From the Declaration of the Rights of Man and of the Citizen of 26 August 1789 to present-day international humanitarian law

by Maurice Aubert

1. Did the 1789 Declaration pave the way for international humanitarian law?

At first glance, the Declaration of the Rights of Man and of the Citizen has no connection with the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The former laid the basis for human rights as we know them today and the latter marked the advent of international humanitarian law.

When, in August this year, France and the entire world celebrate the 200th anniversary of this charter of the rights of man, the States party to the Geneva Conventions, together with the 148 National Red Cross or Red Crescent Societies, will recall that the month of August likewise saw the adoption of the initial Geneva Convention 125 years ago and also marks the fortieth anniversary of those now in force. Apart from the coincidence of occurring in the same month, are these events interlinked in any way?

The lawmakers of 1789 were inspired by the works of Rousseau and Voltaire, both of whom proclaimed that men were naturally free and equal. But these philosophers' thinking went further than that. For Rousseau, warfare was not a man-to-man relationship, but a relationship between States; thus, those who laid down their arms ceased to be enemies.[1] When, in *Candide*, Voltaire describes the horrors of war,

[1] Rousseau, Jean-Jacques, *Du Contrat social*, Livre I, chap. 4, Edition Garnier Flammarion, Paris, 1966, pp. 47-48.

does he not seek to elicit the reader's condemnation of its pointlessly cruel aspects?[2] It is a logical conclusion that the victims of wars ought to be granted rights as well. But it was not until Henry Dunant had witnessed the carnage of Solferino in 1859 that his cry of alarm alerted the world.

As chance would have it, all these three men had links with Geneva. Voltaire had to leave his estate "*Délices*" to live in Ferney (France) because the Geneva government banned his plays. Rousseau would frequently recall that he was a citizen of Geneva,[3] though the government had his works publicly burnt and he had to renounce his ungrateful fatherland.[4] Similarly Dunant, becoming bankrupt, spent the last days of his life in abject poverty in an almshouse in Heiden, far from his native city which had disowned him. Today we find such events surprising, for the legacy of these three men has been restored to its true value by the passage of time and by the greater open-mindedness that prevails today. Of course, both in Geneva and elsewhere the works of Voltaire and Rousseau have long been admired and all due tribute is paid to Henry Dunant. In his book *A Memory of Solferino* Dunant explicitly asks governments two questions:

— Why could not an agreement be reached whereby the armed forces' medical services are recognized as neutral?

— Why not set up a voluntary civilian society in each country to bring relief to the wounded?[5]

The 1864 Geneva Convention solved the first question. It was signed by the representatives of 12 States, including France, and opened the way to a new branch of international public law. The National Red Cross or Red Crescent Societies which exist today are the tangible response to the second question. Moreover, one of the underlying principles of their work is to ensure respect for the human being without discrimination as to nationality, race, religious beliefs, class or political opinions.

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[2] Voltaire, Arouet, Jean-Marie, *Candide*, chap. 2 et 3.

[3] Rousseau, Jean-Jacques, *Confessions*, Le Club Français du Livre, Paris, 1964, Livre I, pp. 15-60.

[4] *Ibid.*, pp. 446, 652, 661, 682, 707.

[5] Dunant, Henry, *A Memory of Solferino*, Henry Dunant Institute, ICRC reprinted edition, 1986, pp. 116 et seq.

2. Defending the same rights in different situations

A direct connection cannot be established between the Declaration of the Rights of Man and of the Citizen and international humanitarian law. Nevertheless, many of their respective rules are intended to safeguard the selfsame rights, although in different situations. The purpose of both sets of laws is to defend the dignity of man.

It would be wrong to claim that the 1789 Declaration was merely a stratagem to combat the *Ancien Régime*. Nor is it solely of philosophical significance, since it forms part of French positive law and is the source of current legislation in most States. The search for elements that this law and the Geneva Conventions have in common goes beyond merely comparing a French legal text with international treaties, for it involves analysing the rules of law agreed upon by the collective conscience of mankind.

As Jacques Godechot points out, "There will henceforth be no outlaw in the remoteness of his exile, no persecuted person in the remoteness of his prison cell or concentration camp, who will not resist arbitrary treatment and tyranny by invoking the rights of man, mindful of the 1789 French Declaration".[6]

This Declaration and subsequent ones were designed to protect the individual against the power of the State in non-conflict situations. Conversely, the purpose of international humanitarian law is to protect the lives and dignity of victims during armed conflicts. In both cases, therefore, the intent is to ensure respect for certain rules which underlie human rights in the widest sense. There are consequently grounds for claiming that the 1789 Declaration and international humanitarian law both stem from the same ideal.

