INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS

BY

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The concept of international humanitarian law can be defined as the corpus of international rules, established by treaties or custom, which are specifically intended to be applied in international and non-international armed conflicts. These rules restrict, on humanitarian grounds, the right of the parties to the conflict to employ means and methods of warfare of their choice and protect persons and property which are, or could be, affected by the conflict.[1] They are inspired by humanitarian principles and also aim to restrict violence.

Traditionally international humanitarian law is divided into two parts: the law of Geneva and the law of the Hague.

The law of Geneva concerns the protection of the individual against the abusive use of force and was born at Geneva by the adoption in 1864 of the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.* The Convention guaranteed the principle of the neutralisation of the wounded and of all personnel whose duties were to aid them. The equipment necessary for them to carry out their role as well as ambulances and hospitals were to be protected by a distinctive sign.[2]

Progress was much slower in the case of maritime warfare, and it was not until the First Hague Peace Conference in 1899 that a *Convention for the Adaptation to Maritime Warfare of the Principles of the 1864 Geneva Convention* was adopted.

Experience from the First World War led to the adoption in 1929 of the *Third Geneva Convention relative to the Treatment of Prisoners of War.* At the end of the Second World War the necessity appeared of again revising and extending the Conventions in the light of experience. Likewise, there was a general understanding that the benefits of the Conventions be extended to civilians. Accordingly, at a Diplomatic Conference in Geneva in 1949, four Geneva Conventions were adopted, viz.:

I First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;

II Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;

[1] International Committee of the Red Cross, *The Red Cross and Human Rights*, Working document prepared by the International Committee of the Red Cross in collaboration with the Secretariat of the League of Red Cross Societies, Geneva 1983, p. 21.

[2] Coursier, *Course of Five Lessons on the Geneva Conventions*, Geneva 1962, p. 5.

III Third Geneva Convention relative to the Treatment of Prisoners of War;

IV Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

The law of the Hague prohibits particular weapons in warfare and certain methods of warfare. The *1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles* has been regarded as the first major international agreement prohibiting the use of a particular weapon in warfare.[3]

What has become known as the First Hague Peace Conference was held in 1899 with the primary objective of limiting armaments. The Conference adopted a number of conventions and declarations, of which the *1899 Hague Declaration Concerning Expanding Bullets* (so-called dumdum bullets) is still of relevance. The Declaration has been regarded as codifying one aspect of the customary rule prohibiting weapons causing unnecessary suffering. It has also been invoked to outlaw modern weapons having effects similar to those of dumdum bullets, especially high-velocity rifle ammunition.[4]

At the Second Hague Peace Conference in 1907 further conventions relating to a prohibition of particular weapons in warfare and methods of warfare were adopted. Of particular importance is the *1907 Hague Convention IV Respecting the Laws and Customs of War on Land* and the *Regulations* thereto, which in its entirety has been regarded as declaratory of customary international law.[5]

Under the auspices of the League of Nations the *1925 Geneva Protocol for the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* was adopted. The Protocol is still of relevance and is considered to contain principles of international customary law. During the Vietnam war the UN General Assembly adopted several resolutions calling for the strict observance and interpretation of the Geneva Protocol.[6] In the on-going war between Iran and Iraq both parties to the conflict have accused each other of having used weapons that contravene the Geneva Protocol.

As regards the protection of cultural property some provisions can be found in the 1907 Hague Convention and in other agreements as well. Experience from the Second World War showed, however, that the protection was unsatisfactory. Under the auspices of UNESCO the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* was adopted. A more recent agreement within the area of the law of the Hague is the *1981 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons*

[3] Roberts-Guelff, *Documents on the Laws of Warfare*, Oxford 1982, p. 29.
[4] *Op.cit.*, p. 40.
[5] *Op.cit.*, p. 44.
[6] United Nations, General Assembly Resolution 2603A (XXIV) of 16 December, 1969.

which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects and three protocols thereto. Protocol I outlaws weapons whose primary effect is to injure by fragments which in the human body escape detection by X-rays. Protocol II aims at protecting civilians from the effects of mines and booby-traps, while Protocol III prohibits and restricts the use of incendiary weapons.

As a result of the experience gained following the entering into force of the above four Geneva Conventions, it was felt that further steps were indispensable. Accordingly, a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts adopted in 1977 two Additional Protocols to the Geneva Conventions. Protocol I relates to international armed conflicts, and Protocol II to non-international armed conflicts.

The Additional Protocols both contain regulations on combat law as well as regulations protecting the individual, with the result that it has been argued that the difference between the law of Geneva and the law of the Hague is now an artificial one.[7] However, it may still be appropriate to distinguish between the law of warfare and the protection of individuals against the abusive use of force.

