

Complementarity between the ICRC and the United Nations and international humanitarian law and international human rights law, 1948–1968

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Abstract

This article shows that between the drafting of the Universal Declaration of Human Rights in 1948 and the Tehran conference in 1968, international human rights law and international humanitarian law and their respective guardian institutions, the United Nations (UN) and the International Committee of the Red Cross (ICRC), were not so conceptually far apart as is sometimes suggested. Its purpose is to give further legitimacy to the role of human rights law in armed conflict and show that cooperation between the UN and the ICRC has a long history.

Keywords: international human rights law, international humanitarian law, ICRC, United Nations, relationship, armed conflict, complementarity.

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Although it is now almost universally accepted that international human rights law applies in times of armed conflict,¹ the majority of authors writing on the subject contend that it applies even though it was never intended to apply in conflict situations and despite the strict institutional divide that used to exist between the International Committee of the Red Cross (ICRC) and the United Nations (UN).² To most authors, the adoption of Resolution XXIII, entitled ‘Respect for Human Rights in Times of Armed Conflict’, at the Tehran human rights conference in 1968 was the first instance in which any conceptual overlap between international human rights law and international humanitarian law was noted and one of the first times that the mandates of the UN and the ICRC came into contact with each other. The purpose of this article is to present research challenging these assumptions. As with all stories that are often told, many of the points in the narrative surrounding the relationship between international human rights law and international humanitarian law and the relationship between the UN and the ICRC have become accepted wisdom; they are often repeated and less often questioned. And while this is mainly unproblematic because most of the narrative is accurate, this article presents evidence that suggests that between the drafting of the Universal Declaration of Human Rights (UDHR)³ in 1948 and the Tehran human rights conference in 1968,⁴ international humanitarian law and international human rights law and their respective guardian institutions were not so conceptually far apart as is sometimes suggested. This evidence is important because as long as we repeatedly read and are told that human rights law was never intended to apply during armed conflict, its ability to assist in this context may be unduly limited. It is hoped that this exercise will show that the ICRC and the UN have a much longer history of working together on issues relating to armed conflict than is often appreciated. It is also hoped that

- 1 For a comprehensive account of the weight of legal authority from the International Court of Justice and human rights treaty bodies confirming that human rights law applies during armed conflict, see UN Commission on Human Rights (UNCHR), ‘Working Paper on the Relationship between Human Rights Law and International Humanitarian Law by Françoise Hampson and Ibrahim Salama’, UN Doc. E/CN.4/Sub.2/2005/14, 21 June 2005. It is noted that in its Fourth Periodic Report to the UN Human Rights Committee (HRC), the United States, previously a long-standing objector to the proposition that international human rights law applies during armed conflict, confirmed its view that international human rights law and the law of armed conflict are ‘in many respects complementary and mutually enforcing’ in times of armed conflict: US Fourth Periodic Report to the HRC, 30 December 2011, para. 507. Israel, the other long-standing objector in this regard, maintains the position that international human rights law does not apply during armed conflict. See Concluding Observations of the HRC on Israel’s Initial Periodic Report to the HRC, UN Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10; UNHRC, Concluding Observations of the HRC on Israel’s Second Periodic Report, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11; and Concluding Observations of the HRC on Israel’s Third Periodic Report to the HRC, UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 5.
- 2 See, for example, Robert Kolb, ‘The relationship between international humanitarian law and human rights law: a brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions’, in *International Review of the Red Cross*, 38th year, No. 324, September 1998, p. 409; Heike Krieger, ‘A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC customary law study’, in *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006, p. 265; and Cordula Droege, ‘The interplay between international humanitarian law and international human rights law in situations of armed conflict’, in *Israel Law Review*, Vol. 40, No. 2, 2007, p. 310.
- 3 Universal Declaration of Human Rights (UDHR) adopted 10 December 1948, UNGA Res. 217 A(III).
- 4 Many authors see the latter event as the first occasion on which the two bodies of law were recognised to have some conceptual overlap.

the exercise may contribute to revising the way in which the historical relationship between the two bodies of law is perceived and thereby make the application of human rights law to armed conflict more valuable.

