criminal Tribunal, in its *Tadic* decision, came to the conclusion that many principles originally applicable in international armed conflicts had only in the course of time become customary rules applicable also in non-international conflicts; it enumerated a considerable number of such customary rules.⁶⁹ This finding constitutes one of the most important results of the post-cold war developments. It shows that non-international armed conflicts are regulated to a much greater extent by legal rules than had generally been assumed. The International Court of Justice, in its Advisory Opinion of 1996 on the legality of the use of nuclear weapons, also affirmed that a great majority of treaty rules on international humanitarian law had become customary. It did not, however, specifically refer to rules on internal armed conflicts.⁷⁰

Antonio Cassese,⁷¹ Christopher Greenwood,⁷² and Theodor Meron⁷³ confirm the customary character of most provisions of the Geneva Conventions.

In particular, the customary nature of Common Article 3 of the Geneva Conventions has been affirmed by the International Court of Justice in the *Nicaragua* case⁷⁴ and, more recently, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case.⁷⁵ In its decision, the Appeals Chamber also held that many of the provisions of Protocol 2 can be regarded as customary law.⁷⁶

As for *jus cogens*, according to Article 53 of the 1969 Vienna Convention on the Law of Treaties, “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a

norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent of general international law having the same character.”

In its Article 60, paragraph 5, the same Convention on the Law of Treaties exempted international humanitarian law from the rule of reciprocity.⁷⁷

The International Court of Justice, in the *Nicaragua* case, considered Article 3 of the 1949 Geneva Conventions as “elementary considerations of humanity” binding all parties to conflicts:

The Court considers that the rules stated in Article 3, which is common to the four Geneva Conventions, applying to armed conflicts of a non-international character, should be applied. The United States is under an obligation to “respect” the Conventions and even to “ensure respect” for them, and thus not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3. This obligation derives from the general principles of humanitarian law to which the Conventions merely give specific expression.⁷⁸

Loss of Responsibility

Disregarding the Geneva Conventions would be ignoring the collective responsibility of all states that consists in ensuring the respect for these instruments. According to Common Article 1 to the four 1949 Geneva Conventions and to Article 1 of Additional Protocol 1, all states parties to these instruments have the obligation “to respect and ensure respect” for them “in all circumstances.” This wording has been widely understood as implying a double responsibility for every state party: for its own duties as well as a collective responsibility for the behavior of other states parties.⁷⁹

The International Court of Justice holds that Common Article 1 to the 1949 Conventions had turned into customary law.⁸⁰

Humanitarian rules and principles are to be respected in all circumstances. This is especially important today, in the case of

“collapsed states,”⁸¹ “postmodern wars,”⁸² and anarchic conflicts.⁸³ According to the ICRC’s Commentary to the 1949 Conventions:

The words “in all circumstances” in Common Article 1 of the four 1949 Geneva Conventions refer to all situations in which the Convention has to be applied and these are defined in Article 2. It is clear, therefore, that the application of the Convention does not depend on whether the conflict is just or unjust. Whether or not it is a war of aggression, prisoners of war belonging to either party are entitled to the protection afforded by the Convention.⁸⁴

This collective responsibility to ensure respect for the Geneva Conventions in all circumstances could take many forms.⁸⁵ It could be a very powerful tool for an effective implementation, and enforcement, of international humanitarian law. Even if this provision was only taken over in Protocol 1 in 1977,⁸⁶ Common Article 1 of 1949 could imply obligations both for internal⁸⁷ as well as international conflicts.⁸⁸

Loss of Universal Jurisdiction

Disregarding the Geneva Conventions would mean abandoning the principle of universal jurisdiction for all states parties in terms of the prosecution of grave breaches of the Conventions and blurring the standards of the definition of war crimes.⁸⁹

The four 1949 Geneva Conventions contain provisions defining “grave breaches” (which Additional Protocol 1 expanded and equated with war crimes) and asking the High Contracting Parties: “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches”;⁹⁰ “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own court. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party

concerned, provided such High Contracting Party has made out a *prima facie* case.”⁹¹

Loss of Special Agreements

Disregarding the Geneva Conventions would also entail losing a valuable tool for special agreements in non-international conflicts and with non-state actors.