The legal technique used in respect of the law of the Hague is peculiar and has been characterized as being not legally sound. The technique leads to the condemnation of a specific kind of test or the use of a specific new weapon, when in the meantime other, even more destructive weapons have been invented which the Conveniton does not mention. "Let us compare here the technique of codifying the international law with that of codifying the domestic law. In terms of domestic penal law, do we expect that each particular technique of killing an individual, or each object that can be taken away from one's neighbour, should be specifically mentioned to make murder or theft a punishable offence? The answer would obviously be negative."[8]

Quite another situation is involved as regards the law of Geneva. This province of law is much more developed. A certain machinery exists in order to control its proper implementation, *inter alia* through the International Committee of the Red Cross (ICRC) and the system of protecting powers. Here the practical possibility and the likelihood that a counterpart will observe the protection of the individual against the abuse of force is greater.[9]

Human rights are concerned above all with the relations between the state

[7] Graefrath, "Die Bedeutung des Ergänzungsprotokolls für den Schutz der Zivilbevölkerung", *Studies and Essays on International Humanitarian Law and Red Cross Principles*, Geneva 1984, p. 171.

[8] Nahlik, "The Role of the 1977 Geneva Protocols in the Progress of the Law of Armed Conflicts", *European Seminar on Humanitarian Law, Jagellonean University, Krakow*, 1979, p. 16.

[9] Melander, "Torture Education during Military Service", *Studies and Essays on International Humanitarian Law and Red Cross Principles*, Geneva 1984, p. 413.

and its nationals. They have their foundation in ethical, moral and sometimes religious ideas of a more or less universal character. Their legal and political origin dates back to the 17th century and the works by Grotius, Locke and Montesquieu, whose writings introduced a completely new way of looking at the relations between the individual and the state. As a result there developed what later came to be known as the first generation of human rights. Important cornerstones are the 1791 Bill of Rights following the American Declaration of Independence of 1776, and the French Declaration on Human Rights, adopted in 1789.

The first generation of human rights comprises civil and political rights, viz. the physical and moral integrity of the human person; the right to liberty; the right to family life and privacy; the right to intellectual activity; the right to political and trade union activity; and the right to the product of individual economic activity.

In treaty law the first generation of human rights has been laid down in a number of international agreements, the most important being the *1966 UN Covenant on Civil and Political Rights*. Within regional organizations there are corresponding agreements: *the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; the American Convention on Human Rights* of 1969, and *the African Charter on Human and Peoples' Rights* of 1981 (not yet in force).

It is customary to draw a clear distinction between international humanitarian law and human rights law, in particular civil and political rights. It has been argued that they have different sources and different purposes.

One argument has been that humanitarian law refers to the relation between states, while human rights are concerned exclusively with the relations between a state and its nationals. This argument is largely connected with the implementation system, i.e. the various possibilities of international supervision and control.

Humanitarian law has been laid down in treaties between states. If warfare is carried out by a state in contravention of its international obligations, the other party may be entitled to take countermeasures or reprisals in accordance with international law. Originally no system of international supervision existed. However, a practice of appointing protecting powers was established by the 1929 Convention on the protection of prisoners of war, which system had been developed further by the 1949 Convention and, in particular, by the First Additional Protocol.

The possibility of establishing a fact-finding commission is prescribed for in the First Additional Protocol. The Commission will be competent to enquire into any facts alleged to be a grave breach of the Conventions and the Protocol or other serious violation of these agreements. It will also be competent to

facilitate the restoration of an attitude of respect for the Conventions and the Protocol (First Additional Protocol, art. 90).

In the Conventions and the First Additional Protocol a few tasks are given to the ICRC. The Committee is authorized to offer its services to the parties to the conflict. In particular, the ICRC has specific tasks as regards prisoners of war and civilian-protected detainees according to the Third and the Fourth Conventions respectively. In practice the ICRC carries out more substantive tasks. The organization tries to negotiate with the parties to a conflict in order to bring into force all parts of the Convention also in non-international armed conflicts.

In recent practice the system of protecting powers has seldom been carried out in the way that was foreseen in the Conventions. However, the role of the ICRC has been strengthened and the ICRC has in many instances been responsible for these activities.

The ICRC supervises the application of the Conventions, *inter alia* by visiting camps for prisoners of war. Should the Committee find that a party to the conflict is contravening the Convention, it will, as a last resort, publish a report giving details of the extent and nature of the violations. A recent example can be taken from the on-going war between Iran and Iraq, where the ICRC recently published a report in which it was stated that the parties were not abiding by the Third Convention as regards the treatment of prisoners of war.

