

François Bugnion

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and international humanitarian law

From the  

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## Just wars, wars of aggression and international humanitarian law

FRANÇOIS BUGNION\*

« Heureux ceux qui sont morts pour la terre charnelle,  
Mais pourvu que ce fût dans une juste guerre.  
Heureux ceux qui sont morts pour quatre coins de terre  
Heureux ceux qui sont morts d'une mort solennelle. »  
Charles Péguy<sup>1</sup>

« Qui croira à la justice de votre guerre  
si elle est faite sans mesure? »  
François de La Noue<sup>2</sup>

*The world looked on with stupefaction as the terrorist attacks against New York and Washington unfolded on 11 September 2001, and the emotion aroused by those tragic events still remains high. On their television screens, hundreds of millions of people saw the twin towers of the World Trade Center erupt in flames and then collapse before their eyes. There is no doubt that the repercussions of these events will continue to be felt for months or years to come and that they will shape a new international balance of power.*

*The attacks and the conflict that engulfed Afghanistan and then Iraq have aroused renewed interest in international humanitarian law and have brought back into sharp focus the question of the relationship between the causes of a conflict on the one hand, and, on the other, respect for the rules that govern the conduct of hostilities and protect the victims of war.*

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## Just wars and respect for international humanitarian law

Throughout history, whenever States and peoples have taken up arms, they have affirmed that they were doing so for a just cause. All too often, this has been used as an argument to refuse mercy to their opponents and to justify the worst atrocities. The enemy was accused of serving an unjust cause and was held responsible for the privation, suffering and bereavement that every war leaves in its wake. Defeat was sufficient proof of guilt and the conquered, whatever their number, could be massacred or enslaved.

“Holy wars”, “crusades”, “just wars”: history shows that the belligerents who are loudest in proclaiming the sanctity of their cause are often guilty of the worst excesses.

So it is that the chroniclers who recounted the capture of Jerusalem by the Crusaders found nothing out of the ordinary in the massacres which besmirched this victory.<sup>3</sup> During the Wars of Religion and the Thirty Years War, appalling crimes (recorded in terrifying detail in the engravings of Jacques Callot) were committed throughout the length and breadth of Europe, yet theologians on either side hastened to justify them in the name of the Gospel.<sup>4</sup> However, the horrors of centuries past were as nothing compared with the massacres and crimes committed in the ideological crusades of the twentieth century — the Russian Civil War, the Spanish Civil War and the Second World War.

<sup>1</sup> “Happy are they who have died for their homeland, provided that it was in a just war. Happy are they who have died for a patch of ground. Happy are they who have died a solemn death.” Charles Péguy, “Ève”. *Oeuvres poétiques complètes*, Paris, Gallimard (Bibliothèque de la Pléiade), 1941, pp. 705-946, *ad p.* 800.

<sup>2</sup> “Who will believe in the justice of your war if it is waged without measure?” François de La Noue (1531-1591), quoted by André Gardot, “Le droit de la guerre dans l’œuvre des capitaines français du XVI<sup>e</sup> siècle”. *Recueil des cours de l’Académie de droit international*, Vol. 72, 1948, No. 1, pp. 393-539, *ad p.* 450.

<sup>3</sup> Matthew of Edessa relates that Godefroy de Bouillon had 65,000 “infidels” put to death in the Temple of Jerusalem. Paul Rousset, *Histoire des Croisades*, Paris, Éditions Payot, 1978, pp. 104-105; Zoé Oldenbourg, *Les Croisades*, Paris, Gallimard, 1965, pp. 154-156; Steven Runciman, *A History of the Crusades*, Vol. 1, *The First Crusade*, Harmondsworth, Penguin Books, 1971, p. 287.

<sup>4</sup> Jean Delumeau, *Naissance et affirmation de la Réforme*, 4th ed., Paris, Presses universitaires de France (Nouvelle Cléo, Vol. 32), 1983, pp. 174-184 and 209-216; Henri Hauser, *La prépondérance espagnole* (1559-1660), Paris, Librairie Félix Alcan (Collection Peuples et civilisations, Tome IX), 1933, pp. 90-101, 120-132, 253-331 and 373-390; Emile G. Léonard, “La Réforme et la naissance de l’Europe moderne”. *in: Histoire universelle*, Vol. III, *De la Réforme à nos jours*, Paris, Gallimard (Encyclopédie de la Pléiade), 1958, pp. 3-114, in particular pp. 84-86 and 97-99.

## Limits to violence

History nevertheless also teaches us that every civilization has tried to impose limits on violence, including the institutionalized form of violence that we call war. After all, the limitation of violence is the very essence of civilization.

For a long time, this limitation took the form of customary rules, generally inspired by religion, which were respected between peoples sharing the same cultural background and worshipping the same gods. All too often, however, those rules were cast aside when it came to doing battle with enemies who spoke a different language or worshipped other gods.

The fathers of international law contributed decisively to the adoption of rules designed to contain the violence of war. By rooting these rules in positive law — that is, in the practice and will of sovereigns and States — they opened the way to the recognition of rules of universal scope, capable of transcending the divisions between cultures and religions. Although Grotius (1583-1645) remained attached to the scholastic doctrine of just war, he laid the foundations of an international law based on positive law, thus preparing the ground for the adoption of the laws and customs of war which remain in force to this day.<sup>5</sup> However, the credit for being the first to call into question, if not the doctrine of just war, at least the conclusions which were commonly drawn from it, must go to Vattel (1714-1767):

*“War can not be just on both sides. One party claims a right, the other disputes the justice of the claim; one complains of an injury, the other denies having done it. When two persons dispute over the truth of a proposition it is impossible that the two contrary opinions should be at the same time true.*

*However, it can happen that the contending parties are both in good faith; and in a doubtful cause it is, moreover, uncertain which side is in the right. Since, therefore, Nations are equal and independent, and can not set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded as equally lawful, at least as regards its exterior effects and until the cause is decided.”*<sup>6</sup>

<sup>5</sup> Peter Haggenmacher, *Grotius et la doctrine de la guerre juste*, Paris, Presses universitaires de France, 1983, in particular pp. 597-612.

<sup>6</sup> Emer de Vattel, *The Law of Nations or Principles of Natural Law*, translated by Charles G. Fenwick, Washington D.C., Carnegie Institution, 1916, Book III, Chapter III, p. 247, paras 39 and 40 (new editions : Geneva, Éditions Slatkine Reprints and Henry Dunant Institute, 1983; Buffalo, N. Y., William S. Hein, 1995; first edition : London, 1758).