The relationship between international human rights law and international humanitarian law and the UN and ICRC between 1948 and 1968: the dominant narrative

The majority of articles addressing the relationship between international humanitarian law and international human rights law tell the story of the relationship between the two bodies of law and their two guardian institutions the same way.⁵ The story starts with a description of how at the time that the UDHR and 1949 Geneva Conventions⁶ were drafted, human rights law and international humanitarian law were conceived of as being completely different bodies of law with different histories and with few overlapping areas of application.⁷ International humanitarian law is one of the oldest branches of public international law and historically was based on honour, military necessity, and chivalry.⁸ The 'humanitarian' aspect was infused into the law of war relatively late in its long history, with the Geneva Convention of 1864 relating to the sick and wounded in the field and the Martens clause in the preamble to the Fourth Hague Convention in 1907.⁹ Human rights law, in comparison, is a much more recent branch of public

- 5 Naz K. Modirzadeh, 'The dark sides of convergence: a pro-civilian critique of the extraterritorial application of human rights law in armed conflict', in *Blue Book*, Vol. 86, May 2010, p. 352.
- 6 International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; ICRC, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; ICRC, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.
- 7 H. Krieger, above note 2, p. 266; Dietrich Schindler, 'The International Committee of the Red Cross and human rights', in *International Review of the Red Cross*, 19th year, No. 208, January–February 1979, p. 7; G. I. A. D. Draper, 'The relationship between the human rights regime and the law of armed conflict', in *Israel Yearbook on Human Rights*, Vol. 1, 1971, pp. 191–192; Dietrich Schindler, 'Human rights and humanitarian law: interrelationship of the laws', in *American University Law Review*, Vol. 31, No. 935, 1981–1982, pp. 935–937; Cordula Drooge, 'Elective affinities? Human rights and humanitarian law', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 503; A. Robertson, 'Humanitarian law and human rights', in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Martinus Nijhoff, The Hague, 1984, pp. 793–795; C. Drooge, above note 2, pp. 312–313; R. Kolb, above note 2, p. 409; Louise Doswald-Beck and Sylvain Vité, 'International humanitarian law and human rights law', in *International Review of the Red Cross*, Vol. 33, No. 293, 1993, pp. 95–105.
- 8 L. Doswald-Beck and S. Vité, above note 7, p. 95.
- 9 G. I. A. D. Draper, above note 7, p. 191. Ben-Naftali and Shany also note that 'the principle of humanity underlying IHR law, was never absent from IHL, as typified by the Martens Clause. . . . Thus, while there is no denying the distinct historical roots of these two regimes, it is equally difficult to refute that the seed that would eventually father the law of human rights was already planted in IHL'. See Orna Ben-Naftali and Yuval Shany, 'Living in denial: the application of human rights in the occupied territories', in *Israel Law Review*, Vol. 37, No. 1, 2003–2004, pp. 43–44.

international law.¹⁰ While it is possible to trace the principles on which human rights law is based – equality, dignity, liberty, and solidarity – to ancient philosophy and writings,¹¹ no international law document containing human rights commitments between states existed before the UDHR. None of the earlier declarations and statutes proclaiming or safeguarding rights were international in scope.¹² On the basis of these separate historical backgrounds, most authors argue that in 1948 and 1949, when the UDHR and the Geneva Conventions were drafted, there was no conceptual overlap between the two bodies of law in the minds of the drafters.¹³ We are told that the UDHR ‘completely bypasses the question of respect for human rights in armed conflicts’¹⁴ and that ‘human rights were scarcely mentioned’ during the drafting of the Geneva Conventions.¹⁵ There seems to be a widespread view that at the time of the UDHR’s drafting, human rights law was assumed not to apply during times of conflict; the two bodies of law were considered to be alternate regimes that would not apply at the same time.¹⁶ Human rights law was the law of peace; international humanitarian law was the law of war.¹⁷

Fitting with this narrative is the fact that bodies of law had different institutional guardians.¹⁸ This is widely thought to have had the effect of cementing the differences between the two legal regimes. Human rights law was developed under the auspices of the UN and emerged out of World War II. Securing a commitment from states to human rights law was considered key to preventing a repetition of the atrocities against civilians that took place during the war. It was central to the hope that the countries of the world, emerging traumatised from total war, would never allow such atrocities to occur again. Against the background of newfound peace and optimism, there was reluctance for the UN to be involved in the redrafting of the laws of war. It was thought that to do so might betray a less than complete commitment to peace on the part of the organisation.¹⁹ There was a strong

10 See ‘Working Paper on the Relationship between Human Rights Law and International Humanitarian Law by Françoise Hampson and Ibrahim Salama’, above note 1, pp. 12–13; D. Schindler, ‘Human rights and humanitarian law’, above note 7, p. 936; R. Kolb, above note 2, p. 409.

11 L. Doswald-Beck and S. Vité, above note 7, pp. 101–102; D. Schindler, ‘The International Committee of the Red Cross and human rights’, above note 7, p. 6.

12 For example, the Magna Carta (1215), Bill of Rights (1689), Virginia Declaration of the Rights of Man (1776), American Declaration of Independence (1776), and French Declaration of the Rights of Man and of the Citizen (1789).

