

International Humanitarian Law and Human Rights Law

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Introduction

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International humanitarian law is increasingly perceived as part of human rights law applicable in armed conflict. This trend can be traced back to the United Nations Human Rights Conference held in Tehran in 1968^[1] which not only encouraged the development of humanitarian law itself, but also marked the beginning of a growing use by the United Nations of humanitarian law during its examination of the human rights situation in certain countries or during its thematic studies. The greater awareness of the relevance of humanitarian law to the protection of people in armed conflict, coupled with the increasing use of human rights law in international affairs, means that both these areas of law now have a much greater international profile and are regularly being used together in the work of both international and non-governmental organizations.

However, as human rights law and humanitarian law have totally different historical origins, the codification of these laws has until very recently followed entirely different lines. The purpose of this paper is to consider the philosophy of these two branches of law in the light of their origins, how in many essential respects they nevertheless coincide, how they have influenced each other in recent developments and, finally, to consider how their similarities and differences could influence their future use.

Origin and nature of human rights law and humanitarian law

The philosophy of humanitarian law

Restrictions on hostile activities are to be found in many cultures and typically originate in religious values and the development of military philosophies. The extent to which these customs resemble each other is of particular interest and in general their similarities relate both to the expected behaviour of combatants between themselves and to the need to spare non-combatants.^[2] Traditional manuals of humanitarian law cite the basic principles of this law as being those of military necessity, humanity and chivalry.^[3] The last criterion seems out of place in the modern world, but it is of importance for an understanding of the origin and nature of humanitarian law.

The first factor of importance is that humanitarian law was developed at a time when recourse to force was not illegal as an instrument of national policy. Although it is true that one of the influences on the development of the law in Europe was the church's just war doctrine, ^[4] which also encompassed the justice of resorting to force, the foundations of international humanitarian law were laid at a time when there was no disgrace in beginning a war. The motivation for restraint in behaviour during war stemmed from notions of what was considered to be honourable and, in the nineteenth century in particular, what was perceived as civilized.^[5] The law was therefore in large part based on the appropriate respect that was due to another professional army. We will use here as a good illustration of the philosophy underlying the customary law of war the Lieber Code of 1863^[6], as this code was used as the principal basis for the development of the Hague Conventions of 1899 and 1907 which in turn influenced later developments.

The relevance of war being a lawful activity at the time is reflected in Article 67 of the Lieber Code:

"The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant".

The law was therefore based on what was considered necessary to defeat the enemy and outlawed what was perceived as unnecessary cruelty:

"Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war" (Art. 14).

"Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district..." (Art. 16).

Two basic rules of international humanitarian law, namely the protection of civilians and the decent treatment of prisoners of war, are described in the following terms:

"Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit" (Art. 22).

The importance of respectful treatment of prisoners of war is referred to as follows:

"A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity" (Art. 56).

"Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information" (Art. 80).

On the protection of hospitals the Lieber Code states:

"Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared..." (Art. 116).

"It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection..." (Art. 1 17).

The chapter relating to occupied territory specifies the action that an occupier may take for military purposes, in particular levying taxes and similar measures, but is very clear about the types of abuses that are prohibited:

"All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penal of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior" [7] (Art. 44).

Finally, in this small selection of articles, mention should be made of Lieber's caution to States in their resort to reprisals which were still generally considered lawful at that time:

"Retaliation will ... never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages" (Art. 28).

The Lieber Code was regarded at the time as generally reflecting customary law although in places it particularly stressed the importance of respecting humanitarian treatment which, in practice, was not always accorded. The Code was used as the basis for the first attempted codification of these customs at the Brussels Conference of 1874. Although the conference was not successful in adopting a treaty, the declaration which was adopted is very similar to the Hague Regulations of 1899 and 1907. Those Regulations are considerably less complete than the Lieber Code, and, like later treaties, do not expressly include the explanation for the rules as does the Lieber Code.

The fundamental concepts of the laws of war have remained essentially unchanged and are still based on the balance between military necessity and humanity, although less reference is now made to chivalry. The major characteristic of humanitarian law which first tends to strike a human rights lawyer is the fact that the law makes allowance in its provisions for actions necessary for military purposes. Much of it may therefore not seem very "humanitarian", and indeed many lawyers and military personnel still prefer to use the traditional name, "the law of war" or "the law of armed conflict." The way in which humanitarian law incorporates military necessity within its provisions is of particular interest when comparing the protection afforded by this branch of law and human rights law.

Military necessity has been defined as:

"Measures of regulated force not forbidden by international law, which are indispensable for securing the prompt submission of the enemy, with the least possible expenditure of economic and human resources". [8]

The Lieber Code describes military necessity as follows:

"Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God" (Art. 15).

The fact that military necessity is included in the rules of humanitarian law is well explained in the German Military Manual as follows:

"Military necessity has been already taken into consideration by the conventions on the law of war, because the law of war Constitutes a compromise between the necessities to obtain the aims of war and the principles of humanity".[9]

This balance between military necessity^[10] and humanity is broadly speaking achieved in four different ways.^[11] First, some actions do not have any military value at all and are therefore simply prohibited, for example, sadistic acts of cruelty, pillage and other private rampages by soldiers which, far from helping the military purpose of the army, tend to undermine professional disciplined behaviour. In this respect it is worth recalling that many of the early customs of war, which were set down in written instructions to armies,^[12] were motivated by a desire to encourage discipline.

Secondly, some acts may have a certain military value, but it has been accepted that humanitarian considerations override these. On this basis, the use of poison and toxic gases has been prohibited.

Thirdly, some rules are a true compromise in that both the military and the humanitarian needs are accepted as important to certain actions and consequently consideration of both is limited to some extent. An example is the rule of proportionality in attacks, which accepts that civilians will suffer "incidental damage" (the

limitation with respect to humanitarian needs), but that such attacks must not take place if the incidental damage would be excessive in relation to the value of the target (the limitation with respect to military needs).

