

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND HUMAN RIGHTS

by Professor D. Schindler

The separate evolution of international humanitarian law and of human rights

The 150th anniversary of the birth of Henry Dunant, the 30th anniversary of the Universal Declaration of Human Rights and the 25th anniversary of the European Convention on Human Rights were all celebrated in 1978. Also in 1978, both the American Convention on Human Rights (1969) and the Protocols additional to the Geneva Conventions (1977) entered into force. The concurrence of these various notable events, all relating to human rights, constitutes an appropriate occasion for an analysis of the relationship which exists between international humanitarian law and human rights.

These two branches of international law which had been developing separately for a long time began, after the Second World War, gradually to approach each other, and now one largely overlaps the other. Both have the same purpose: the protection of human beings. But they deal with different situations and have evolved differently, and it is this which needs to be stressed first of all.

Development of international humanitarian law

The aim of international humanitarian law, which is a branch of the law of war or of armed conflicts, is to protect individuals who have been

placed *hors de combat* or who do not take part in the conflict, and to ensure that they are treated humanely.

In nearly all the great civilizations, already in ancient times and in the Middle Ages, rules restricting the right of belligerents to inflict injury on their adversaries existed. Laws for the protection of certain categories of persons can be traced back to the Persians, Greeks and Romans, as well as to India, the Islam, Ancient China, Africa and the Christian States. Those categories included women, children and aged people, disarmed combatants and prisoners. Attacks against certain objects—places of worship for example—and treacherous means of combat, such as the use of poison in particular, were prohibited.

The law of war in its present form evolved, mainly under the influence of the Christian faith and the rules of chivalry, in the course of the wars waged by the European nations against each other after the appearance of the modern European State system. It was expressed in ordinances issued by States to their armies, laying down what was to be the behaviour of their troops towards the enemy, and also in bilateral pacts (cartels, capitulations, armistices) concluded by army commanders, with the purpose of arranging for the care of the wounded or for the exchange of prisoners of war. The uniform character of these regulations led to the creation of customary rules of law. The writings of publicists, such as Grotius and Vattel, contributed to the consolidation of customary law. But it was only in the nineteenth century, when wars were waged by large national armies, employing new and more destructive weapons and leaving a terrifying number of wounded lying helpless on the battlefield, that a law of war based on multilateral conventions was developed. It was not just a coincidence that this development took place at a time when, in the States of the western world, common principles in respect of human rights began to prevail. The decisive impulse to this general trend was given by the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field. It expressed with clarity this idea of generally applicable human rights, since it compelled the High Contracting Parties to treat equally their own wounded and those of the enemy.

The members of the Geneva Committee, who were the sponsors of this Convention and then continued to act under the name of International Committee of the Red Cross, later directed their efforts to the further development of international humanitarian law. In the course of the next few decades, provisions were adopted for the protection of other categories of persons, namely the wounded, sick and shipwrecked members of armed forces at sea (in 1899), prisoners of war (in 1929)

and civilians (in 1949). The Conventions were revised in 1906, 1929 and 1949, and in 1977 two Protocols supplementing the four Conventions of 1949 were adopted.

While the Geneva Conventions deal with the protection of persons who have fallen into the hands of an enemy (wounded, sick, prisoners of war, civilian persons), the Hague Conventions of 1899 and 1907 seek in the first place to lay down the conduct of military operations. They restrict the freedom of belligerent States to attack specified persons and objectives and ban the use of certain methods and means of combat in the conduct of war. Part of these rules have been re-affirmed and developed by the two 1977 Protocols to the Geneva Conventions. While the Hague Conventions ultimately also aim to protect human beings, humanitarian concerns are more pronounced in the Geneva Conventions, which deal directly with problems relating to persons affected by war.

Independently of the development of international humanitarian law, the International Committee of the Red Cross has acted also in various other ways to protect the victims of armed conflicts and, as a consequence, to work for the defence of human rights. It has been entrusted by the Geneva Conventions themselves with the task of contributing to and watching over their application; this it does mainly by its visits to prisoners of war and civilian internees. The International Committee has also carried out a wide range of relief operations to bring aid to persons affected by international or non-international conflicts and to the victims of internal strife and tension. The fact that, since the Second World War and in situations unconnected with armed conflicts, ICRC delegates have been able to visit in over seventy countries some 300,000 detainees unprotected by any Convention is, in the context of the protection of human rights, an achievement of considerable importance. As a result, this protection has been extended to a category of persons who are in a situation very similar to that of prisoners of war or civilian internees but for whom the States are not very eager to sign a convention because in the majority of cases these persons are nationals of the States.