13 C. Droege, above note 2, p. 314; D. Schindler, ‘Human rights and humanitarian law’, above note 7, p. 936.

14 R. Kolb, above note 2, pp. 411–412; D. Schindler, ‘The International Committee of the Red Cross and human rights’, above note 7, p. 7.

15 R. Kolb, above note 2, p. 412. See also G. I. A. D. Draper, ‘Humanitarian law and human rights’, in Michael Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G. I. A. D. Draper, OBE*, Kluwer Law International, The Hague/ Boston/ London, 1998, p. 143.

16 D. Schindler, ‘Human rights and humanitarian law’, above note 7, p. 936; H. Krieger, above note 2, p. 266; C. Droege, above note 2, p. 314. On the drafting of the UDHR, see, in particular, R. Kolb, above note 2, pp. 412–413.

17 N. K. Modirzadeh, above note 5, p. 352.

18 Nancie Prud’homme, ‘*Lex specialis*: oversimplifying a more complex and multifaceted relationship?’, in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 359–360.

19 *Ibid.*, p. 359; R. Kolb, above note 2, p. 410; D. Schindler, ‘The International Committee of the Red Cross and human rights’, above note 7, p. 7. It is interesting to note that the idea that the UN should distance

feeling that the new organisation should focus on the law of peace, the law on the use of force found in the UN Charter, and human rights law. This led to an institutional divide: international human rights law fell under the auspices of the UN, and international humanitarian law under the auspices of the ICRC. It is often emphasised by academic commentators that the laws of war ended up being entrusted to the guardianship of the ICRC not only because the UN did not wish to be involved in their codification, but also because the ICRC was fearful that the UN's involvement in the codification of such laws might compromise the distinction between *jus in bello* and *jus ad bellum* that is fundamental to the ICRC as an institution.²⁰ A picture emerges from the literature of the two institutions maintaining a 'cautious distance' from each other and each other's mandates.²¹ Many authors point to this institutional divide as further evidence of the fact that in the years immediately after the UDHR and the Geneva Conventions were drafted, there was no connection between international human rights law and international humanitarian law.²²

itself from the laws of war pre-dates World War II and the establishment of the UN. This is seen in the publication of an anonymous article in the 1920–1921 first edition of the *British Yearbook of International Law* which set out a comprehensive set of reasons why (i) the laws of war should not be rewritten and (ii) the laws of war should not be a project with which the League of Nations should be associated. Its reasoning for the latter argument was based on the fact that the 'new machinery' of the League of Nations should be used not to 'solve the old problems connected with the codification of the laws of war ... [but] rather [for] the building up of a new body of international law for time of peace' (pp. 114–115). It also posited the rather heavy allegation that 'the failure of international law to provide solutions to the problems of peace ha[d] been at least in part due to the fact that the attention of writers and statesmen ha[d] always been diverted from the law of peace to the law of war' (p. 115). The article went on to argue that it was only 'by the development of the law of peace, rather than by renewing the attempts to codify the law of war, that a stable international system can be built up by the League of Nations' (p. 116). It is clear that this article was influential in Great Britain because shortly after it was published there, it was republished by the *Michigan Law Review*, which described it as 'one of the most illuminating and significant discussions of the subject that has appeared up to the present date'. Although it had apparently 'attracted a great deal of attention in Great Britain', the editors of the journal felt that the article had not attracted as much attention as 'it deserves' in the United States. It was republished in the Michigan journal 'in the hope that a real service may be rendered by affording it wider publicity among those whose opinions will weigh heavily in influencing the decisions to be made'. Anonymous, 'The League of Nations and the laws of war', in *British Yearbook of International Law*, 1920–1921, pp. 110–124. Josef Kunz, writing in 1951, argued that the 'dominating attitude' to the laws of war – expounded in the anonymous article – continued to prevail after World War II. In his words: 'the same neglect, indifference and apathy, the same hostility toward this subject, which so disastrously prevailed during the inter-war period, prevails again since the actual end of fighting in 1945. All the old arguments – the impossibility and futility of a revision of the laws of war, the "abolition" of war and, hence, the non-existence of the laws of war, the idea that any occupation with the laws of war would make "a bad impression on public opinion" – are repeated again ... The United Nations, like the League of Nations, is again leading in this policy of the ostrich'. See Josef Kunz, 'The chaotic status of the laws of war and the urgent necessity for their revision', in *American Journal of International Law*, Vol. 45, No. 37, 1951, pp. 39 and 42.