Finally, some provisions allow the military needs in a particular situation to override the normally applicable humanitarian rule. Conceptually, these provisions resemble more closely the limitation clauses commonly found in human rights treaties. Some provisions introduce the limitation within the body of the protective rule, for example, medical personnel cannot be attacked unless they engage in hostile military behaviour. Secondly, certain protective actions required by the law are restricted by the military situation. For example, parties to a conflict are to take "all possible measures" to carry out the search for the wounded [13] and dead, and "whenever circumstances permit" they are to arrange truces to permit the removal of the wounded. There are also a number of limitation clauses that refer directly to military necessity. For example, immunity may in "*exceptional cases of unavoidable military necessity*" be withdrawn from cultural property under special protection.[14] Other examples are Article 53 of the Fourth Geneva Convention which prohibits the destruction of property by occupying authorities in occupied territory "*except where such destruction is rendered absolutely necessary by military operations*", and Article 54 of 1977 Protocol I which allows the destruction of objects indispensable to the survival of the civilian population in a party's own territory when this is "*required by imperative military necessity*".

Unlike human rights law, however, there is no concept of derogation in humanitarian law. Derogation in human rights law is allowed in most general treaties in times of war or other emergency threatening the life of the nation.[15] Humanitarian law is made precisely for those situations, and the rules are fashioned in a manner that will not undermine the ability of the army in question to win the war. Thus in order to cease respecting the law an army cannot, for example, invoke the fact that it is losing for such violation of the law will not be of sufficient genuine military help to reverse the situation.

The philosophy of human rights law

Turning now to the nature of human rights law, we see that the origin of this law is actually very different and that this has affected its formulation.

The first thing that is noticed when reading human rights treaties is that they are arranged in a series of assertions, each assertion setting forth a right that all individuals have by virtue of the fact that they are human. Thus the law concentrates on the value of the persons themselves, who have the right to expect the benefit of certain freedoms and forms of protection. As such we immediately see a difference in the manner in which humanitarian law and human rights treaties are worded. The former indicates how a party to a conflict is to behave in relation to people at its mercy, whereas human rights law concentrates on the rights of the recipients of a certain treatment.

The second difference in the appearance of the treaty texts is that humanitarian law seems long and complex, whereas human rights treaties are comparatively short and simple.

Thirdly, there is a phenomenon in human rights law which is quite alien to humanitarian law, namely, the concurrent existence of both universal and regional treaties, and also the fact that most of these treaties make a distinction between so-called "civil and political rights" and "economic, social and cultural" rights. The legal difference between these treaties is that the "civil and political" ones require instant respect for the rights enumerated therein, whereas the "economic, social and cultural" ones require the State to take appropriate measures in order to achieve a progressive realization of these rights. The scene has been further complicated by the appearance of so-called "third generation" human rights, namely, universal rights such as the right to development, the right to peace, etc.

We have seen that humanitarian law originated in notions of honourable and civilized behaviour that should be expected from professional armies. Human rights law, on the other hand, has less clearly-defined origins. There are a number of theories that have been used as a basis for human rights law, including those stemming from religion (i.e. the law of God which binds all humans), the law of nature which is permanent and which should be respected, positivist utilitarianism and socialist movements.[16] However, most people would point to theories by influential writers, such as John Locke, Thomas Paine or Jean-Jacques Rousseau, as having prompted the major developments in human rights in revolutionary constitutions of the eighteenth and nineteenth centuries. These theorists of the natural law school pondered on the relationship between the government and the individual in order to define the basis for a just society. They founded their theories on analysis of the nature of human beings and their relationships with each other and came to conclusions as to the best means of assuring mutual respect and protection. The most commonly cited "classical" natural lawyer is Locke, whose premise is that the state of nature is one of peace, goodwill, mutual assistance and preservation. In his opinion the protection of private rights assures the protection of the common good because people have the right to protect themselves and the obligation to respect the same right of others. However, as the state of nature lacks organization, he saw government as a "social contract" according to which people confer power on the understanding that the government will retain its justification only if it protects those natural rights. He generally referred to them as "life, liberty and estate". Positivist human rights theorists,[17] on the other hand, do not feel bound by any overriding natural law but rather base their advocacy for human rights protection on reason which shows that cooperation and mutual respect are the most advantageous behaviour for both individuals and society. The other important factor to be taken into account in the development of human rights is the existence of various cultural traditions and advocates for social development.[18] Although coming from different starting points, these influences stressed the importance of providing means to maintain life as well as assuring protection from economic and social exploitation. A particularly important development which influenced later human rights law was the creation of the International Labour Organization in 1919 which made major efforts, through the development of treaties and the installation of supervisory mechanisms, to improve economic and social (including health) conditions for workers.[19]

As the development of human rights progressed from theories of social organization to law, it is not surprising that lawyers began to analyse the nature of these rights from the legal theory point of view. Thus there is a plethora of articles arguing over whether human rights are really legal rights if the beneficiary cannot insist on their implementation in court.[20] The focus of this argument is on the nature of economic and social rights, which many legal theorists argue cannot therefore be described as legal rights.