Special agreements were concluded through ICRC delegates in the Spanish Civil War (for the application by both the Madrid Government and the Burgos Junta of the two 1929 Geneva Conventions),⁹² in Palestine in 1948,⁹³ in the Yemen Civil War in 1963,⁹⁴ as well as in the Civil War in Nigeria⁹⁵ in 1969. Both sides accepted to abide by the four 1949 Geneva Conventions. In Afghanistan, the Soviet Union on one side and the Afghan mujahideens on the other side both signed the same agreement with the ICRC in order to ease the plight of prisoners: the Soviets let the ICRC visit prisoners in the Puli-Charki jail in Kabul and the mujahideens handed over their Soviet prisoners to the ICRC for a two-year internment in Switzerland before being repatriated to Mother Russia. In the former Yugoslavia, numerous special agreements were concluded in Geneva and elsewhere under the auspices of the ICRC.⁹⁶ The status of the conflicts—whether international or non-international—was left unclear on purpose so as not to jeopardize ICRC’s activities in the field. In Somalia, ICRC was allowed to visit a U.S. prisoner of war (POW) in the hands of General Aidid, thanks to such a special agreement.⁹⁷

In addition to the general applicability of the Geneva Conventions to a conflict and to the improvement of the treatment of prisoners on both sides, the establishment of protected areas was achieved by ICRC thanks to special agreements in Jerusalem in 1948, in Dacca/Dhacca in 1971, in Nicosia in 1974, in Jaffna in 1990, and in Dubrovnik and Osjek in 1991. The rejection by the UN Security Council of such a procedure for Srebrenica—and the creation of the so-called “safe areas” instead—paved the way for the massacre of thousands of civilians.⁹⁸

Loss of Antiterrorism Rules

Disregarding the Geneva Conventions would mean giving up a set of rules clearly prohibiting acts of terrorism⁹⁹ in times of armed conflict, such as attacks against civilian persons and objects, hostage taking, torture and ill-treatment, as well as collective punishments.

Article 33, paragraph 1, of the Fourth Geneva Convention reads as follows: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”

Article 51, paragraph 2, of Additional Protocol 1 also specifically prohibits acts of terrorism: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

Disregarding the Geneva Conventions is certainly not legally admissible. But:

Could the existing rules and implementation mechanisms be used more effectively?

Could the limits of the existing rules and mechanisms be identified more clearly, both in regard to the use of mass destruction weapons and to low-intensity conflicts?

Existing rules and mechanisms could certainly be used more effectively on the domestic and international level. National implementation regulations as well as the criminal prosecution of violations by domestic courts could be improved. The role of regional organizations (African Union, Arab League, Council of Europe, OSCE, Organization of American States) in ensuring respect for international humanitarian law “in all circumstances” could be enhanced.

The role of the UN, mentioned in Article 89 (“Cooperation”) of Additional Protocol 1, could be clarified. This Article reads as follows: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act,

jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.”

The use of weapons of mass destruction is not explicitly regulated in the 1949 Geneva Conventions or in the 1977 Additional Protocols.

Less than a month after Hiroshima and Nagasaki, the ICRC launched an appeal to all Red Cross and Red Crescent National Societies on September 5, 1945 (“The end of hostilities and the future task of the Red Cross”) expressing its “anxiety for the future of the Red Cross work in face of the development of war techniques.”¹⁰⁰ In an Appeal to the States Parties to the Geneva Conventions of April 5, 1950 (“Atomic Weapons and Non-Directed Missiles”), the ICRC stressed the incompatibility between the recently adopted 1949 Geneva Conventions and the use of the nuclear bomb. The ICRC then requested governments to make every possible effort in order to reach an agreement prohibiting this weapon and “non-directed weapons” in general, as a natural complement to the 1949 Geneva Conventions and the 1925 Geneva Protocol. The ICRC motivated this appeal by stressing the contradiction between weapons of mass destruction and the fundamental principles of international humanitarian law, the distinction between combatants and non-combatants, and the prohibition of unnecessary suffering:

