Trends in the application of international humanitarian law by United Nations human rights mechanisms

by Daniel O'Donnell

UN human rights mechanisms continue to proliferate, producing numerous decisions and voluminous reports. This article reviews the ways in which such mechanisms apply international humanitarian law, including the law of Geneva and the law of The Hague. In doing so, it focuses mainly on the practice of the rapporteurs appointed by the UN Commission on Human Rights to investigate the human rights situations in specific countries and on that of the thematic rapporteurs and working groups which the Commission has entrusted with monitoring specific types of serious human rights violations wherever they occur, in particular the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Representative of the Secretary-General on Internally Displaced Persons, whose mandates most often lead them to examine abuses occurring in the context of armed conflicts. Reference is also made to two innovative mechanisms which functioned in El Salvador: the first UN-sponsored "truth commission" and the first human rights monitoring body established as part of a comprehensive mechanism for monitoring compliance with a UN-sponsored peace agreement. Certain observations made by treaty monitoring bodies are also mentioned.

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This review does not claim to be comprehensive; it merely seeks to identify and illustrate recent trends. The topic is an important one and would deserve to be studied in greater depth.

Application of international humanitarian law

UN human rights mechanisms do not apply international humanitarian law consistently. Many reports make no reference to it, even when they recognize the existence of an armed conflict. Others contain vague affirmations that humanitarian law has been violated, but do not mention the specific facts of the case or the relevant provisions of that law. Nevertheless, the application of humanitarian law by UN human rights mechanisms is increasing. It occurs in four types of situations:

- when humanitarian law standards are expressly designed to cover a specific practice, which human rights standards cover only indirectly;
- when humanitarian and human rights standards are equally applicable;
- when humanitarian law is more appropriate than human rights law because of the identity of the offender;
- when the applicable humanitarian standards merge with human rights law.

These categories are not mutually exclusive. Indeed the boundaries between them are fluid and depend mainly on how broadly the relevant provisions of international human rights law are interpreted. Examples of how humanitarian standards are applied to each type of situation are given below.

Humanitarian law standards as the most appropriate legal framework

Humanitarian standards are often applied with regard to practices which do not easily fit the traditional parameters of human rights violations, particularly when a rapporteur wishes to take a position on a method of warfare as such and not on specific acts affecting the rights of identifiable victims: in other words, when the analysis focuses on the duties of the State and not on rights as such.

The use of mines is one example. In 1993, referring to the situation in northern Iraq, the Special Rapporteur on Iraq concluded:

> "... in some cases, the mines have been laid ... more to prevent the civilians from living and farming in their traditional ways. In this way, many civilians have no choice but to move into the amalgamized [sic]

villages built by the Government. In this connection, the Special Rapporteur draws attention to the Land Mines Protocol of 1981. According to this humanitarian instrument, measures should be taken to protect civilians from the effects of mines, while prohibiting the indiscriminate use of mines."[1]

The use of chemical weapons provides another example. In 1994, the Special Rapporteur on Iraq concluded that Iraq's use of such weapons against Kurdish villages demonstrated "State responsibility for serious breaches of the 1925 Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare".[2] While in the light of human rights law the use of chemical weapons could be regarded as incompatible with the right to life, the right to health and even as a form of torture, it would seem unnecessarily circuitous to invoke these standards in such a case. Assuming that the prerequisites for application of the relevant humanitarian standards are met, the approach followed by the Special Rapporteur on Iraq has the advantage of clarity and simplicity.

Forced displacement of the civilian population is a third example. Rapporteurs tend to view such displacement as a violation of international standards only when Protocol II[3] is applicable. The report on Burundi by the Representative of the Secretary-General on Internally Displaced Persons is a case in point.[4] Forced displacement is an area where international humanitarian law could be used to interpret international human rights law, the relevant provisions being the substantive standards contained in Article 17 of Protocol II and the provisions of human rights law concerning freedom of movement and residence (an example of the fourth type of situation). Indeed, the Guiding Principles on internal displacement in effect provide that displacement that is not in conformity with Article 17, para. 1, of Protocol II constitutes an arbitrary deprivation or restriction of such freedom.[5] It is surprising that this conclusion has not been drawn in the Representative's reports on countries that are not party to Protocol II.

[1] E/CN.4/1993/45, para. 113.

[2] E/CN.4/1994/58, paras. 112-116, 185.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

[4] E/CN.4/1995/Add.2, para. 63.

[5] E/CN.4/1998/53/Add.2, Principle 6.