However, the first major international instrument defining "human rights", namely the 1948 Universal Declaration of Human Rights, contains not only civil and political but also economic and social rights. In drafting it a conscious effort was made to take into account the different philosophies as to the appropriate content of human rights. It was only when the attempt was made to transform this document into international treaty law that the legal difficulties outlined above made themselves felt. The International Covenant on Civil and Political Rights (CP Covenant), 1966, requires each State Party to "*respect and to ensure to all individuals ... the rights recognized in the present Covenant*". [21] On the other hand, the International Covenant on Economic, Social and Cultural Rights (ESC Covenant), 1966, requires each State Party to "*take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant*". [22] The main difference is that civil and political rights are perceived as not requiring any particular level of economic development, as for the most part they consist in individual freedoms. Yet it would not be accurate to say that respect for the CP Covenant does not involve the creation of certain State structures. In particular, the right to fair trial calls for certain infrastructures and professional training, and the same is true as regards the political rights listed in Article 25. However, it is a fact that the implementation of most of the economic rights does necessitate some resources and thought as to the best economic arrangement in order to achieve the best standard of living possible. The genuine difficulty thus created in giving a proper interpretation to the ESC Covenant in the particular circumstances of each State has a direct effect on the nature of the individual's economic rights.[23] In 1987 a committee was created in order to examine the reports submitted by States under the Covenant. Such a committee was not originally provided for, and although its creation would appear to show a willingness to examine the implementation of this instrument more carefully, the committee is finding that States are

still somewhat reticent about having their economic policies carefully analysed by an international body in order to assess whether they are compatible with the Covenant.[24]

A further development of importance in the philosophy underlying human rights law is the appearance of what are commonly referred to as " third generation " rights. [25] Third World States have in particular pointed out that in order to be able to show proper respect for economic and social rights, the appropriate economic resources are required, and that for this purpose they have a right to development. Other rights in this category are, for example, the right to peace or to a decent environment. It is clear that these factors have a direct effect on the quality of individuals' lives or even their very existence, but legal purists again indicate here that it is not possible to categorize these as human rights as they cannot be implemented by a court and also because the specific corresponding legal duties are unclear.

What is certain, however, is that these doctrinal differences with regard to economic and social rights and third generation rights have resulted in seriously divergent interpretations of human rights obligations, in terms both of what they really entail (economic and social) and of the extent to which they exist , if at all (third generation). Some doubt has even been expressed recently as to the universality of civil and political rights.[26] Although it is true that there are some differences in the terms of the United Nations Covenant, the European Convention, the Inter-American Convention and the African Charter, it is the opinion of these authors that their similarities are far more evident, and that they are essentially the same in their protection of basic civil rights and freedoms. Further, the extent to which the United Nations now investigates certain human rights violations, irrespective of whether the State concerned is a party to one of these treaties, indicates that it considers the rights concerned to be customary.

Conceptual similarities in present-day humanitarian law and human rights law

Having looked at the origins and formulation of these two areas of law, we can now turn to their present method of interpretation and implementation.

The most important change as far as humanitarian law is concerned is the fact that recourse to war is no longer a legal means of regulating conflict. In general, humanitarian law is now less perceived as a code of honour for combatants than as a means of sparing non-combatants as much as possible from the horrors of war. [27] From a purist human rights point of view, based as it is on respect for human life and wellbeing, the use of force is in itself a violation of human rights. This was indeed stated at the 1968 Human Rights Conference in Tehran as follows:

"Peace is the underlying condition the full observance of human rights and war is their negation". [28]

However, the same conference went on to recommend further developments in humanitarian law in order to ensure a better protection of war victims. [29] This was an acknowledgement, therefore, that humanitarian law is an effective mechanism for the protection of people in armed conflict and that such protection remains necessary because unfortunately the legal prohibition of the use of force has not in reality stopped armed conflicts.

A conceptual question of importance is whether human rights law can be applied at all times, thus in armed conflict as well, given that the philosophical basis of human rights is that by virtue of the fact that people are human, they always possess them. The answer in one sense is that they do continue to be applicable. The difficulty as regards human rights treaties is that most of them allow parties to derogate from most provisions in time of war, with the exception of what are commonly termed " hard-core " rights, i.e., those which all such treaties list as being non-derogable. These are the right to life, the prohibition of torture and other inhuman treatment, the prohibition of slavery and the prohibition of retroactive criminal legislation or punishment. However, the other rights do not thereby cease to be applicable, but must be respected in so far as this is possible in the circumstances. Recent jurisprudence and the practice adopted by human rights implementation mechanisms have stressed the importance of this, and also, in particular, the continued applicability of certain judicial guarantees that are essential in order to give effective protection to the " hard-core " rights.[30] However, the major difficulty of applying human rights law as enunciated in the treaties is the very general nature of the treaty language. Even outside armed conflict situations, we see that the documents attempt to deal with the relationship between the individual and society by the use of limitation clauses. Thus the manner in which the rights may be applied in practice must be interpreted by the organs instituted to implement the treaty in question. Although the United Nations Human Rights Committee, created by the CP Covenant, has made some general statements on the meaning of certain articles, [31] the normal method of interpretation by both the United Nations and regional systems has been through a decision or an opinion on whether a particular set of facts constitutes a violation of the article in question. A study of this jurisprudence shows that although at first sight an assertion of an individual right may seem very favourable to the individual, its interpretation in practice reduces its implementation considerably in order to take into account the needs of others.[32] Now, if we transfer this to a situation of armed conflict, we can appreciate straight away the inconvenience of having to wait for decisions as to whether every action that takes place is justifiable or not, as the protection of people in armed conflict is usually literally a matter of life or death at that very moment. What is needed, therefore, is a code of action applicable in advance. Human rights lawyers have consequently turned to humanitarian law because, despite its different origins and formulation, compliance with it has the result of protecting the most essential human rights both of the " civil " and the " economic and social " type. The major legal difference is that humanitarian law is not formulated as a series of rights, but rather as a series of duties that combatants have to obey. This does have one very definite advantage from the legal theory point of view, in that humanitarian law is not subject to the kind of arguments that continue to plague the implementation of economic and social rights.

As space does not allow us to go into a detailed assessment of the similarities between human rights law and humanitarian law, we shall limit ourselves here to an impressionistic overview of the most important provisions of humanitarian law that help to protect the most fundamental human rights in practice.