The use of this arm is less a development of the methods of warfare than the institution of an entirely new conception of war, first exemplified by mass bombardments and later by the employment of rocket bombs. However condemned—and rightly so—by successive treaties, war still presupposed certain restrictive rules, above all did it presuppose discrimination between combatants and non-combatants. With atomic bombs and non-directed missiles, discrimination becomes impossible. Such arms will not spare hospitals, prisoners of war camps, and civilians. Their inevitable consequence is extermination, pure and simple. Furthermore, the suffering caused by the atomic bomb is out of proportion to strategic necessity; many of its victims die as a result of burns after weeks of agony, or are stricken for life with painful infirmities. Finally,

its effects, immediate and lasting, prevent access to the wounded and their treatment.

In 1957, the ICRC presented “Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.” Article 14 (“Weapons with Uncontrollable Effects”) prohibited the use of weapons “whose harmful effects—resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive, or other agents—could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.” The Draft Rules were not adopted by the International Conference of the Red Cross at New Delhi in 1957. Western powers were against any regulation of the use of weapons of mass destruction within the framework of international humanitarian law, while the Soviet Union wanted a complete prohibition of nuclear weapons, not only a restriction of their use.

In 1965, the Twentieth International Conference of the Red Cross, in Vienna, in its Resolution No. 28, solemnly declared that:

All governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:

- That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited
- That it is prohibited to launch attacks against the civilian population as such
- That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible
- That the general principles of the Law of War apply to nuclear and similar weapons

On May 19, 1967, the ICRC sent a Memorandum (“Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare”) to the Governments Parties to the 1949 Geneva Conventions and to the Fourth Hague Convention of 1907 concern-

ing the laws and customs of war on land reminding them of the Vienna Resolution and requesting governments to sanction these principles and “if need be, to develop them in an adequate instrument of international law.” The ICRC also asked governments to reaffirm these principles in a resolution of the United Nations General Assembly and to include them in the instructions given to the armed forces.¹⁰¹

The United Nations General Assembly Resolution 2444 (XXIII) (“Respect for Human Rights in Armed Conflicts”) reaffirmed the first three principles and left out the fourth principle.¹⁰²

Before the ICRC could start the process of “Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts” after the adoption of Resolution XX of the Twenty-first International Conference of the Red Cross, in Istanbul in 1969, it had to agree with the nuclear powers that its endeavor would only deal with conventional warfare, excluding from its scope weapons of mass destruction as well as chemical and bacteriological warfare.

As a result, the Additional Protocols of 1977 never make any specific mention of these arms.

The International Court of Justice dealt with the conformity of nuclear weapons with international humanitarian law in one Advisory Opinion following two requests.

The first request for an opinion was transmitted to the court under a World Health Assembly resolution of May 14, 1993, with the following question: “In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligation under international law including the WHO Constitution?”

The second was requested by the General Assembly of the United Nations in Resolution 49/75 K of December 15, 1994 (“Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”), pursuant to Article 96, paragraph 1 of the Charter of the United Nations, on the following question: “Is the threat or use

of nuclear weapons in any circumstances permitted under international law?”

On July 8, 1996, the International Court of Justice gave its advisory opinion in response to the two inquiries. On one hand, the court did not find any international rule specifically prohibiting, in all circumstances, the threat or use of nuclear weapons during an armed conflict. On the other hand, the court decided unanimously that any use of nuclear weapons would be subject to the rules and requirements of international humanitarian law.

The issue is certainly not closed. As Judge Géza Herczegh said: “Given the importance of the Advisory Opinion and of the contrasting views expressed by the members of the court, it would seem most important that eminent experts in international humanitarian law thoroughly investigate the theoretical questions that may be raised in this connection.”¹⁰³

IS DISREGARDING THE GENEVA CONVENTIONS POLITICALLY ADVISABLE?

Are the Geneva Conventions to be discarded by the new realists—in a time without mercy—as the remnant of idealists of the second half of the last century?

Loss of Time

Disregarding the Geneva Conventions would entail, from a political point of view, losing at least fifty years of campaigning for humanitarian standards in armed conflicts.