The activities of the Human Rights Division of the UN Observer Mission in El Salvador (ONUSAL) are a unique example of the application of humanitarian law by a UN human rights mechanism. The first UN field mission to have been entrusted with a human rights mandate, ONUSAL became operational while negotiations were still underway to settle the internal armed conflict in El Salvador. Although it had an express mandate to monitor violations of international humanitarian law as well as violations of human rights law, ONUSAL decided to give priority to the latter. This decision was based in part on its interpretation of the intent of the parties to the agreement defining its mandate, but it was also taken out of deference to the role of the ICRC and because ONUSAL wished to avoid any unnecessary and potentially counterproductive duplication of efforts.[6]

The Human Rights Division nevertheless decided to investigate some violations of humanitarian law and included a separate category for such violations in the operational guidelines it adopted concerning the scope of its mandate. This category included:

"a. Attacks on the civilian population as such and on civilians;

b. Acts or threats of violence whose main purpose is to intimidate the civilian population;

c. Acts involving attacks on material goods essential to the survival of the civilian population or the obstruction of relief operations, and

d. Arbitrary relocation of the civilian population."[7]

The apparent intent was to apply humanitarian law to cases or situations not directly addressed by human rights standards. In practice, this category was expanded or interpreted to include acts such as the execution of non-combatants by the guerrillas without respect for due process and the indiscriminate use of land mines.[8] Ironically, despite its professed intention not to give high priority to violations of humanitarian law, ONUSAL probably applied humanitarian law more often and more

[6] First Report of the ONUSAL Human Rights Division, A/45/1055-S/23037, Annex, paras. 17-25, reprinted in *The United Nations and El Salvador, 1990-1995*, UN doc. DPI/1475, pp. 152 and 153.

[7] *Ibid.*, para. 52.

[8] Third report of the Human Rights Division, A/46/23580-S/23580, paras. 170 and 172, reprinted in *The United Nations and El Salvador*, *supra* (note 6), p. 235.

systematically than any other UN human rights mechanism has done, with the possible exception of the Salvadorian Truth Commission.

Humanitarian law reinforces human rights law

In the second type of situation, humanitarian law standards are applied, not because they are actually needed to evaluate the legality of a specific practice, but simply because the circumstances of a violation suggest that it is appropriate to refer to them. Massacres of civilians by military units are a typical example: it is well established that the extrajudicial execution of a group of unarmed persons for no reason other than their real or presumed political sympathies or the material support they have given to an illegal armed movement violates the right to life under human rights instruments. Yet the fact that such killings are perpetrated by members of the armed forces using military weapons and tactics in the context of an armed conflict makes it seem appropriate to apply relevant standards of humanitarian law, in addition to human rights law.

In his 1990 report on Colombia, the first Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions (hereafter "Special Rapporteur on Executions") observed that "in the counter-insurgency campaign, the forces of law and order were failing to comply with certain basic principles of international humanitarian law, such as the principle of not engaging in violence against the civilian populations".[9] The examples cited are the deliberate massacres of unarmed villagers and the execution of captured guerrillas.[10] Similarly, the Special Rapporteur on Myanmar found that forced labour and porterage during counter-insurgency operations violated both international human rights law and humanitarian standards.[11]

There may be a psychological motive, conscious or not, underlying the tendency to apply international humanitarian law in these circumstances. Reference to humanitarian law serves to emphasize the gravity of the offence: not only does a particular act violate human rights law, but it also violates humanitarian law. Technical considerations aside, there is a generalized perception that international humanitarian law is designed to cover war, whereas human rights law is designed to cover ordinary

[9] E/CN.4/1990/22/Add.1, para. 50.

[10] *Ibid.*

[11] E/CN.4/1996/65, para.180.

situations; and since more is permitted in wartime than in peacetime, the affirmation that humanitarian law has been violated — that what has happened is prohibited even during an armed conflict — carries a connotation of greater moral reprobation.

One example is the execution by the Salvadorian Army of a nurse captured in an attack on a Farabundo Martí National Liberation Front (FMLN) hospital, which the Truth Commission concluded was "in flagrant violation of international humanitarian law and international human rights law." The Commission certainly would have concluded that the extrajudicial execution of a person deprived of her freedom was incompatible with international human rights law, even if humanitarian law had been inapplicable. Yet the finding that the killing of the nun violated the laws of war — especially given the special status under humanitarian law of medical personnel serving in an armed conflict — highlights the gravity of this departure from a universally accepted moral, as well as legal, imperative.

Rapporteurs are also concerned with the general impact of conflict on the population and of its collective economic, social and cultural rights. These issues, too, may be addressed in terms of human rights law, humanitarian law or both. In a 1993 report, the Special Rapporteur on Iraq declared: "The present economic blockade against the Kurdish region is clearly incompatible with Iraq's obligations under both international human rights law (in terms of economic rights and, to the extent it threatens survival, the right to life) and international humanitarian law, in so far as the blockade amounts to a siege."[12]

The Special Rapporteur on the former Yugoslavia, in his first report, condemned the siege of Sarajevo and Bihac in terms that were clearly intended to refer to humanitarian law standards. In Sarajevo, he noted, the hospital had been "deliberately shelled on several occasions, despite the proper display of the internationally recognized red cross symbol".[13] Regarding the situation in Bihac, he reported: "Shelling occurs daily. There are no significant military targets in the city, and the main reason for the shelling appears to be that of terrorizing the civilian population."[14] This statement is introduced by the following observation: "Most of the

[12] E/CN.4/1993/45, para. 184.

[13] E/CN.4/1992/S-1/9, para. 17.

