3. Theories on the relationship between international humanitarian law and human rights law

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The relationship between human rights law and international humanitarian law has been the subject of extensive discussions over the last 40 years. In particular, the experts on international humanitarian law were quite reluctant to accept the application of human rights law during armed conflicts. They argued that the two systems of rules were assigned to two distinct legal regimes, and close ties did not exist from the outset. Many scholars argue that connections ‘between the two branches of the law are not in any sense natural or necessary’.1 This may be true for a historical analysis but after the ICJ ‘Advisory Opinion on Nuclear Weapons’2 the viewpoints centre upon the applicability of human rights law in cases of armed conflicts.3 The viewpoints of the ICJ reflect the overcoming of the rift between the two branches of the law, which was, in the first place, a consequence of the appearance of non-international armed conflicts after the end of the Second World War. A precondition for the legal regulation of these conflicts was the applicability of human rights law together with international humanitarian law. Regardless, the whole debate is surprising against the background of the ‘openness’4 of international humanitarian law articulated by the Martens Clause. According to the clause, in the absence of specific 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 humanity, and the requirements of public conscience.5 The same approach characterizes Article 72 of Additional Protocol I: ‘The provisions of the Section are additional … to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflicts.’

Taking into account the reluctance of the community of States to codify the principle of humanity in detail, the question is posed as to which developments have been made in the abutting bodies of law, and how they influence international humanitarian law.6 Particular attention must be paid to international human rights law, as today human rights are an integral part of international law for the common welfare of humanity and represent common values that no State may revoke, even in times of war.7 While international humanitarian law and human rights law vary in terms of origin and the situations in which they apply, the two bodies of law share the objective of protecting and safeguarding individuals in all circumstances.

It seems that the co-existence or even merger of international humanitarian law and human rights law is much more advanced in practical terms than in legal theory. Some scholars still regret that the detailed debate did not succeed in a common conclusion as to how the normative wealth of both branches of the law can combine to serve the protection of human beings.8 Therefore it makes sense to deal with the different dominating theories on the relationship.
1. THE TRADITIONAL APPROACH: THE SEPARATION THEORY

Traditional international public law used to be divided into two different branches of law. There was a clear separation between the law of peace and the law of war. Depending on the state of international relations, either the corpus juris of the law of peace or that of the law of war was applied. Therefore it was possible to speak of a separation theory.

1.1 Human Rights as Challenge

The appearance of human rights law after the Second World War challenged the traditional approach of international law because the protection of the human being became step-by-step part of two branches of law. Things started to change. Some experts in the field of the law of war feared a politicization of international humanitarian law since they considered human rights law an issue of politics. However, through the UN Charter, human rights left the status of political/moral obligations and became part of international law. Thus the question arose of the relationship between human rights and international humanitarian law.

The adoption of the UN Charter in 1945 and of subsequent major human rights documents changed the surgically clear division, at least in theory. Since then there have been norms which are valid both in peacetime and in times of war. However, in practice the two branches were nearly completely separated. This can be illustrated by the lack of interest in each other of the experts involved in the elaboration of the Geneva Conventions of 1949 on the one hand, and those drafting the Universal Declaration of Human Rights on the other hand. In practice, the conferences took place simultaneously but ignored each other. They did so quite deliberately, as the UN expressed at this time, again and again, that their task was to build a peaceful international society and to save succeeding generations from the scourge of war. Furthermore, the UN described human rights as a condition for the maintenance of peace, and consequently as part of the ius contra bellum. From this viewpoint the UN was not ready to deal with the ius in bello. Yet, during the debates in the Third Committee of the UN General Assembly only one delegate (Lebanon) mentioned that human rights should also be guaranteed in times of war, but there was no discussion. This can only be explained by the self-image of the UN as guarantor of international peace. By contrast to Article 25 of the Covenant of the League of Nations, which dealt with humanitarian law and the Red Cross, nothing was said in the UN Charter. The authors thought that this was unnecessary since war had been outlawed.

