Introduction

Armed conflict and massive violations of fundamental human rights continue to elude the efforts of the international community to prevent them. The shortcomings of international law are more strikingly illustrated with every crisis. Even genocide, the most intolerable assault on humanity, so far has proven impossible to stamp out. To most people, and probably to most jurists, international law appears not merely ill-equipped but broadly impotent in its ability to provide concrete solutions to these blatant violations. While international lawyers may not subscribe completely to this assessment, a real unease must accompany an analysis of theoretical constructs which are supposed to provide solutions to these intractable problems. Clearly, human rights and humanitarian law do not offer easy answers as to how to prevent infringements of the basic dignity and integrity of all people in times of war and peace. They represent rational attempts to articulate standards which ideally will become universally accepted and guide the international community in its evaluation of, and reaction to, such violations.

The international community has succeeded in building a consensus on a large number of standards in the fields of human rights and humanitarian law. We now have a thick code of rules at our disposal, although it clearly does not address every situation nor cover every region. Those rules will be called upon to evolve as the challenges facing the international community take on new shapes. Indeed the adoption of the Statute of the International Criminal Court and the growing jurisprudence of the International Criminal Tribunals for former Yugoslavia and Rwanda, for example, are signals of the speed at which some segments of international law are changing. But adding new rules and creating new institutions, even if they are accepted by a large number of states, does not in itself provide relief to individuals

whose interests are being trampled. We must attempt not only to better our understanding of why such violations occur, a task primarily carried out by sociologists and political scientists, but also to investigate what can be achieved with the normative instruments already at our disposal.

Comparative law's promise is that, by examining how two legal systems seek to protect similar interests by way of different norms or institutions, we achieve a greater understanding of each of these systems. A comparison of human rights and humanitarian law thus seems full of potential, as the two systems appear to share, as one of their central goals, the protection of the integrity of the human person. One of the by-products of comparative analysis is the possibility of finding in one system answers which may be borrowed and adapted to solve challenges faced by another legal system. Such cross-pollination between human rights and humanitarian law is also made possible by their similarity. This study undertakes to analyse systemic similarities and differences between human rights and humanitarian law, to assess whether and to what extent the promise of comparative law can indeed be realised in their respect.

The issue of a connection between human rights and humanitarian law surfaced on the legal and political scene in the late 1960s and early 1970s. Links between the two bodies of law had been discussed from the end of the Second World War, following the successive adoptions of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions. By the late 1960s, humanitarian law stood at a standstill following the cool reception by the majority of states to the proposal by the International Committee of the Red Cross for supplementary rules for the protection of civilian populations in times of war, approved by the XIXth International Conference of the Red Cross in New Delhi in 1957.[1] Human rights law, on the other hand, was experiencing a great boom, most strikingly with the adoption in 1966 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights,[2] which concretised into positive norms the ideals embodied in the Universal Declaration. Given the bleak prospects for a renewed

[1] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, *reprinted in* Dietrich Schindler and Jirí Toman, *The Laws of Armed Conflict*, 3rd edn (Dordrecht: Nijhoff, 1988) 251.

[2] 16 December 1966, (1966) 999 UNTS 1 and 171, *reprinted in* Ian Brownlie ed., *Basic Documents on Human Rights*, 3rd edn (Oxford: Clarendon, 1992) 114 and 125.

humanitarian order, the pressing need for increased protection of victims of war caught in the conflicts in Algeria, Nigeria, the Middle East and the Indochinese peninsula, and the more extensive range of treaty human rights norms at the time, a partial fusion of human rights and humanitarian law appeared to be a practical and effective way of increasing protection for individuals affected by armed conflicts.[3]

The rapprochement of human rights and humanitarian law was given a decisive push by the 1968 International Conference on Human Rights, convened by the UN in Tehran to celebrate the International Year for Human Rights. The conference marked the UN's first foray into the development of humanitarian law, a field considered up to then incompatible with the very purpose of the organisation and the prohibition of the use of force in Article 2(4) of the UN Charter.[4] Humanitarian desire to expand the protection afforded the individual by international law in times of war was compounded by the charged political context in which the conference took place. Following the Six Day War, Arab states wanted condemnation of Israeli behaviour in the occupied territories, while Third World and Eastern Bloc states sought to legitimise decolonisation wars.[5] The first resolution of the Conference, entitled 'Respect and Enforcement of Human Rights in the Occupied Territories', combined human rights and humanitarian law in calling on Israel to apply both the Universal Declaration and the 1949 Geneva Conventions in the occupied territories.[6] The Conference then adopted the more general Resolution XXIII entitled 'Respect for Human Rights in Armed Conflicts', which proffered, in a manner rather more vague and general than its title would suggest, that 'peace is the underlying condition of the full observance of human rights and war is their negation', and that 'even during the periods of armed conflicts, humanitarian principles must prevail'. It also called for those fighting racist or colonial regimes to be