Human rights originated from tensions within States, between government and subjects. Later on, human rights principles were extended to international or internal armed conflicts, as well as to other situations in which violence is used. Initially rules of internal law, human rights were substantially developed in public law. The convergence with international humanitarian law has progressively become more and more marked. However, the institutions responsible for safeguarding the respective rights of those in need are not the same:

— for human rights, the United Nations and various specialized organizations;

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[6] Godechot, Jacques, *Les Institutions de la France sous la Révolution et l'Empire*, Presse Universitaire de France, 3e édition, 1985, p. 40.

— for international humanitarian law, the International Committee of the Red Cross.[7]

3. Correlation between the rights safeguarded by the Declaration of the Rights of Man and of the Citizen, and international humanitarian law

Without studying the matter in too much depth, we shall show that there is a genuine correlation in thought between the two legal instruments. We shall take as a basis certain articles from the 1789 Declaration. Since Articles 2, 3, 4, 6, 12, 13, 14, 15 and 16 are not related to humanitarian law, they will not be discussed.

3.1. Article 1: *"All men are born and remain free, and have equal rights. Social distinctions are unjustifiable except in so far as they may serve the common good."*

Non-discrimination is a fundamental principle of humanitarian law. The 1864 Geneva Convention stipulated—and this is remarkable given the era—that wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for (Article 6). Of the four 1949 Geneva Conventions, *the first* one deals with the protection of the wounded and sick in armed forces in the field and the *second* one extends protection to the shipwrecked members of armed forces at sea. Hence both simply enlarge upon this principle of non-discrimination.

The 1929 Convention relative to the Treatment of Prisoners of War had already explicitly stipulated that they must be treated with impartiality, stating that difference in treatment is lawful only when it is based on the military rank, state of physical or mental health, professional qualifications or sex of those who benefit thereby (Article 4). This provision made it possible to save the lives of countless Jewish prisoners of war during World War II.[8]

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[7] Meron, Theodor, *Human Rights in International Strife: Their International Protection*, pp. 26-27, Hersch Lauterpacht Memorial Lectures, Cambridge, Grotius Publications 1987.

[8] Meron, Theodor, *op. cit.*, p. 19.

The *Third Convention* (currently in force) which protects prisoners of war specifies that they are entitled to equality of treatment on the part of the Detaining Power "without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria" (Article 16).

The *Fourth Convention* (Article 27, para. 3) for the protection of civilians similarly states that all protected persons shall be treated with the same consideration.

Protocol I of 1977, which deals with the protection of victims of international armed conflicts, establishes a very full list of fundamental guarantees. Article 75, para 1, states that persons who are in the power of a Party to the conflict shall be treated humanely in all circumstances without any adverse distinction based upon race, colour, sex, language, religion or belief, political opinions or upon any other similar criteria.

As regards *conflicts of a non-international character*, Article 3 common to the Four Conventions grants similar safeguards to persons taking no active part in the hostilities (Article 3, para 1).

3.2. Article 5: *"The law can proscribe only those actions which harm society. Any action not forbidden by law cannot be disallowed, nor can anyone be forced to do what the law does not specifically command."*

This means that a person may be prosecuted only on the basis of impartial law and according to proper procedure. Hence humanitarian law makes the provision that prisoners of war may be punished only for committing any offence recognized as such under the laws, regulations and orders in force in the armed forces of the Detaining Power (III/82). Such protection against arbitrary treatment is particularly important whenever they are accused of penal offences.

Furthermore, a prisoner of war may be tried only by a court which offers the essential guarantees of independence and impartiality. The procedure must afford the accused the rights and means of defence (III/84). He may not be punished more than once on the same charge (III/86).

Protected persons in an occupied territory are entitled to special protection. No sentence may be pronounced except after a regular trial (IV/71). Accused persons are entitled to present evidence and call witnesses (IV/72). Provision must be made for rights of appeal (IV/73). Persons condemned to death must not be deprived of the right of petition for pardon (IV/75).

Protocol I specifies what is meant by a proper trial: conducted in a language which the accused understands, conviction for the alleged offence only on the basis of individual penal responsibility, the right of the accused to be tried in his presence and not to be compelled to testify against himself, etc. (Article 75, paras. 3 and 4).

In internal conflicts, no sentence may be passed and no penalty may be executed except pursuant to a conviction pronounced by a regularly constituted court (Article 3 common to the Geneva Conventions). *Protocol II* relating to the protection of victims of non-international conflicts supplements these provisions and reiterates the principles contained in Protocol I and referred to above (Article 6, paras. 2 (b) and (c)).

