The Hague Academy of International Law

The Humanization of International Law

Theodor Meron

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by

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For Monique

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Introduction

My object in this book is not to retrace the fairly familiar terrain of establishing the legal character of human rights, or to argue the proposition, now well accepted, that human rights are part and parcel of the discipline of international law,[1] but to consider the influence of human rights and humanitarian law on general international law. Although human rights and humanitarian norms are central to this book, this is not a book about human rights and humanitarian law. Rather, this is a book about the radiation, or the reforming effect, that human rights and humanitarian law has had, and is having, on other fields of public international law. Because of the peculiarities of human rights law, this influence cannot be taken for granted. It is sometimes said that the elaboration of human rights norms and institutions has produced no less than a revolution in the system of international law. Is this true, and if so, in what parts of international law? By examining most of the general areas of public international law, I attempt to demonstrate that the influence of human rights and humanitarian norms has not remained confined to one sector of international law, and that its influence has spread to many other parts, though to varying degrees. The humanization of public international law under the impact of human rights has shifted its focus above all from State-centered to individual-centered.

A human rights scholar must resist the urge to present a triumphalist view of the impact human rights have had on all the rest of international law. We must not exaggerate their influence where there has been little or none. In such important areas as territory of State, or settlement of disputes, for example, human rights have had little impact. But we must recognize and assess that influence where it can be found.

1 *See, e.g.,* Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (1989); Human Rights Law-Making in the United Nations (1986).

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Chapter 1: The Humanization of the Law of War

A. Introduction and General Principles

In this chapter, I focus on the humanization of the law of war, a process to a large extent driven by human rights and principles of humanity. The subject is vast. It is inevitable that major issues must be left out of my discussion. I will show how – under the influence of human rights – the law of war has been changing and acquiring a more humane face: the inroads made on the dominant role of reciprocity; the fostering of accountability; the formation, formulation and interpretation of rules. These trends are manifested by both substantive and terminological changes. For example, the phrase "international humanitarian law" has increasingly supplanted terms such as the "law of war" and the "law of the armed conflict," a change influenced by the human rights movement. Although initially, in the 1950's, international humanitarian law or IHL referred only to the Geneva Convention on the protection of war victims, it is now increasingly employed to refer to the entire law of armed conflict.

The law of war has always contained rules based on chivalry, religion, and humanity designed for the protection of non-combatants, and especially women, children and old men, presumed incapable of bearing arms and committing acts of hostility. It also contained rules protecting combatants (in matters such as quarter, perfidy, unnecessary suffering).[1] For some time now, the law of war has included an increasing number of rules on accountability and protection, such as those on protecting powers, the International Committee of the Red Cross (ICRC), criminal responsibility and international criminal tribunals. Nevertheless, the law of war has inevitably been geared to considerations of military strategy and victory.[2] Historically, reciprocity has been central to its development, serving as a rationale for the formation of norms and as a major factor for securing respect and discouraging violations. The law of war was paradigmatically inter-State law, and thus, as Georges Abi-Saab put it, driven by "collective responsibility, with the attend-

1 *See* Theodor Meron, Henry's Wars and Shakespeare's Laws (1993); Bloody Constraint: War and Chivalry in Shakespeare (1998). For a recent study *see* Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2004).

2 *See generally* Theodor Meron, Human Rights in Internal Strife: Their International Protection (1987).

ant collective sanctions of classical international law: belligerent reprisals *durante bello* and war reparations *post bellum*."[3] This State-centric character of the traditional law of war was reflected in the definition both of liability and of remedies. When a soldier violated the rules, the State for whom he fought was usually liable for the violation not to the victims but to the victims' State. Individuals seldom benefited from such arrangements.

Chivalry and principles of humanity are a competing inspiration for the law of armed conflict, creating a counterbalance to military necessity. Nevertheless, in recent conflicts where wars are increasingly fought against civilians, chivalry is often ignored. Tension between military necessity and restraint on the conduct of belligerents is the hallmark of the law of armed conflict. However, the weight assigned to these two conflicting factors has been shifting. The principle of humanitarian restraints has been of growing importance, especially in normative developments and in the elaboration of new standards, but, regrettably, less in the actual practice in the field, which remains cruel and bloody, especially in internal conflicts.

Calamitous events and atrocities have always driven the development of international humanitarian law. The more offensive or painful the suffering, the greater the pressure for adjustment of the law. The American Civil War generated the Lieber Code (1863), which ultimately spawned the branch of international humanitarian law commonly known as the Hague Law, which governs the conduct of hostilities. The battle of Solferino, immortalized in Henry Dunant's moving portrayal of the suffering and the bloodshed at the battle, in *A Memory of Solferino* (1862), inspired the Red Cross Movement and the Geneva Law, the other branch of humanitarian law, which starting with the first Geneva Convention (1864), emphasizes the protection of the victims of war, the sick, the wounded, prisoners and civilians. Nazi atrocities led to Nuremberg, the Geneva Conventions for the Protection of Victims of War and the Genocide Convention. Those atrocities also helped shift some State-to-State aspects of international humanitarian law to individual criminal responsibility, thus contributing to a change in its emphasis from State-centric to homocentric. The atrocities in the former Yugoslavia, Rwanda and elsewhere had a pronounced impact not because of their unprecedented nature – there is, unfortunately, nothing new in atrocities – but because of the role of the media, which resulted in rapid sensitization of public opinion, reducing the time between atrocities and responses. One result was the establishment of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, which have had a tremendous impact both on the development of international humanitarian law and on its humanization.[4] The current changing

3 Abi-Saab, *International Criminal Tribunals and the Development of International Humanitarian Law, in* Liber Amicorum – Judge Mohammed Bedjaoui 649, 650 (Emile Yakpo & Tahar Boumedra eds., 1999).

