HUMAN RIGHTS AND PROTOCOL II [1]

by Sylvie Junod

Human rights, particularly civil and political, have influenced the latest developments in international humanitarian law, especially 1977 Protocol II relating to non-international armed conflicts. At the Teheran Conference in 1968 the United Nations began to reconcile these two branches of international law; it was at this Conference that international humanitarian law was first called "human rights in periods of armed conflict". This rapprochement was helped further by the adoption in the 1977 Protocols of some basic rules identical to those in the Human Rights Conventions; it helps strengthen the protection of human beings in situations of armed conflict.

The second sentence of the Preamble to Protocol II establishes a link with human rights by "recalling that international instruments relating to human rights offer a basic protection to the human person." This is a very important position in view of the function of a preamble which is to provide pointers for the interpretation of a treaty. This is the first time that an instrument of international humanitarian law specifically mentions human rights. This does not mean, however, that there were no links between the two branches of international law before that. The Universal Declaration of Human Rights of 1948 undoubtedly had some influence on the 1949 negotiators; several draft preambles to the Conventions made direct references to this Declaration but were not adopted.[2] Since no agreement on a preamble was reached, the 1949 Conventions do not have one.

---

[1] Lecture given at the Round Table of the International Institute for Humanitarian Law in 1981. The opinions expressed are those of the author.

[2] See Acts of the 1949 Conference, Vol. II A, pp. 761-766, Vol. III (Appendices), pp. 96-100.

Professor D. Schindler [3] was among those who stressed certain similarities between the Geneva Conventions and human rights but, as he pointed out, they were not the result of a concerted legal technique. In addition, the two most important Human Rights Conventions which implemented the Declaration, i.e. the two United Nations Covenants, one on civil and political rights and the other on economic, social and cultural rights, were adopted much later, in 1966.

There is a correlation between human rights and the objectives of the United Nations Charter which prohibits recourse to force and hence aims at maintaining peace. Their role in this respect has been clearly identified by the Secretary-General of the United Nations who, in his report on the observance of human rights in periods of armed conflict, submitted to the General Assembly of 1969, stated that there was a close link "between the disgusting attitude of a government towards its own nationals and the aggression it perpetrates against other nations and consequently between the observance of human rights and the maintaining of peace".[4] Thus a link can be established between the observance of human rights and the right which prohibits recourse to force, i.e. the *ius ad bellum*. International humanitarian law on the other hand has of course no function in this context, since it is intended to apply when the norms of the *ius ad bellum* have failed to prevent war taking place. Its aim is to limit the use of force without looking into the causes of the conflict and by basing itself on humanitarian considerations. I merely wish to indicate here the different viewpoints of human rights and international humanitarian law without entering into the legal technicalities.

The Universal Declaration does not make any specific reference to the observance of human rights in periods of armed conflict. What is more, since the major objective of the United Nations is to maintain peace, the International Law Commission decided right from the start in 1949 not to deal with the law of armed conflicts.

The United Nations Conference on Human Rights mentioned above, which was held in Teheran in 1968 to celebrate the Universal Declaration's 20 years of existence, is a milestone in the rapprochement of human rights and international humanitarian law. By adopting a resolution relating "to the observance of human rights in periods of armed conflict",[5] which encouraged the setting up of new standards and

[3] "The ICRC and human rights" in International Review of the Red Cross, January-February 1979.

[4] Report A 7720, 1969.

[5] Resolution XIII, 12 May 1968.

called for better application of existing law, the Conference presented humanitarian law as an extension of human rights and thus put it on a par with United Nations concerns. Since then the Secretary-General's reports and the General Assembly resolutions have provided an impetus to the development of international humanitarian law. In fact, one can consider that the protection of the victims of armed conflicts is closely linked to human rights: the aim is to reinforce the protection of human beings who are particularly threatened in exceptional circumstances.

Nonetheless, human rights and international humanitarian law are two distinct legal systems, with their respective objectives, their fields of application and their own workings.

Human rights set out to ensure that each individual's rights and freedoms are respected, whether they be civil, political, economic, social or cultural, and to defend the exercise of these rights against the excesses of State institutions. They aim to protect the individual and to create living conditions which encourage his or her development within a community; this is why, although human rights instruments are applicable in all circumstances, both in peacetime and in armed conflict, they can only fully attain their objectives in peacetime. This is all the more true in that their rules and regulations provide for derogations in emergency situations such as, in particular, armed conflicts, where international humanitarian law is applied. In these situations, the only requirement is the observance of the essential norms of protection; as we shall see, these norms are akin to international humanitarian law. This law, on the other hand, has been specially conceived for armed conflicts with a view to ensuring at least a minimum of protection to the victims of these situations and to limiting violence by setting a number of rules to be observed in the conduct of hostilities.

To this end it contains its own norms providing, for example, for the protection of the wounded and sick, the protection of medical transport and the safeguarding of the enemy who is *hors de combat.*

Despite their own particularities, humanitarian law and human rights do have certain major points in common which are clearly seen in the rules of non-international armed conflicts. First of all, they use similar legal techniques; and secondly their fields of application partially overlap. As we shall see, the overlapping area is made up of minimum rules for the protection of human beings which are valid in all circumstances, both in peacetime and in armed conflict.