Thus Vattel does not openly attack the doctrine of just war, as he acknowledges that war cannot be just on both sides. What he does is to put the doctrine into perspective and draw its sting. As States are sovereign and cannot be judged without their consent, he concludes that it is rarely possible to decide which of the two belligerents is defending a just cause. Each of them may, in good faith, be persuaded that it is doing so. Hence, each may have the same right of recourse to arms. Furthermore, Vattel is ready to grant this margin of uncertainty and the resulting presumption of good faith to both sides, even in the case of civil war — a position which clearly runs counter to the custom of his time.<sup>7</sup>

It is in large measure out of this margin of uncertainty and tolerance that the laws and customs of war were to develop.<sup>8</sup>

The emergence of nation States in the Europe of the seventeenth and eighteenth centuries would radically change people's conception of war and the fate allotted to its victims. War was no longer perceived as the means of ensuring the triumph of a dogma, a truth or a religion but rather as a means — and a highly imperfect one at that — of settling a dispute between two sovereigns who recognized no common judge. The emergence of nation States also permitted the adoption of rules designed to restrain the scourge of war. Warfare was seen as the prerogative of kings. States fought through the intermediary of their armed forces, easily recognizable by their colourful uniforms. Civilians who took no part in the fighting and combatants who were wounded or who surrendered were to be spared. Similarly, States agreed not to make use of treacherous methods and to prohibit certain weapons, such as dum-dum bullets and poisoned weapons, designed to cause unspeakable suffering out of all pro-

<sup>7</sup> Vattel, *op. cit.*, Book III, Chapter XVIII, pp. 238-248.

<sup>8</sup> "War inexorably expresses the prevailing ideas of the age. It takes the form of the passions on which it feeds. On the battlefield man encounters his own demons. It is in fact the ceremonial aspect of this bloody confrontation that the law of war is designed to regulate.

But the law of war also implies a certain respect for one's adversary. The Roman canon that that which is foreign is barbarian legitimates extermination and creates a barrier to the emergence of the law. The same applies when the enemy are considered as inferior beings or as the agents of a criminal ideology. Here again the conditions for an attitude of restraint disappear and the 'right' which justifies the unleashing of violence highlights the defeat of the rule of law. War against criminals is not subject to any restraining influence since one does not negotiate with criminals. It is only to the extent that war appears as an unfortunate and tragically inadequate means of settling international disputes that it can be tacitly or contractually codified." Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, Geneva, Henry Dunant Institute, 1985, pp. 141-142 (first ed. in French, Paris, Plon, 1963).



portion to the only legitimate aim that can be admitted in war, namely to weaken the military forces of the enemy.<sup>9</sup>

These rules were gradually codified, particularly in the Geneva Conventions of 1864, 1906, 1929 and 1949, and in the 1868 Declaration of St Petersburg and the Hague Conventions of 1899 and 1907.

Generally speaking, two principal means of curbing the violence of war are recognized:

- rules relating to the conduct of hostilities, which govern the methods and means of warfare and which prohibit indiscriminate attacks, attacks directed against non-combatants, weapons of a nature to cause suffering disproportionate to the object of the war and perfidy;
- rules intended to protect non-combatants and persons placed *hors de combat*: wounded, sick and shipwrecked members of armed forces, prisoners of war, army medical personnel and the civilian population.

It will be noted that these two bodies of rules are interdependent and complementary. Certain rules are common to both. For example, the rules which restrict aerial bombardment and prohibit indiscriminate bombing fall within the law governing the conduct of hostilities if seen from the viewpoint of the aircrew, and within the law protecting the civilian population if seen from the viewpoint of the effects of air raids on the ground. These two bodies of law were merged in the Protocols additional to the Geneva Conventions of 8 June 1977, which updated both the provisions relating to the conduct of hostilities and those relating to the protection of war victims.

### **International humanitarian law and the prohibition of recourse to war**

Most of the rules of humanitarian law were adopted at a time when recourse to war was legal. War was an attribute of sovereignty and was lawful when waged on the orders of the ruler. A State that went to war was the sole judge of the reasons which led it to take up arms. This was the legal opinion of States and the predominant view of legal doctrine before the French Revolution and in the nineteenth century.

<sup>9</sup> According to the Declaration of St Petersburg of 1868 to the effect of prohibiting the use of certain projectiles in wartime (signed at St Petersburg, 29 November-11 December 1868), "(...) *the only legitimate object which the States should endeavour to accomplish during war is to weaken the military forces of the enemy*". De Martens, *Nouveau recueil général de traités*, 1st series, Vol. XVIII, pp. 474-475.

The situation nowadays is completely different: recourse to war was first restricted by the Covenant of the League of Nations and was then prohibited by the Pact of Paris (or Briand-Kellogg Pact)<sup>10</sup> and by the Charter of the United Nations. Under the terms of the Pact of Paris, the contracting States declared that they condemned “recourse to war for the solution of international controversies” and renounced it “as an instrument of national policy”. The United Nations Charter prohibits any recourse to force in international relations, with the exception of the collective enforcement action provided for in Chapter VII and the right of individual or collective self-defence reserved in Article 51.

The following question then arises: Can a belligerent set aside his obligations under international humanitarian law and refuse to respect its rules on the grounds that he is the victim of an aggression?

This question raises a broader issue: are the rules governing relations between belligerents (*jus in bello*) autonomous, or is their application conditioned by the rules prohibiting the recourse to force (*jus ad bellum*)? Can the fact that one side has launched a war of aggression alter the conditions of application of *jus in bello* and, more specifically, the conditions of application of the humanitarian rules?<sup>11</sup>

<sup>10</sup> Signed at Paris on 27 August 1928. Text in: *League of Nations, Treaty Series*, Vol. 94, pp. 58-64.