[3] See G. I. A. D. Draper, 'The Relationship Between the Human Rights Regime and the Law of Armed Conflict', in *Proceedings of the International Conference on Humanitarian Law – San Remo, 24–27 Sept. 1970* (Grassi: Istituto Editoriale Ticinese, 1970) 141, 145; Alessandro Migliazza, 'L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme', (1972-III) 137 *Recueil des cours* 142, 192; 'Report of the Secretary-General on Respect for Human Rights in Armed Conflicts', UN Doc. A/8052 (1970) 13 para. 28.

[4] 'Report of the Secretary-General on Respect for Human Rights in Armed Conflicts', UN Doc. A/7720 (1969) 11 para. 19.

[5] See Henri Meyrowitz, 'Le droit de la guerre et les droits de l'homme', (1972) 88 *Revue de droit public et de la science politique en France et à l'étranger* 1059, 1061–2.

[6] 12 May 1968, 'Final Act of the International Conference on Human Rights', 22 April–13 May 1968, UN Doc. A/Conf.32/41 (Sales No. 68.XIV.2).

treated as either prisoners of war or political prisoners.[7] Despite the ambiguous reference to 'humanitarian principles', which could reasonably be interpreted to refer to either human rights or humanitarian law, Resolution XXIII has been seen as a turning point, marking a change in attitude in thinking about the relationship between human rights and humanitarian law.[8]

Resolution XXIII was reaffirmed by the UN General Assembly later that year, with the adoption of Resolution 2444 (1968), 'Respect for Human Rights in Armed Conflicts', which called on the Secretary-General to draft a report on measures to be adopted in order to increase the protection given to all individuals in times of armed conflict.[9] No direct linkage of human rights to humanitarian law can be found in the body of the resolution. The only hint of such a connection lies in the title, borrowed from Resolution XXIII. The Secretary-General's two reports issued in 1969 and 1970, likewise entitled 'Respect for Human Rights in Armed Conflicts', represent a significant contribution to the position that no fundamental distinction exists between human rights and humanitarian law.[10] In the wake of these reports, the General Assembly called for the enforcement of human rights in times of armed conflict in the form of Resolution 2675 (1970), which affirmed that '[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict'.[11] The General Assembly later adopted a number of similar resolutions leading up to the inception of the 1977 Additional Protocols.[12]

The resolutions of the International Conference on Human Rights and the UN General Assembly did not create an entirely novel concept, but rather reflected real and recognised links between human rights and humanitarian law. Although the regulation of the conduct of warfare in international law considerably predates the appearance of human

[7] *Ibid.*, *reprinted in* Schindler and Toman, *Laws of Armed Conflict*, at 261.

[8] See Meyrowitz, 'Droit de la guerre', at 1060–4; Arthur Henri Robertson, 'Humanitarian Law and Human Rights', in Christophe Swinarski ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva/The Hague: ICRC/Nijhoff, 1984) 793, 795.

[9] 19 December 1968, UN GAOR, 23rd Sess., Supp. No. 19, at 50–1, *reprinted in* Schindler and Toman, *Laws of Armed Conflict*, at 263.

[10] UN Doc. A/7720 (1969); UN Doc. A/8052 (1970).

[11] UN GAOR, 29th Sess., Supp. No. 31, *reprinted in* Schindler and Toman, *Laws of Armed Conflict*, at 269.