The 1949 Geneva Conventions, with the UN Charter in 1945 and the Universal Declaration on Human Rights in 1948, are the result of the tragic suffering of millions of civilians and prisoners, victims of total war and genocide in Europe and in Asia. The survivors pushed for the adoption of international instruments in order to avoid the repetition of such tragedies. Many governments, international and regional organizations, as well as the

civil society, especially international humanitarian organizations and human rights NGOs, strived for decades to guarantee a better respect of these instruments.

Loss of Universality

Disregarding the Geneva Conventions would entail, from a political point of view, losing the universality of humanitarian standards, re-establishing different areas and levels of protection of human dignity in armed conflicts.

The Geneva Conventions, since the First Convention in 1864, did incorporate in a single body of international law—recently known as “international humanitarian law,” and also as “laws of war,” “laws of armed conflicts,” or even “human rights in armed conflicts”—rules and customs originating from all civilizations. Before this progressive universalization of humanitarian customs, first limited to “civilized nations,” humanitarian restraints in war were limited within the same tribe, nation, civilization; wars against adversaries outside of the group were usually not conducted according to the same restraints. The possible demise of the universal standards painstakingly attained through the Geneva Conventions could mean the return to various standards applicable within diverse groups. As the brief Kosovo campaign demonstrated, strikingly diverging interpretation of humanitarian restraints within a military alliance nearly provoked the breakdown of a coalition.¹⁰⁴

Loss of Dialogue

Disregarding the Geneva Conventions would entail, from a political point of view, losing an important common ground for maintaining a minimal dialogue even in the midst of conflicts, as well as powerful tools for the re-establishment of peace and for the sustainability of peaceful settlements.

The exchange of names and messages between prisoners and their families, the passage of relief supplies, more importantly

the release of prisoners or the repatriation of civilians, keep communication between warring parties open—directly or through intermediaries such as the ICRC. Such contacts give opportunity for belligerents to engage in truces, cease-fires, and even peace negotiations. The fact that prisoners are visited by ICRC delegates, identified, taken care of, their families reassured on their survival and well-being, and themselves certain of being released and repatriated contribute to the peaceful settlement and to its sustainability. On the contrary, attacks against civilians, mistreatment of prisoners, and denial of visits by the ICRC do nothing to create an atmosphere leading to dialogue. The re-establishment of normal, trustful relations between Germany and the USSR after 1945, on one hand, and between the U.S.A. and Vietnam after 1975, on the other hand, was considerably influenced by the treatment of POWs during the wars. The first American Ambassador in Hanoi was a former POW, who had to demonstrate that the noncompliance by the Democratic Republic of Việt-Nam of the Third Geneva Convention was past history.

Loss of Restraint

Disregarding the Geneva Conventions would entail, from a political point of view, losing restraints in the use of violence that aim at avoiding degradation between adversaries and among one's own population.

Veterans coming back home often experience severe problems within their families and communities, partly because of lack of limitations while they were engaged in combat.¹⁰⁵

Loss of Movement

Disregarding the Geneva Conventions would entail, from a political point of view, losing rules that could effectively prevent the movement of internally displaced persons (IDPs)¹⁰⁶ and of refugees.

Most internally displaced persons and refugees were com-

pelled to move from their homes by violations of international humanitarian law. Implementing international humanitarian law would be the best way to prevent the creation of IDPs and refugees and avoid social and security problems in recipient countries and territories.

Loss of POWs and MIAs

Disregarding the Geneva Conventions would entail, from a political point of view, losing procedures allowing the repatriation of prisoners of war, civilian internees, and internally displaced persons as well as of refugees. Unsolved humanitarian issues become serious political issues (refugees, missing, disappeared,¹⁰⁷ MIAs,¹⁰⁸ etc.), necessarily leading to the renegotiation of issues that could have been solved easily through a faithful implementation of the Geneva Conventions.