<sup>11</sup> The standard work on the question of the relationship between *jus ad bellum* and *jus in bello* is that of Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, Éditions A. Pedone, 1970. Reference may also be made to the following works: *The Geneva Conventions of 12 August 1949: Commentary*, published under the general editorship of Jean S. Pictet (hereinafter: *Commentary*), Vol. I, *The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, ICRC, 1952, pp. 25-28; Denise Bindschedler-Robert, “A reconsideration of the law of armed conflicts”. in: *The Laws of Armed Conflicts*, New York, Carnegie Endowment for International Peace, 1971, pp. 5-61, in particular pp. 9-10; Ian Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1968, pp. 406-408; Yoram Dinstein, *War, Aggression and Self-Defence*, 2nd ed., Cambridge, Cambridge University Press, 1994, in particular pp. 155-162; Paul Guggenheim, *Traité de droit international public*, Vol. II, Geneva, Librairie Georg & Cie, 1954, pp. 93-100, 253-261 and 295-305; Sir Hersch Lauterpacht, “The limits of the operation of the law of war”. *The British Year Book of International Law*, Vol. XXX, 1953, pp. 206-243; L. Oppenheim, *International Law*, Vol. II, *Disputes, War and Neutrality*, 7th ed. by Sir Hersch Lauterpacht, London, Longman, 1952, pp. 177-197; Dietrich Schindler, “Abgrenzungsfragen zwischen ius ad bellum und ius in bello”. in: *Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug*, edited by Yvo Hangartner and Stefan Trechsel, Bern and Stuttgart, Verlag Paul Haupt, 1986, pp. 251-258; Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals*, Vol. II, *The Law of Armed Conflict*, London, Stevens & Sons, 1968, pp. 96-106; Krzysztof Skubiszewski, “Use of Force by States - Collective Security - Law of War and Neutrality”. in: *Manual of Public International Law*, Max Sørensen, ed., London, Macmillan, 1968, pp. 739-854, in particular pp. 808-812; Robert W. Tucker, *The Law of War and Neutrality at Sea* (International Law Studies, Vol. 50), Newport (Rhode Island), United States Naval War College, 1955, pp. 3-25; Robert W.

In all recent conflicts, one or other of the belligerents — and, more often than not, both of them — have declared that they were only exercising their right of self-defence in repelling an aggression of which they themselves or their allies were the victims. Voices have been raised to affirm that they are therefore freed from the obligations stemming from the laws and customs of war and that the victim of an aggression is not bound to observe the rules vis-à-vis its aggressor. Certain authors, particularly in the United States and the former Soviet Union, tried to mould this claim into a legal theory by proposing to subordinate the application of *jus in bello* to *jus ad bellum*.<sup>12</sup> In that case, two solutions can be envisaged:

- either a war of aggression is deemed to be an unlawful act — the international crime *par excellence* — that cannot be regulated, in which case it has to be accepted that, in the event of aggression, the laws and customs of war do not apply to either of the belligerents;
- or the sole effect of the unlawfulness of the use of force is to deprive the aggressor State of the rights conferred by *jus in bello*, whereas all the aggressor's obligations under this law remain unchanged. This results in a differentiated application of the laws and customs of war, the aggressor State remaining subject to all the obligations incumbent on it as a belligerent, while the State which is the victim of the aggression is freed of any obligation vis-à-vis its enemy.<sup>13</sup>

Tucker, *The Just War: A Study in Contemporary American Doctrine*, Baltimore, The Johns Hopkins Press, 1960; Gregory Ivanovic Tunkin, *Droit international public: Problèmes théoriques* (translated from the Russian by the Centre for Research on the USSR and the Eastern bloc countries of the Strasbourg Faculty of Law and Political and Economic Sciences, Paris, Éditions A. Pedone, 1965, pp. 35-55 and 210-219; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed., Basic Books, 1992; Quincy Wright, "The outlawry of war and the law of war". *American Journal of International Law*, Vol. 47, No. 3, July 1953, pp. 365-376. With regard to the Soviet conception of the law of armed conflict, reference may be made to Jiri Toman, *L'Union soviétique et le droit des conflits armés*, Geneva, Graduate Institute of International Studies, 1997.

<sup>12</sup> The main positions are set forth in Meyrowitz, *op. cit.*, pp. 77-140.

<sup>13</sup> A detailed presentation of the doctrine of the differentiated application of humanitarian law is to be found in Document CDDH/41 submitted on 12 March 1974 by the Democratic Republic of Vietnam to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974-1977)*, 17 vols, Bern, Federal Political Department, 1978 (hereinafter: *Official Records CDDH*), Vol. IV, pp. 177-190.

### **The setting aside of international humanitarian law in the event of a war of aggression**

While the first hypothesis is the only one that draws all the logical conclusions of any subordination of *jus in bello* to *jus ad bellum*, it must still be rejected out of hand. Whether at national or international level, the fact is that one purpose of the law is to regulate situations resulting from unlawful acts.<sup>14</sup> Furthermore, since there can be no war under the system laid down in the United Nations Charter, save in response to an aggression, it would have to be admitted that States had drawn up rules lacking any field of application, and that would be absurd. Finally, this hypothesis opens the way to utter lawlessness and to a degree of savagery beside which the horrors of earlier wars pale into insignificance. The consequence of an abdication of the rule of law, the first hypothesis would produce absurd and monstrous results.

### **Differentiated application of international humanitarian law in the event of a war of aggression**

The second hypothesis needs to be examined in greater depth. Essentially, the proponents of a differentiated application of the laws and customs of war have adduced three arguments:

(a) justice requires that an absolute distinction be drawn between the aggressor and the victim of aggression; it is not legitimate for humanitarian law to place the aggressor State on the same footing as the State that resists aggression; on the contrary, humanitarian law should come to the aid of the victim and bar the way of the aggressor; finally, it should condemn the aggressor unequivocally;

(b) as a war of aggression is the war crime *par excellence* — the crime which engenders and subsumes all others — no-one is bound to comply with the rules of the law of war vis-à-vis a party which has broken the most important of them all by starting a war; in other words, the aggressor State puts itself in the position of an outlaw;

(c) in accordance with the maxim “*ex iniuria jus non oritur*”, the aggressor State cannot enjoy rights deriving from an unlawful act.<sup>15</sup>

<sup>14</sup> This is, in particular, the purpose of the penal code in domestic matters and of the rules relating to international responsibility in the law of nations.

<sup>15</sup> According to the maxim “*ex iniuria jus non oritur*”, an unlawful act cannot be the source of rights.

How pertinent are these arguments?