[14] *Ibid.*, para. 20.

territory of the former Yugoslavia, in particular Bosnia and Herzegovina, is at present the scene of systematic violations of human rights, as well as serious grave [sic] violations of humanitarian law."[15]

Some evidence of this trend can also be detected in the work of treaty monitoring bodies. In a comment on the right to housing, which was adopted in 1997, the Committee on Economic, Social and Cultural Rights declared that "[F]orced eviction and house demolition as a punitive measure were ... inconsistent with the norms of the Covenant" on Economic, Social and Cultural Rights. "Likewise", the paragraph goes on, "the Committee takes note of the obligations enshrined in the Geneva Conventions of 1949 and Protocols thereto of 1977 concerning prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction."[16] This demonstrates a conscious effort to emphasize the complementarity of the two bodies of law and the importance of their coordinated, harmonious application.

The application of humanitarian law to non-State actors

The third type of situation, the application of humanitarian law is arguably needed to cover acts that, owing to the identity of those who perpetrate them, lie beyond the scope of international human rights law. Classical human rights doctrine maintains that human rights law is binding only on States, and that human rights standards cannot be applied to acts committed by private individuals or groups unless there is incitement, complicity or tolerance on the part of some public official or authority. This view has been questioned in recent years, but is still shared by most UN human rights mechanisms.[17] Nevertheless, most UN rapporteurs also consider that a thorough, impartial and objective analysis of the situation of human rights in a specific country must take into account grave abuses

[15] *Ibid.*, para. 6.

[16] General comment 7, para. 13, reprinted in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, HRI/GEN/1/Rev.3, 1997, p. 96.

[17] The argument for an expansive interpretation of the applicability of human rights law is stated in the report of the Special Rapporteur on Mercenaries, E/CN.4/1991/14, para. 158. The classical position is defended by the Special Rapporteur on Torture in E/CN.4/1994/31, paras. 12 and 13. Most UN rapporteurs and working groups have not addressed this question expressly but, although their practice is not entirely consistent, they generally apply the position defended by the Special Rapporteur on Torture.

committed by armed groups having no link with the established government as well as those committed by governments and groups associated with them.

When a situation of armed conflict exists, international humanitarian law provides the solution. Some of the decisions adopted by the Salvadorian Truth Commission concerning killings and abductions committed by the FMLN during the civil war in El Salvador may serve to illustrate the point. The Commission concluded that the abduction of the President's daughter and her exchange (together with 25 abducted local public officials) for a number of wounded guerrillas constituted hostage taking, in violation of humanitarian law.[18] It also concluded that the FMLN had violated humanitarian law by killing a judge, a renegade guerrilla, four off-duty US Embassy guards and two US military advisors captured when their helicopter was shot down.[19]

The execution of 11 mayors by the FMLN was found to violate both humanitarian law and human rights law. The conclusion that the FMLN was subject to international human rights law was explained in these terms: "... when insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding for the State under international human rights law ... The official position of the FMLN was that certain parts of the national territory were under its control, and it did in fact exercise that control."[20] Most UN human rights mechanisms have not endorsed this position, and the Commission offered no explanation as to why the other executions committed by the FMLN did not violate human rights law as well as humanitarian law.

The FMLN argued that the execution of the mayors was allowed under humanitarian law. The Commission rejected this argument, stating:

> "There is nothing in international humanitarian law to prohibit belligerents from punishing, in areas under their control, individuals who commit acts that, according to the applicable laws, are criminal in nature ... The Commission recalls that, when punishing persons accused of crimes, it is necessary to observe the basic elements of due

[18] "From madness to hope", chap. IV E, reproduced in *The United Nations and El Salvador*, *supra* (note 6), p. 377.

[19] *Ibid.*, pp. 370, 373, 376 and 377.

[20] *Ibid.*, p. 297.

process. International humanitarian law does not in any way exempt the parties to a conflict from that obligation ...

In none of the cases mentioned above is there any evidence that a proper trial was held prior to the execution. Nor is there any evidence that any of the individuals died in a combat operation, nor that they resisted their executioners."[21]

The Special Rapporteur on Sudan applied Article 3 common to the four 1949 Geneva Conventions to the Sudan People's Liberation Army (SPLA) and found both factions responsible for violations of humanitarian law, in interfactional fighting as well as in the struggle against government forces.[22] The violations included indiscriminate attacks on the civilian population, rape, mutilation and looting.[23] The recruitment of child soldiers by the SPLA was also emphasized, although the Rapporteur did not explain how this might be considered a violation of common Article 3 or any other provisions of humanitarian law binding on the SPLA.[24] Both SPLA factions subsequently signed an agreement to respect Protocol II, even though it had not been ratified by the government of Sudan.[25] The Rapporteur also condemned one SPLA faction for seizing an ICRC aircraft and detaining its passengers and crew as hostages, calling this a "serious breach of international humanitarian law".[26]

The joint report on Colombia by the Special Rapporteurs on Torture and on Extrajudicial Executions contains repeated references to violations of humanitarian law and to "abuses" committed by insurgent groups. The report clearly implies that guerrilla groups have violated humanitarian law by engaging in practices such as the assassination of informers, girlfriends of members of the armed forces and hostages abducted for ransom.[27]

The Special Rapporteur on Violence Against Women has indicated that humanitarian law forms part of the legal framework of her mandate,

[21] *Ibid.*, p. 367.