The most important general observation to be made is that, like human rights law, humanitarian law is based on the premise that the protection accorded to victims of war must be without any discrimination. This is such a fundamental rule of human rights that it is specified not only in the United Nations Charter but also in all human rights treaties. One of many examples in humanitarian law is Article 27 of the Fourth Geneva Convention of 1949:

"...all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion".

Given the obvious risk to life in armed conflict, a great deal of humanitarian law is devoted to its protection, thus having a direct beneficial effect on the right to life. First and foremost, victims of war, i.e. those persons directly in the power of the enemy, are not to be murdered as this amounts to an unnecessary act of cruelty. These persons are mainly protected by the 1949 Geneva Conventions, with some extension of this protection in 1977 Additional Protocol I. As far as the protection of life during hostilities is concerned, it is obvious that the lives of combatants cannot be protected whilst they are still fighting. However, humanitarian law is not totally silent even here, for the rule that prohibits the use of weapons of a nature to cause superfluous injury or unnecessary suffering is partly aimed at outlawing those weapons that cause an excessively high death rate among soldiers.

[33] With regard to civilians, we have seen that the customary law of the nineteenth century required that they be spared as much as possible. Military tactics at the time made this possible, and civilians were less affected by direct attacks than by starvation during sieges, or shortages due to the use of their resources by occupying troops. However, military developments in the twentieth century, in particular the introduction of bombardment by aircraft or missiles, seriously jeopardized this customary rule.

The most important contribution of Protocol I of 1977 is the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible. The balance between military necessities and humanitarian needs that was explained in the Lieber Code continues to be at the basis of this law, and the States that negotiated this treaty had this firmly in mind so as to codify a law that was acceptable to their military staff. The result is a reaffirmation of the limitation of attacks to military objectives and a definition of what this means, [34] but accepting the occurrence of " incidental loss of civilian life " subject to the principle of proportionality. [35]

This is the provision that probably grates most with human rights lawyers, not only because it in effect allows the killing of civilians but also because the assessment of whether an attack may be expected to cause excessive incidental losses, and therefore should not take place, has to be made by the military commander concerned. On the other hand, the Protocol protects life in a way that goes beyond the traditional civil right to life. First, it prohibits the starvation of civilians as a method of warfare and consequently the destruction of their means of survival [36] (which is an improvement on earlier customary law). Secondly, it offers means for improving their chance of survival by, for example, providing for the declaration of special zones that contain no military objectives [37] and consequently may not be attacked. Thirdly, there are various stipulations in the Geneva Conventions and their Additional Protocols that the wounded must be collected and given the medical care that they need. In human rights treaties this would fall into the category of " economic and social rights " .[38] Fourthly, the Geneva Conventions and their Protocols specify in considerable detail the physical conditions that are needed in order to sustain life in as reasonable a condition as possible in an armed conflict. Thus, for example, the living conditions required for prisoners of war are described in the Third Geneva Convention and similar requirements are also laid down for civilian persons interned in an occupied territory. With regard to the general population, an occupying power is required to ensure that the people as a whole have the necessary means of survival and to accept outside relief shipments if necessary to achieve this purpose.[39] There are also provisions for relief for the Parties'own populations, but they are not as absolute as those that apply in occupied territory.[40] Once again, these kinds of provisions would be categorized by a human rights lawyer as " economic and social " . [41] Finally in this selection of provisions relevant to the right to life, humanitarian law lays down restrictions on the imposition of the death penalty, in particular, by requiring a delay of at least six months between the sentence and its execution, by providing for supervisory mechanisms, and by prohibiting the death sentence from being pronounced on persons under eighteen or being carried out on pregnant women or mothers of young children. Also of interest is the fact that an occupying power cannot use the death penalty in a country which has abolished it. [42]

The next " hard-core " right is that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Humanitarian law also contains an absolute prohibition of such behaviour, and not only states this prohibition explicitly in all the appropriate places [43] but goes still further, since a large part of the Geneva Conventions can be said in practice to be a detailed description of how to carry out one's duty to treat victims humanely.

As far as the prohibition of slavery is concerned, this is explicitly laid down in 1977 Protocol II;[44] the possibility of slavery is furthermore precluded by the various forms of protection given elsewhere in the Geneva Conventions. It is interesting to note in particular that this prohibition was well established in customary law, and is reflected in the Lieber Code's articles on the treatment of prisoners of war, who are not to be seen as the property of those who captured them, [45] and on the treatment of the population in occupied territory. [46]

As mentioned above,[47] human rights bodies are now recognizing the importance of judicial guarantees to protect hard-core rights although, with the exception of the Inter-American Convention, these are unfortunately not expressly listed as non-derogable. If human rights specialists had at an earlier stage taken a close interest in humanitarian law, they would have noted the extensive inclusion of judicial guarantees in the Geneva Conventions. This is because those drawing up humanitarian law treaties had seen from experience the crucial importance of judicial control in order to avoid arbitrary executions and other inhuman treatment.

The protection of children and family life is also given a great deal of importance in humanitarian law. It is taken into account in a number of different ways, such as the provision made for children's education and physical care, the separation of children from adults if interned (unless they are members of the same family), and special provisions for children who are orphaned or separated from their families.[48] The family is protected as far as possible by rules that help prevent its separation by keeping members of dispersed families informed of their respective situation and whereabouts and by transmitting letters between them. [49]

Respect for religious faith is also taken into account in humanitarian law, not only by stipulating that prisoners of war and detained civilians may practise their own religion,[50] but also by providing for ministers of religion who are given special protection.[51] In addition the Geneva Conventions stipulate that if possible the dead are to be given burial according to the rites of their own religion.[52]

This very brief review is by no means an exhaustive list of the ways in which humanitarian law overlaps with human rights norms. However, it should be noted that there are a number of human rights, such as the right of association and the political rights, that are not included in humanitarian law because they are not perceived as being of relevance to the protection of persons from the particular dangers of armed conflict.