20 See R. Kolb, above note 2, p. 411, citing in footnote 7 the amendment proposed by the United Kingdom and adopted by the 17th International Conference of the Red Cross in Stockholm in 1948 which urges the ICRC, 'in view of the non-political character of the constituent bodies of the International Red Cross, to exercise the greatest care in regulating [its] relationship with intergovernmental, governmental or non-governmental organisations'.

21 O. Ben-Naftali and Y. Shany, above note 9, p. 47.

22 See, for example, *ibid.*, pp. 30–31; and D. Schindler, 'Human rights and humanitarian law', above note 7, p. 936.

From this starting point, the story is then told of the gradual coming together of the two bodies of law and the first signs of appreciation that there might be an overlap between the mandates of the ICRC and the UN. For most authors, the relationship between international human rights law and international humanitarian law began in 1968: the year of the human rights conference in Tehran.²³ A minority of authors point to earlier indications of a convergence between the two bodies of law in the 1950s²⁴ and 1960s.²⁵ It has been noted in this respect that while a derogation clause did not feature in the UDHR, one can be found in both the European Convention on Human Rights (ECHR) of 1950 and the International Covenant on Civil and Political Rights (ICCPR) of 1966. The existence of a derogation clause in these later documents has been taken as an indication that by this point, perceptions of human rights had changed sufficiently for their drafters to extend the application of human rights to times of war.²⁶ Likewise, the UN is noted to have slowly started to appreciate the ‘relevance of human rights in armed conflict’ in the 1950s.²⁷ Evidence of this is seen in resolutions from the Security Council and the General Assembly of the UN requesting parties to conflicts to respect human rights.²⁸ The convergence between the two bodies of law in these years is seen as relating to many factors. First, it was proving difficult to sustain interest among states parties for further codification of the laws of war. Efforts by the international humanitarian law community to secure the adoption of the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War – which contained important provisions relating to the conduct of hostilities – had almost come to a standstill at the end of the 1950s.²⁹ And, importantly, at the very time that enthusiasm for further codification of international humanitarian law seemed to be waning, the international community seemed to be increasingly cognisant of the fact that human rights law could be relevant in times of war. Concurrent to this, a similar movement was taking place among ordinary people,

23 See L. Doswald-Beck and S. Vité, above note 7, p. 112, who identify the Tehran conference as being ‘the true turning point’ and the ‘first time [that the United Nations] considered the application of human rights in armed conflict’. See also H. Krieger, above note 2, p. 266, who writes: ‘For several decades [after the drafting of the Geneva Conventions and the UDHR], it was generally considered that human rights law is not applicable in situations of armed conflict’. G. I. A. D. Draper, above note 15, p. 149, writes that the ‘confusion of the diametrically opposed regimes of human rights and the law of armed conflict [was] launched in the UN in 1968’. See also R. Kolb, above note 2, p. 419, who states: ‘it must be emphasized that this common front hardly existed before the adoption of Resolution XXIII by the International Conference on Human Rights’, in Tehran in 1968.

24 C. Droege, above note 2, p. 314; N. Prud’homme, above note 18, p. 362.

25 A. Robertson, above note 7, p. 795.

26 H. Krieger, above note 2, p. 267.

27 C. Droege, ‘Elective Affinities?’, above note 7, p. 504.

28 See UNGA Res. 804 (VIII), 3 December 1953, and UNGA Res. 1312 (XIII), 12 December 1958, as cited in C. Droege, ‘Elective Affinities?’, above note 7, pp. 504–505.

29 C. Droege, above note 2, p. 314; see also G. I. A. D. Draper, above note 7, p. 195, where he writes: ‘I venture to suggest that the revision of the law of armed conflicts after the conclusion of the Geneva Conventions of 1949, and the Genocide Convention of 1948, had come perilously near to stagnation before the impact of the movement for the establishment of a regime of human rights was brought to bear upon it’. Of course, this proved to be only a temporary doldrums for international humanitarian law as the 1970s brought the successful drafting of the Additional Protocols.

'human rights' as a concept was starting to captivate the human imagination, television was causing people to feel more connected to problems on the other side of the world, and human rights non-governmental organisations were gaining increasing popular support.³⁰

