

EDITORIAL

There is no doubt that international humanitarian law is closely intertwined with international human rights law. Whereas the Universal Declaration of Human Rights of 1948 was originally meant for times of peace and did not much influence the elaboration of the Geneva Convention, adopted a year later, Article 75 of the 1977 Protocol I additional to the 1949 Geneva Conventions introduced fundamental guarantees and even procedural requirements derived from human rights treaties into what was, and sometimes still is, called the 'law of war'. Despite their different origins and development, international humanitarian law and international human rights law 'have met, are fusing together at some speed and ... in a number of practical instances the regime of human rights is setting the general direction and objectives for the revision of the law of war', as the eminent military historian and scholar Gerald I. A. D. Draper put it.

Today, nobody questions that international humanitarian law and international human rights law apply during armed conflict and that the two bodies of law are complementary and influence each other. The various organs of the United Nations, along with national and international jurisprudence and doctrine, affirm the principle that '[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.'

The present edition of the *Review* examines this relationship between international humanitarian and human rights law in situations of armed conflict according to the criteria recently set by the International Court of Justice in its *Wall* decision:

there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

While international humanitarian law remains the special law applicable during armed conflict, conflicting norms or standards sometimes require interpretation to determine whether a rule of humanitarian law or human rights law prevails in a concrete setting. Questions relating to detention in non-international

armed conflict and law enforcement in situations of occupation dominate this substantive debate.

These fundamental questions about the relationship between humanitarian law and human rights law are overshadowed by the even more political question of whether human rights implementation mechanisms should also govern situations of armed conflict. The mechanisms provided for in humanitarian law are often considered to be less stringent, only exceptionally applied (especially with regard to criminal prosecution) and only rudimentarily developed in non-international armed conflicts. Human rights mechanisms, however, promise a more open – and often judicial – treatment of serious violations of ‘fundamental human rights in armed conflict’. In particular, litigation concerning situations of armed conflict has evolved considerably in recent years, highlighting key human rights issues such as the prohibition of torture, arbitrary detention or forcible expulsion (*non-refoulement*) in armed conflicts as well as in the so-called ‘war on terror’. It has helped to bring human rights violations to court as a matter of law and not of politics, reasserting the rule of law in the highly sensitive area of war and terrorism, where circumstances put the law – and its mechanisms – to the ultimate test.

Almost all Western states are party to a regional human rights convention. In past years the European Court of Human Rights in particular has rendered several judgments which have an impact on the legal reading of situations of armed conflict and its applicable law. The Court has notably agreed to hear cases, brought by Chechen civilians against Russia, of human rights abuse in the course of the second Chechen war and has made 31 rulings to date. In contrast to the Inter-American Court it has, in clear situations of armed conflict, applied only the rules of the European Convention on Human Rights. It refrained from even mentioning humanitarian law, probably to avoid potential problems of material competence. But even so, the Court did not avoid referring to concepts deriving directly from humanitarian law, namely the distinction between combatants and civilians.

The issue is of even greater importance since the human rights treaties may apply not only within the national borders of the state party thereto, but also to acts committed by it abroad – including in situations of armed conflict. The International Court of Justice endorsed this principle of extraterritorial application of human rights by emphasizing that it is unconscionable to permit states to do abroad what they are prohibited from doing at home. The jurisprudence of the European Court of Human Rights – namely the meaning of ‘effective control’ and the question of whether the application is restricted to detention of persons – demonstrates the uncertainty in this grey area. Differing jurisdiction and jurisprudence of the various treaty bodies may directly affect the actual conduct of hostilities – and the distribution of roles among allied parties to a conflict – especially as acts of some belligerents are not subject to review by human rights bodies.

