Chapter 49

The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law

Hans-Peter Gasser

As of today, international criminal law, human rights law and international humanitarian law are perceived to be linked one to another. Nobody would deny today their close relationship or advocate the separate existence of these three chapters of international law.

This has not always been the case.

These few lines intend to throw a light on the way the relationship among these three chapters of international law developed.

1st period: lonely presence of international humanitarian law

International humanitarian law deals with victims of armed conflict. While its roots go back into Antiquity or before, its modern codification was set in motion by the Conference which met 1864 in Geneva and adopted in a few weeks time the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864). The dramatic experience of Henry Dunant on the battlefield of Solferino (Italy) and published in his Memory of Solferino set the goals for the Geneva meeting: ameliorating the fate of the wounded on the battlefield and protecting aid and relief efforts against violence. That covers personnel, field hospitals and medical transport, and included the adoption of the Red Cross on a white ground as a distinctive emblem for identification purposes. In short: The (historically speaking) first Geneva Convention developed the idea of charity into an international commitment to be respected in war time.

These topics remained on the agenda, as classical themes for any subsequent codification of international humanitarian law, at least of one of its chapters: the protection of victims of warfare, also called the Law of Geneva. No considerations based on human rights (in the modern sense) had any influence on the debate. Moreover, there was no attempt to criminalize violations of its obligations.

The year before the adoption of the Geneva Convention in Geneva President Lincoln promulgated in 1863 the Instruments for the Government of Armies of the United States in the Field (General Orders 100), the so-called Lieber Code. That text codified rules of behaviour on the battlefield or, in other words, rules on the conduct of hostilities, later to be known as Law of The Hague. It is law of war in its original sense. While the text refers to the obligation of States to punish violations of the law,
the Code does not propose individual criminal responsibility under international law.

The Peace Conferences proposed by the Russian Tsar and convened in The Hague in the years 1899 and 1907 failed to reach consensus on significant measures for ensuring peace. Yet the gathering produced major developments of the laws of war by adopting a series of conventions on topics related to warfare. The most important treaty is, of course, the (Fourth) Convention Respecting the Laws and Customs of War on Land of 1907, with its annex, the so called 1907 Hague Regulations. Part of the newly codified rules deals with aspects relating specifically to the conduct of hostilities. Yet two of its major chapters, i.e. Section I, Chapter II – on Prisoners of War – and Section III – Military authority over the Territory of the Hostile State: occupied territories – cover issues whose relations with human rights considerations are obvious, at least today. At that time, however, nobody referred to the larger context of the need to protect the dignity of human beings in general.

In the period between the two World Wars international humanitarian law progressed in fields like the prohibition of particularly cruel weapons (e.g. the 1925 Geneva Protocol on the prohibition of gas).

None of these international agreements provides for individual criminal responsibility in case of violation of a treaty provision or for the obligation of States to prosecute and punish violators.

During that same period first international texts protecting human rights took shape, such as the codification of rules on protecting labour standards, elaborated in the context of the International Labour Organization. Yet such emerging codification processes in other fields remained fully independent from international humanitarian law, and vice versa.

2nd period: continuing separate evolution of international humanitarian law and human rights law

The end of the 2nd World War brought about the beginning of the human rights era, which still characterizes our present time. The Universal Declaration of Human Rights (1948) set the starting point. The rights proclaimed by that document were later on codified by the two International Covenants of 1966 and elaborated under United Nations auspices, one on civil and political rights and the other on economic, social and cultural rights (1966). A considerable number of other treaties relating to one or the other human rights issue followed up. On a regional level, the protection of fundamental rights was codified by comprehensive treaties, particularly the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969) and the African Charter on Human and Peoples’ Rights (1981).

None of these human rights codifications elaborates on problems relating to armed conflict.

Insofar as international humanitarian law is concerned, the period after 1945 brought two major developments: the Nuremberg Trials of major German war criminals and the rewriting of the Geneva Conventions.

The judgments of the International Military Tribunals at Nuremberg (1946) – and, to a lesser degree, the Tokyo trials – are considered today as starting point for the development of international criminal law applicable in armed conflict. Yet the