In the same way as the human rights covenants and conventions, Article 3 common to the Geneva Conventions and Protocol II relating

to non-international armed conflicts make inroads into the domain of States since they govern relations with some of their own nationals.

It proved to be indispensable to take into account existing rules concerning human rights, in particular the Covenant on civil and political rights, when drawing up Protocol II, with a view to ensuring that these new rules of international protection, which put limits on internal legal systems, would be consistent with earlier rules.

Before analysing this overlapping area of Protocol II and civil and political rights, I should like to give an outline of the legal technique on which both Article 3 common to the four Geneva Conventions and Protocol II are based, as it also provides a basis for rapprochement with the instruments of human rights.

1. Legal technique

The 1949 Conventions and the instruments relating to human rights, both universal and regional, adopt different legal techniques. On the one hand, the Conventions establish categories of protected persons such as the wounded and sick, the shipwrecked or the prisoners of war; on the other hand, human rights are applied to all individuals without conferring on them a particular status. However, recently humanitarian law has begun to resemble the legal system of human rights in seeking to protect all people who are not taking part in hostilities albeit without providing for specific categories. The only way in which it differs in this respect from the universal approach of human rights is that it concentrates on persons affected by armed conflict.

This method had already been adopted in Article 3 common to the Geneva Conventions; it was then retained and confirmed in Protocol II. There is a similar development in Protocol I, which, while conserving the categories of persons provided for by the Conventions, provides fundamental guarantees of treatment for all those to whom the Protocol is applicable and who do not benefit from more favourable treatment.[6] The wording of these basic guarantees is modelled on the Covenant on civil and political rights.

Moreover, human rights draw up norms directly applicable to individuals. Here again, the rules of internal conflicts show a certain similarity. The rights they confer are not dependent on contracts between

[6] Article 75 of Protocol I.

parties to the conflict but are laid down in Article 3 common to the Geneva Conventions and from Protocol II. Thus, *de facto* they are individual rights similar to those granted by the instruments of human rights.

2. The overlapping area

As we have already pointed out, the objectives of human rights can only be fully attained in peacetime. When a State is confronted with problems of security or public order, it is admitted that certain rights may be suspended: the right of association is one example. These limitations can come about when, in the words of the Covenant on civil and political rights, a "public danger... threatens the life of the nation",[7] that is to say in periods of serious tension or armed conflict. In this case the protection of the individual is more or less adapted to possibilities and circumstances; this does not mean, however, that he is deprived of all protection. There exist a certain number of inalienable rights to which there is no exception: these are the fundamental guarantees of human treatment which have as their main aim the preservation of the physical and mental well-being of each individual. This is the absolute minimum necessary for human beings and without which they would simply cease to exist, physically, mentally and legally speaking.

This kernel of inalienable rights on which human rights are based also constitutes the minimum protection which Article 3 common to the Geneva Conventions and Protocol II set out to guarantee, and this kernel represents the "overlapping area" common to two legal systems.

This kernel of rights makes up the minimum protection to which any individual is entitled at any time. Since Protocol II has its own field of application, it was important for these fundamental guarantees to be included after having been adapted and supplemented according to the circumstances to which that Protocol applies. Consequently, when drafting it, the ICRC drew on the rules of the Covenant, in particular when drafting Part II relating to Humane Treatment.

During discussions at the Diplomatic Conference, a number of delegates referred systematically to the corresponding rules of the Covenant on civil and political rights which they wished to insert into Protocol II by using them, somehow or other, as a basis for discussion. This reflected the concern to include in the Protocol guarantees at least equivalent to

[7] Art. 4, par. 1 of the Covenant on civil and political rights.

those provided by the instruments of human rights, in order to secure the Protocol from disparagement for lagging behind.

Such concern was not shared by everyone; some people did not see the need to align the rules of two independent legal systems having different objectives. Despite this controversy, those who supported the "harmonization" of the rules of Protocol II with the rules of human rights concerning humane treatment greatly affected the results of the debates: some of the norms of the Covenant have been directly inserted into the Protocol and others begot some clauses of the Protocol.

In his writings, Mr. Jean Pictet educed three main principles common to human rights and humanitarian law: 1) non-discrimination, 2) inviolability, 3) personal safety. The rules of Protocol II which are based on these three principles are on the lines of the Covenant on civil and political rights. Article 3 common to the Geneva Conventions already implied what Protocol II explicitly mentions and supplements by drawing on the rules of human rights.

Non-discrimination

Equality of treatment which is based on non-discrimination is one of the fundamental principles both of human rights and of international humanitarian law. Protocol II states this in Article 2, using the same wording as Article 2 of the Covenant on civil and political rights. This identical phrasing is a way of avoiding a restrictive or divergent interpretation of a fundamental principle of protection.