Another issue that has gained prominence in recent years is the above-mentioned principle of *non-refoulement*. It precludes the transfer of persons from one state to another if they face a risk of violation of certain fundamental rights. This principle is found in refugee law and extradition treaties, but also in international humanitarian law and international human rights law, and shows the complementarity between these two bodies of law. A growing phenomenon has been the transfer of people during multinational operations in armed conflicts; in such complex operations, transfers may occur between troop- or police-contributing countries, the United Nations, regional organizations and the host state. The baseline is that people must not be transferred if there are substantial reasons to believe that they would thereby be exposed to a risk of persecution, torture, cruel, inhumane or degrading treatment or arbitrary deprivation of life. In the current military operations in Afghanistan, Iraq, Sudan or Chad, the challenge is to find practical solutions to accommodate both the object and purpose of those operations and their inherent restrictions. International forces have a very limited capacity and desire to detain persons, and have difficulty in upholding all fundamental human rights standards in a foreign war-torn country, but may be legally prevented from handing over the detainees to the host country. At the very least, the legal obligations in such situations should not have the perverse result that no prisoners are taken.

At the UN level, the creation of the Human Rights Council two years ago raised hopes of a more efficient and less politicized multilateral discussion of human rights. As 2008 draws to a close, the Council has almost completed its institution-building and the Universal Periodic Review process favours a more impartial and co-operative approach. But it is still encountering major obstacles in turning its attention to urgent human rights issues and situations. What is more, the universality of human rights is being increasingly challenged within the Council, as many countries emphasize the need for consideration of cultural and religious idiosyncrasies in the interpretation of human rights. In particular, the special sessions of the Human Rights Council have shown that it, like the former UN Commission on Human Rights, remains politically deeply divided, and the United States has even given up its observer status on the Council.

States are also divided as to how far the Council, and above all the Special Procedures mechanisms, should take international humanitarian law into consideration. Some states fear that selective treatment of certain armed conflict situations, particularly in the Middle East, may further politicize the Council, whereas other states, knowing their strong position in this forum, favour discussions in it about the application of international humanitarian law. At the very least, the Council should not assume the function of the various human rights treaty bodies which bring some impartiality to the often politicized debate.

The ICRC has a mandate to perform the tasks incumbent on it under the Geneva Conventions and to work for the faithful application of that branch of international

humanitarian law. It has no similar mandate under international human rights law, although its more general right of humanitarian initiative and its recognized role in situations of internal violence have led it to take action in many situations below the threshold of armed conflict. Naturally enough the ICRC, like the armed forces, feels more comfortable with international humanitarian law because this law has evolved side by side with it and its operational activities.

Instead of referring explicitly to international human rights law, the ICRC's practice has often been to use general expressions such as 'internationally recognized standards' or 'humanitarian principles'. The ICRC feared the possible politicization that might result from invoking international human rights law directly. This was – and still is – especially the case in multilateral fora, which are closely linked with the necessarily politicized system of the United Nations. Similarly, the ICRC has been concerned that if it involves itself in human rights, it could be confused or associated with non-governmental human rights organizations whose working methods differ from those of the ICRC, in particular 'naming and shaming'. Such methods are in contrast to the ICRC's preferred use of confidentiality in bilateral representations. A further concern is that that human rights law endows individuals with rights to be respected by the state, whereas humanitarian law governs relations between states and other parties to conflict.

However, the growing role of human rights – in terms of complementarity, the case-law of the human rights courts, and extraterritorial application – needs to be taken into account and does give an additional perspective to the legal obligations of parties to armed conflict and the rights of conflict victims. The fundamental rules of human rights law, especially those that protect persons in situations of violence (e.g. provisions relating to the right to life and to physical and psychological integrity or dignity; the use of force for law enforcement; missing persons; etc.), are comparable to the rules of international humanitarian law, have similar origins and correspond largely to many of the current ICRC's activities. Moreover, in situations not amounting to armed conflict where the police, sometimes backed or replaced by the military, intervene to maintain or re-establish order, only national law and human rights law are applicable and provide the reference points and common standards required when engaging the authorities. Here, the ICRC may explicitly refer to human rights treaty rules or soft law standards to improve the protection of persons in the particular context of ICRC activities, while maintaining its identity as linked to international humanitarian law.

Toni Pfanner
Editor-in-Chief