[22] E/CN.4/1994/48, paras. 23 and 130.

[23] *Ibid.*, para. 115.

[24] *Ibid.*, para. 101.

[25] E/CN.4/1996/62, para. 87.

[26] E/CN.4/1997/58, para. 27.

[27] E/CN.4/1995/111, para. 57.

and her 1998 report contains a chapter on "Violence against women in times of armed conflict", suggesting that this type of violation of humanitarian law will receive particular attention.[28] The chapter contains information on cases attributed to both governmental and non-State actors, but the report suggests that humanitarian law is particularly relevant as a legal basis for addressing violations committed by non-State actors.[29]

In so far as States are concerned, they have been held responsible not only for the behaviour of their armed forces and officially recognized militias, but also for the conduct of irregular militia which, while not under direct government control, are aligned with the government and enjoy impunity for violations of humanitarian law.[30] The Rapporteur has implied that Sudan is responsible for violations of human rights and humanitarian law committed by rebel groups based on its territory dedicated to the overthrow of the government of Uganda.[31]

Convergence of humanitarian and human rights standards

The obligations and prohibitions set forth in comprehensive human rights treaties such as the International Covenant on Civil and Political Rights are often defined in broad terms, and the treaty monitoring bodies that apply them frequently turn to more detailed and specific instruments for guidance. In the context of an armed conflict it would be logical, for example, to take humanitarian standards into account in determining whether specific instances of deprivation of life, liberty or property should be considered arbitrary or not. This is where the convergence of humanitarian and human rights law is most obvious.

In his 1992 report, reviewing the methodology and jurisprudence developed during the first decade of this mandate, the first Special Rapporteur on Executions indicated that the legal framework of his mandate extended to deaths occurring during an armed conflict and thus included the Geneva Conventions and their Protocols, in particular Article 3 common to the Conventions, Article 51 of Protocol I and Article 13 of

[28] E/CN.4/1998/54, chap. I. See also the report on a mission to Rwanda, E/CN.4/1998/54/Add.1, and the report on a mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, E/CN.4/1996/53/Add.1.

[29] *Ibid.*, paras. 16 and 17.

[30] Special Representative on Sudan, E/CN.4/1996/62, paras. 39 and 40.

[31] E/CN.4/1997/58, para. 39; E/CN.4/1998/66 paras. 35 and 36.

Protocol II.[32] He explained that these instruments were applied, not because his mandate expressly comprised violations of humanitarian law as such, but because the standards cited could be used to determine whether deaths occurring in the context of armed conflict were "arbitrary" or not, and thus whether or not they violated the human rights standards which constituted his main frame of reference.[33]

The Special Rapporteur on Torture has not actually indicated that the legal framework of his mandate includes humanitarian law, but he has referred to that law in interpreting the scope of his mandate. In 1995, in explaining why rape should be considered a form of torture under international human rights law, he gave considerable weight to provisions of humanitarian law under which rape is expressly prohibited.[34] Similarly, in his 1997 report, he took into account provisions of humanitarian law prohibiting corporal punishment of prisoners in determining whether this practice is compatible with provisions of human rights law prohibiting torture and cruel, inhuman and degrading treatment.[35]

Article 38 of the Convention on the Rights of the Child represents another instance in which international humanitarian and human rights law converge. Not only are paragraphs (2) and (3) regarding minimum ages for participation and recruitment inspired by Protocol II, but paragraphs (1) and (4) incorporate vast portions of international humanitarian law into the regime of protection established by this instrument. The Committee on the Rights of the Child has recently begun to evaluate compliance with humanitarian law in its examination of the reports submitted by States Parties involved in armed conflicts. In 1997, the Committee declared that it was "deeply concerned that the rules of international humanitarian law applicable to children in armed conflict were being violated in the northern part of the State Party [Uganda] in contradiction to the provisions of Article 38 of the Convention".[36] Specific mention was made of the abduction, killing and torture of children and of the use of child soldiers. The Committee recommended that the government take measures to make

[32] E/CN.4/1992/30, para. 28.

[33] *Ibid.*, paras. 19-28 and 608.

[34] E/CN.4/1995/34, para. 17.

[35] E/CN.4/1997/7, para. 11.

[36] Concluding observations of the Committee on the Rights of the Child: Uganda, of 10 October 1997, UN doc. CRC/C/69, para. 136.

all the parties to the conflict aware of their duty "to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention" and to punish those responsible for violating such rules.[37] It also addressed this issue in its examination of the report submitted by Myanmar on its implementation of the Convention, recommending that the government investigate and prosecute rape and other abuse of children by members of the armed forces and cease the recruitment of underage child soldiers and the forcible recruitment of children as porters.[38]

The third report of the Special Rapporteur on the former Yugoslavia provides an example of the incipient development of a new legal concept drawing on both humanitarian and human rights law. The practice of ethnic cleansing is defined as a combination of practices incompatible with both bodies of law, including killings, torture, inhuman and degrading treatment, the forced movement of civilians and the destruction of historic monuments and places of worship constituting the cultural and spiritual heritage of a people. Killings, torture and cruel, inhuman and degrading treatment violate both international human rights law and common Article 3 — which the Rapporteur refers to as *jus cogens* — while the forced movement of civilians and the destruction of monuments and places of worship violate articles 16 and 17 of Protocol II additional to the Geneva Conventions.[39] The Rapporteur's next report reaffirms that "[e]thnic cleansing violates fundamental principles of international human rights and humanitarian law" and adds rape to the list of practices "deliberately used as an instrument of ethnic cleansing".[40]

The concept of ethnic cleansing has subsequently been applied to situations in other countries, such as Burundi.[41] The Guiding Principles on internal displacement likewise indicate that displacement intended to perpetuate ethnic cleansing violates international law.[42]

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[37] *Ibid.*, para. 151.