As with every innovation, this development was not immediately accepted by all. In particular, those who subscribed to the so-called separation theory rejected the application of human rights norms during armed conflicts, with the argument that these and the norms of the ius in bello were two separate fields, which could not be applied at the same time. G.I.A.D. Draper, a leading international law scholar, opposed the fusion of the two bodies of law, arguing that they had fundamental distinctions based upon their origin, theory, nature and purpose:
The attempt to confuse the two regimes of laws is unsupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed ... At the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things, be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states and other organized armed groups, and in internal rebellions.14

He presents a legal construct whereby human rights are the normal regime and international humanitarian law the derogation. There is no common ground because the two bodies of law can only apply in a mutually exclusive fashion.15 Draper's logic is not supported given the recent historical development of the law of armed conflict as practical and persona-oriented. Of course, the law of armed conflict was always characterized by the dominance of the methods and means of warfare rather than by regulations concerning humanity. However, humanity always played a role too. Even in the classic law of armed conflict, humanitarian and human rights considerations – on the basis of natural law – were taken into account. In this vein, J.C. Bluntschli argued in 1872 that the declaration of war did not rescind the legal order but 'on the contrary, we recognize that there are natural human rights that are to recognized in times of war as in peacetime'.16 Furthermore, several conventions drafted during the Second Hague Peace Conference of 1907 reflect this practically. The 1907 Hague Convention on Land Warfare refers to the parties to the treaty as 'animated by the desire to serve, even in this extreme case, the interests of humanity'.17 The 1907 Convention on Naval Mine Warfare is another example, even if one has to accept against the background of the travaux préparatoires that considerations of humanity did not especially drive the initial codification of international humanitarian law. Britain’s motivation to outlaw naval mines was rooted in retaining its naval dominance rather than in any sense of altruism.18

However, even the lip service of the leading military powers reflects that humanitarian concerns began to influence the development of the law of armed conflict. Thus, it can be taken for granted that the principle of humanity is a fundamental principle of the law of armed conflict and part of numerous treaty provisions. The principle protects combatants from unnecessary suffering, as well as individuals who are no longer, or never were, active participants in hostilities, by mandating that they be treated humanely at all times.19 In the light of the customary international law status of the principle of humanity and the statements in this regard by some scholars, one can have doubts about the justification of the separation theory. Thus, one can argue that separation is an old position, 'which has recently not been maintained'.20 This is only partly true. It seems that there are still some supporters of the separation theory, even today. For instance, W. Heintschel von Heinegg argues, 'it would not make much sense to complicate the situation by demanding ... the obligations provided for by human rights instruments'.21 One may wonder which kind of complications is meant. To respect legal obligations is always a challenge for parties to an armed conflict. However, the obligations according to the principle of humanity are binding independently of how complicated the implementation may be for the parties.
1.2 State Practice Enables Clarification

This application of the principle of humanity in time of peace and war is in line with the opinions of the International Court of Justice. The ICJ dealt in the ‘Nuclear Weapons Advisory Opinion’ and in ‘Legal Consequences of the Wall Advisory Opinion’ with the relationship between the two bodies of law. In these Advisory Opinions the Court clearly rejected the position that human rights, first and foremost Article 6 of the ICCPR of 19 December 1966, could only be applied in peacetime. The wording of relevant human rights treaties supports the ICJ jurisprudence on the subject. Indeed, these treaties contain clear stipulations concerning the observance of human rights obligations by States Parties in times of armed conflict. For example, Article 15 of the ECHR of 4 November 1950 deals with the fate of human rights norms in situations in which the life of a nation is threatened by war or other public emergencies.

Under such circumstances the respective State Party is allowed to ‘take measures derogating from its obligations under this Convention’. However, the human rights enshrined in the ECHR may be limited only to the extent strictly required by the exigencies of the situation. Some of the rights explicitly mentioned in the foregoing articles may never be derogated from (inter alia the right to life, the freedom of belief and the prohibition of torture). These human rights are called non-derogable, which means that they are to be applied in all circumstances, without exception. The traditional impermeable border between international humanitarian law, which applies during armed conflicts, and the law of peace, is thereby crossed. This ‘crossing of the border’ is further supported by Article 3 common to the Geneva Conventions of 12 August 1949, containing a list of rights which are to be protected in all circumstances. Interestingly, these rights broadly cover the non-derogable human rights. This very configuration is what led academics to draft the ‘Turku Declaration’, which called for the legal grey zones – in the border areas between the law of peace and the law of war – to be filled by the cumulative application of human rights law and international humanitarian law, thereby guaranteeing at least minimum humanitarian standards.