It is evident that the prohibition of the threat and the use of force in international relations would be futile if it were not backed up by sanctions, particularly in the form of an adverse distinction drawn between the aggressor and the victim of the aggression. It is indisputable and undisputed that contemporary international law does draw such a distinction, particularly with regard to the right of individual or collective self-defence, the application of the collective enforcement measures provided for in Chapter VII of the Charter, relations with third-party States, the acquisition of territories, the treaties imposed by the aggressor on its victim, and the payment of reparations once the hostilities are over. Moreover, those who prepare, initiate or wage a war of aggression bear personal criminal responsibility for their acts.

This leads us to yet another question: Can the unlawfulness of recourse to force justify a discriminatory application of the rules which govern the reciprocal relations of the belligerents and, in particular, the rules of humanitarian law?

This question needs to be examined from the viewpoint of legal doctrine, as well as in the light of positive law.

As far as legal doctrine is concerned, the first thing to note is that there are important exceptions to the maxim "*ex inuria jus non oritur*" both at the domestic and at the international level, therefore it is not certain that this maxim can be acknowledged as one of the general principles of law referred to in Article 38, para. 1(c), of the Statute of the International Court of Justice.<sup>16</sup> Furthermore, even if it were to be recognized as a general principle of law, its application to the case in point stems from a twofold confusion: on the level of formal logic, from a con-

<sup>16</sup> As regards domestic law, we can mention the maxim "*male captus, bene judicatus*", by virtue of which a criminal court may declare itself competent to judge an accused even if he has been brought before it by illegal means (e.g. following an abduction in another State). As regards international law, we can mention the fact that an occupation of territory - which is a *de facto* situation - produces legal effects, even where such occupation has no valid basis and results from a pure act of force. Similarly, we may recall the relative indifference of the law of nations to the situation of the government of a State with regard to the constitutional law of that State. Provided that a government effectively exercises *de facto* control over a large part of the territory and the population, it will generally be recognized to have full powers on the international level, even if it came to power by illegal means. Thus an illegal act *in foro domestico* produces legal effects on the international level which go for the most part unchallenged. The Tobar doctrine, according to which a State should refrain from recognizing a foreign government which has come to power by force, never gained acceptance outside the Americas and was never the object of any long-term application.

fusion between cause and accident; and on the legal level, from a confusion between the source of a right or an obligation and the fact which entails the application of the right or obligation. If a house burns down, it is not the fire but the insurance policy which is the legal basis of the claim of the insured against the insurance company; if it were otherwise, no householder would ever bother to pay the premiums. In the same way, it is not war which is the source of the rights and obligations arising from the laws and customs of war but the humanitarian conventions as regards the obligations and rights deriving from those treaties, and international custom as regards the rights and obligations deriving therefrom. The armed conflict — however it may be categorized — is nothing other than the fact which results in the application of the rules stemming from the conventions or from custom. Otherwise, the belligerents would have identical rights and obligations, whether or not they were party to the humanitarian conventions, and this is not the case. The maxim “*ex iniuria jus non oritur*” thus has no relevance to the case in point.<sup>17</sup>

Similarly, we must reject the argument which equates an aggressor State with an outlaw. Transposing concepts of domestic law into international law is often misleading, especially when it comes to concepts stemming from criminal law. In the case under discussion the transposition is both false and fallacious: false because it equates the international responsibility of a State with the criminal liability of an offender; fallacious because it presupposes that the criminal is automatically stripped of all legal protection, a situation which no legal system could tolerate.

<sup>17</sup> In a sense, the whole theory of the discriminatory application of the law of war is based on the notion - mistaken in our view - that *jus in bello* confers on the belligerents subjective rights and powers. Yet this is not the case. The law of war does not have the function of attributing rights or powers. On the contrary, it seeks to impose limits on the freedom of action of the belligerents, as may be seen from the arbitral decision rendered on 2 August 1921 in the case of the cession of vessels and tugs for navigation on the Danube: “International law as applied to warfare is a body of limitations, and is not a body of grants of power”. *Reports of International Arbitral Awards*, Vol. I, New York, United Nations, 1948, p. 104. In the same sense: “International law is prohibitive law”. The Hostage Trial, United States v. List *et al.*, United States Military Tribunal, Nuremberg, 8 July 1947 to 19 February 1948, *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, Vol. VIII, London, His Majesty's Stationery Office, 1949, pp. 34-92, *ad p.* 66. The powers that are commonly referred to as “rights of belligerents” are, properly speaking, nothing other than the exercise of State sovereignty in wartime within the limits imposed by the laws and customs of war; see also Schwarzenberger, *op. cit.*, pp. 63-65. Were it otherwise, the absence of rules in one particular domain would result in the absence of rights and powers and not, as is in fact the case, the absence of limits imposed on the belligerents' freedom of action.

In any State governed by the rule of law, an offender remains subject to and under the protection of the penal code, no matter how serious the crime of which he is accused. As an unlawful act, the war of aggression results in a sanction or even in a number of sanctions, notably in the form of the right of individual or collective self-defence, collective enforcement measures, the non-recognition of territorial acquisitions effected by force, the nullity of treaties imposed by the threat or use of force, a discriminatory attitude on the part of third-party States, reparations imposed on the aggressor once the hostilities are over, and so on. Nevertheless, the war of aggression cannot have the effect of placing the aggressor State outside the bounds of the law.<sup>18</sup>

This leaves us with the argument based on the requirement of justice or equity. While this is undoubtedly the most persuasive from the moral point of view, it betrays a complete lack of understanding of the object of humanitarian law. Humanitarian law does not place the aggressor on the same footing as the victim of the aggression as it has no competence to do so. The sole function of humanitarian law is to protect the individual as such, to the exclusion of political, military, ideological, religious, racial, economic or any other considerations. Humanitarian law establishes only one equality, namely that founded on the right of all victims of war to be treated in accordance with the principle of humanity. Moreover, no demands of justice or equity could ever justify all the nationals of one State — or even all the members of its armed forces — being lumped together as criminals simply because they are citizens of a State regarded as an aggressor. In other words, the criminal responsibility of all the nationals of a State or of all the members of its armed forces cannot be deduced from that State's international responsibility.

Thus the main arguments which have been put forward in support of a discriminatory application of *jus in bello* must be dismissed. Furthermore, there are compelling reasons for maintaining the principle of the equality of the belligerents before the law of war.