[38] *Supra* (note 36), paras. 154-156 and 176.

[39] A/47/666, paras. 129-132.

[40] E/CN.4/1993/50, paras. 256 and 260.

[41] Report of the Representative of the Secretary-General on Internally Displaced Persons, E/CN.4/1995/Add.2, para. 68; Report of Special Rapporteur on Executions, E/CN.4/4/Add.1, paras. 43-45.

[42] E/CN.4/1998/53/Add.2, Principle 7.

The threshold for application of international humanitarian law and related issues

Although UN human rights rapporteurs are applying humanitarian law with increasing frequency, they rarely analyse in any detail the factual circumstances that lead them to do so. There appears to be a risk that UN human rights mechanisms may arrive at different conclusions regarding the question of whether an armed conflict exists in a given country. This threshold question aside, difficulties have also been encountered in determining whether the applicable standards are those that cover international or non-international armed conflicts. The praxis of UN rapporteurs also highlights the importance of issues concerning the temporal and spatial scope of application of humanitarian standards. Some examples are given below.

The 1996 report on Peru by the Representative of the Secretary-General on Internally Displaced Persons found that although military operations had "significantly diminished" and security had "improved considerably", security was "still fragile", "pockets" of insurgency remained and armed skirmishes continued to be reported in some remote regions.[43] The report concludes: "...where the requirements for its application are fulfilled, in particular in the emergency zones, common Article 3 of the Geneva Conventions and Additional Protocol II should be enforced".[44] A year later, the Human Rights Committee observed that Peru had been "affected by terrorist activities, internal disturbances and violence".[45]

A report based on a mission which the Representative of the Secretary-General on Internally Displaced Persons carried out in Burundi in September 1994 paraphrases the Commentary published by the ICRC on Article 3 common to the Geneva Conventions[46] and vaguely concludes: "Some of the events that have taken place in Burundi would seem to fall within the ambit of this provision."[47] Having gathered specific information on the nature and extent of military activities during a mission that took

[43] E/CN.4/1996/52, para. 22.

[44] *Ibid.*, para. 32.

[45] A/52/40, para. 148.

[46] *Geneva Conventions of 12 August 1949*, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952-1960.

[47] E/CN.4/1995/50/Add.2, para. 50.

place a few months later, the Special Rapporteur on Executions reached the more concrete conclusion that "a low intensity civil war" was taking place in a certain province.[48]

The 1998 report by the Special Representative on Violence Against Women indicates that violations of the rights of women have occurred during armed conflicts in Algeria, China (Tibet), Haiti, India (the Punjab), Indonesia (East Timor), Mexico and the Republic of Korea, among other countries.[49]

In a 1992 report, the Independent Expert on El Salvador declared: "The protection granted by international humanitarian law remains in effect throughout the present period of cessation of the armed conflict."[50] It is not clear how this statement can be reconciled with the general rule that humanitarian law applies only until "the general close of hostilities", except with regard to prisoners who remain in the power of a party to the conflict or with regard to occupied territories.[51] A 1992 report on Afghanistan finds that rocket attacks on cities violate Protocol I, even though it suggests that such attacks were carried out by insurgent forces, not a foreign army.[52]

In 1995, the Special Rapporteur on Executions undertook a mission to the "Papua New Guinea island of Bougainvillea", where an independence movement was locked in conflict with the armed forces and pro-government militia. The report urged the government to "take into account" the provisions of the Fourth Geneva Convention.[53] Recommendations of this sort are not necessarily predicated on a finding that the instrument in question is legally applicable, but since the Fourth Convention applies to international armed conflicts, it would have been preferable to state explicitly why that instrument might be considered relevant to this conflict.

It would be neither feasible nor desirable to curb the independence of the various UN mechanisms which examine the human rights situation in

[48] E/CN.4/1996/4/Add.1, paras. 61, 63 and 64.

[49] E/CN.4/1998/54, paras. 19-57.

[50] A/47/596, para. 105.

[51] Protocol II, Art. 2 (2); for international armed conflict, see Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 6, and Geneva Convention relative to the Treatment of Prisoners of War, Art. 5.

[52] E/CN.4/1992/33, paras. 37, 38 and 98.

[53] E/CN.4/1996/4/Add.2, para. 104.

specific countries in order to eliminate the risk that these mechanisms will offer different interpretations concerning the applicability of international humanitarian law. There is a tendency towards greater cooperation and coordination among such mechanisms, which has proved beneficial and which hopefully will continue to grow. What does not yet exist, and would be useful, is a forum where UN human rights experts and specialists in international humanitarian law could periodically engage in an informal exchange of views on issues of common concern.