Against this background, the human rights conference in Tehran is almost always recognised as the most significant landmark in the story of the relationship between the two bodies of law.³¹ In 1968, the nations of the world gathered at a conference in Tehran that marked the twentieth anniversary of the UDHR. One of the key resolutions that emerged from this conference – Resolution XXIII – was entitled 'Respect for Human Rights in Armed Conflicts'.³² This resolution is important on the narrative timeline of the relationship between the two bodies of law and the ICRC and UN for two reasons. First, with its title, it confirms a consensus amongst the voting states that human rights continue to exist in times of conflict; second, because it is seen to represent a first step in the gradual lessening of the institutional divide between the two bodies of law that we have seen since. The body of the resolution asks the Secretary-General of the UN to commission a study on international humanitarian law. This was undoubtedly a significant development; it shows the UN explicitly renouncing its seemingly ideologically motivated distance from the codification of the laws of war and taking an interest in their development. It is frequently noted that this request in Tehran – later confirmed by the General Assembly in a resolution – was the first step towards the drafting of the Additional Protocols to the Geneva Conventions in the 1970s³³ – protocols that, more than any other treaty before them, demonstrated the growing connections between international humanitarian law and international human rights law.³⁴

30 A. Robertson, above note 7, p. 794.

31 O. Ben-Naftali and Y. Shany, above note 9, pp. 43–44; D. Schindler, 'Human rights and humanitarian law', above note 7, p. 936; G. I. A. D. Draper, above note 15, p. 149.

32 Several writers note that although the title of the resolution referred to human rights law, the body of the resolution refers only to international humanitarian law. See D. Schindler, 'Human rights and humanitarian law', above note 7, p. 937; and Louise Doswald-Beck, 'Human rights and humanitarian law: are there some individuals bereft of all legal protection?', Proceedings of the Annual Meeting of the American Society of International Law, 2004, p. 354. The reason for this anomaly is not clear but is discussed by Aristidis Calogeropoulos-Stratis, 'Droit humanitaire – Droits de l'Homme et victimes des conflits armés', in Swinarski (ed.), above note 7, p. 659.

33 Respect for Human Rights in Armed Conflicts, UNGA Res. 2444 (XXIII), 19 December 1968. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977, 1125 UNTS 3 and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977, 1125 UNTS 609.

34 Both Additional Protocols to the Geneva Conventions explicitly confirm the continued application of international human rights law in times of armed conflict. See in this regard, Art. 72 of AP I, which states that its provisions are 'additional . . . to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict'. See also the preamble to AP II, which recalls that 'international instruments relating to human rights offer a basic protection to the human person'. The connections between international humanitarian law and international human rights law demonstrated by the two additional protocols are also seen in Art. 75 (fundamental guarantees) of AP I and Art. 6 (penal prosecutions) of AP II. The drafting of these articles is very clearly influenced by human rights provisions, in particular Arts. 14 and 15 of the International Covenant on Civil and Political Rights.

The application of human rights law to armed conflict in the late 1940s and 1950s

While most of this narrative is undoubtedly accurate, some important aspects are less black-and-white than they are portrayed to be and deserve to be questioned. In particular, it is important to challenge the oft-made assumption that at the time the UDHR was drafted in 1948, its drafters thought it would not apply in times of conflict. While it is true that the *travaux préparatoires* of the UDHR do not reveal its drafters discussing whether or how the declaration might be applied during conflict, it is not clear that this silence should be interpreted to indicate a belief that human rights – as a concept – were deemed by its drafters to be irrelevant in times of armed conflict.³⁵ Indeed, if it is assumed for the sake of hypothesis that the drafters assumed that the UDHR *would* apply during times of conflict, some of the facts cited as evidence of the international community's nascent appreciation that human rights law might apply during conflict – facts that otherwise sit uncomfortably in the temporal narrative – make much more sense. For example, it may seem strange to consider Security Council resolutions from the 1950s as an indication of the international community 'slowly' starting to appreciate that human rights continue to apply in times of armed conflict.³⁶ Relative to the speed of other changes in international law, these would indicate a fast change of attitude indeed. Similarly, it is ambitious to see the derogation clauses in the ECHR and the ICCPR as indications that states had changed their minds on whether human rights could apply during conflict when it is remembered that the ECHR was finalised only two years after the UDHR was drafted;³⁷ this is a blink of an eye in international law terms and an exceptionally short period for perceptions on such a fundamental issue to change, especially in the absence of a clear catalysing event. The timing of these developments makes more sense if it is considered that at the time the UDHR was drafted, its drafters and other key members of the legal community already believed that its provisions would be relevant in times of conflict – in which case, the early examples of the UN calling upon states to respect human rights in times of conflict would be seen not as evidence of a changed perception of the way human rights law was understood, but simply as examples of the international organisation getting to grips with its new human rights mandate and determining its capabilities in this regard.

Support for the argument that the drafters of the UDHR believed it would be relevant in times of conflict is found in the fact that a derogation clause – similar to that in the ECHR and ICCPR – existed in the draft Covenant of Human Rights

35 R. Kolb, above note 2, pp. 412–413, states: 'The absence of any discussion of the problem of war can be explained by the general philosophy which prevailed within the United Nations at the time. There seemed to be a tacit but nevertheless general consensus that the Declaration was intended for times of peace, of which the United Nations was the guarantor'.