4 Meron, *The Normative Impact on International Law of the International Tribunal for former Yugoslavia*, [1995] Israel Y.B. Hum. Rights 163.

nature of conflicts from international to internal has drawn humanitarian law in the direction of human rights law.

Human rights law has had a major influence on the formation of customary rules of humanitarian law, in terms of scholarship and, more importantly, of the jurisprudence of courts and tribunals and the work of international organizations. This trend started at Nuremberg and has continued through such ICJ cases as the *Nicaragua* case and the *Nuclear Weapons Advisory Opinion* and the jurisprudence of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda. *Opinio juris* has proven influential in the form of verbal statements by governmental representatives to international organizations, the content of resolutions, declarations and other normative instruments adopted by such organizations, and in the consent of States to such instruments.[5]

This is not surprising, given that robust efforts had to be made to humanize the behavior of States and fighting groups in armed conflicts. Although humanitarian norms may have a lesser prospect for actual compliance than other norms of public international law, they enjoy a stronger moral support. Judges, scholars, governments and non-governmental organizations are often ready to accept a rather large gap between practice and norms without questioning their binding character. Gradual and partial compliance with norms has often been accepted as fulfilling the requirements for the formation of customary law. Contrary practice has been downplayed. Courts and tribunals have often ignored operational or battlefield practice. Without formally abandoning the traditional dual requirements (practice and *opinio juris*) for the formation of customary international law, the tendency has been to weigh statements by governments, the ICRC, and intergovernmental organizations both as evidence of practice and as articulation of *opinio juris*. Courts and tribunals have relied on *opinio juris* or general principles of humanitarian law distilled in part from the Geneva, the Hague and other humanitarian conventions. The methodology thus resembles that applied in the human rights field. However, even in other areas of international law, conclusory treatment of customary law is becoming common. This is true even of the International Court of Justice. In terminology, however, courts and tribunals have followed the law of war tradition of speaking of practice and custom, even when this requires stretching the traditional meaning of customary law. Similar tendencies have also been apparent in the restatement of norms in the Rome Conference for the establishment of an international criminal court (ICC) and in the ICRC study on customary rules of International Humanitarian Law.[6] Public opinion, the media, the NGOs and the ICRC have played a critical role in promoting such

5 Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, ch. I (1989); Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238 (1996).

6 Theodor Meron, War Crimes Law Comes of Age, ch. XVII and the Epilogue (1998); Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (2005). I was one of the reporters and served on its steering committee of experts.

tendencies. The jurisprudence of the ICTY, however, has dealt with customary law more rigorously.

Human rights enrich humanitarian law, just as humanitarian law enriches human rights. The recognition of customary norms rooted in international human rights instruments affects, through application by analogy, the interpretation, and eventually the status, of the parallel norms in instruments of international humanitarian law.[7] The influence of processes followed in the human rights field on the development of customary law by humanitarian law tribunals is well-known.[8] The International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) demonstrate how criminal tribunals applying humanitarian law are informed by human rights law. The *ad hoc* criminal tribunals have often adopted human rights approaches to the definition of humanitarian norms. In some situations, however, it may be better to maintain distinct humanitarian or human rights approaches. Take the definition of torture, for example, where the requirement of State action under Article 1 of the UN Convention against Torture was found inapplicable to individual criminal responsibility. Thus, in *Prosecutor v. Kunarac, Kovač and Vuković*, the ICTY explained why it found it necessary to depart from human rights approaches to the definition of torture which require State action:

> The Trial Chamber draws a distinction between those provisions which are addressed to States and their agents and those provisions which are addressed to individuals. Violations of the former provisions result in the responsibility of the State to take the necessary steps to redress or make reparation for the negative consequences of the criminal actions of its agents. On the other hand, violations of the second set of provisions may provide for individual criminal responsibility, regardless of an individual's official status. While human rights norms are almost exclusively of the first sort, humanitarian provisions can be of both or sometimes of mixed nature. This has been pointed out by the Trial chamber in the *Furundžija* case:
>
> Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to prevent torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly wrongful act generating State responsibility.[9]

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7 Meron, *supra* note 5, at 56-57; Meron, *The Humanization of Humanitarian Law*, 94 ASIL 239 (2000); Koller, *The Moral Imperative: Towards a Human Rights-Based Law of War*, 46 Harv. Int'l L.J. 231 (2005).

8 Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, *in* Meron, *supra* note 5, at 262.

9 Case No. IT-96-23-T & IT-96-23/1-T, paras. 489-90 (2001); Mettraux, *Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int'l L. J. 238, 290-91 (2002). The Appeals Chamber agreed with the Trial Chamber that "the public official requirement is not