Support for ratification of humanitarian law instruments and for the International Committee of the Red Cross

Ratification of international humanitarian law

When States under scrutiny have not ratified all the relevant instruments of international humanitarian law, rapporteurs may encourage them to do so. The Special Rapporteur on Executions, for example, encouraged the government of Papua New Guinea to ratify the Fourth Geneva Convention, although, perhaps paradoxically, no mention was made of Protocol II.[54] The Special Rapporteur on Sudan encouraged the government to ratify Protocol II,[55] and a similar recommendation was addressed to Sri Lanka by the Working Group on Disappearances and by the Representative of the Secretary-General on Internally Displaced Persons.[56] The Special Rapporteur on Cambodia recommended ratification of the 1980 Convention on Certain Conventional Weapons.[57]

When governments do ratify international instruments of humanitarian law, this is duly mentioned. The 1996 report of the Special Rapporteur on Myanmar notes ratification of the 1949 Geneva Conventions, while calling for ratification of their Additional Protocols.[58] The 1995 report on Colombia prepared jointly by the Special Rapporteurs on Torture and on Executions "welcomes" the ratification of Protocol II, although it cautiously adds that ratification has "symbolic significance", and appeals to all parties to the conflict to comply with the Protocol's provisions.[59]

[54] E/CN.4/1996/4/Add.2.

[55] E/CN.4/1997/58, para. 59(c).

[56] E/CN.4/1994/44/Add.1, para. 80.

[57] E/CN.4/1994/73/Add.1, para. 79.

[58] E/CN.4/1996/65, paras. 3 and 180(b).

[59] E/CN.4/1995/111, para. 129.

Incorporation of international humanitarian law into domestic law

UN human rights rapporteurs have also made recommendations concerning the incorporation of provisions of international humanitarian law into domestic legislation. In 1997, for example, in an analysis of the problem of impunity, the Special Rapporteur on Torture pointed out that both the Geneva Conventions and the Convention Against Torture obliged States Parties to extradite or prosecute torturers found within their jurisdiction, regardless of the nationality of the victim or the accused, or the country where the crime was committed. He urged all States to review their legislation to ensure that their courts had jurisdiction over war crimes and crimes against humanity.[60]

Support for the International Committee of the Red Cross

Their investigations of human rights violations give UN human rights rapporteurs a unique opportunity to appreciate the activities of the ICRC, and recommendations aimed at facilitating its work frequently appear in their reports. In at least one instance, a rapporteur encouraged the government to invite the ICRC to return to the country.[61] Recommendations that the government allow the ICRC to visit prisons or detention centres are common, and have appeared in reports on Cambodia,[62] Iran[63] and the former Yugoslavia.[64] On occasion, these recommendations have been directed specifically to opposition movements.[65] After a visit to East Timor, the Special Rapporteur on Torture made such a recommendation in connection with a specific incident in a meeting with the Indonesian Minister of Foreign Affairs.[66] A similar recommendation was made by the Special Rapporteur on the former Yugoslavia during his first mission.[67] Governments have also been called on to cooperate with the ICRC in clarifying the whereabouts or fate of persons who have disappeared during an armed conflict.[68]

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[60] E/CN.4/1998/38, para. 230-232.

[61] Myanmar, E/CN.4/1996/65, para. 180(e).

[62] A/49/635, para. 158(h).

[63] E/CN.4/1992/34, paras. 444-446.

[64] E/CN.4/1992/S-1/9, para. 64.

[65] Special Rapporteur on Afghanistan, E/CN.4/1992/33, para. 115(e).

[66] E/CN.4/1992/17/Add.1, para. 55.

[67] E/CN.4/1992/S-1/9, para. 13.

[68] Iraq, E/CN.4/1997/57, para. 24; former Yugoslavia, E/CN.4/1996/63, para. 58.

Contributions to the development of international humanitarian law

UN human rights bodies have recently provided the framework for efforts to develop or promote recognition of instruments intended to consolidate and clarify standards in three areas where the two bodies of law converge: states of emergency and situations of internal unrest; the rights of displaced persons; and the right of victims to reparation.[69] An effort is also underway to raise the age limit for participation in armed conflicts and possibly the age of recruitment through the adoption of an optional protocol to the Convention on the Rights of the Child. Such efforts are beyond the scope of this article.

UN human rights mechanisms also contribute to the development of international law by interpreting and consolidating the law through their practice. In so far as international humanitarian law is concerned, interesting developments can be observed regarding the evolution of certain standards from treaty law to customary law.