36 C. Droege, above note 2, p. 314.

37 H. Krieger, above note 2, p. 267.

that was written in parallel to the UDHR in 1947 and 1948.³⁸ The existence of this clause, which allowed states to derogate from certain human rights obligations in times of public emergency, is evidence that even in 1947 human rights law was deemed to apply in times of conflict, even though it was recognised that its application might have to be modified in these situations.³⁹ Moreover, it is also questionable whether it makes sense from a conceptual point of view to interpret the lack of a derogation clause in the UDHR as a sign that it was not intended to be applied in times of armed conflict. It is noteworthy in this regard that shortly after the UDHR was drafted, the opposite argument was made by Claude Pilloud, the Head of the ICRC's Legal Division, who had regularly attended the drafting sessions of the UDHR in 1947.⁴⁰ Writing in the *International Review of the Red Cross* in 1949, Pilloud stated:

Let us further add that the Universal Declaration does not provide for derogation clauses in exceptional circumstances such as wars, internal disturbances or other disasters; it must therefore be applied in its entirety at all times and all places. This is an important point, as during the *travaux préparatoires*, some proposals included such derogation clauses.⁴¹

In Pilloud's view, the drafters' decision that the UDHR should not contain a derogation clause indicated their view that it should apply at all times, even in times of armed conflict.

The distinctly natural law character of the UDHR provides further support for this interpretation. According to its preamble, human rights are 'inalienable' – they cannot be taken away or transferred. Article 1 of the Declaration states that human beings are 'born free and equal in dignity and rights'. This wording reflects a conception of human rights law based in natural law and suggests that the UDHR's drafters considered human rights to exist not because they are conferred by a treaty by means of positive law, but because they are innate to the human person. Against

38 See Article 4 of the draft International Covenant on Human Rights, set out in UNCHR, *Report on the Commission on Human Rights*, Supplement No. 1, Economic and Social Council Official Records, New York, 1948, p. 25. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights*, CCPR Commentary, N. P. Engel, Kehl am Rhein, 2005, p. 88.

39 Conceived from an early date to be a non-binding document, the UDHR was intended to have a moral rather than legal force. As such, unlike the draft Covenant – which in 1947 was written in parallel with the UDHR by the same individuals – the UDHR did not have any of the fundamental aspects required for a legally binding convention. When the two quite early drafts of these documents are compared, as they existed in 1947, it is notable that the Covenant of Human Rights already had a jurisdiction clause, a derogation clause, and limitation clauses. None of these appear even in the completed UDHR because it was never intended to provide that level of detail. Instead, its purpose was to provide broad over-arching principles of 'rights' that would provide guidance to states.

40 See note 60 below for details of Pilloud's attendance at the drafting sessions of the UDHR in 1947.

41 [translation from the original text in French by the editorial team]. Claude Pilloud, 'La Déclaration Universelle des Droits de l'Homme et Les Conventions Internationales Protégeant Les Victimes de la Guerre', in *Revue internationale de la Croix-Rouge*, 31th year, No. 364, April 1949, p. 254. Original text: 'Ajoutons encore que la Déclaration universelle ne prévoit pas de dérogations lors de circonstances exceptionnelles comme les guerres, les troubles civils ou autres calamités; elle doit donc conserver sa valeur en tout temps et en tout lieu. C'est là un point important car, lors des travaux préparatoires, certaines propositions tendaient à prévoir de semblables dérogations'.

the background of this language, it is hard to imagine that the drafters of the UDHR could have imagined that the rights contained therein would only exist in a state of peace.⁴² In particular, it seems unlikely that they would have deemed human rights to become irrelevant at the outbreak of an armed conflict. The drafters of the UDHR would have been acutely aware of the obvious truth that human rights become more, not less, important during wartime, as this is when they are most threatened.⁴³ It is no coincidence that the human rights declarations and documents that have existed over the centuries – including the UDHR – have been drafted after a period of conflict or revolution.⁴⁴ The norms that they contain reflect the values and hierarchies of power that have been fought for, and achieved, during the preceding conflict or civil unrest. ‘Rights documents’ not only represent a code of how people want to live thenceforth, but also constitute an undertaking by the government that the inequalities that caused the conflict and the atrocities that took place during the conflict will not be repeated. It does not do justice to this part of human rights law’s heritage to adhere to an overly utopian conception of human rights that is based on a harmonious relationship between the governor and the governed. On the contrary, since their earliest conception, human rights documents have been born out of antagonisms between governments and individuals. One of their primary purposes has always been to provide a means by which individuals can assert their rights in the face of the tyranny of government, the most extreme examples of which lead to and are manifested by armed conflict.⁴⁵