Development of human rights

Human rights and the law of war evolved along entirely different and totally separate lines, but their spiritual roots may be traced in part to the same origin and, from the nineteenth century, a certain degree of similarity may be observed in the development of each. The first expressions of human rights may be found in the various declarations issued

by a number of North American States towards the end of the eighteenth century, in particular in Virginia's Bill of Rights of 1776, and also, for instance, in the French Declaration of the Rights of Man and of the Citizen pronounced in 1789. These declarations marked the accomplishment of a long process. British constitutional history is eloquent in this respect. The people of England managed to wrest from the king a certain number of rights set forth in various charters: in 1628 the Petition of Rights, in 1679 the Habeas Corpus Act and in 1689 the Bill of Rights. These rights could be overridden by Parliament and were not therefore considered fundamental rights or human rights as we consider them today. Most of them were none the less included in the human rights declarations of the revolutionary period and in this context they were accorded wider scope. Behind those declarations a long evolution of ideas may be perceived. Its beginnings may be traced to the stoic philosophy in Ancient Greece, a doctrine which claimed, for the first time, equality of all human beings. This idea was central to overcoming the obstacles constituted at the time by the isolation of peoples from each other and the lack of any rules of law for foreigners. The conquests of Alexander the Great and the Roman Empire lent further support to the stoic doctrine, which later was combined with the Christian dogma that man was made by the Creator in His own image and that all men were equal. This concept of equality permeated natural law in the Middle Ages and at the beginning of our modern epoch until it was finally incorporated in the teaching of the philosophers of the Age of Reason, on which the American and French declarations of human rights repose.

In the nineteenth century, declarations of fundamental rights were included more and more frequently in the constitutions of States, and today the constitutional law in nearly every country contains such guarantees. But until the Second World War international guarantees of this kind did not exist, if one excepts some international conventions on particular aspects of human rights, such as the abolition of slavery or the protection of minority groups.

At all times, human rights guarantees have primarily been concerned with the relations between States and their own nationals in time of peace. On the other hand, the treatment of enemy persons in wartime has always remained outside their scope. The cleavage between human rights and the law of war continued even when, after the Second World War, international conventions on human rights were concluded. They, too, govern in the first place relations between States and their own nationals. The adoption of these conventions resulted from recognition of the fact that the respect of human rights within every State was a condition for

the maintenance of peace. The United Nations Secretary-General, in his first report on "Respect for human rights in armed conflicts" (A/7720, para. 16), said: "The Second World War gave conclusive proof of the close relationship which exists between outrageous behaviour of a Government towards its own citizens and aggression against other nations, thus, between respect for human rights and the maintenance of peace". The relationship of human rights to internal law is the reason why the conventions in respect of human rights have been ratified by fewer countries than the Geneva Conventions. On 31 December 1978, 52 States were parties to the United Nations International Covenant on Civil and Political Rights and 54 to the Covenant on Economic, Social and Cultural Rights, while 145 States had notified their accession to the Geneva Conventions.

Relationship between international humanitarian law and human rights after the Second World War

At the United Nations, the view held at first was that the very fact that the law of war might be discussed within its walls would shake world confidence in its ability to maintain peace. The United Nations International Law Commission therefore decided, at the first meeting it held in 1949, not to include the law of war among the subjects with which it would concern itself. The Universal Declaration of 1948 does not refer in any of its provisions to the question of respect for human rights in armed conflicts. Conversely, the 1949 Geneva Conventions, which were drafted at more or less the same time, made no mention of human rights.

All the same, unintentionally, a link was established between those two branches of international law—the Geneva Conventions and the human rights conventions. On the one hand, a tendency may be detected in the *Geneva Conventions of 1949* for their provisions to be considered not only as obligations to be discharged by the High Contracting Parties but as individual rights of the protected persons. An article in each of the four Conventions provides that protected persons may not renounce the rights secured to them by the Conventions (article 7 of the First, Second and Third Conventions, and article 8 of the Fourth). Furthermore, article 3, which is common to all four Conventions, obliges the Parties to apply, as a minimum, certain humanitarian rules in an armed conflict not of an international character. It thus lays down the relations

between the State and its own nationals and, consequently, encroaches upon the traditional sphere of human rights. It should also be noted that it was the influence of the human rights movement which, in the 1950's, led to the use of the expression "international humanitarian law", when referring to the Geneva Conventions, a term which later was extended to cover the whole of the law of war or law of armed conflicts.