The visits paid by the organization to places of detention in countries where there are large numbers of political detainees may be regarded as an extension of the ICRC's responsibility for visiting prisoners of war. In such cases the ICRC is acting at the discretion of the state in question and in confidence.[10]

Human rights, on the other hand, were previously considered to be a purely internal question and were concerned only with relations between the state and its nationals. In textbooks on international law from the beginning of this century it is clearly stated that human rights have no place in international law, since this area of law was concerned exclusively with relations between states and therefore could not be concerned with the rights of individuals.[11]

During the era of the League of Nations the individual became the object of interest to the international community, at least to a limited extent. Within the League of Nations protective measures were taken as regards refugees and certain groups of minorities. The suppression of slavery was discussed and a few treaties adopted. Improvements in working conditions were promoted through the International Labour Organization.

[10] Melander, "Political Prisoners—A Dilemma of Our Time", *Israel Yearbook on Human Rights*, Tel Aviv 1981, p. 76.

[11] Oppenheim, *International Law*, vol. I, 4th ed. London 1928, p. 21.

It was not until after the Second World War that human rights became of real interest to the international community, certainly because of the situation in Nazi Germany. The preamble of the UN Charter reaffirms faith in the dignity and worth of the human person, in the equal rights of men and women. And one of the purposes of the United Nations is to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion (art. 1:3).

An effective way of promoting human rights is considered to be the adoption of international agreements. In the course of the years a considerable number of agreements have been adopted, from the more general Covenant on Civil and Political Rights, to the special 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment. However, it is considered necessary not only to formulate human rights. What is equally important is that agreements relating to human rights contain a system of implementation that enables the international community to satisfy itself that a country is applying the agreement strictly.

In practice a variety of methods of implementation have been used:

(1) One possibility is to oblige a contracting state to enact national legislation whereby any act contrary to the particular convention should be considered as a punishable offence.

(2) Another method of monitoring the implementation of treaties relating to human rights is to oblige the contracting party to submit reports to an international organization on the measures they have adopted to give effect to the provisions of the treaty.

(3) According to a number of human rights conventions a contracting party may formulate a communication against another contracting party in respect of a failure of the latter to fulfil its obligations according to the convention in question.

(4) Some human rights conventions prescribe for an individual right of petition, i.e. a person who claims he is a victim of a violation of any of the rights set forth in a given convention has the possibility of communicating his complaint to an international organ.

(5) Sometimes intergovernmental organizations or international organs are competent to receive and discuss complaints relating to human rights made against a state, irrespective of any contractual obligation.

(6) A similar method is to establish commissions of enquiry following information that human rights have been systematically violated in a state. In some cases such a commission presupposes the consent of the country in question.

Since the Second World War human rights have gradually developed into an important part of international law. In the field of international supervision

and the establishment of a system of controlling state performance, common elements can be found between humanitarian law and human rights law. In this respect the two fields of international law have come closer to each other.

A second argument for drawing a line between humanitarian law and human rights is that their material content differs considerably. The aim of humanitarian law is to humanize warfare, and originally it imposed restrictions on the right of the parties to a conflict to employ means and methods of warfare which cause excessive human suffering, and was also designed to protect persons *hors de combat*. Human rights, on the other hand, are based on the "inherent dignity and ... the equal and inalienable rights of all members of the human family".[12] While human rights contain provisions on the right to life, humanitarian law prescribes that a human being may not be killed by making use of an inhumane weapon. Human rights law prohibits the arbitrary arrest of a human being, while humanitarian law includes a concern for the protection of enemy combatants who have fallen into the hands of a power involved in an armed conflict. The protective element in the internment of prisoners of war has been so prominent that it has been considered a privilege to obtain prisoner-of-war status.[13]

During the 20th century humanitarian law has developed and provisions have been adopted which traditionally fall within the scope of human rights law. This development had its origin already in the 1929 Convention concerning the treatment of prisoners of war.

All forms of corporal punishment, confinement in premises not lighted by daylight and, in general, all forms of cruelty were prohibited (art. 46). A prisoner should not be punished more than once for the same act or on the same charge (art. 52). In judicial proceedings a prisoner of war should be given the opportunity to defend himself (art. 61) and he should have the right to be assisted by a qualified advocate of his own choice (art. 62).

The 1949 Geneva Conventions contain a set of provisions belonging to the field of human rights. Art. 3, which is common to all four Conventions, prohibits torture and cruel treatment. Furthermore, discrimination based on race, colour, religion or faith, sex, birth or wealth, or any similar criteria is prohibited. Provisions are also included that prohibit the passing of sentences and the carrying out of executions without previous judgment pronounced by a regular court, thus affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The protection in respect of judicial proceedings has been enlarged by the

[12] UN Declaration of Human Rights, preamble.