The ECHR is not the only instrument referring to the applicability of human rights in wartime. A further regional human rights instrument, the American Convention on Human Rights of 22 November 1969, lists in its Article 27 non-derogable rights which cannot be abrogated in times of war.

Universal human rights treaties also refer to non-derogable rights. For example, Article 4 of the ICCPR includes an emergency clause similar to that formulated in regional instruments. All these human rights instruments show that human rights are an intrinsic part of the legal rules governing wars and other emergency situations.

Taking into account the obligation of States to respect non-derogable rights in all circumstances, according to human rights instruments and the final document of the First World Conference on Human Rights in Teheran in 1968, C.M. Cerna concluded in 1989 that international humanitarian law had already been “transformed into a branch of human rights law and termed “human rights in armed conflicts””. Against this background of the legal regulations concerning states of emergencies it becomes quite obvious, that the separation theory is out of fashion.
2. COMPLEMENTARITY THEORY

When examining which duties are incumbent on a State in times of armed conflict, it is not possible to avoid taking international human rights law into consideration. Even if one accepts that both branches have different roots and approaches as well as functions they can complete each other on specific points. This implies the complementarity of both bodies of law. The theory of complementarity is especially acceptable for those scholars who are against a merger of the two bodies of international law. According to this theory, human rights law and international humanitarian law are not identical bodies of law but complement each other and ultimately remain distinct. This is undoubtedly true, but the point is that they do overlap.

2.1 ICRC Supports the Complementarity Theory

Although the ICRC has in the past approached the subject cautiously, it is nowadays involved in the establishment of common values that transcend legalistic arguments and distinctions. At the end, the ICRC supports the concept of complementarity of international humanitarian and human rights law. Based on the concept of complementarity the ICRC has produced a number of institutional doctrines and directives to its involvement in non-international armed conflicts and situations below the threshold of applicability of international humanitarian law. The most recent doctrine (DOCT/63-2006/1) ‘The Invocation of International Human Rights Law by the ICRC’ has formulated an overarching approach and mentions the range of human rights which may be invoked by the ICRC. The idea is, on the one hand, to enable the ICRC to use human rights, where appropriate, in its humanitarian work. On the other hand, the ICRC wants to ensure that it remains distinct from doing human rights advocacy and to maintain its unique identity.

In accordance with the concept of complementarity, the ICRC has no obligation to act as a human rights defender. If the application of human rights law would be detrimental to its operational activities the ICRC may decide not to refer expressly to these regulations. Thus, the ICRC in the first line of its operational argumentation takes international humanitarian law into consideration and complements this, when appropriate, by reference to selected sources of human rights law.

Against this background it is convincing that the ICRC took part in the UN discussions on fundamental standards of humanity. The ICRC suggested that there is need for clarification of their desired content and argued:

The first issue regarding the content related to the question of whether an attempt to merge norms of international humanitarian law and human rights law was the way forward. ICRC expressed concern that such a merger would risk confusing two distinct, albeit complementary, areas of law to the detriment of legal obligations contained in each.

This approach has been reaffirmed by the ICRC Study on customary international humanitarian law. The Study notes that human rights law may serve ‘to support, strengthen and clarify analogous principles of humanitarian law’.

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term ‘fair trial’ which is obviously a human rights issue. If one wants to apply that concept in international humanitarian law it is useful to take stock of the human rights case law.