### **Designation of the aggressor**

It is indeed impossible to ignore the difficulties inherent in designating the aggressor. Despite more than half a century of debate within various international forums, there is still no general and binding agreement on the definition of aggression. There is no definition of aggression

<sup>18</sup> Meyrowitz, *op. cit.*, pp. 127-130.

in the Briand-Kellogg Pact or in the United Nations Charter. Moreover, resolution 3314 (XXIX) adopted on 14 December 1974 by the United Nations General Assembly<sup>19</sup> is far from constituting a genuine definition. It has virtually nothing to say about the indirect forms of aggression so typical of our era, such as subversion, terrorist attacks, foreign intervention in civil wars, occupation with the acquiescence of a puppet government, etc. Furthermore, by making an exception for wars of national liberation,<sup>20</sup> resolution 3314 takes into consideration an essentially subjective element, namely the grounds for the recourse to arms. This is incompatible with a proper definition, since any definition capable of legal effect must be based on objective and verifiable elements. Finally, this resolution is not binding on the Security Council.<sup>21</sup>

The adoption of the Statute of the International Criminal Court on 17 July 1998 did not resolve the difficulty. Indeed, States did not succeed in agreeing on a definition of the crime of aggression, or on the way in which the Court would exercise its jurisdiction in that regard. Article 5, paragraph 2, of the Court's Statute provides as follows: "*The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations*". The Statute came into force on 1 July 2002 and there are 89 States Parties to date, but until a compromise is reached on this question the Court will have jurisdiction only with respect to the crime of genocide, crimes against humanity and war crimes. The working group dealing with the issue of the crime of aggression within the Preparatory Commission of the International Criminal Court has so far held only preliminary discussions on the matter.

Is it possible to overcome this difficulty by entrusting to some competent body the task of resolving the problem on a case-by-case basis by designating the aggressor? It is up to the Security Council to determine the existence of a threat to peace, a breach of the peace or an act of

<sup>19</sup> Resolution 3314 (XXIX) 1974, "Definition of aggression". *Resolutions adopted by the General Assembly in the course of its Twenty-ninth Session*, Vol. I, General Assembly, Official Records, Twenty-ninth session, Supplement No. 31 (A/9631), pp. 148-150.

<sup>20</sup> Article 7 of the annex to resolution 3314.

<sup>21</sup> Article 4 of resolution 3314.



aggression.<sup>22</sup> By virtue of Article 25 of the Charter, such a finding is valid *erga omnes*, meaning that all the member States of the United Nations are bound to accept it. Yet this does not get round the problem. In the absence of legal criteria binding on the Security Council, its decision can only be a political act and it is impossible to see how it could have legal effects beyond those laid down in the Charter or in the provisions of other conventions. The fact is that there is no provision in the Charter to authorize a discriminatory application of *jus in bello* in relations between belligerents.<sup>23</sup> Furthermore, as a determination that an aggression has occurred requires the affirmative vote of the five permanent members of the Security Council,<sup>24</sup> the Council will be paralysed whenever the aggressor happens to be a permanent member or an ally or client State of one of the permanent members. Given the existing structure of the international system, the Council is capable of taking such a decision only in exceptional circumstances, such as those prevailing in June and July of 1950 at the outbreak of the Korean war, or again in the summer and autumn of 1990 in the wake of Iraq's occupation of Kuwait.

That being the case, there is a considerable temptation to dispense with a decision of the Security Council. The advocates of a discriminatory application of the law of war have therefore proposed either to refer the matter to a resolution of the General Assembly,<sup>25</sup> or to refer to the judgment of public opinion.<sup>26</sup> However, there is nothing in the Charter that attributes such a power to the General Assembly. And as for the judgment of public opinion, we have only to ask ourselves who will act as its spokesman to see where this slippery slope would lead, that is, to every government deciding unilaterally who is the aggressor.

In the absence of a centralized and mandatory judicial procedure allowing the determination of aggression in each case on the basis of clear legal criteria and in such a way as to be binding equally on all belligerents, the theory of the discriminatory application of *jus in bello* would lead to the non-application of this body of law on either side: each of the belligerents

<sup>22</sup> Article 39 of the United Nations Charter.

<sup>23</sup> Meyrowitz, *op. cit.*, p. 8.

<sup>24</sup> Article 27, para. 3, of the United Nations Charter.

<sup>25</sup> Wright, *loc. cit.*, p. 370.

<sup>26</sup> A. Alvarez, *Le droit international nouveau dans ses rapports avec la vie actuelle des peuples*, Paris, Éditions A. Pedone, 1959, p. 510.

would consider its adversary to be the aggressor and take advantage of this determination to disregard the rules imposed by the law of war. Here too, the floodgates would be left open for a surge of unchecked violence.

However, even supposing that this difficulty could be overcome and that an exceptional political configuration might permit the Security Council to take a decision under conditions which would not prompt any objection, other no less serious difficulties would certainly arise.

### **Can rights be separated from obligations?**

The theory of the discriminatory application of the law of war is based on the assumption that it is possible to separate the rights from the obligations deriving from this body of law, and that the aggressor State would have all the obligations without any of the rights, while the reverse would hold true for the victim.

This position betrays a profound lack of understanding of the law of war in general and of international humanitarian law in particular. The purpose of the laws and customs of war is not to confer subjective rights on belligerents with no corresponding obligations or vice-versa. On the contrary, it is to protect the individual by establishing objective rules which impose both rights and obligations on all belligerents.

This is the case with the emblem of the red cross or red crescent: on the one hand the emblem protects the medical facilities on which it is displayed, while on the other it protects the adversary, in that the facilities marked with the emblem cannot be used for hostile acts. Similarly, while the main aim of the distinction between combatants and non-combatants is to protect the civilian population, it also protects the adversary in that civilians know they cannot engage in hostile acts without losing their protective immunity. Finally, the status of prisoner of war protects both the prisoner and the adverse power because it restricts the categories of persons who can engage in hostile acts while being entitled to claim the protection of prisoner of war status in the event of capture. The same remarks apply to the prohibition of perfidy, the protection of the bearer of a flag of truce, respect for truces and armistices, the maintenance of order and security in occupied territories, etc. It is clear, therefore, that the rights cannot be separated from the obligations without undermining both and dismantling the rules.<sup>27</sup> The law of war consists

<sup>27</sup> Meyrowitz, *op. cit.*, pp. 106-116, in particular p. 112.

of a set of balances between rights and obligations; if these balances are upset, what remains is not the unilateral application of the law but lawlessness and anarchy.