3.3. Article 7: *"No man can be indicted, arrested or held in custody except for offences legally defined, and according to specified procedures. Those who solicit, transmit, execute or cause to be executed arbitrary commands must be punished; but if a citizen is summoned or arrested in due legal form it is his duty to obey instantly".*

Under humanitarian law this means that the taking of hostages is prohibited in international conflicts (IV/34) and in internal conflicts (IV/3 and Article 4, para. 2 (c), Protocol II).

As a corollary to this, no protected person may be punished for an offence he or she has not personally committed and collective penalties are prohibited (IV/33). Civilians may not be interned unless the security of the Detaining Power makes it absolutely necessary (IV/42).

Judicial investigations relating to a prisoner of war must be conducted rapidly. A prisoner of war must not be confined while awaiting trial unless a similar measure would be applicable to a member of the armed forces of the Detaining Power, or for security reasons. Under no circumstances may preventive detention exceed three months (III/103).

We have previously referred to other regulations banning any kind of arbitrary detention. To that may be added the provision in *Protocol I* whereby any person arrested or detained must be released with the minimum delay possible except in cases of detention for penal offences (Article 75, para. 3). According to *Protocol II*, during internal conflicts, in penal prosecutions related to the armed conflict, no sentence may be passed without prior conviction by a court, pronounced solely on

the basis of individual penal responsibility, and no one may be compelled to testify against himself, etc. (Article 6).

3.4. Article 8: *"The law must impose only penalties that are obviously necessary. No one can be punished except under the correct application of an established law which must, moreover, have existed before he committed the offence".*

The principle that a law may not be applied retroactively either to prisoners of war or to civilians has been clearly set out in *Protocol I* (Article 75, para. 4 (c)). This principle also applies during internal conflicts (Article 6, para. 2 (c), Protocol II).

The penal laws in force for the civilian population in occupied territories must remain unchanged unless they constitute a threat to the security of the occupying power. The occupying power may, however, subject the population to exceptional provisions essential to ensuring the said Power's own security (IV/64); these shall not come into force before they have been brought to the knowledge of the inhabitants (IV/65). Only those provisions which were in force prior to the offence are applicable. They must take into consideration the principle that the penalty must be proportionate to the offence (IV/67). No sentence may be pronouced except after a regular trial. (IV/71).

3.5. Article 9: *"Everyone must be presumed innocent until he is pronounced guilty. If his arrest and detention are thought necessary, then no more force may be used than is necessary to secure his person".*

The presumption of innocence is one of the basic rules of a fair trial as laid down in international humanitarian law. Indeed both *Additional Protocols* take almost word for word this article from the 1789 Declaration when they stipulate that "anyone charged with an offence is presumed innocent until proved guilty according to law" (Article 75, para. 4 (d), Protocol I and Article 6, para. 2 (d), Protocol II).

3.6. Article 10: *"No one must suffer for his opinions, even for religious opinions, provided that his advocacy of them does not endanger public order".*

Respect for religious convictions and practice already appears in the regulations of the Hague Convention of 1907 (Convention No. IV of

1907, Reg. Art. 46). This provision has been considerably developed in current law.

Prisoners of war must enjoy complete latitude in the exercise of their religious duties (III/34). Chaplains who fall into the hands of the enemy Power must be allowed to exercise freely their ministry and assist prisoners of war (III/35). These provisions also apply to ministers of religion who have not officiated as chaplains to their own forces (III/36).

Civilians in occupied territories are entitled to respect for their religious convictions and practices (IV/27). Internees must enjoy complete latitude in the exercise of their religion on condition that they comply with disciplinary routine (IV/93). Among the fundamental guarantees to be found in *Protocol I* is the one which specifies that each of the Parties to the conflict shall respect the person, honour, convictions and religious practices of all those in its power (Article 75, end of para. 1).

In *non-international conflicts*, persons who do not take part or who have ceased to take part in hostilities are likewise entitled to respect for their religious convictions (Article 4, para. 1, Protocol II).

The four Geneva Conventions stipulate that religious personnel, like medical personnel, must be respected in all circumstances, and must be enabled to carry out their duties; this is expressly specified once again in both Protocols (Protocol I, Article 15, para. 5, Protocol II, Article 9, para. 1).

3.7. Article 11: *"Free communication of thought and opinion is one of the most valuable rights of man; thus, every citizen may speak, write and print his views freely, provided only that he accepts the bounds of this freedom established by law".*

Although there is no direct relationship with this article, it should be noted that prisoners of war are allowed to send and receive letters (III/71). However, such correspondence is confined to exchanging family messages and may be censored. All civilians in the territory of a Party to the conflict or in a territory occupied by it must be enabled to give news of a personal nature to members of their families, wherever they may be, and to receive news from them (IV/25).