[12] A partial list of the resolutions adopted by the UN General Assembly can be found in Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Nijhoff, 1987) 1571–7.

rights, the two bodies of law share as a basis a fundamental concern for humanity. The transformation in the last century and a half of the ancient law of arms into modern humanitarian law stems from humanitarian values derived from a variety of social, religious, political, moral, military and scientific factors.[13] This humanitarian dimension of the law of war was expressed explicitly in the 'Martens clause', inserted in the preamble of the 1899 Hague Convention II, and later in the 1907 Hague Convention IV, as well as in the 1949 Geneva Conventions and 1977 Additional Protocols.[14] It is commonly remarked that while human rights law is infused with considerations of humanity, humanitarian law is shaped by the tension between concerns for humanity and military necessity.[15] Meyrowitz suggests the further distinction that, while human rights law derives from humanity understood as the defining characteristic of the human race (*menschheit*), humanitarian law is coloured not only by that aspect of humanity, but also by humanity understood as a feeling of compassion towards other human beings (*menschlichkeit*), so that in humanitarian law humanity–*menschheit* is safeguarded through humanity–*menschlichkeit*.[16] It seems in fact possible to discern elements of humanity–*menschlichkeit* in human rights as well, particularly in economic, social, cultural and collective rights.

Apart from sharing this concern for humanity as a basis, human rights and humanitarian law have had some influence on each other's development. On the one hand, human rights law in part grew out of war and humanitarian law, more specifically the experiences of the Second World War and, in particular, the Nuremberg trials. Defendants in those trials were charged not only with crimes against peace and war crimes, but also with 'crimes against humanity', that is crimes committed

[13] Draper, 'Relationship', at 141; Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius, 1987) 12–13; Jean Pictet ed., *The Geneva Conventions of 12 August 1949 – Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Geneva: ICRC, 1958) 77.

[14] The most relevant passage of the Martens clause states that 'in cases not included in the present Regulations . . . , populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanities, and the requirements of the public conscience'. 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, *reprinted in* Schindler and Toman, *Laws of Armed Conflict*, at 69; 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, *reprinted in ibid.*, at 77.

[15] See the comments of Judge Koroma in his dissent in the *Advisory Opinion Concerning the Legality of the Use or Threat of Nuclear Weapons*, 8 July 1996, at 15.

[16] Henri Meyrowitz, 'Réflexions sur le fondement du droit de la guerre', in Swinarski, *Mélanges Pictet*, at 419, 426–31.

against any individuals, including a state's own nationals. Hersch Lauterpacht suggested that the acknowledgment by the international community that crimes against humanity existed in customary international law necessarily implied the recognition of corresponding fundamental human rights for the individual.[17] The prohibition of genocide, derived from the concept of wartime crimes against humanity and later enlarged to prohibit similar peacetime behaviour, can perhaps be seen as an example of the intersection of human rights and humanitarian law. On the other hand, the Universal Declaration of Human Rights, drafted in the aftermath of the Nuremberg judgments, had some influence on the development of humanitarian law through the preparation and adoption of the 1949 Geneva Conventions. The influence of the Universal Declaration on the text of the Geneva Conventions may be seen, for instance, in the provisions prohibiting discrimination (Arts. 12/12/16/27). Similar influences can be perceived in other provisions dealing with torture, cruel, unusual and degrading treatment or punishment, arbitrary arrest or detention, and due process.[18] Some parts of the more recent 1977 Additional Protocols bear a strong resemblance to human rights instruments: for instance Article 75 of Protocol I resembles Article 14 of the Covenant on Civil and Political Rights. The progressive rejection of military necessity as a valid justification for disregarding humanitarian law over the course of the last century can also be linked to the development of individual human rights.[19] Thus, as emphasised by UN resolutions in the late 1960s and early 1970s, there has been some degree of cross-pollination in the development of human rights and humanitarian law. This movement continues to this day, most visibly in the work to elaborate minimum humanitarian standards.[20]

Despite the UN's efforts to bring together human rights and humanitarian law, differences between these two areas of international law

[17] Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons, 1950) 35–7; Hersch Lauterpacht, 'The Subjects of the Law of Nations – 2', (1948) 64 *L Quart. Rev.* 97, 104; Johannes Morsink, 'World War Two and the Universal Declaration', (1993) 15 *Hum. Rts Quart.* 357–405.

[18] See Meron, *Human Rights in Internal Strife*, at 13; Migliazza, 'L'évolution', at 191–2; Giuseppe Barile, '*Obligationes erga omnes* e individui nel diritto internazionale umanitario', (1985) 68 *Rivista di diritto internazionale* 5, 12; Claude Pilloud, 'La Déclaration universelle des droits de l'homme et les Conventions internationales protégeant les victimes de la guerre', [1949] *Revue internationale de la Croix-Rouge* 252, 254–7.

[19] Migliazza, 'L'évolution', at 198–201.