The Third Geneva Convention explicitly provides for a clear and rapid identification of the prisoners, a location of their detention places, a monitoring of their health, and the exchange of messages between prisoners and their families. According to Article 118, the release of the prisoners shall happen “without delay after the cessation of active hostilities.” The non-respect of this rule after the war between Iraq and Iran was unfortunately facilitated by a UN Security Resolution asking for—in this order—the cease-fire, the withdrawal of the troops on the border, and only then the release and repatriation of the POWs. As a result, thousands of POWs on both sides were not repatriated for many years after the end of hostilities. This leads to severe consequences on the individual, family, national, and regional level.

Loss of Private Property

Disregarding the Geneva Conventions would mean losing standards prohibiting the destruction of civilian objects indispensable for the survival of the civilian population. The violation of

those standards generates the need for relief, medical, and food assistance during the conflict and reconstruction thereafter.

The 1949 Geneva Conventions and especially both 1977 Additional Protocols prohibit the destruction of objects indispensable for the survival of the civilian population.

Loss of Casualty Guidelines

Disregarding the Geneva Conventions would mean losing guidelines that aim at minimizing civilian casualties¹⁰⁹ and keeping a good image for one's cause, as well as standards of behavior that avoid alienating the civilian population of occupied territories and thus lessen the support for resistance movements.¹¹⁰

Loss of International Security

We would also lose a set of standards essential for international security referred to in many resolutions of the United Nations (Security Council, General Assembly, Commission on Human Rights, and other UN organs), of regional organizations, and international human rights NGOs in the last fifty years; and an important aspect of multilateral and international cooperation at a time when solidarity might be greatly needed on many levels.¹¹¹

The four Geneva Conventions on the protection of war victims constitute an important part of international cooperation. They contribute to international security, facilitate dialogue between warring parties, aid in the re-establishment of peace and to the sustainability of peaceful settlements.

The first items to be discussed during negotiations are often humanitarian issues, such as visits by the ICRC to prisoners of war, their release,¹¹² or the plight of civilians.

Violations of the Geneva Conventions exacerbate conflicts, leading to escalations of hostilities and adding obstacles to the efforts for a peaceful settlement of conflicts.

Violations in one part of the world—if not met by an appropriate reaction by individual states and/or by the international

community—are too often imitated on the spot in other parts of the world.

Violations of the Geneva Conventions often are the cause of movements of internally displaced persons and of refugees, and can facilitate criminal activities in the area of conflict and well beyond.

Violations of the Geneva Conventions represent a serious threat to international security, at the regional level and worldwide, because:

- They are a frequent cause of or pretext for foreign armed intervention. Violations of international humanitarian law thus served to justify armed intervention in Iraq, Somalia, Bosnia-Herzegovina, Kosovo, and East Timor.
- They lead to a geographical extension of conflicts, as shown by the wars in Algeria and Vietnam and the wars of liberation in Africa, or even the recent and current conflicts in the African Great Lakes region.
- They create a system of anarchic instability at national, regional, and international levels. The situations in Sierra Leone, Liberia, and Guinea are recent examples of this kind of anarchy, fomented and fueled by the warring parties, who lived by preying on the civilian population, or even on the humanitarian agencies. Afghanistan and Colombia are other current examples of anarchy leading to disturbances and giving rise to trafficking and various kinds of terrorism.
- They cause large-scale movements of displaced persons and refugees, which are sometimes recognized by the United Nations Security Council as threats to security. Even during internal armed conflicts, population displacements are strictly prohibited. Article 3, common to the 1949 Geneva Conventions and their Additional Protocol 2 of 1977, contain rules that, if respected, would significantly reduce the number of refugees and internally displaced persons, and victims in general. Respect for international humanitarian law would also imply the separation of combatants from civilians, the disarming of camps, the careful placing of refugees, and preventing combatants from using refugees for cover or aid supplies.¹¹³

—They may contribute to or even cause terrorism. In the words of Madeleine Albright, former Secretary of State, quoted in the *Christian Science Monitor* of November 15, 2002: “We need to figure out what are the circumstances that cause unhappy people to strap bombs to themselves.”¹¹⁴

IS DISREGARDING THE GENEVA CONVENTIONS MILITARILY ADVANTAGEOUS?