This situation justifies speaking of a convergence of both branches of law, which is more far-reaching than only ‘a natural convergence of humanitarian principles underlying these two bodies of law’. Convergence here means an overlap in terms of the scope of protection. However, the distinction between the two areas of law, which is primarily procedural, must be borne in mind. According to Sperber, human rights law is invoked by an individual against a State. However, humanitarian law is not at present enforced against a State by individuals. The convergence approach opens the possibility for the cumulative application of both bodies of law. Some obligations in human rights treaties remain in force during armed conflicts. The result is undoubtedly a substantial overlap of both bodies of law. However, the response of legal opinion to this situation differs.

2.2 Application by UN Rapporteurs

The somewhat more assertive convergence theory is gaining in influence. It goes further than mere complementarity and aims at providing the greatest effective protection of the human being through the cumulative application of both bodies of law. Reference can consequently be made to one unified complex of human rights beneath different institutional umbrellas.

A glance at the most recent State practice shows that this is not merely theory. Examples are Kuwait in 1991 and Iraq in 2003–2004. The cumulative application of both bodies of law during the armed conflict in Kuwait was both ‘feasible and meaningful’ and clarified the practical meaning of the convergence theory applied to the occupying regime in Kuwait in 1990/91.

Parallels can be drawn between this and the situation in Iraq in 2003–2004. Security Council Resolution 1483 (2003), which lays down the basic principles for the occupation and reconstruction of Iraq, requires all ‘involved’ to fulfil their obligations under international law, especially those according to the Geneva Conventions (para. 5), and requests the Secretary-General’s Special Representative for Iraq to work for the promotion of human rights protection (para. 8(g)). It goes without saying that such duties require the cumulative application of international humanitarian law and human rights law. With regard to cumulative application, three points need to be underscored:

1. The interpretation of rights and duties must refer to both areas of law. It is, for example, difficult to interpret the term ‘inhuman treatment’ found in human rights law in any other way than according to the requirements of the Third Geneva Convention, as it has a specific meaning in the context of a prisoner-of-war camp. On the other hand, the requirements of paragraph 1(c) of Article 3 common to the four Geneva Conventions could not be fulfilled, after considering ‘the legal guarantees deemed imperative by civilized nations’ in criminal proceedings, without applying the human rights instruments.
2. Human rights law strengthens the rules of international humanitarian law by providing a more exact formulation of State obligations. Thus the duties arising
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from Article 55 of the Fourth Geneva Convention pertaining to health care have to be applied in the light of the right to health contained in the International Covenant on Economic, Social and Cultural Rights.35

In the separation of rape, as a method of war and as prohibited by international humanitarian law, from torture, the human rights law provisions of the UN Convention against Torture must necessarily be resorted to.36

(3) International humanitarian law brings human rights law into effect by spelling out, for example, the duties regarding missing persons. Even though ‘disappearances’ undoubtedly represent a serious human rights violation, the relevant law regarding the obligations of States in such cases is very underdeveloped. In times of armed conflict, the occupying power is obliged by the Third and Fourth Geneva Convention to provide information about detained persons, including notification of the death of detained persons and the possible causes thereof, and to search for persons whose fate is unknown.37

In a report to the Security Council entitled ‘On the Protection of Civilians in Armed Conflict’,38 the UN Secretary-General voiced his opinion on the cumulative application of all norms which protect the individual, at least those civilians as defined in the Geneva Conventions and their Protocols. He recommended States to ratify equally the relevant instruments of international humanitarian law, international human rights law and refugee law, as all three are ‘essential tools for the legal protection of civilians in armed conflicts’.39 From a practical point of view the growing recourse to international humanitarian law protection is, of course, also a result of the increased occurrence of civil conflicts, which often take place in a grey zone in terms of that law, owing to its relatively few rules governing such situations. Its practical importance for parties to the conflict has been convincingly pointed out in legal literature.40 Therefore the cooperation of the three main actors in the field (the ICRC, UNHCR and the Human Rights organs of the UN), without compromising their respective mandates, was welcomed in the literature. Meron considers the readiness of the UN human rights rapporteurs to include as yardsticks for compliance not only human rights but also humanitarian law standards as one of the most useful developments and as an example of the convergence.41