On the other hand, the *human rights conventions* contain provisions for their implementation in time of war. Article 15 of the European Convention on Human Rights of 1950 provides that in time of war or public emergency threatening the life of the nation certain rights contained in the Convention may be abrogated, except for four inalienable rights which constitute an "immutable core". Similar provisions are to be found in article 4 of the United Nations Covenant on Civil and Political Rights and article 27 of the American Convention on Human Rights. The human rights conventions may thus also be applied in the event of armed conflicts. Where a conflict does not threaten the life of the nation, which may be the case when a State carries out limited military operations on the territory of another, all provisions of the human rights conventions are applicable, side by side with international humanitarian law.

For a long time no attention was paid to the relations between those two branches of international law. It was only towards the end of the 1960's, with the outbreak of a succession of armed conflicts at this period—wars of national liberation in Africa, the Middle East conflict, the wars in Nigeria and Viet Nam—in which aspects of the law of war and aspects of human rights arose at the same time, that people became conscious of the relationship. At the International Conference on Human Rights, convened in 1968 by the United Nations at Teheran, a link was officially established between human rights and international humanitarian law. In its resolution XXIII adopted on 12 May 1968 and entitled "Respect for human rights in armed conflicts", the Conference urged the better application of existing conventions in armed conflicts and the conclusion of further agreements. This resolution initiated United Nations action on international humanitarian law, as may be witnessed in the Secretary-General's annual reports and the resolutions adopted every year by the General Assembly. It was the impulse given at Teheran which led the States to consider in a favourable light the development of the Geneva Conventions, whereas the "Draft rules for the limitation of the dangers incurred by the civilian population in time of war" presented by the International Committee of the Red Cross in 1956 had failed to elicit any comparable response.

The influence of human rights had an impact on the content of the two 1977 Protocols, several of whose provisions, for example article 75 of Protocol I (Fundamental guarantees) and article 6 of Protocol II (Penal prosecutions), are directly derived from the United Nations Covenant on Civil and Political Rights.

The convergence of international humanitarian law and human rights shows that war and peace, civil wars and international conflicts, international law and internal law, all have increasingly overlapping areas. It follows that the law of war and the law of peace, international law and internal law, the scopes of which were at first clearly distinct, are today often applicable at the same time side by side. Thus, the Geneva Conventions and the human rights conventions may often be applied in cumulative fashion.

Maintenance of separate human rights conventions and international humanitarian law conventions

We have seen that human rights and international humanitarian law overlap to a certain extent. Does that imply that once the conventions on human rights have been universally ratified they will supersede the law of Geneva and the law of The Hague? Evidently not, and in support of this assertion, we shall distinguish between two things: first, the degree of concordance of substantive rules in the two groups of conventions and second, the efficiency of the machinery of supervision and of sanctions provided for in each group.

Concordance of substantive rules

The Geneva Conventions appear to offer the victims of armed conflicts greater protection than do the human rights conventions because they are better suited to the circumstances.

Most provisions of the human rights conventions were elaborated without taking into account the special conditions met with in armed conflicts. This is noticeable, for example, in the United Nations Covenant on Civil and Political Rights which protects only persons within the territory of a State Party to the Covenant (article 2, para. 1) but not those outside that territory who, in the case of an international armed conflict, would be equally in need of its protection. It is significant, too, that article 5 of the European Convention on Human Rights lists the cases

when a person may be deprived of his liberty but omits to mention the capture of prisoners of war and internment of persons on grounds of security. Furthermore, the provisions concerning the human rights guarantees and their limits would not be sufficient in the case of armed conflict. The following examples will suffice to show that the Geneva Conventions offer protected persons protection which is more extensive and better suited to armed conflict situations than that offered by human rights conventions.