In 1994, referring to the provisions of Protocol II to the 1980 Convention on Certain Conventional Weapons which prohibit the indiscriminate use of landmines against the civilian populatives and oblige States Parties to keep a record of their location, Professor van der Stoel wrote:

> "While the Special Rapporteur recognizes that Iraq is not a signatory to the said Convention, he equally observes that the specific standards articulated by the Convention derive from three customary principles of international humanitarian law: (a) that the right to adopt means of warfare is not unlimited; (b) that unnecessary suffering is prohibited; and (c) that non-combatants are to be protected. In so far as land mines appear to have been placed outside the war zone without adequate protection of civilians, and inasmuch as it does not appear that the laying of the minefields was adequately recorded ... the Government of Iraq may be in violation of customary international humanitarian law."[70]

The Special Rapporteur on Iran, Mr. Galindo Pohl, made a similar contribution regarding the legality of the use of chemical weapons by Iraq during the eight-year conflict with Iran:

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[69] Declaration of minimum humanitarian standards, E/CN.4/1996/80; Guiding Principles on internal displacement, E/CN.4/1998/53/Add.2; and draft Basic Principles and Guidelines on the right to reparation of victims of violations of human rights and international humanitarian law, E/CN.4/1998/34.

[70] E/CN.4/1994/58, para. 108.

"No one could fail to be moved at the horror of chemical weapons, but emotional reactions aside, it is appropriate to examine the case from the point of view of international law. In the opinion of the Special Representative, the prohibition of the use of chemical weapons, contained in the Geneva Protocol of 1925, has become a rule of *jus cogens*, and therefore binds all States without exception ... It is an imperative prohibition from which no derogation is permitted, because it corresponds to the moral and legal conscience of humanity."[71]

A third example can be found in the 1992 report of the Special Rapporteur on Afghanistan, Professor Ermacora, which is devoted largely to the situation of prisoners. At the time, the Soviet Union had withdrawn from Afghanistan, but fighting continued, especially between rival opposition factions. A paragraph analysing the applicability of the Third Geneva Convention, common Article 3 and Additional Protocol I to different categories of prisoners concludes with the following statement; "In any case, the Protocols additional to the Geneva Conventions serve as guidelines for the organs of the United Nations."[72] Subsequently, after citing Article 118 of the Third Geneva Convention concerning the duty to release and repatriate prisoners of war after the cessation of hostilities, the report declares: "The Special Rapporteur is of the opinion that combatants as defined by Article 3 common to the Geneva Conventions are covered by Article 118 (1) of the said Convention on humanitarian grounds."[73] This suggests that the duty to release prisoners, and perhaps some of the other provisions of the Third Geneva Convention and of Protocol I pertaining to the rights of prisoners, are in the process of being recognized as customary international humanitarian law.

This report even suggests that the above-mentioned standards may apply to prisoners in an internal armed conflict, or at least in the internal dimension of an "internationalised internal armed conflict": "In addition, the so-called political prisoners held in Afghan prisons who belong to the armed forces of the opposition may also be considered as captured combatants within the meaning of the Geneva Conventions and Additional

[71] E/CN.4/1992/34, paras. 398 and 399.

[72] E/CN.4/1992/33, para. 49.

[73] *Ibid.*, para. 56.

Protocol I thereto, irrespective of their internal legal status (most of them are considered to be terrorists within the meaning of the Afghan law concerning terrorism)."[74] One factor which appears to underlie the Rapporteur's conclusions, and which may explain his rather far-reaching proposals regarding the scope of these standards, is the sense that discrimination cannot be tolerated between different classes of combatants imprisoned in connection with the same conflict.[75]

Of course, customary international law is created by States, not by UN Rapporteurs, even those who are authorities on international law. But the interpretations offered by UN Rapporteurs cannot be brushed aside. These are serious efforts by competent international experts to determine how humanitarian law can and should be applied to meet the exigencies of real situations. They make a contribution to the understanding of the law which, despite the limitations inherent in the working methods used, cannot be overlooked.

Even more important is the value of the statements by UN human rights mechanisms as a stimulus for State practice regarding humanitarian law, including the State or States whose conduct is alluded to and the States which make up the UN bodies that receive these reports. The reports referred to here are submitted to the Human Rights Commission, which is composed of 53 UN member States, and in some cases to the General Assembly or, less often, the Security Council. To the extent that the UN human rights mechanisms develop a coherent body of interpretation that is not contested by the States directly concerned and is approved by the political organs of the United Nations, they can, with time, make a real contribution to the development of customary standards of international humanitarian law.

Less frequently, UN human rights mechanisms have suggested the need for new international instruments setting humanitarian standards. In 1994, the first Special Rapporteur on Cambodia voiced support for the convening of an international conference to ban the manufacture and export of anti-personnel landmines.[76]

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[74] *Ibid.*, para. 46.

[75] See for example paras. 53-55, 105 and 106, which implicitly raise issues concerning discrimination on the basis of nationality, religion and rank.

[76] E/CN.4/73/Add.1, para. 79.

War crimes and genocide

Some rapporteurs have addressed the question of whether the serious violations of human rights law and humanitarian law which they have found to have occurred might constitute war crimes, crimes against humanity or genocide.