### **Reprisals and reciprocity**

The discriminatory application of humanitarian law would, furthermore, constitute a form of reprisal. Since those personally responsible for preparing, initiating and waging a war of aggression are out of reach, the sick and wounded, prisoners of war, civilian internees or the populations of occupied territories would be punished in their stead. Yet all the provisions of the Geneva Conventions and their Additional Protocols which prohibit reprisals against sick and wounded military personnel, army medical staff, the shipwrecked, prisoners of war, civilians and civilian property<sup>28</sup> also stand in the way of a differentiated application of international humanitarian law.

Finally, there is major practical obstacle to the discriminatory application of the laws and customs of war. Diplomats and jurists have a tendency to argue as if the law of war were ultimately intended for them. With all due respect to these eminent professions, that is not the case. Those for whom the rules are ultimately intended, those on whom, in the last analysis, respect for or violation of the laws and customs of war will depend, are the combatants. What is their position? Every nation expects its soldiers to endure suffering and privation, to accept the death of their comrades and to be ready to sacrifice their own lives. At the same time, they are expected to show respect for enemy soldiers who are wounded or surrender. No easy matter in the best of circumstances! However, military discipline, a spirit of chivalry, concern for the fate of comrades who have fallen into the hands of the enemy, and perhaps some vestige of the sense of humanity not entirely snuffed out by the horrors of modern war, all these may tend to encourage respect for the rules. Moreover, every combatant knows intuitively that, with the changing fortunes of war, he may find himself in the position of having to fall back on the protection of humanitarian law. He will hesitate, therefore, to transgress rules which may be the key to the survival of himself, his comrades in arms and his loved ones. On the other hand, it is a

<sup>28</sup> First Geneva Convention, Article 46; Second Geneva Convention, Article 47; Third Geneva Convention, Article 13, para. 3; Fourth Geneva Convention, Article 33, para. 3; Additional Protocol I, Articles 20; 51, para. 6; 52, para. 1; 53 (c); 54, para. 4; 55, para. 2; and 56, para. 4.

delusion to expect a soldier to respect the laws and customs of war if he himself is declared an outlaw by the mere fact of belonging to a State designated an aggressor. No amount of legal argument will persuade a combatant to respect the rules when he himself has been deprived of their protection.

It is no less fanciful to expect a State to respect the laws and customs of war while at the same time declaring that the State and all its nationals have been stripped of all the rights deriving therefrom.

This psychological impossibility is the consequence of a fundamental contradiction in terms of formal logic. The contradiction lies in considering as unlawful all the acts of war committed by the alleged aggressor, while at the same time requiring this same party to observe the distinction between, on the one hand, acts of war which are lawful having regard to the laws and customs of war and, on the other, acts of war which are intrinsically unlawful because they are committed in violation of the laws and customs of war. It is impossible to demand that an adversary respect the laws and customs of war while at the same time declaring that every one of its acts will be treated as a war crime because of the mere fact that the act was carried out in the context of a war of aggression.

It is clear, therefore, that whatever the underlying moral or legal thinking, the theory of the discriminatory application of the laws and customs of war leads in practice to the same result as the theory of the war of aggression being beyond all regulation, that is, to unbridled war.

### **The principle of the equality of the belligerents before the law of war**

Hence, the principle of the equality of the belligerents before the laws and customs of war must be upheld. Its application corresponds to a requirement of humanity because the principle of humanity insists on respect for the victims of war in all circumstances, irrespective of the side to which they belong. It corresponds to a requirement of public policy in as much as only the application of this principle can prevent unrestrained violence.<sup>29</sup> Finally, it corresponds to a requirement of civilization since, as Bluntschli emphasizes, “*the law of war civilizes just and unjust war alike*”.<sup>30</sup>

<sup>29</sup> Meyrowitz, *op. cit.*, pp. 252-259.

<sup>30</sup> “Das Kriegerrecht zivilisiert den gerechten und den ungerechten Krieg ganz gleichmässig”. Johann Caspar Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, Nördlingen, Beck, 1868, p. 292, para. 519.

These conclusions are fully in accordance with positive law.

Neither the Covenant of the League of Nations nor the Pact of Paris breached the principle of the equality of the belligerents before the law of war. The so-called “Committee of Eleven” established by the Council of the League of Nations in 1930 to study the changes needed to bring the Covenant into line with the Briand-Kellogg Pact expressly recognized that *jus in bello* remained applicable and fully relevant in the event of resistance to aggression or international police actions, however such operations might be categorized.<sup>31</sup>

Similarly, the United Nations Charter contains no provision modifying the conditions for the application of the law of war in relations between belligerents. Conversely, the Charter unreservedly affirms the principle of the sovereign equality of States,<sup>32</sup> of which the principle of the equality of the belligerents before the law of war is one application.

The Charter of the International Military Tribunal (Nuremberg International Tribunal) annexed to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945, is certainly the instrument of international law which has gone furthest in condemning the war of aggression, describing it not only as an unlawful act incurring the international responsibility of the State concerned but also as an international crime incurring the criminal responsibility of the individuals who were guilty of preparing and initiating such a war. Nevertheless, it maintained in the clearest terms the distinction between crimes against peace (i.e. planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances) and war crimes (i.e. violations of the laws or customs of war), thereby indicating that acts in conformity with the laws and customs of war would not be

<sup>31</sup> “Amendment of the Covenant of the League of Nations to bring it into line with the Pact of Paris, Report of the Committee appointed by the Council, 8 March 1930”, *League of Nations Official Journal*, 1930, pp. 353-383, in particular pp. 354-355.

<sup>32</sup> Article 2, para. 1. The fact that none of the provisions of the Charter justifies a discriminatory application of the laws and customs of war must be seen in the light of the many provisions which authorize or impose discrimination against the aggressor in relations between third-party States and the belligerents. Thus the principle of interpretation “*expressio unius est exclusio alterius*” confirms that the authors of the Charter did not intend to breach the principle of the equality of the belligerents before the law of war and that they did not do so.

subject to sanctions even if they were committed in the context of a war of aggression.<sup>33</sup>

The Tribunal scrupulously respected the distinction between crimes against peace and war crimes. It treated as war crimes only acts committed in violation of the laws and customs of war, the unlawful nature of which was established by reference to the Geneva Conventions or the Hague Conventions. On the other hand, the Tribunal acknowledged that the accused could claim to exercise the rights provided for by *jus in bello* even if they had taken part in a war of aggression.<sup>34</sup> In this way, the Tribunal confirmed the principle of the equality of the belligerents before the law of war and the autonomy of *jus in bello* with regard to *jus ad bellum*.