The Geneva Conventions and their Additional Protocols were discussed, adopted, and ratified by decision-makers, including military experts. Have they been overtaken by the new realities of war, both high-technology and low-intensity warfare?

Destruction of Humanitarian Values

Disregarding the Geneva Conventions would mean, from a military point of view, destroying humanitarian values largely based on universal military ethics, traditions, and honor;¹¹⁵ and giving up decades—even centuries—of humanitarian customs embodied in the Geneva Conventions and incorporated in military manuals and instructions. Abiding by the Geneva Conventions is also an important part of military discipline¹¹⁶ and legitimacy of an army¹¹⁷ and of individual units.¹¹⁸ In November 1847, one of the founders of the ICRC, Swiss General Dufour, issued the following proclamation to the Confederation troops under his command: “Confederates, I place in your keeping the children, the women, the aged and the ministers of religion. He who raises a hand against an inoffensive person dishonours himself and tarnishes his flag.”¹¹⁹

Among the reasons for the military to abide by the Geneva Conventions, we could mention:

—International humanitarian law was developed in the real world of military practice, not in an ideal world imagined by academics or humanitarians, but out of expediency and mutual interest. The

input of military specialists was constant throughout the codification of the Geneva Conventions. International humanitarian law is not divorced from the day-to-day military practices and professional military standards.

—Combatants do not get a free ride because they are fighting a liberation war or a war against terrorism. The forms of war change, but the core of international humanitarian law does not.

As an important military document recently stated:

Military power must be wielded in an unimpeachable moral fashion, with respect for human rights and adherence to the Geneva Conventions. This morality should not be a matter of legality, but of conscience.

Moral behavior is essential for gaining and maintaining the positive worldwide reputation of American fighting men and women as well as the confidence and support of the American people, a basic source of American military strength.¹²⁰

Jeopardizing Protection

Disregarding the Geneva Conventions would mean jeopardizing clear and universally agreed-upon guarantees for the protection of combatants in case of injury, sickness, shipwreck, and capture; and undermining the probability that one's own soldiers would be receiving POW status and treatment in case of capture.

Limiting Surrender

Disregarding the Geneva Conventions would mean limiting the probability of the surrender of enemy combatants, in view of the uncertainty they could have on their treatment and status; the surrender of the enemy may be more easily obtained if the enemy knows that it will be treated humanely.

The principle of humanity,¹²¹ the cornerstone of humanitarian law, has frequently been opposed to military necessities. Nevertheless, these two essential factors are not necessarily contradictory. On the contrary, humanity and military effectiveness are often complementary; the best approach is, indeed, to highlight

the mutual military, political, and economic benefits of recognizing the enemy—civilian or combatant—as a human being with the same dignity as one would wish for oneself.

Besides, attacks against the civilian population, far from reducing it into submission, often incites it to resistance. One should use the dynamic role of humanitarian action to disarm the adversary or, in the words of the famous Chinese strategist Sun Tzu, to “build a golden bridge to the retreating enemy,” meaning: “Treat the captives well, and care for them. Generally, in war, the best policy is to take a state intact; to ruin it is inferior to this. To capture the enemy’s army is better than to destroy it; to take intact a battalion, a company, or a five-man squad is better than to destroy them.”¹²²

One of the fundamentals of the four Geneva Conventions on the protection of war victims is military self-interest: the first three Conventions protect members of the armed forces when wounded or sick (First Convention), shipwrecked (Second Convention), captured (Third Convention). The Fourth Convention, relating to the treatment of civilians, could protect their own families in occupied territories, or if wounded or interned. Each of the four Conventions contributes to military discipline. Discipline of one’s own troops must incorporate the respect of humanitarian restraints. History shows that when combatants are given free rein to kill and destroy indiscriminately, or to commit acts of savagery against the enemy, they will more likely turn against their own leaders and act ruthlessly against their own population. To assure that humanitarian principles are respected and implemented at this most basic level, credible instruction and rigorous training are essential. To this end, it is important that these rules be disseminated simply and clearly in military manuals or instructions¹²³ and that they be coupled with a system of disciplinary sanctions guaranteeing their observance.¹²⁴

IS DISREGARDING THE GENEVA CONVENTIONS ETHICALLY ACCEPTABLE?