2.3 Application by the ICJ

The cumulative application of human rights law and international humanitarian law inevitably raises the question of the reciprocal relationship. The ICJ had to answer this question in the Nuclear Weapons Advisory Opinion42 because the advocates of the illegality of the use of nuclear weapons had argued that such use violated the right to life laid down in Article 6 of the ICCPR.43 Article 6 of the ICCPR stipulates that: ‘No one shall be arbitrarily deprived of his life’. The ICJ established in its Opinion that Article 6 is a non-derogable right and consequently also applies in armed conflict, and that even during hostilities it is prohibited to ‘arbitrarily’ deprive someone of his life. In the same Opinion, the ICJ recognizes the primacy of international humanitarian law over human rights law in armed conflicts, thereby designating the former as lex
specialis. The term ‘arbitrarily’ is, therefore, to be defined according to international humanitarian law.

The 2004 Advisory Opinion concerning the wall in the occupied Palestinian territory tends to show even more clearly that the right to life in times of armed conflict is only to be interpreted according to international humanitarian law. The Human Rights Committee, too, stresses in its General Comment on Article 2 that the ICCPR applies also in situations of armed conflicts to which the rules of international humanitarian law are applicable. However, the Human Rights Committee is not as crystal clear as the ICJ because it avoids touching on the lex specialis issue: ‘While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.’ The lex specialis character of international humanitarian law is nevertheless essential. In certain circumstances human rights law cannot be considered. For example, a combatant who, within the scope of a lawful act during an armed conflict, kills an enemy combatant, cannot, according to jus in bello, be charged with a criminal offence.

The evaluation given in the ICJ Opinion has been welcomed by academics, mainly for its clarification that the norms developed for peacetime, that is, human rights law, cannot be applied ‘in an unqualified manner’ to armed conflicts. Human rights have instead to be inserted into the structure of international humanitarian law in a sensitive manner. The primacy of international humanitarian law is herewith emphasized. It must, however, be noted that the provisions of human rights law as a whole remain valid as prescribed in Article 4 of the ICCPR (and the analogous regional treaties), and are consequently of importance. The ICJ in its Advisory Opinions therefore supports the need to regard the protection granted by international humanitarian law and human rights law as a single unit and to harmonize the two sets of international rules.

Admittedly, such a viewpoint inevitably raises the lex specialis derogat legi generali objection. It can be refuted by reference to the Martens Clause, which is accepted both in international treaties and in customary international law. This clause confirms that the rules of the laws pertaining to armed conflicts cannot be regarded as the final regulation of the protection of human beings, but can be supplemented with human rights law protection.

The interpretation of the right to life by human rights law in times of armed conflicts becomes more obvious in regional human rights instruments than in the ICCPR. In Article 15 of the ECHR, for instance, it is made clear that cases of death as a result of legal acts of war are not to be regarded as a violation of the right to life spelled out in Article 2 of the ECHR.

2.4 Practical Consequences

Armed conflict does not occur in isolation. It has to be governed according to human rights norms and to international humanitarian law. Both bodies of law contribute to establishing a secure environment for the enjoyment of fundamental rights. The incorporation of human rights principles of accountability, especially, ‘can have a positive impact on the regulation of the use of force during armed conflict’. However, in line with the complementarity theory the author claims that the mechanisms of
accountability developed to regulate human rights domestically cannot simply be transferred to the international humanitarian law context. This underlines once more the differences between the two bodies of law.

3. INTEGRATION THEORY

The Convention on the Rights of the Child (CRC) adopted in 1989 impressively corroborates the view of the integration of IHL in the broader concept of human rights law. Here the substantial overlap between international human rights protection and international humanitarian law becomes obvious. Article 38(1) of that Convention obliges the States Parties to undertake to respect and ensure respect for rules of international humanitarian law that deal with the protection of children. Thus, a human rights treaty, normally applicable in peacetime, contains provisions that are not only applicable in armed conflicts, but are also enshrined in the law regulating armed conflicts.

The regulations are even more detailed because Article 38(2), (3) and (4) repeat the standards laid down in Article 77 of Additional Protocol I to the Geneva Conventions which restricts the recruitment and participation of children in armed conflicts. Those standards, adopted in 1977, permit the recruitment and direct participation of children from the age of 15 onwards.