The great majority of national tribunals entrusted with the task of judging war crimes committed during the Second World War applied the same principles, thereby confirming the autonomy of *jus in bello* with regard to *jus ad bellum*.<sup>35</sup>

The Geneva Conventions of 12 August 1949 provided a twofold confirmation of the principle of the equality of the belligerents in relation to the application of humanitarian law, by prohibiting reprisals against the persons and property protected by the Conventions,<sup>36</sup> but above all by the terms of Article 1 common to the four Conventions:

*“The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances.”*

This provision underlines the binding force of the Geneva Conventions, the application of which cannot be made subject to any

<sup>33</sup> Article 6 of the Charter of the International Military Tribunal. The text of the London Agreement of 8 August 1945 and of the annexes thereto is reproduced in *United Nations Treaty Series*, Vol. 82, pp. 280-301.

<sup>34</sup> The judgment of the Nuremberg International Tribunal is reproduced in the *American Journal of International Law*, Vol. 41, No. 1, January 1947, pp. 172-333. It will be noted in particular that the Tribunal refused to condemn Admirals Dönitz and Raeder for conducting all-out submarine warfare, notably including the torpedoing of Allied and neutral merchant shipping and the abandonment of the survivors, on the grounds that the illegality of these acts in relation to the laws and customs of war had not been sufficiently proven (pp. 304-305 and 308). Thus the Tribunal acknowledged that the rules of *jus in bello* worked not only against the accused but also in their favour. They could not be condemned for hostile acts whose illegality under the laws and customs of war had not been proven, even though the acts in question had been committed during a war of aggression.

<sup>35</sup> Numerous examples are cited in Meyrowitz, *op. cit.*, pp. 62-76.

<sup>36</sup> First Geneva Convention, Article 46; Second Geneva Convention, Article 47; Third Geneva Convention, Article 13, para. 3; Fourth Geneva Convention, Article 33, para. 3.

assessment as to the legality or illegality of the recourse to force, whether such assessment comes from the parties to the conflict or from an international body.<sup>37</sup> Common Article 2 further provides that the Conventions apply to “*all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties*”.

This interpretation is confirmed by the *Commentary* on the Geneva Conventions published by the International Committee of the Red Cross:

*“[T]he application of the Convention does not depend on the character of the conflict. Whether a war is ‘just’ or ‘unjust’, whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected”.*<sup>38</sup>

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, held in Geneva from 1974 to 1977 to update international humanitarian law and adapt it to the new forms of conflict which had emerged since 1949, put an end to all argument by including the following provision in the Preamble to Protocol I:

*“The High Contracting Parties (...)*

*Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict...”*<sup>39</sup>

This provision, which the Diplomatic Conference adopted by consensus, without debate or opposition,<sup>40</sup> must be considered as the authentic interpretation of the Geneva Conventions. It is therefore binding on all the States party to the Conventions, whether or not they are bound by Protocol I.

<sup>37</sup> Same interpretation in Meyrowitz, *op. cit.*, pp. 37-40.

<sup>38</sup> *Commentary*, Vol. I, p. 27.

<sup>39</sup> Protocol I, para. 5 of the Preamble. Under the terms of Article 31, para. 2, of the Vienna Convention on the Law of Treaties of 23 May 1969, the preamble is an integral part of the treaty.

<sup>40</sup> *Official Records CDDH*, Vol. VII, pp. 167-172, in particular p. 172, Document CDDH/SR.54, Summary Record of the fifty-fourth plenary meeting held on 7 June 1977.

This provision confirms the autonomy of humanitarian law in relation to *jus ad bellum*. In consequence, a State cannot claim to be released from its obligations under international humanitarian law and refuse to apply its rules on the grounds that it is the victim of an aggression or for any other consideration deriving from the origin or nature of the conflict. To do so would be contrary to the spirit and the letter of the Geneva Conventions and Protocol I.

The Statute of the International Criminal Court also confirms the autonomy of *jus in bello vis-à-vis jus ad bellum*. Indeed, while it is true that the Court has jurisdiction to punish the crime of genocide, crimes against humanity, war crimes and the crime of aggression, each crime has to be dealt with for itself, even though several of them may have been committed at the same time.<sup>41</sup> But above all, the fact that the Court may judge the crime of genocide, crimes against humanity and war crimes before any agreement is reached on the definition of the crime of aggression or on the exercise of the Court's jurisdiction to repress that crime<sup>42</sup> emphatically confirms that war crimes are independent of crimes against peace.

### **State practice**

The majority of States which have been involved in armed conflicts since 1945 have asserted that they were exercising the right of individual or collective self-defence to resist a war of aggression of which they or one of their allies claimed to be the victims. To our knowledge, only one of them drew specific conclusions from this position as regards the application of humanitarian law and the activities of the International Committee of the Red Cross (ICRC). Until the Paris agreements of January 1973 which were supposed to bring the Vietnam war to an end, and until the repatriation of the American prisoners of war, the Democratic Republic of Vietnam rebuffed all offers of services by the ICRC. It alleged, in particular, that Vietnam was the victim of a war of aggression waged by the United States and that, in consequence, the country was not bound to apply the Third Geneva Convention to the American prisoners of war or to allow the ICRC to conduct the activities provided for in the Convention on behalf of those prisoners. All the

<sup>41</sup> Rome Statute of the International Criminal Court, Article 13.

<sup>42</sup> Rome Statute of the International Criminal Court, Article 5, para. 2.



approaches made by the ICRC with a view to coming to the aid of the prisoners remained in vain.<sup>43</sup>

The government of the Socialist Republic of Viet Nam relied on the same argument during the Sino-Vietnamese conflict of February 1979. However, following lengthy discussions, this government finally authorized ICRC delegates to visit the Chinese prisoners of war captured during the conflict, despite Viet Nam's assertion that it had been the victim of a war of aggression waged by the People's Republic of China.<sup>44</sup>

Finally, in ratifying Protocol I, the Hanoi government tabled no reservations with regard to paragraph 5 of the Preamble.<sup>45</sup> There is reason to believe, therefore, that this government changed its position in respect of the conditions for the application of the Geneva Conventions and rallied to the unanimous opinion of the Diplomatic Conference that no consideration based on the nature or origin of a conflict or the causes espoused by the parties could create an obstacle to the application of humanitarian law.