The mutual influence of human rights and humanitarian law

The separate development of these two branches of international law has always limited the influence which they might have had upon each other. However, their present convergence, as described above, makes the establishment of certain closer links between these two legal domains conceivable.

In this connection, Article 3 common to the Four Geneva Conventions is revealing. A real miniature treaty within the Conventions, common Article 3 lays down the basic rules which States are required to respect when confronted with armed groups on their own territory. It thus diverges from the traditional approach of humanitarian law which, in principle, did not concern itself with the relations between a State and its nationals.[53] Such a provision would be more readily associated with the human rights sphere which, in 1949, had just made its entry into international law with the mention of human rights in the 1945 Charter of the United Nations and the adoption of the Universal Declaration of Human Rights in 1948.

The true turning point, when humanitarian law and human rights gradually began to draw closer, came in 1968 during the International Conference on Human Rights in Tehran, at which the United Nations for the first time considered the application of human rights in armed conflict. The delegates adopted a resolution inviting the Secretary-General of the United Nations to examine the development of humanitarian law and to consider steps to be taken to promote respect for it. [54] Humanitarian law thus branched out from its usual course of development and found a new opening within the UN, which had hitherto neglected it - unlike human rights, to which UN attention had been given from the start.

The convergence which began in 1968 slowly continued over the years and is still in progress today. Human rights texts are increasingly expressing ideas and concepts typical of humanitarian law. The reverse phenomenon, although much rarer, has also occurred. In other terms, the gap which still exists today between human rights and humanitarian law is diminishing. Influences from both sides are gradually tending to bring the two spheres together.[55]

The rest of this chapter will give a few examples illustrating the tendency we have just outlined.

Some of these illustrations are to be found in the texts of treaties. For example, the adoption in 1977 of the two Protocols additional to the 1949 Geneva Conventions was, in a certain sense, a reflection of what had happened in Tehran nine years earlier. The world of humanitarian law paid tribute to the world of human rights. The subjects and wording of Protocol I's Article 75, entitled " Fundamental guarantees " , are in fact directly inspired by the major human rights instruments, for it lays down the principle of non-discrimination, the main prohibitions relating to the physical and mental well-being of individuals, the prohibition of arbitrary detention and the

essential legal guarantees. The same could be said of Articles 4, 5 and 6 of Protocol II, which, in situations of non-international armed conflict, are the counterpart to the aforesaid article in Protocol I.

Another example appears in the 1989 Convention on the Rights of the Child. The adoption procedure for this Convention, the substance of the rules which it establishes and the built-in mechanism for its implementation clearly show that it belongs to the family of human rights treaties. That did not prevent it, however, from casting a glance at the law of armed conflicts. It does so in Article 38, on the one hand by making a general reference to the humanitarian law provisions applicable to children (paragraph 1), and on the other hand by laying down rules itself that are applicable in the event of armed conflict.[56]

This tendency can also be seen in international instruments which are legally less binding than the Conventions we have just briefly surveyed. In particular, several United Nations General Assembly resolutions mingle references to humanitarian law and human rights within one and the same text. The General Assembly often states that it is " guided by the principles embodied in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and accepted humanitarian rules as set out in the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977 " .[57]

A more restricted forum than that of the United Nations, namely the Islamic Conference of Ministers of Foreign Affairs, adopted an Islamic Declaration of Human Rights in April 1990.[58] Although expressly claiming to be a human rights instrument, this declaration contains provisions which derive their inspiration directly from humanitarian law. For instance, it stipulates that " in case of use of force or armed conflict " , people who do not participate in the fighting, such as the aged, women and children, the wounded, the sick and prisoners, shall be protected. It also regulates the methods and means of combat.[59]

This declaration is one of the working documents used in preparation for the World Conference on Human Rights to be held in Vienna in June 1993. As such it is a sign that humanitarian law and human rights might again draw a little closer during that conference.

The interlinking of human rights and humanitarian law can also be seen in the work of bodies responsible for monitoring and implementing international law.

In this connection, it is interesting to note that in recent years the Security Council has been citing humanitarian law more and more frequently in support of its resolutions. The latest example of this tendency can be found in Resolution 808 (1993) on the conflict in the former Yugoslavia, in which the Security Council decided to establish an international tribunal " for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 " .[60]

A body more specifically concerned with the implementation of human rights, the Commission on Human Rights, likewise no longer hesitates to invoke humanitarian law to back up its recommendations.[61] The " Report on the Situation of Human Rights in Kuwait under Iraqi Occupation " presented at its 48th session is a clear example. [62]

To establish the law applicable to the situation in Kuwait, the Special Rapporteur begins by pointing out, in a chapter entitled " Interaction between human rights and humanitarian law " , that " there is consensus with the international community that the fundamental human rights of all persons are to be respected and protected both in times of peace and during periods of armed conflict.[63] Customary international law provides the Rapporteur with some of the rules he seeks to apply. There are, *inter alia*, three fundamental rules of humanitarian law which he singles out as being customary principles of human rights protection. These three principles stipulate: " (i) that the right of parties to choose the means and methods of warfare, i.e. the right of the parties to a conflict to adopt means of injuring the enemy, is not unlimited; (ii) that a distinction must be made between persons participating in military operations and those belonging to the civilian population to the effect that the latter be spared as much as possible; and (iii) that it is prohibited to launch attacks against the civilian population as such. " [64] The Rapporteur further considers that the rules of customary law applicable to the occupation of Kuwait include Article 3 common to the 1949 Geneva Conventions, Article 75 of the 1977 Additional Protocol I thereto and the 1948 Universal Declaration of Human Rights. In terms of positive law, he considers that the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights and the 1949 Geneva Conventions can also be applied.