Support for a belief that human rights were relevant in times of conflict before 1968 is also seen in the General Assembly resolutions which invoke human rights law in times of conflict, drafted in the 1950s and 1960s. Droege has noted the 1953 General Assembly resolution invoking human rights in the context of the Korean conflict⁴⁶ and the Security Council resolution calling upon the Soviet Union and the authorities of Hungary to respect the Hungarian people’s enjoyment of human rights and freedoms.⁴⁷ She also mentions the Security Council resolution reaffirming the importance of human rights in the territories occupied by Israel after the Six-Day War.⁴⁸ Similar resolutions by the General Assembly are found in respect to the forceful denial of the ‘fundamental human rights and freedoms of the

42 C. Droege, above note 2, p. 324.

43 Marko Milanovic, ‘A norm conflict perspective on the relationship between international humanitarian law and human rights law’, in *Journal of Conflict & Security Law*, Vol. 14, No. 3, 2010, p. 460; and see G. I. A. D. Draper, above note 7, p. 198, who refers to an ‘awareness, universal among reflecting members of society, that respect for human rights is under maximum attack in times of war’.

44 The Magna Carta in 1215, the Bill of Rights in 1689, the Declaration of the Rights of Man and of the Citizen in 1789, the Virginia Declaration of Rights in 1776, the Declaration of Independence in 1776, and the Universal Declaration of Rights in 1948.

45 See Eleanor Roosevelt’s Statement to the United Nations General Assembly on the Universal Declaration of Human Rights, 9 December 1948, in *United States Department of State Bulletin*, Vol. 19, 19 December 1948, p. 751, in which she writes: ‘Man’s desire for peace lies behind this declaration. The realization that the flagrant violation of human rights by Nazi and Fascist countries sowed the seeds of the last world war has supplied the impetus for the work which brings us to the moment of achievement here today’.

46 C. Droege, above note 2, p. 314, citing UNGA Res. 804 (VIII), 3 December 1953.

47 *Ibid.*, p. 314, citing UNGA Res. 1312 (XIII), 12 December 1958.

48 *Ibid.*, pp. 314–315, citing UNSC Res. 237, 14 June 1967.

people of Tibet' in 1959⁴⁹ and the 'critical and explosive situation' in Aden which 'constitutes a denial of fundamental rights and endangers peace and security in the region' in 1963.⁵⁰ In another resolution on the Territory of Aden, the General Assembly requested the administering power to 'cease forthwith all repressive action against the people of the Territory, in particular military expeditions and the bombing of villages'.⁵¹ In 1961, the President of the Security Council affirmed that violations of the Security Council's request for a 'cease-fire' in the Dominican Republic had taken place and acts of repression against the civilian population and other violations of human rights had been brought to the Council's attention.⁵² In 1961, the Security Council expressed its concern about the 'systematic violations of human rights and fundamental freedoms and the general absence of the rule of law' in the Congo at a time when fighting in the country was widespread.⁵³ These examples of the UN Security Council and General Assembly invoking human rights law in situations of both near-conflict and outright conflict strongly indicate a belief on the part of the UN's members that human rights law was relevant and could be invoked in times of conflict. They also expose the illogicality of the argument that atrocities perpetrated in a situation nearing conflict might be characterised as human rights violations but that atrocities perpetrated in situations of outright armed conflict should not; a chronological reading of General Assembly and Security Council resolutions offers a vivid historical record of how quickly situations of internal disturbance can deteriorate into situations of non-international armed conflict.

Indeed, the fact that human rights law was conceived as applying in times of armed conflict is likewise confirmed by the fact that in the late 1940s several authoritative commentators perceived crimes against humanity to be analogous to crimes against fundamental human rights. In addressing the question of whether all war crimes could also be crimes against humanity, the digest of case law from the Nuremberg and Tokyo Tribunals published in 1949 states: 'it does not seem possible that war crimes in which there is no violation of human rights could possibly be regarded as crimes against humanity'.⁵⁴ Its conclusion in this regard is supported by a footnote which further adds that the 'remark assumes crimes against humanity to be restricted to offences against human rights'.⁵⁵ Hersch Lauterpacht, writing in 1950, similarly noted:

To lay down that crimes against humanity are punishable is, therefore, to assert the existence of rights of man grounded in a law superior to the law of the State. Thus, upon analysis, the enactment of crimes against humanity in an