<sup>43</sup> The Hanoi government stated its position on many occasions, and in particular in the note of 31 August 1965 from the Ministry of Foreign Affairs of the Democratic Republic of Vietnam in response to the appeal of 11 June 1965 by the International Committee of the Red Cross relating to the conduct of hostilities in Vietnam (the English translation of this note was reproduced in the *International Review of the Red Cross*, No. 55, October 1965, pp. 527-528). Reference may also be made to Document CDDH/41 submitted on 12 March 1974 to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (*Official Records CDDH*, Vol. IV, pp. 177-190). A summary of the negotiations between the ICRC and the government of the Democratic Republic of Vietnam is to be found in the study by Michel Barde, entitled *La Croix-Rouge et la révolution indochinoise: Histoire du Comité international de la Croix-Rouge dans la guerre du Vietnam*, Geneva, Graduate Institute of International Studies, 1975, and in the work by Professor Jacques Freymond, *Guerres, révolutions, Croix-Rouge*, Geneva, Graduate Institute of International Studies, 1976, pp. 85-94. The government of the Democratic Republic of Vietnam also asserted the reservation it had formulated with regard to Article 85 of the Third Convention, relating to the treatment of war criminals. For an examination of the position of the Hanoi authorities in the light of international humanitarian law, reference may be made to an article by Paul de La Pradelle, "Le Nord-Vietnam et les Conventions humanitaires de Genève". *Revue générale de droit international public*, Vol. 75, No. 2, April-June 1971, pp. 313-332.

<sup>44</sup> Report on the protection and assistance mission to the Socialist Republic of Viet Nam during the period 5-14 April 1979, in particular Annex 7.1, p. 11; Report on the protection and assistance mission to the Socialist Republic of Viet Nam during the period 24-31 May 1979, in particular pp. 6-10 and Annex 8, ICRC Archives, file 251 (69).

<sup>45</sup> Instrument of ratification of Protocol I by the Socialist Republic of Viet Nam, 28 August 1981, and communication from the Swiss Federal Department of Foreign Affairs to the author of the present article, 24 June 1982.

Only three military operations have been undertaken on the basis of Chapter VII of the United Nations Charter and of a mandate expressly and unequivocally given by the Security Council:

- the operation launched by the United States and its allies in Korea on the basis of resolution 83 (1950) adopted by the Security Council on 27 June 1950;
- the operation by the anti-Iraqi coalition to liberate Kuwait, based on resolution 678 (1990) adopted on 29 November 1990;
- the intervention of NATO forces in Bosnia-Herzegovina, based on resolutions 816 (1993) and 836 (1993) adopted on 31 March and 4 June 1993 and on many subsequent resolutions.

In none of these cases did the States acting on the orders or with the authorization of the Security Council try to argue that this released them from their obligations under international humanitarian law.

Thus, State practice corresponds to the conclusions of scholarly analysis: a belligerent cannot assert that it is freed from the obligations stemming from the laws and customs of war, and humanitarian law in particular, on the grounds that it is the victim of an aggression or that it is defending a just cause. This is hardly surprising. These conclusions simply reflect the will of the international community to set limits on the exercise of violence and to ensure that the individual is protected in all circumstances, whatever the reasons that have led the belligerents to take up arms.

Furthermore, a just cause could in no way authorize belligerents to flout the basic requirements of humanity or provide a pretext for the use of unbridled violence. Even just war has its limits.

## **Conclusions**

It is precisely in moments of crisis or extreme tension that the relevance and value of the law truly come to the fore, because it is at such times that the temptation to justify recourse to means which would at other times be repudiated is at its most insidious. The law of armed conflict was adopted to restrict violence in war and no argument can be advanced to justify repudiating it, no matter how serious the aggression suffered, no matter what the causes espoused by the parties to the conflict and their reasons for taking up arms.

From this point of view, no State or any other party can declare itself to be above the law, whatever cause it may claim to serve. Conversely, no-one can be cast out from the authority and the protection of the law.

Whether it is a question of “war against terrorism” or any other form of conflict, we must take care not to destroy by arms the values that we claim to protect by arms. “*Who will believe in the justice of your war if it is waged without measure?*” wrote François de La Noue, one of the finest captains of Henri of Navarre, the future Henri IV.<sup>46</sup>

The same sentiment is echoed by Albert Camus in *Chronique algérienne*:

“*S’il est vrai qu’en histoire, du moins, les valeurs, qu’elles soient celles de la nation ou de l’humanité, ne survivent pas sans qu’on ait combattu pour elles, le combat (ni la force) ne suffit pas à les justifier. Il faut encore que lui-même soit justifié, et éclairé, par ces valeurs. Se battre pour sa vérité et veiller à ne pas la tuer des armes mêmes dont on la défend, à ce double prix les mots reprennent leur sens vivant*”.<sup>47</sup>

Whatever the means at its disposal, whatever the violence of the attacks for which it is responsible, no terrorist movement can, on its own, destroy a modern society or democratic State founded on the rule of law, government by the consent of the governed and respect for fundamental human rights. There is considerable evidence to suggest that those who lead terrorist organizations are well aware of this and that they try to use the emotions stirred up by the attacks they succeed in launching to goad the target State into undermining, in the name of the fight against terrorism, the very values on which it is founded. These are the values that need to be protected.

<sup>46</sup> François de La Noue (1531-1591), quoted by André Gardot, “Le droit de la guerre dans l’œuvre des capitaines français du XVI<sup>e</sup> siècle”. *Recueil des cours de l’Académie de droit international*, Vol. 72, 1948, No. 1, pp. 393-539, *ad p.* 450.

<sup>47</sup> “While it is true that in history at least, values - whether of the nation or of humanity - do not survive unless we fight for them, neither combat nor force suffices to justify them. The fight itself must be justified and enlightened by those values. To fight for the truth and to take care not to kill it with the very weapons we use in its defence; this is the double price to be paid for restoring the power of words.” Albert Camus, *Actuelles III, Chronique algérienne (1939-1958)*, in: *Œuvres complètes, Essais*, Paris, Éditions Gallimard (Bibliothèque de la Pléiade), 1965, p. 898.

As terrorist networks operate internationally and scorn national borders, the only way to defeat them is through concerted action at the international level. In the long term, such action can succeed only if it is firmly rooted in the international legal order, of which humanitarian law is, in a sense, the last bastion.





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