This brief review of the legal framework thus defined shows that the Commission on Human Rights is no longer concerned with marking an overly clear distinction between human rights and humanitarian law. Although the Commission was set up to promote the implementation of human rights, it does not hesitate to invoke humanitarian law when the situation so requires. It now seems to consider that its mandate is no longer confined to human rights but takes in a larger area comprising " the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience. " [65] This view of its terms of reference thus enables it to draw upon the rules of humanitarian law to make pronouncements on the situations it is asked to examine.

Outside the United Nations, one must look to the Inter-American Commission on Human Rights to find any hint of a similar tendency. In 1983, the organization *Disabled Peoples' International* filed a complaint with the Commission, accusing the United States of violating the right to life guaranteed by Article I of the American Declaration of the Rights and Duties of Man. During its invasion of Grenada that year, the United States had bombed a mental asylum, killing several patients. In its petition, the organization asked the Commission to interpret Article I of the American Declaration on the basis of the principles of humanitarian law. The Commission declared the petition to be admissible. In dealing with the fundamental aspects of the issue, therefore, the Commission had to base its decision on a provision drawn up in the spirit of human rights in order to apply that provision to an armed conflict.[66]

Outside official circles as well, the convergence of human rights law and humanitarian law is increasingly apparent in the form of private initiatives. Law specialists are concerning themselves more and more with situations involving widespread violence but which cannot be said to have reached the point where they could be described as armed conflicts and where humanitarian law could be applied. Such situations often induce the State concerned to declare a state of emergency and to suspend most of the human rights that it has undertaken to respect.[67] Though, as we have seen, such derogations must remain the exception and are in any case excluded for certain rights, there is a risk of a gap in the law appearing in that area. In order to fill it, a new approach is needed to protection of the individual. It is becoming apparent that legal instruments should be drawn up combining elements of both humanitarian and human rights law in order to provide rules that can be applied in peacetime as well as in wartime.

This objective was behind the adoption in 1990 of the Declaration of Minimum Humanitarian Standards, the so-called Turku Declaration.[68] This text makes it clear from the outset that its drafters are determined not to take a position on any dichotomy between humanitarian law and human rights law. It proclaims principles " which are applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances " .[69] That determination finds expression in a succession of provisions based alternately on the spirit of human rights law (for example the prohibition of torture and the principle of *habeas corpus*) and on the spirit of humanitarian law (for example the prohibition on harming individuals not taking part in hostilities and the obligation to treat wounded and sick persons humanely).

The Turku Declaration is the work of a group of experts who met privately for the purpose. It therefore lacks the force in law that it would have if it had been adopted by an international body. But it is not meaningless; for one thing, some of its provisions have long been part of general international law. For another, it was drawn up by qualified specialists in order to meet a need acknowledged by the international community. It can thus not be ruled out that the Declaration will gradually gain recognition

by a number of international legal institutions. A first step in this direction has already been taken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities which referred to it in its Resolution 1192/106 on the human rights situation in Iraq.[70]

Conclusion

It is very likely that the present trends will continue in future. The obvious advantage of human rights bodies using humanitarian law is that humanitarian law will become increasingly known to decision-makers and to the public who, it is hoped, will exert increasing pressure to obtain respect for it. On the other hand, one concern could be that the growing politicization of human rights by governmental bodies could affect humanitarian law. However, there are several reasons why this is unlikely. First, humanitarian law treaties are all universal and there are no regional systems which could encourage a perception that the law varies from one continent to another. Secondly, we have seen that humanitarian law does not present the kind of theoretical difficulties encountered by human rights law as regards " first ", " second ", and " third " generation rights. Thirdly, the most politically sensitive aspect of human rights law, namely, political rights and mode of government, is totally absent from humanitarian law. What will probably not be avoided, however, are the political influences that lead States to insist on the implementation of the law in some conflicts whilst ignoring others. This, however, is not new and it is to be hoped that a greater interest in humanitarian law will tend to bring about more demands for it to be respected in all conflicts.

There can be no doubt that the growing prominence of human rights law in recent decades is largely due to the activism of non-governmental human rights organizations. Several have now begun to use humanitarian law in their work[71] and may well exert a considerable influence in the future. Such an interest could encourage both the implementation and the further development of the law. As one of the major factors in the development of humanitarian law, namely the perception of honour in combat, has lost influence in modern society, there is a need for a motivating force to fill this void. A perception of human rights has in effect done so, and will continue to be of importance in the future. Another area in which interest in human rights could help further develop humanitarian law is that of internal armed conflicts. Common Article 3 and 1977 Protocol II are much less far-reaching than the law applicable to international armed conflicts and yet internal conflicts are more numerous and are causing untold misery and destruction. Given that human rights law is primarily concerned with behaviour within a State, it is possible that resistance to further responsibility in internal armed conflicts will be eroded by human rights pressure. We have already seen how there are moves towards further regulation in states of emergency [72] which have been influenced by humanitarian law although they are outside its sphere of action.

It may well be, however, that States will recognize their own interest in respecting humanitarian law and will not in future perceive themselves as being induced to show such respect solely because of human rights activism. The benefits of respecting humanitarian law are self-evident, in particular the prevention of extensive destruction and

bitterness so that a lasting peace is more easily established.[73] If the chivalry of earlier times cannot be resurrected, it would be a positive development if the military could be encouraged to take a certain pride in the professionalism shown when behaving in accordance with humanitarian law.[74] As this law is still largely rooted in its traditional origins, it is not alien to military thinking and has the advantage of being a realistic code for military behaviour as well as protecting human rights to the maximum degree possible in the circumstances. It is to be hoped that continued recognition of the specific nature of humanitarian law, together with the various energies devoted to implementation of human rights law, will have the effect of enhancing the protection of the person in situations of violence.