[20] See UN Secretary-General, 'Report on Minimum Humanitarian Standards', UN Doc. E/CN.4/1998/87, para. 99.

remain, most clearly with regard to their respective context of application and the types of relationships they regulate. The classic conception of human rights and humanitarian law is that they apply in different situations and to different relationships. That is, human rights are understood to regulate the relationship between states and individuals under their jurisdiction in every aspect of ordinary life, but are largely inapplicable in times of emergencies that threaten the life, independence or security of the nation or state. Humanitarian law, meanwhile, historically has governed the wartime relationship of belligerent states and of states and protected persons, which include enemy persons and neutrals, but not a state's own nationals. Recent developments have narrowed this gap somewhat and have created real examples of crossover between the fields of application of human rights and humanitarian law. In human rights law, a so-called 'third generation' of rights based on global human solidarity and possessing both individual and collective dimensions purports to create rights and obligations between individuals and states other than their own. For instance, the right to peace, the right to development, and the right to food could be claimed by individuals or peoples against other states.[21] In humanitarian law, the ripening into custom of common Article 3 of the 1949 Geneva Conventions, applying basic humanitarian norms to non-international armed conflicts, supplemented by the adoption of Protocols I and II (e.g. Arts. 1(4) and 75, Protocol I; Art. 1(1), Protocol II), has expanded the scope of humanitarian law to cover certain relationships between a state and its own nationals.[22] A measure of overlap can thus be ascertained between the fields of human rights and humanitarian law, although by and large they remain applicable to different situations.

The nature of the relationships envisaged by human rights law and humanitarian law also remains generally and significantly different. Despite humanistic ideas put forward during the Enlightenment to the effect that wars occur between governments and not between peoples, the reality of modern armed conflicts is such that all members of a belligerent state's population are considered enemies, although a clear distinction is drawn between combatants and non-combatants. The

[21] See Stephen Marks, 'Emerging Human Rights: A New Generation for the 1980s?', (1981) 33 *Rutgers L Rev*. 435–52; Louis B. Sohn, 'The New International Law: Protecting the Rights of Individuals Rather than States', (1982) 32 *Am. UL Rev*. 1, 48–62.

[22] Part II (Arts. 13–26) of the 1949 Fourth Geneva Convention also contains minimal norms applicable to the populations of all parties to a conflict, including a state's own nationals.

relationship embodied in humanitarian law is resolutely based on hostility. This holds true not only for relations between a belligerent state and enemy combatants and prisoners of war, but also for relations between non-combatants of enemy states. For example, according to Article 45 of the 1907 Hague Regulations, it is a war crime for an occupying power to attempt to sway the allegiance of the occupied population. Correspondingly, Article 4(A)(2) and (6) of the 1949 Third Geneva Convention grants prisoner-of-war status to civilians taking up arms against an enemy power – inasmuch as they comply with the specific requirements of these provisions – which can be construed as a right of resistance of the population against a hostile force.[23] More generally, humanitarian law as a whole is coloured by the legality of killing enemy combatants and – at least collaterally – innocent civilians.

Human rights law, to the contrary, is based on a model fostering a harmonious relationship between the state and individuals under its jurisdiction. It focuses on individuals and seeks to protect and support personal development to the maximum of their potential. Not only must the state respect individuals by refraining from encroaching on their protected sphere, but it must also at times actively support personal development and be representative of its population, as democracy is an essential condition of freedom and human rights.[24] As such, human rights can be seen as having a constitutional nature, setting universal criteria of political legitimacy.[25]

Human rights and humanitarian law appear related but distinct. Because the substantive norms they contain are in many ways similar or related – for example both provide a protection against torture – there

[23] Meyrowitz, 'Droit de la guerre', at 1097–9. Purely private individuals taking up arms against an occupying power without complying with the command and openness requirements of the 1949 Third Geneva Convention commit a war crime punishable by the enemy power: United Kingdom War Office, *British Manual of Military Law*, part III – 'The Law of War on Land' (London: HMSO, 1958) para. 634; Art. 5(2), 1949 Third Geneva Convention. See Lassa Oppenheim, *International Law*, Hersch Lauterpacht ed., 7th edn (London: Longmans, 1952) II, 574; Julio A. Barberis, 'Nouvelles questions concernant la personnalité juridique internationale', (1983–I) 179 *Recueil des cours* 145, 210.

