PART II

HUMAN RIGHTS APPLIED
HUGO GROTIIUS AND THE ROOTS OF HUMAN RIGHTS LAW

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1. Introduction

It has always been the case that ‘laws of war’ and ‘individual rights’ to a certain extent coalesce. The link and occasional overlapping between international humanitarian law (IHL) and human rights law is evidenced by, inter alia, common Article 3 of the Geneva Conventions. Individuals who do not take part in hostilities should be treated humanely according to certain minimum standards. The more specific norm that prisoners should not be killed or mistreated goes way back in history, its moral and philosophical rationale presumably being possible to sum up in two premises: (1) that all individuals in some basic form have an ‘inherent right to life’; and (2) that in the specific event of armed conflict, all individuals who do not act as combatants or otherwise present a military threat should have their lives protected.

Today we speak confidently about IHL and human rights law as separate legal systems. In antiquity the rights issue did not exist as such, although the Stoic conception of universally applicable rules of natural law made things happen. Slowly and implicitly the concept of human rights grew out of the emerging law of armed conflict, jus in bello, and to a lesser extent it also grew out of the law on the use of force and the concept of bellum justum.

Hugo Grotius is often referred to in any discussion on jus ad bellum, especially with regard to his position that trans-border humanitarian protection of a population under tyranny could be seen as a just war (bellum justum). The doctrine on legitimacy of such armed humanitarian intervention dates back to the time of St Thomas Aquinas (1225–74), but although the Thomist theologian doctrine included action to protect individuals, such protection may have been limited to individuals of the Christian faith. The Grotian doctrine, on the other hand, is obviously linked to a certain perception of inherent rights of human beings, thereby indicating an embryonic normative human rights thinking. Similarly, Grotius’ and his predecessor Gentili’s treatment of an emerging humanitarian law of warfare, jus in bello, indicates a certain element of human rights ideology with regard to civilians and prisoners of war. If this is a correct description, the ‘inherency’ language of present human rights documents has more to speak for it in a historical perspective than is usually realized.

At the time of Grotius (1583–1645) these early ‘human rights developments’ on two parallel tracks – humanitarian intervention and protection of non-combatants – had crystallized into at least positions de lege ferenda. Only much later in history

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