Notes :

1. Resolution XXIII " Human Rights in Armed Conflicts " adopted by the International Conference on Human Rights, Tehran, 12 May 1968.
2. For an interesting survey of these customs from different parts of the world, see Part I of *International Dimensions of Humanitarian Law*, UNESCO, Paris, Henry Dunant Institute, Geneva, 1988.
3. See, for example, L. Oppenheim, *International Law*, Volume II , *Disputes, War and Neutrality*, Seventh edition, Longmans and Green, London, 1952, pp. 226-227.
4. For a good summary of these doctrines, see S. Bailey *Prohibitions and Restraints in War*, Oxford University Press, 1972, Chapter I.
5. There are frequent references in the preambles of nineteenth century humanitarian law instruments to civilization requiring restraints in warfare, for example, the Declaration of St. Petersburg of 1868 to the effect of prohibiting the use of certain projectiles in war time: "*Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war...*"; 1899 Hague Convention II with Respect to the Laws and Customs of War on Land: "*Animated by the desire to serve ... the interests of humanity and the ever increasing requirements of civilization*" .
6. *Instructions for the Government of Armies in the Field*, 24 April 1863, prepared by Francis Lieber during the American Civil War, and promulgated by President Lincoln as General Orders No 100. Reproduced in Schindler and Toman, eds., *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, Dordrecht, Henry Dunant Institute, Geneva, 1988.
7. Needless to say, this punishment would these days be a violation of the right to fair trial of the accused, which is reflected in Article 75 of 1977 Protocol I and equally applies to the treatment of a party's own soldiers.
8. *U.S. Air Force Law of War Manual*. There are similar definitions published in the United States Manual FM 27-10 and in the German Manual ZDv 15/10.
9. *ZDv 15/10*.
10. For a very good analysis of the concept of military necessity, see E. Rauch, "*Le concept de nécessité militaire dans le droit de la guerre*", *Revue de droit pénal militaire et de droit de la guerre*, 1980, p. 205.
11. See G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, Volume II, *The Law of Armed Conflict*, Stevens, London, 1968, pp. 10-12. These are not legal categories, but rather a conceptual way of grouping the different methods used for this purpose.
12. *Ibid.* at pp. 15-16.
13. Article 15, First Geneva Convention of 1949.
14. Article 11, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.
15. Article 4 of the International Covenant on Civil and Political Rights, 1966; Article 15 of the European Convention on Human Rights, 1950; Article 27 of the American Convention on Human Rights, 1969. Curiously, the African Charter on Human and Peoples' Rights contains no derogation clause, but in general it has more far-reaching limitation clauses.
16. For a good presentation of the different human rights theories, see J. Shestack, " The Jurisprudence of Human Rights " in T. Meron, ed., *Human Rights in International Law*, Oxford University Press, London, 1984, Volume 1, p. 69.

17. In particular J. Bentham and J. Austin, in T. Meron, ed., *ibid.* p. 79.

18. Marx is commonly cited as the origin of this social development, but he was not the only theorist of that period to speak of the importance of social and economic rights. We may refer in particular to Thomas Paine who proposed, in *The Rights of Man*, a plan which resembles a type of social security system, including children's allowances, old-age pensions, maternity, marriage and funeral allowances, and publicly endowed employment for the poor.

19. For a general article on the work of the ILO, see F. Wolf, " Human Rights and the International Labour Organization " in T. Meron, ed., *Human Rights and International Law, op.cit.*, No. 16 above, Volume 11, p. 273.

20. See in particular M. Cranston, *What Are Human Rights?*, 1973. Also, Dowrick, *Human Rights, Problems, Perspectives and Texts*, Saxon House, Farnborough, 1979.

21. Article 2.

22 Article 2.

23. Illustrative of this problem is the extensive discussion of how the right to food should be implemented in P. Alston and K. Tomasevski, eds., *The Right to Food*, SIM, Utrecht, 1984.

24. See P. Alston, " The Committee on Economic, Social and Cultural Rights " in P. Alston, ed., *The United Nations and Human Rights, 1992*.

25. For a general article on this subject see K. Drzewicki, " The Rights of Solidarity - the Third Revolution of Human Rights " , 53 *Nordisk Tidsskrift for International Ret*, 1984, p. 26.

26. There are various articles on the subject in *Interculture*, Volume XVII, Nos. 1-2 1984. An interesting address on " The universality of human rights and their relevance to developing countries " was also given by Dr. Shashi Tharoor at the Friedrich Naumann Stiftung Conference on Human Rights, Sintra, Portugal, 14-16 November 1988 (available from UNHCR).

27. The main justification of the continued applicability of humanitarian law is that most of the rules have as their aim the protection of the vulnerable in armed conflicts and that these rules can be applied in practice only if they are applicable to both sides. Further, as with human rights philosophy, humanitarian law has as its major premise the applicability of protection to all persons, irrespective of whether the individuals are perceived as " good " or " bad " .

28. Note 1 above.

29. *Ibid.*

30. See in particular:

- For the Human Rights Committee: *Lan a de Netto, Weismann and Perdomo v. Uruguay*, Com. No. R.2/8, A/35/40, Annex IV, paragraph 15; *Camargo v. Colombia*, Com. No. R. 1 1/45, Annex XI, paragraph 12.2.

- European Court of Human Rights: *Lawless Case (Merits)*, Judgment of 1st July 1961, paragraph 20 ff.; *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A No. 25, paragraph 202 ff.

- For the Inter-American Court of Human Rights: *Habeas corpus in emergency situations*, Advisory opinion OC-8/87 of 30 January 1987; *Judicial guarantees in states of emergency*, Advisory opinion OC-9/87 of 6 October 1987.

31. See in particular the following general observations:

5(13) on Article 4 of the Covenant, A/36/40, Annex VII;

7(16) on Article 7 of the Covenant, A/37/40, Annex V;

8(16) on Article 9 of the Covenant, A/37/40, Annex V;

13(21) on Article 14 of the Covenant, A/39/40, Annex VI.