This undoubtedly unsatisfying standard in the CRC of 1989 runs counter both to the progressive codification of international public law and to the goal of the Convention, which, according to Article 3, is to ensure that the ‘best interests’ of the child (defined in Article 1 as a person below the age of 18 years) are protected. It is most unlikely that it is in the interest of a child aged 15 to take direct part in hostilities.

This contradiction has been severely criticized in legal literature. Particularly at issue is why the 1989 Convention on the Rights of the Child, which was drawn up more than a decade after the adoption of the Additional Protocols to the Geneva Convention and marks considerable progress in codification of the protection of the individual, contains no protection exceeding that of Article 77 of Additional Protocol I. This failure is all the more regrettable because, when the CRC was being negotiated, the opponents of the relevant improvement in child protection (in particular the USA, Iran and Iraq) had not put forward a very sturdy legal argument. As a matter of fact, the USA was of the opinion that neither the General Assembly nor the Human Rights Commission was a suitable forum for the revision of existing international humanitarian law.

However, the American argument, which is based on the aforementioned traditional separation of the law of peace and the law of war, is not convincing, for the CRC was intended to be a new, independent treaty and not a revision or amendment of international humanitarian law. It can, moreover, also be argued that obligations over and above the general standards should have been laid down for the States party to the new instrument, as is definitely possible in treaty law. Since many feared a lowering of standards, the American argument was not further discussed. The USA later departed from its (untenable) position, when, in 1992, it signed the Optional Protocol on the involvement of children in armed conflict to the CRC. This Protocol, adopted in 2000
through Resolution 54/263 of the UN General Assembly, obliges the States Parties to take all feasible measures to ensure that children under the age of 18 do not take a direct part in hostilities. It entered into force on 12 February 2002 and has to date been ratified by 52 States. This means that, at least where these States are concerned, the standard of protection is higher than that propounded in international humanitarian law.52

The example of the CRC demonstrates not only that the law of peace and the law of war overlap, but also that, when examining which duties are incumbent on a State in times of armed conflict, it is not possible to avoid taking international human rights law into consideration. This situation alone justifies speaking of a convergence of both bodies of law which is more far-reaching than only ‘a natural convergence of humanitarian principle underlying these two bodies of law’.53 Convergence here means an overlap in terms of the scope of protection. However, the distinction between the two areas of law, which is primarily procedural, must be borne in mind.54 The convergence approach opens the possibility for the cumulative application of both bodies of law.

The consequence of the convergence approach was the establishment of a human rights law for armed conflict situations. The implementation mechanisms of the treaty bodies of human rights treaties are nowadays obliged to consider the application of human rights treaties in contexts of armed conflicts. Against the background of the lack of effective enforcement mechanisms of international humanitarian law this is doubtless a very positive development and a success story of the integration theory.

NOTES

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6. This approach is in line with the ICRC’s Avenir statement, which stresses that ‘the relationship between humanitarian law and human rights law must be strengthened’. See D. Forsythe, ‘1949 and 1999: Making the Geneva Conventions relevant after the Cold War,’ International Review of the Red Cross 81, No. 834 (1999): 271.
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22. Legality of the Threat or Use of Nuclear Weapons, supra note 2.


28. See, e.g., Forsythe, supra note 6, at 271. The Human Rights Sub-Commission of the UN Commission on Human Rights also refers in its Resolution 1989/26 to ‘Convergence’.


35. UN Treaty Series 993: 3.


37. Kälin, supra note 34, at 27.

38. UN Doc. S/1999/957.

39. Ibid., para. 36.


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43. According to Greenwood this viewpoint was taken by Malaysia, the Solomon Islands and Egypt. See C.J. Greenwood, ‘*Jus bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion’, in *International Law, the International Court of Justice and Nuclear Weapons*, ed. L. Boisson de Chazournes and P. Sands (Cambridge: Cambridge University Press, 1999), 253.
45. UN Doc. CCPR/C/74/Add.6.
54. Sperber et al., *supra* note 32, at 239.