The *right to life* is among the first rights referred to in those conventions (article 6 of the United Nations Covenant; article 2 of the European Convention; article 4 of the American Convention), qualified by some exceptions such as capital punishment or homicide in self-defence. A more specific definition is needed in armed conflicts, since the killing of enemy military personnel is considered to be a legitimate act. So the Geneva Conventions (and their 1977 Protocols) and the Hague Conventions forbid violence to the life of all protected persons (the wounded, the sick, prisoners of war, civilian persons); they likewise forbid the killing or murder of enemy persons who have laid down their arms, have surrendered or are defenceless. The prohibition is also extended to attacks on persons parachuting from an aircraft in distress, indiscriminate attacks, all acts intended to starve civilians, the destruction of objects and installations indispensable to the survival of the civilian population, etc. The right to life in armed conflicts would not be sufficiently regulated without such details.

The human rights conventions next guarantee the *right to personal liberty*. Here, too, they specify some exceptions, in particular the restriction of freedom following a criminal offence. They also forbid slavery and, subject to certain reservations, forced labour (articles 8 and 9 of the United Nations Covenant; articles 4 and 5 of the European Convention; articles 6 and 7 of the American Convention). These rights are, however, defined also in the humanitarian conventions applicable in armed conflicts. In particular, the taking of hostages and the deportation of civilians are prohibited; more detailed rules are laid down with regard to restrictions to the liberty of prisoners of war, the retention of medical personnel by an enemy, the internment of civilians of enemy nationality, the right to compel prisoners of war and enemy civilians to do work, and related questions.

It would not be difficult to demonstrate by further examples that the humanitarian conventions contain more extensive and more precise provisions for the protection of individuals in armed conflicts than the human rights conventions. Generally speaking, this is also true for non-

international armed conflicts. It is true that common article 3 does not offer more than the “immutable core” of the human rights conventions but Protocol II of 1977 lists a wider range of rights.

However, it is not the sole task of the law of armed conflicts to adapt certain human rights to the special situations of armed conflicts. It goes further for it lays down rules which lie outside the scope of human rights; conversely, the human rights conventions contain rules which are irrelevant to armed conflicts. In other words, the law of armed conflicts and human rights only partially overlap. The former, for instance, governs the right to take part in the fighting, the conduct of military operations, the conduct of economic warfare, in particular in naval war, and relations between belligerent States and neutral States. Such questions would have no place in human rights conventions, which in their turn, provide for rights which are of no importance in armed conflicts, for example, political rights or certain political freedoms, such as freedom of the press, freedom of expression, freedom of association.

Supervision and sanctions machinery

While the content of international humanitarian law coincides in part with that of the human rights conventions, they have different provisions regarding their supervision and sanctions machinery.

The *Geneva Conventions* are applied with the cooperation and under the supervision of the Protecting Powers and of the International Committee of the Red Cross, whose representatives are entitled to go to all places where prisoners of war or protected civilian persons may be and to interview them without witnesses. Their reports and recommendations are confidential; this measure encourages States to agree to such visits. As a general rule, appropriate action is taken on the recommendations and requests in the reports.

In an international conflict, the parties are obliged to admit supervisory bodies, but in the case of armed conflict not of an international character an impartial humanitarian body, such as the International Committee of the Red Cross, may only offer its services to the parties to the conflict. On the other hand, the ICRC may, in both international and non-international conflicts, take any initiative to protect persons affected by the conflict. It avails itself of this right of initiative in all armed conflicts, to bring material assistance, to exchange prisoners of war, and to request permission to visit persons deprived of their liberty.

With regard to the repression of breaches, a particularity of the law of armed conflicts is that its provisions, besides being binding on States,

are also directly binding on individuals. The State may therefore punish persons who have committed breaches, the legal basis being international law. The Geneva Conventions of 1949 and Protocol I of 1977 require the High Contracting Parties to provide penal sanctions for persons committing grave breaches of the Conventions or Protocol and to bring those persons to trial. The origin and the justification of penal guarantees in the law of armed conflicts are derived from the fact that it is primarily the members of the armed forces who have to apply the law of war. Therefore, penal sanctions would be the most suitable means for the repression of acts contrary to the law committed by military personnel. On this point the difference between the law of war and the system of human rights is fundamental. Where human rights are involved, it is basically the injured parties themselves who have to institute proceedings before the national courts and, if necessary, an international authority. In international humanitarian law, legal actions by injured parties are generally out of the question for two reasons: first, because legal proceedings are not appropriate to remedy breaches committed by soldiers and, secondly, because international humanitarian law protects primarily persons who, helpless and defenceless, normally would be in no position to resort to any legal process, whether national or international. The implementation of the humanitarian conventions is therefore better secured by the intervention of a neutral body, acting independently, and by complementary penal sanctions.