If one cornerstone of the Geneva Conventions is military self-interest, another is ethics—of religious or humanist origin, aim-

ing at the preservation of the survival of the group and at the respect of fellow human beings, even in time of war. The most universal formulation of this ethical basis for the Geneva Conventions is the Golden Rule, in its positive (“Do unto others . . .”) and negative (“Do not do . . .”) forms.

Loss of Human Dignity

Disregarding the Geneva Conventions would mean, from an ethical point of view, undermining a cornerstone of our civilization for the protection of human dignity in armed conflicts;¹²⁵ losing the common denominator of humanitarian principles and rules based on all civilizations, building a thin red line between all civilizations;¹²⁶ and recreating “islands of humanity” within the international community, with different levels of humanitarian standards.

The Golden Rule can be found in several civilizations, not only Judeo-Christian ones, and states: “So, whatever you wish that men would do to you, do so to them.”¹²⁷

This rule was set to ensure the survival of a group, and forbade behaviors that would have permanently endangered the group.¹²⁸ Indigenous peoples of all continents have attempted to prevent excesses that would turn conflicts into collective suicides. The customs of Melanesians,¹²⁹ Inuit,¹³⁰ and Nilotic peoples;¹³¹ Buddhism,¹³² Hinduism,¹³³ Taoism,¹³⁴ Confucianism,¹³⁵ and Bushido¹³⁶ in Asia; Judaism,¹³⁷ Christianity,¹³⁸ and Islam¹³⁹ in the Middle East; customary humanitarian law in Africa;¹⁴⁰ and mutual restrictions imposed by chivalry and military honor¹⁴¹ in Europe contain examples of rules of “Life-Affirmative Societies,” in which the main emphasis of ideals, customs, and institutions is the preservation and growth of life in all its forms.¹⁴²

Loss of Legitimacy

Disregarding the Geneva Conventions would mean “destroying one’s cause by the very means used to defend it” (Camus):¹⁴³

undermining the legitimacy of military actions. Civilian casualties, allegations of ill-treatment, torture, and execution of prisoners that stained various wars did bring these military operations to an end, due to the reaction of the “public conscience” against torture,¹⁴⁴ killing of civilians,¹⁴⁵ and mistreatment of prisoners.¹⁴⁶ This has also been true for peacekeeping operations.¹⁴⁷

Loss of Civilian Population

Disregarding the Geneva Conventions could also be threatening the survival of the civilian population locally or on a broader scale. Over the course of time, we have seen in each civilization “islands of humanity” being formed, inside which certain rules limited violence in war-time, by imposing responsibilities toward victims.

The Geneva Conventions sum up these rules on a universal level. What is at stake today is not so much the survival of the tribe or the nation or a specific individual civilization, but humankind as a whole. We need to maintain those values of common humanity, cooperation, and equal respect.¹⁴⁸

Breaking the Geneva Conventions (and underogable human rights such as the prohibition of torture) using the defense of democracy and freedom as a pretext would be fallacious.

Beyond the literal meaning of the Conventions, there is a need to stress the spirit of the Conventions, and the common interest in keeping up the standards for our survival.

CONCLUSION AND PROPOSALS

Can the Geneva Conventions survive such merciless wars, conflicts, where everything seems permissible, where every limitation is equaled to weakness?

As Georges Abi-Saab recently wrote, “There is no need to reinvent the law.”¹⁴⁹

What is really needed is a better application of existing rules,

customs, and existing mechanisms, a stronger political will to abide by the fundamental principles and rules of humanity.