3.8. Article 17: *"Since the right to private property is sacred and inviolable, no one can be deprived of it except in certain cases legally determined to be essential for public security; in such cases a fair indemnity must first of all be granted".*

The 1907 Hague Regulations stipulate that it is forbidden to destroy or seize the enemy's property unless it be imperatively demanded by the necessities of war (Article 23 (g)) and that private property cannot be confiscated (Articles 46). As a corollary to this in cases of international conflict, pillage is prohibited (IV/33). The personal belongings of prisoners of war must remain in their possession (III/18).

A similar provision applies to civilian internees (IV/97). In occupied territories, any destruction by the Occupying Power of real or personal property is prohibited, unless rendered absolutely necessary on military grounds (IV/53).

Protocol I makes provision for the general protection of all civilian objects. As such, they may not be the object of attacks or of reprisals (Article 52 et seq.).

Lastly, it should be noted that the ICRC, under the mandate conferred upon it by the international community, has the mission to protect the victims of armed conflicts from arbitrary executions and inhumane treatment.

3.9. The 1789 code of principles, a source of inspiration for the Additional Protocols

Although the aims are different, it is evident that the Declaration of the Rights of Man and of the Citizen and the Geneva Conventions have the same objective, namely to defend the dignity of the individual; for this reason we have been able to trace the main elements they have in common.

Since the purpose of the Additional Protocols, as stressed in both their preambles, is to develop the provisions protecting the victims of conflicts, these legal instruments, too, had to be cited. This reference to them is all the more important in that the Protocols set down in writing the rules admitted by customary law. Obviously, the 1789 Declaration had an influence on the development of this law. Consequently, the representatives of the States taking part in the Diplomatic Conference who signed the 1977 Protocols were, perhaps unwittingly, inspired by the Declaration of the Rights of Man and of the Citizen.

4. What lessons can be drawn from the 1789 Declaration as regards the obligations entered into by States under international humanitarian law?

Since the Geneva Conventions have been ratified by almost all States, efforts must now be centred on their dissemination and application, for unfortunately certain governments give their own political interests pride of place over humanitarian law. The opposite ought to be the case.

Protocol I, ratified by 87 States, has the merit of giving extensive protection in international conflict to medical staff and the civilian population, who unfortunately are increasingly bearing the brunt in present-day conflicts.

Moreover, it regulates the methods and means of warfare. It is indeed the only treaty which expressly prohibits the bombardment of civilians and indiscriminate attacks. It also makes it obligatory, before launching an attack, to give due consideration to the proportionality between the injury that will be caused to the civilian population and the anticipated military advantage. Given the awesome power of modern weapons of mass destruction, these provisions are of paramount importance. However, among the Powers that possess such weapons, both China and, more recently, the USSR have ratified Protocol I. Several NATO members (Belgium, Denmark, Greece, Iceland, Italy, the Netherlands, Norway and Spain) have also ratified the Protocol. As for members of the Warsaw Pact States, first Hungary and then Bulgaria took this step.

Protocol II, ratified by 77 States, has the great merit, vis-à-vis Article 3 of the Conventions, of introducing fundamental basic guarantees for people who are not taking a direct part in hostilities and requires that people deprived of their freedom because of the conflict be shown a minimum of respect.

As we have noted, the two Protocols take up and develop several principles which are to be found in the 1789 Declaration. By supplementing the Geneva Conventions, they further advance the protection of life and dignity, those two basic rights which are the essential foundation for all other rights of victims of armed conflicts. Is there not a lesson to be drawn here? For ratifying the Protocols, States demonstrate their willingness to promote respect for human rights, not only in times of peace but also during armed conflicts.

To complete our analysis, mention must also be made of internal disturbances or tensions, i.e. situations in which the ICRC, by virtue

of its right of initiative, but subject to government consent, visits security detainees to ensure that they are treated with the respect which each individual might rightfully expect.

Legally speaking, such situations characterized by major acts of violence over a longer period are classified somewhere in between international law and human rights. Apart from a few non-derogable norms, the guarantees for protection are somewhat vague. But whatever the justification for taking exceptional measures may be, the right to respect for human dignity remains. Precise rules should therefore be established, at international level, entitling all human beings to a minimum of protection in times of internal disturbances and tensions.[9]

In conclusion, this bicentenary of the Declaration of the Rights of Man and of the Citizen should serve to remind us that even though considerable progress has been achieved, we are still living in a violent world. There is still some way to go to ensure the protection and respect to which each and every person is entitled, not only in peacetime but also in armed conflict and situations of internal disturbances and tensions.

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[9] Gasser, Hans-Peter, "A measure of humanity in internal disturbances and tensions: proposal for a Code of Conduct", *International Review of the Red Cross* (*IRRC*), No. 262, January-February 1988, p. 38 et seq.

Meron, Theodor, "Draft Model Declaration on International Strife", *IRRC*, No. 262, January-February 1988, p. 59.