Inviolability

The principle of the inviolability of human beings is based on respect for their life and their physical and mental well-being. However, according to the instruments of human rights, the right to life is not an absolute right; it is limited by public law, in particular by criminal law. As things stand at present, for example, capital punishment for persons who have benefited from legal guarantees is not prohibited.

Given the circumstances in which it applies, humanitarian law cannot claim to establish a general guarantee of respect for life. Article 4 of Protocol II does provide for the respect for the life and the mental and physical well-being of people who do not take part or who are no longer taking part in hostilities and who should be treated humanely. It establishes then the inviolability of non-combatants and of combatants placed *hors de combat*. The principle of humane treatment is illustrated,

as in Article 3 common to the Geneva Conventions, by a series of prohibitions taken up by the inalienable rules of the Covenant, such as the prohibition of torture, inhumane or degrading sentences or treatment (Art. 4, par. 2 a) and the prohibition of slavery and the slave trade in all its forms (Art. 4, par. 2 f).

Another inalienable right concerning the principle of inviolability of human beings was reproduced in Article 5, par. 2 e, of the Protocol; it relates to detention conditions and prohibits medical or scientific experiments on people.

Personal safety

The individual's safety is ensured by the granting of legal guarantees. It is here that Protocol II (Article 6, on penal prosecutions) is closest to the Covenant. First of all, Article 6 of Protocol II reaffirms the principle of legality already dealt with in Article 3 common to the Geneva Conventions: each individual is entitled to be judged by a court affording all the judicial guarantees of independence and impartiality. It then goes on to establish the principle of non-retroactivity of the law by quoting in full Article 15, par. 1 of the Covenant. It stipulates also that the death sentence will not be passed on people less than 18 years old when the offence was committed and that it will not be carried out against pregnant women and mothers of young children. This age limit of 18 years is taken from the Covenant and the Conventions. The norm is modelled it a step further, as the death penalty on mothers of young children is not prohibited by the Covenant. These three rules, the principle of legality, non-retroactivity and the limitation of the application of the death sentence, constitute the kernel of rights permitting of no derogation.

Article 6 of Protocol II also repeats other judicial guarantees contained in the Covenant. These are not part of the inalienable kernel of rights but are of special importance in situations of armed conflict. It was therefore all the more important to have them in Protocol II: the presumption of innocence, the right to be present at one's own trial and the principle according to which no one can be compelled to testify against him or herself (Art. 6, par. 2 d, e and f).

Of course this brief analysis is incomplete. I have restricted myself to those human rights which cannot be suspended in any circumstance and which figure in Protocol II, and to the rules which drew their inspiration from the Covenant during the negotiations. It might also be of interest to compare Protocol II with the inalienable rights contained

in such regional instruments as the European and the Inter-American Human Rights Conventions, the latter being more far-reaching as it is more recent. This comparison should be dealt with in another exposé. During the discussions at the Diplomatic Conference, the Covenant on civil and political rights was invoked as a universal instrument of human rights.

Protocol II contains almost all of the inalienable rights of the Covenant. This kernel of rights, reaffirmed by humanitarian law, is given the force of law in the constitutions of the majority of States. These rights, as basic provisions of universal application, are often considered as suprapositive rights, claimable from States, even in default of any treaty obligation or other form of commitment on their part.

These rights can be assumed to be part of *ius cogens*. For some of them such an opinion might be contested; but not, for example, where the prohibition of slavery and torture is concerned. Let it be said in passing that Article 53 of the Vienna Convention on the Law of Treaties defines *ius cogens* as "a norm accepted and recognized by the international community of States as a whole norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character".

It proved to be indispensable for Protocol II, which has its own field of application, to confirm and supplement them in keeping with the specific situations to which it applies.

In one of his courses at The Hague, Professor Karel Vasak said that internal conflict was the most dangerous period for human rights, since it was then that humanitarian law and human rights looked like two crutches on which the individual could lean in order to escape the consequences of the conflict.

In fact, Protocol II and the instruments of human rights can be applied cumulatively and simultaneously. As the United Nations General Assembly stated, human rights remain fully applicable in cases of armed conflict (AG 2657, XXV). The possibility to superimpose reinforces the protection of human beings.

In addition, by re-employing some of the terminology used for the basic rules of protection common to human rights, Protocol II helps to reinforce and safeguard the consistency of the rules of protection. Despite this, it is a treaty independent of the rules and regulations of human rights, which do not affect its application. The concordance of the norms of protection laid down in these instruments, which remain quite distinct, meets the needs of protected persons.

In conclusion, it can be said that humanitarian law is often better accepted than human rights since it does not give rise to ideological problems. Publicity is important for the promotion of human rights but inevitably it entails a certain amount of politicization of the problems and may even provoke a certain reticence concerning human rights from States which are the subject of international criticism. Humanitarian law does not have this problem. Consequently, comparison of human rights with international humanitarian law is now often part of the programmes for the dissemination of knowledge of humanitarian law, in order to show not only the interrelationship between these two branches of international law, as we have done today, but also their differences. An examination of the differences and similarities helps to make humanitarian law more acceptable and promotes a better understanding of the nature of human rights.

Sylvie Junod
Legal Adviser at the ICRC