Here are three proposals to contribute to a reinforcement, a renewal, and a better implementation of the Geneva Conventions in today's conflicts:

- Reaffirm the fundamentals
- Train, teach, educate, and research
- Implement and enforce essential existing rules

Reaffirm the Fundamentals

Reaffirm the foundations of the Geneva Conventions through a declaration of the fundamental humanitarian rules, customs, and principles applicable in armed conflicts in a simple, easy-to-understand form.¹⁵⁰ The struggle for the respect of fundamental humanitarian rules in today's conflicts is not a lost cause; it is nevertheless an uphill battle to uphold the "principles of humanity and the dictates of public conscience."¹⁵¹

There is no need to redraft or to renegotiate the formulation of these fundamental rules. They already exist:

- Common Article 1 to the four Geneva Conventions of 1949
- Common Article 3 to the four Geneva Conventions of 1949
- Article 12 ("Protection and Care") of the First Convention
- Article 12 ("Protection and Care") of the Second Convention
- Article 13 ("Humane Treatment of Prisoners") of the Third Convention
- Article 27 ("Treatment. General Observations") of the Fourth Convention
- Article 48 ("Civilian Population—General Protection against Effects of Hostilities—Basic Rule") of Additional Protocol 1 of 1977
- Article 75 ("Fundamental Guarantees") of Additional Protocol 1 as well as:
 - Article 10 ("Protection and Care")
 - Article 11 ("Protection of Persons")
 - Article 15 ("Protection of Civilian Medical and Religious Personnel")

- Article 16 (“General Protection of Medical Duties”)
- Article 35 (“Methods and Means of Warfare—Basic Rules”)
- Article 40 (“Quarter”)
- Articles 4 (“Fundamental Guarantees”) and 5 (“Persons Whose Liberty has been Restricted”) of Additional Protocol 2
- The Martens Clause

Train, Teach, Educate, and Research

Train, teach, and educate arm bearers,¹⁵² troops, police, militias, armed groups, and trainers, including foreign trainers and foreign private security groups, in fundamental restraints of violence and essential humanitarian principles.¹⁵³

This could include mobilizing public role models (such as artists¹⁵⁴ or athletes) in close contact with the local traditions¹⁵⁵ who can influence leaders or public opinion at large. Spiritual leaders should participate in those campaigns, especially when religious and spiritual values have been used to fuel conflicts.¹⁵⁶

Implement and Enforce Essential Existing Rules

Strengthen the implementation of the existing rules through a better use of existing legal mechanisms and other remedies against violations.

The international community of States Party to the 1949 Geneva Conventions should reaffirm their collective responsibility according to Article 1, common to all four Conventions and to Protocol 1.¹⁵⁷ The role of the United Nations could also be clarified.¹⁵⁸

Other remedies exist and could be used to improve the respect for the Geneva Conventions, by states and by non-state actors.¹⁵⁹

The Geneva Conventions are not only the result of painful experiences of war victims, long negotiations, decisions by courts, practice of states, and writings of legal experts. The Geneva Conventions are based on the balance between military interest and universal humanitarian principles. What is needed today is a better application of the existing law and implementation mecha-

nisms, more creative interpretation and remedies to overcome the limitations of the letter of the law and to support the spirit of the Conventions and their Additional Protocols. Multidisciplinary research and training in history, anthropology, ethics, and spiritualities would highlight the renewed necessity of humanitarian standards in conflicts. Such research would also give evidence of the contribution of the Geneva Conventions to peace and security on the national, regional, and international level. It could show as well that violations of the Geneva Conventions are shortsighted, and do not meet the military and political interests of any warring party. It might, indeed, be too easy for lawyers and other experts without any battlefield experience to put aside the Geneva Conventions. It might seem the easy way out for political leaders to declare the Geneva Conventions inapplicable to a particular conflict, territory, category of prisoners or civilians. The reality of conflicts could well bring back the mutual interest of parties, even in asymmetrical conflicts, to abide by fundamental principles. Even if one side is violating the Geneva Conventions, there is a unilateral interest in respecting them. To grant humane treatment to an enemy who surrenders is less costly militarily than to corner him and face heroes and fanatics. Respecting civilians is good for the image, and militarily sound, because it avoids excessive resistance, even terrorism. The Geneva Conventions could prove very advantageous, both in today's and tomorrow's conflicts, for everyone: for superpowers as well as for smaller nations; for governments and non-state insurgents; for regular armies as well as non-state actors. What is needed is not the undermining of this vital set of rules, but rather the reinforcement of the Geneva Conventions on every possible level: legal, political, military, ethical, and spiritual.