[13] Eide, "The Laws of War and Human Rights—Differences and Convergences", *Studies and Essays on International Humanitarian Law and Red Cross Principles*, Geneva 1984, p. 688.

1949 Geneva Conventions. For instance, the Third Convention on prisoners of war provides that a protected person must be tried by a court which is independent and impartial. The principle of *nullum poene sine lege* has been expressed (art. 99). Similar provisions can be found in the Fourth civil convention. This goes even further, in particular in respect of judicial proceedings in occupied territories (arts. 64 ff.).

The provisions of the Additional Protocols of 1977 express even stronger connection with the field of human rights. Protected persons are entitled to a number of fundamental guarantees drafted in a way that has been strongly influenced by the wording of corresponding provisions in the human rights conventions.

If by humanitarian law is meant the corpus of international rules which are specifically intended to be applied in international and non-international armed conflicts, the argument in favour of different material content has not the same strength. The circle of humanitarian law increasingly overlaps the circle of human rights law.

A third argument for the drawing of a distinct line between humanitarian law and human rights has been that the former can only be applied in time of war and the latter only in time of peace.

It is true that humanitarian law is mainly applicable in time of war. However, in practice it has become more and more difficult to differentiate between war and peace. A remarkable development since the Second World War has been the deliberate change of terminology, whereby "war" has been replaced by the term "international armed conflict". It should also be noted that the UN Charter does not make any reference to humanitarian law, this being due to the theory that it was unnecessary to discuss the laws of war, since war had been outlawed.[14]

It is hardly possible to establish objective criteria when an international armed conflict is involved. The term can be defined as a conflict in which armed force of a certain intensity is being used. However, such a definition leaves it to the parties themselves to qualify the conflict. "The truth of the matter is that any attempt at greater precision in defining 'armed conflict' will be tied up with certain more or less explicit goals of a political or other similar order."[15]

In many instances, especially as regards the means and methods of warfare, the question of qualification is of no relevance, as many treaties form part of international customary law and as such are applicable to all states and not

[14] Robertson, "Humanitarian Law and Human Rights", *Studies and Essays on International Humanitarian Law and Red Cross Principles*, Geneva 1984, p. 794.
[15] Kalshoven, *The Law of Warfare*, Leyden 1973, p. 11.

merely to those which have formally ratified or adhered to the instrument. Such is, for instance, the case as regards the 1907 Hague Convention respecting the laws and custom of war on land and the 1925 Geneva Protocol.

In other instances it is necessary for the conflict to qualify as an international armed conflict before the various agreements can be applied. Sometimes the applicability of the Geneva Conventions has been disputed and various opinions have been expressed as to whether an international or a non-international armed conflict has arisen.[16]

It has been said that human rights are of relevance only in time of peace. However, today this statement is open to objections. The various conventions relating to human rights often contain provisions according to which it is possible to derogate from the obligations under the particular convention in time of war or internal disturbance. However, some rights must be observed.

The European Convention on human rights provides that it is not permitted to derogate from the right to life "except in respect of deaths resulting from lawful acts of war". Similarly, derogation is not allowed as regards the prohibition of torture, inhuman or degrading treatment, nor against the prohibition of slavery or servitude. The principle *nullum poene sine lege* should also be applied without exception.

The UN Covenant on Civil and Political Rights also contains a clause of derogation similar to the one in the European Convention. The UN Covenant, however, goes slightly further in that derogation is also prohibited as regards the right not to be imprisoned on the ground of inability to fulfil a contractual obligation, the right to recognition everywhere as person before the law, and the right to freedom of thought, conscience and religion.

The American Convention on Human Rights goes even further and also includes the rights of the family, the right to a name, the rights of the child, the right to nationality, and the right to participate in Government, among the rights that cannot be derogated from.

At the same time, the Additional Protocols to the Geneva Conventions contain provisions belonging to the field of human rights (especially art. 75 of the First Additional Protocol) from which it is possible to derogate according to the human rights conventions. This means that a state party can derogate from a right under the particular human rights convention, but be obliged to apply the same right by virtue of the Additional Protocol.

In conclusion there seems to be a clear tendency today that the links between humanitarian law and human rights are real and growing stronger. The two systems complement each other. "On a more philosophical plane, it

[16] Cf. Rosas, *The Legal Status of Prisoners of War*, Turku 1976, p. 145.

may be added that these two branches of law are impelled by a single conviction: respect for the dignity of the human person, which must be protected against any harm. Beyond legal considerations which are after all of only relative significance, it is essential to engage all possible means to achieve the common purpose."[17]

[17] International Committee of the Red Cross, *The Red Cross and Human Rights*, Working document prepared by the International Committee of the Red Cross in collaboration with the Secretariat of the League of Red Cross Societies, Geneva 1983, p. 29.