[24] H. Lauterpacht, *International Law and Human Rights*, at 123; CSCE, 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE' (1990) at I(5), (6) and (7), *reprinted in* Brownlie, *Basic Documents*, at 456–9.

[25] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell UP, 1989) 14; Meyrowitz, 'Droit de la guerre', at 1083.

seems to be fertile ground for comparison and perhaps cross-pollination between the two systems. Indeed, writers analysing specific norms in either human rights or humanitarian law increasingly refer to the corresponding norm in the other system to strengthen their argument.[26] Given that norms will be specific to their context, such exchanges must be undertaken with some degree of caution if they are to be enlightening and positive. There is an observable tendency in the literature inspired primarily by human rights law to consider humanitarian law as merely a subset of human rights. Conversely, some writers in humanitarian law have argued for an overly rigid differentiation between human rights and humanitarian law, as a defence against the perceived threat to subsume the latter into the former.[27] Comparative analysis ought to be grounded in a deep understanding of both legal systems and an awareness of the differences in the nature and structure of human rights and humanitarian law, as well as an openness to meaningful interaction.

The interaction of human rights and humanitarian law is multifaceted, and gives rise to a number of enquiries. Given that they may apply concurrently, not only in the context of internal armed conflicts but also in international conflicts, the relationship between the fields of application of human rights and humanitarian law calls out for an examination. In particular, it seems important to determine whether gaps exist whereby neither set of norms applies. Many studies have concluded that existing norms are deficient and that new ones must be developed, leading to calls for the adoption of the proposed Declaration of Minimum Humanitarian Standards.[28] Another line of enquiry focuses on whether the normative web created by human rights offers substantively superior protection to that offered by humanitarian law, and vice versa. Several studies of this type have been conducted, highlighting the fact that each system offers, in some areas, greater

[26] See e.g. René Provost, 'Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait', (1992) 30 *Colum. J Transnat'l L* 577, 631–2.

[27] See Christopher Greenwood, 'Rights at the Frontier – Protecting the Individual in Time of War', in *Law at the Centre – The Institute of Advanced Legal Studies at Fifty* (Dordrecht: Kluwer, 1999) 277.

[28] See 'Declaration of Minimum Humanitarian Standards', UN Doc. E/CN.4/1996/80; UN Secretary-General, 'Report on Minimum Humanitarian Standards', UN Doc. E/CN.4/1998/87; Theodor Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', (1983) 77 *Am. J Int'l L* 589–606.

protection than the other.[29] A further line of enquiry, pursued in this book, calls for a systemic comparison of human rights and humanitarian law, to consider their respective normative dynamic in order to learn more about each and, ultimately, to gain a greater understanding which will inform the interpretation, application and future development of human rights and humanitarian law. There will thus be no attempt here to offer a comprehensive exposition and comparison of all facets, or even of all important facets, of each system. Rather than seek informational exhaustiveness, the analysis highlights selected elements of human rights and humanitarian law in order to bring out significant similarities and differences at structural and substantive levels. As such, the comparative approach adopted here departs from more traditional comparative methodology to provide a fully integrated or transsystemic analysis. While arguments are necessarily grounded in existing law, the integration of human rights and humanitarian law has led to the formulation of themes which up to now were not regarded as 'issues' in either field.

This enquiry is carried out through three transversal themes which correspond to the three parts of this book: the first part sketches the normative frameworks of human rights and humanitarian law, meaning the legal structures used to achieve their related goal of protection of the individual; the second part turns to reciprocity which, while one of the grounding principles of both legal systems, is said to occupy a fundamentally distinct place in human rights and humanitarian law; finally, the third part examines problems related to the translations of these norms into concrete standards to be applied by the various actors of the international community, and more specifically the role of normative indeterminacy and factual characterisation in the application of human rights and humanitarian law.

[29] See Aristidis Calogeropoulos-Stratis, *Droit humanitaire et droits de l'homme: La protection de la personne en conflits armés* (Geneva: Institut universitaire de hautes études internationales, 1980); Mohammed El Kouhene, *Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme* (Dordrecht: Nijhoff, 1986); Paul Urner, *Die Menschenrechte der Zivilperson im Krieg gemäss der Genfer Zivilkonvention von 1949* (Winterthur: Keller, 1956) 55–150; Yoram Dinstein, 'Human Rights in Armed Conflict: International Humanitarian Law', in Theodor Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon, 1984) II, 345–68.