The *human rights conventions* provide that either the High Contracting States or the individuals whose rights have been infringed may lodge a complaint against the State which has committed the breach. The European Convention lays down that a High Contracting State may present a petition without restriction but that individuals do not have that right unless the State concerned has issued a specific declaration to that effect. In contrast, the American Convention allows the High Contracting States to present petitions on condition that they have published a statement to that effect, but individuals may do so in any case. In the United Nations Covenant, the procedure for petitions (here called "communications") is more limited. Communications by States may be received and considered only if both the plaintiff State and the defendant State have made a special declaration, which may be withdrawn at any time. Communications from individuals may be received and considered only if the State concerned is a party to the Optional Protocol annexed to the Covenant. This Protocol may be denounced at any time by a State Party and the denunciation takes effect three months after its notification.

Because of its optional character and the short period of time allowed for denunciation, the utility of the procedure in the United Nations Covenant is restricted in cases of armed conflict. The procedures in the European and American Conventions, not being subjected to any suspension in time of emergency, can play a more meaningful role in time of conflict, provided the work of the competent courts is not brought to a standstill by the war. They could be of great utility in conflicts not of an international character; in such cases there are no provisions for the institution of Protecting Powers, and the ICRC's offer of services may be refused. The procedures in the human rights conventions are, however, cumbersome—they might take several years—but the publicity attending them might serve as a substantial deterrent.

The supervision machinery of these two types of conventions can be fairly easily brought into action in a cumulative way, as their procedures are quite different, as a rule. Supervision by the ICRC or by a Protecting Power is much more swift and more direct than the system laid down in the human rights conventions; the latter, depending on circumstances, may even become superfluous. One can, however, imagine situations in which human rights agencies may act more efficiently than the ICRC, especially when they are empowered, as is the Inter-American Commission on Human Rights, to take action on their own initiative. When, in 1965, the Dominican Republic was in the throes of civil war, the Inter-American Commission, which already existed then, was very active, visiting interned persons. This it did in agreement with the ICRC delegates who were in the country, and the two organizations split their tasks between them and carried out their operations in such a way as to avoid overlapping.

Conclusions

After the Second World War, the idea that human rights should be guaranteed worldwide gathered momentum and not only led to the conclusion of conventions on human rights but also gave a vigorous impulse to humanitarian law. Without the impetus of human rights, the adoption of the two Protocols of 1977 additional to the Geneva Conventions would not have been possible. It is therefore right to say that there is a close relationship between those two branches of international law and that it is necessary to reconcile them. Nevertheless, human rights and humanitarian law must each constitute the subject of separate treaties. Armed conflicts require rules which are more precise

than and partly different from those that are necessary in time of peace. In addition, the provisions of humanitarian law must be supplemented by rules relative to the conduct of hostilities. Such rules are outside the sphere of human rights and, therefore, have to be dealt with separately.

It is likewise desirable that the supervision of the application of the human rights conventions should not be entrusted to the same bodies which supervise the humanitarian conventions. The mediation of Protecting Powers or of the ICRC, the visits to places of detention and the communication of confidential reports produce, in time of armed conflict, better results than formal complaints, which are usually possible only in peace-time, when individuals have free access to national and international authorities competent and able to enquire into allegations, institute conciliation procedure and issue judgements based on law. When the procedures specified by one or the other type of agreement can function simultaneously, that is not a disadvantage: it can but strengthen the protection of the persons concerned.

There is a further reason why separate rules are desirable for human rights, on the one hand, and the law of armed conflicts, on the other; namely that the humanitarian conventions are more widely accepted than the human rights conventions. The law of armed conflicts concerns questions which have for a long time been dealt with by international law. The parties have generally a reciprocal interest in its application. On the other hand, human rights were until recently—and indeed to a large extent are still—considered as forming a part of the domestic law of States. Much more than the law of armed conflicts, human rights are affected by the diversity of the concepts of the State and by ideological antagonisms. The adoption of the two 1977 Protocols additional to the Geneva Conventions is a proof that a separate set of rules for armed conflicts is in fact what States want.

For all the reasons set out above, the International Committee of the Red Cross can still make a contribution of paramount importance to the promotion of human rights. It does so by ensuring the application of existing humanitarian conventions and their development and by taking, independently of those Conventions, appropriate measures for the protection of all persons affected by armed conflicts or internal troubles.

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