32. See Higgins, " Derogations under Human Rights Treaties " . *British Yearbook of International Law*, 1976-1977, 281.

33. The most recent codification of the prohibition of the use of weapons of a nature to cause unnecessary suffering is in Article 35(b) of 1977 Protocol I. This reasoning, however, is most clearly stated in the St. Petersburg Declaration of 1868: "...the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy ... this object would be exceeded by the disabled men, or render their death inevitable..."

34. Articles 48 and 52.

35. Article 52(5)(b).

36. Article 54.

37. Articles 14 and 15 of the Fourth Geneva Convention and Articles 59 and 60 of 1977 Protocol I. It should be noted, however, that a non-defended area was protected from bombardment in customary law.

38. Article 12 of the ESC Covenant recognizes that everyone has the right to "the enjoyment of the highest attainable standard of physical and mental health". This goes much further of course than what is provided for in humanitarian law, but it is the only human rights provision under which the right to receive needed medical treatment could be categorized.

39. Article 55 of the Fourth Geneva Convention and Article 69 of Additional Protocol I.

40. Article 23 of the Fourth Geneva Convention and Article 70 of Additional Protocol I.

41. Article 11 of the ESC Covenant recognizes the right of everyone to " an adequate standard of living... including adequate food, clothing and housing " .
42. Articles 68 and 75 of the Fourth Geneva Convention.
43. For example, Article 3 common to the Geneva Conventions prohibits " violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture " .
44. Article 4(2)(f).
45. Article 74 in particular.
46. Articles 42 and 43 in particular.
47. Page 106.
48. For further detail, see D. Plattner, " Protection of children in international humanitarian law " , *IRRC*, No. 240, May-June 1984, pp. 140-152.
49. The articles are too numerous to list individually, but the majority are to be found in the Third and Fourth Geneva Conventions and their Additional Protocols.
50. Article 34, Third Geneva Convention, and Articles 27 and 38(3), Fourth Geneva Convention.
51. Articles 33 and 35-37, Third Geneva Convention, and Articles 38(3), 58 and 93, Fourth Geneva Convention.
52. Article 17, First Geneva Convention; Article 120, Third Geneva Convention; Article 130, Fourth Geneva Convention.
53. Although the Lieber Code did make some mention of forms of protection that could be accorded in civil wars, treaty law did not do so until common Article 3 of the Geneva Conventions.
54. See footnote 1 above.
55. See: T. Mecron, " The protection of the human person under human rights law and humanitarian law " , *Bulletin of Human Rights* 91/1, United Nations, New York, 1992.
56. " Convention on the Rights of the Child " , *Human rights in international law, Basic texts*, Council of Europe, Strasbourg, 1991.
57. Resolution 46/136 on the situation of human rights in Afghanistan. See also Resolution 46/135 on the situation of human rights in Kuwait under Iraqi occupation and Declaration 47/133 on the protection of all people against forced disappearances.
58. This document was published by the UN under reference No. A/CONF.157/PC/35.
59. Islamic Declaration of Human Rights, Article 3.
60. See also Security Council Resolutions 670 (1990) and 674 (1990) on Iraq's occupation of Kuwait, and Resolution 780 (1992) establishing a Commission of Experts to enquire into breaches of humanitarian law committed in the territory of the former Yugoslavia. See also the Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992): S/25274.
61. Among the most recent examples, see in particular the Report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1993/25 paras. 508-510) and its Addendum on the situation in Sri Lanka (E/CN.4/1993/25/Add.I paras. 40.42), and the Report on Extrajudicial, Summary or Arbitrary Executions (E/CN.4/ 1993/46 paras. 60, 61, 664 and 684).
62. Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin (E/CN.4/1992/26).
63. *Ibid*, para. 33.
64. *Ibid*, para. 36.
65. As in Articles 63, 62, 142 and 158 common to the four 1949 Geneva Conventions. The Rapporteur considers that the principles set out in these articles are relevant to the case he is examining and that they belong both to human rights and to humanitarian law.
66. For further details on the Grenada affair, see D. Weissbrodt and B. Andrus, " The Right to Life During Armed Conflict: Disabled Peoples'International v. United States " 29, *Harvard Int. L.J.*, 1988, p. 59.
67. See Article 4(2) of the International Covenant on Civil and Political Rights, Article 15(2) of the European Convention on Human Rights and Article 27(2) of the American Convention on Human Rights.
68. For the text of the Declaration of Minimum Humanitarian Standards, see E/CN.4/Sub.2/1991/55 or the *International Review of the Red Cross*, No. 282, May-June 1991, pp. 330-336.
69. *Idem*, Article 1.
70. Other initiatives comparable to the Turku Declaration have been taken in recent years. Examples are:
Hans-Peter Gasser, " Code of Conduct in the event of internal disturbances and tensions " , *Intet.natio al Review of the Red Cross*, No. 262, January-February 1988, pp. 51-53.
Theodor Meron, " Draft Model Declaration on Internal Strife " , *International Review of the Red Cross*, No. 262, January-February 1988, pp. 59-76.
71. In particular Human Rights Watch, which has used humanitarian law in a number of its reports, e.g. *Needless Deaths*, issued in 1992, on the Second Gulf War. A large number of these organizations have recently begun a campaign to reduce the severe problems caused by the indiscriminate use of land mines, by calling for better respect for existing humanitarian law and for the eventual ban of the use of anti-personnel mines.
72. See pp. 116-117 above.

73. The importance of humanitarian law for facilitating the return to peace was already indicated in nineteenth century instruments, including the Brussels Declaration of 1874.

74. Modern teaching methods of humanitarian law stress the importance of inculcating correct behaviour during military exercises, rather than separate lessons that appear to have nothing to do with practicalities.