The Special Rapporteur on Iraq concluded that "serious violations of human rights committed against the civilian population of Iraq both in times of war and peace involve crimes against humanity ... Specifically, the use of chemical weapons against numerous communities in northern Iraq ... constitute a crime against humanity."[77] He also said that the information he had obtained through his investigation "may prove State responsibility for breaches of the 1948 Genocide Convention".[78] According to this Convention, genocide can take place "in time of peace or in time of war." The possible genocidal acts referred to by the Rapporteur had taken place during a military campaign aimed at eliminating the Kurdish guerrilla forces and the Kurdish civilian population, that is in the context of an internal armed conflict.[79]

In his first report, the Special Rapporteur on the former Yugoslavia stated: "The need to prosecute those responsible for mass and flagrant human rights violations and for breaches of international humanitarian law and to deter future violators requires the systematic collection of documentation on such crimes and of personal data of those responsible. A commission should be created to assess and further investigate specific cases in which prosecution may be warranted ..."[80] The following year, the Rapporteur observed: "Evidence of war crimes during the conflicts in both Croatia and in Bosnia and Herzegovina is mounting." The destruction of religious sites was among the crimes specifically mentioned.[81]

As for the Committee on the Elimination of Racial Discrimination, it adopted a resolution declaring that it "considers that an international tribunal with general jurisdiction should be established urgently to prosecute genocide, crimes against humanity ... and grave breaches of

[77] E/CN.4/1994/58, para. 189.

[78] *Ibid.*, para. 185.

[79] *Ibid.*, para. 112.

[80] E/CN.4/1992/S-1/9, para. 69.

[81] E/CN.4/1993/50, para. 259.

the Geneva Conventions of 1949 and the Additional Protocols of 1977 thereto".[82]

UN human rights mechanisms have also demonstrated concern for the rights of those accused of war crimes. In a 1998 report on Croatia, the second Special Rapporteur on the former Yugoslavia expressed deep concern regarding the conviction of an individual for war crimes on the basis of a slight association with a local militia unit.[83]

Concluding observations

The increasing application of humanitarian law by UN human rights mechanisms is, perhaps, the inevitable consequence of years of promoting the idea that human rights law and humanitarian law are complementary and dedicated to the same ultimate objective. Moreover, as the geographic and thematic coverage of UN human rights mechanisms expands and the global role of the UN human rights system is strengthened, such mechanisms are increasingly called upon to deal with situations of armed conflict — and it is in such situations that the most serious and widespread types of human rights violations occur.

The normative framework provided by international human rights law is sufficient to cover most human rights violations, even those linked to armed conflict. Yet, certain specific types of violations occur in situations where the standards set by humanitarian law are the most directly relevant. The application of international humanitarian law by UN human rights mechanisms to address violations of basic rights committed by non-State parties to an armed conflict reinforces the impartiality and objectivity of the system while respecting basic legal principles concerning State responsibility. And the use of humanitarian standards to interpret human rights standards, and other ways of developing stronger composite standards drawing on both bodies of law to cover practices and situations where both have relevance, enhances the compatibility and effectiveness of the two systems.

In general, the application of substantive humanitarian law standards by UN human rights mechanisms has been judicious. Practice concerning the applicability of international humanitarian law, including when it

[82] General Recommendation XVIII, operative para. 1, UN doc. A/49/18, 1994, reprinted in "Compilation...", *supra* (note 16), p. 111.

[83] E/CN.4/1998/14, para. 60.

comes to dealing with admittedly sensitive and sometimes complex issues such as whether a situation qualifies as an armed conflict and, if so, whether it is domestic or international in character, has unfortunately been somewhat inconsistent and, on occasion, frankly questionable. Humanitarian law must be taken seriously, and the complementarity of the two bodies of law should not be considered as a licence to act on unexamined presumptions.

The ICRC has a special responsibility for safeguarding the integrity of international humanitarian law and for promoting its implementation and development. Yet it does not have sole responsibility for monitoring compliance with humanitarian law during armed conflicts. That responsibility is shared with national tribunals, and with international tribunals when such tribunals have been established. In some instances, the parties to peace agreements and higher UN political organs have expressly given this responsibility to ad hoc human rights mechanisms. UNICEF and UNHCR have used their influence to help persuade non-State parties to armed conflicts to make commitments to respect humanitarian law.

The ICRC's confidential efforts to raise issues concerning non-observance of humanitarian law with the responsible parties are invaluable. During a conflict, however, operational and humanitarian imperatives inevitably receive highest priority. "Technical" legal issues may be addressed only if doing so will have a beneficial effect on the delivery of relief, access to prisoners and other field activities.

Human rights mechanisms are not subject to such constraints: publication of the results of their investigations is their *raison d'être*, and they have no responsibility for providing humanitarian services. Their efforts to investigate violations of international humanitarian law as an activity subsidiary to the monitoring of human rights violations are, therefore, complementary to the role of the ICRC. The ICRC has broader concerns, it usually has greater and more continuous access to conflict areas, and it uses different procedures. But the roots of inhumanity are deep, and the combined efforts of all concerned are needed to minimize the impact of war on the civilian population and other non-combatants.

It is important to ensure that organizations sharing the same goals do not inadvertently undermine one another's efforts. The independence of the ICRC and the confidentiality of the information it obtains through its field operations preclude the sharing of most types of information with UN human rights investigators and the adoption of joint policies or strategies with regard to specific countries. Other forms of cooperation are possible, however. Greater dialogue would certainly be beneficial, and the

sharing of experiences, within limits, would foster a common perspective on important issues. Activities of this kind would help promote better application of international humanitarian law without sacrificing the principles of independence and confidentiality.