49 UNGA Res. 1353 (XIV), 21 October 1959; and UNGA Res. 1723 (XVI), 20 December 1961.

50 UNGA Res. 1972 (XVIII), 16 December 1963.

51 UNGA Res. 1949 (XVIII), 11 December 1963.

52 See Record of Security Council's 1233rd Meeting on 26 July 1965.

53 UNSC Res. 169 (1961), 24 November 1961.

54 See *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission*, Vol. 15: Digest of Laws and Cases, 1949, p. 135.

55 *Ibid.*, p. 135, footnote 7.

international instrument signifies the acknowledgment of fundamental rights of the individual recognized by international law.⁵⁶

The clear perception in these years that there was a link between crimes against humanity and human rights amounts to evidence of a belief on the part of the authors of the digest and Lauterpacht that human rights law – or at least fundamental human rights – existed and could be violated in times of armed conflict.⁵⁷ This conclusion is particularly valid when it is remembered that then, much more than today, ‘crimes against humanity’ were thought to be inherently linked to armed conflict.⁵⁸

Appreciation of conceptual overlap between international humanitarian law and international human rights law in the late 1940s and early 1950s

Evidence that human rights law was already deemed relevant to armed conflict in the years immediately after 1948 prompts us to question whether there was really such a pronounced conceptual divide between human rights law and humanitarian law between 1948 and 1968. Although the *travaux préparatoires* to the UDHR do not reveal any discussion of international humanitarian law on the part of the drafters, it is noteworthy that the ICRC sent one or sometimes two senior representatives to many of the drafting sessions of the UDHR and the Covenant of Human Rights in Geneva⁵⁹ and New York.⁶⁰ In December 1947, when the sessions

56 Hersch Lauterpacht, *International Law and Human Rights*, Stevens & Sons, London, 1950, p. 36.

57 Lauterpacht’s use of the term ‘fundamental rights’ raises the difficult question of whether some human rights should be understood to be more ‘fundamental’ than others.

58 While today there is a consensus that crimes against humanity can be committed in the context of both peace and war, in the years immediately following World War II this was more contentious. Certainly, the charter of the International Military Tribunal limited the tribunal’s jurisdiction to crimes against humanity which were connected to war crimes. Bassiouni argues that the war-connecting link was required in order to legitimise the ‘creation’ of crimes against humanity in the Nuremberg Charter which were widely thought to be an extension of ‘war crimes’. However, it is noted that in 1950, the International Law Commission deemed the link to a conflict no longer to be a requirement. See M. Cherif Bassiouni, ‘Crimes against humanity’, in M. Cherif Bassiouni (ed.), *International Criminal Law*, Martinus Nijhoff, The Hague, 1999, pp. 521–545.

59 See, for example, UNCHR, *Summary Record of the Twenty-Eighth Meeting*, UN Doc. E/CN.4/SR/28, 4 December 1947; UNCHR, *Summary Record of the Thirtieth Meeting*, UN Doc. E/CN.4/SR.30, 5 December 1947; UNCHR, *Summary Record of the Thirty-Second Meeting* UN Doc. E/CN.4/SR/32, 11 December 1947; UNCHR, *Summary Record of the Thirty Third Meeting*, UN Doc. E/CN.4/SR/33, 11 December 1947; UNCHR, *Summary Record of the Thirty-Fourth Meeting* UN Doc. E/CN.4/SR.34, 12 December 1947; UNCHR, *Summary Record of the Thirty-Fifth Meeting* UN Doc. E/CN.4/SR/35, 12 December 1947; UNCHR, *Summary Record of the Thirty-Seventh Meeting*, UN Doc. E/CN.4/SR.37, 13 December 1947; and UNCHR, *Summary Record of the Forty-Third Meeting* UN Doc. E/CN.4/SR./43, 17 December 1947.

60 See, for example, UNCHR, *Summary Record of the Forty-Seventh Meeting*, UN Doc. E/CN.4/SR.47, 1 June 1948; UNCHR, *Summary Record of the Forty-Ninth Meeting*, UN Doc. E/CN.4/SR.49, 2 June 1948; UNCHR, *Summary Record of the Forty-Eighth Meeting*, UN Doc. E/CN.4/SR.48, 4 June 1948; UNCHR., *Summary Record of the Fifty-Eighth Meeting*, UN Doc. E/CN.4/SR.58, 16 June 1948; UNCHR, *Summary Record of the Sixtieth Meeting*, UN Doc. E/CN.4/SR.60, 23 June 1948; UNCHR, *Summary Record of the Sixty-Fourth Meeting*, UN Doc. E/CN.4/SR.64, 17 June 1948; UNCHR, *Summary Record of the*

were in Geneva, the sessions were regularly attended by the ICRC's Secretary-General, Jean Duchosal, and/or the Head of the ICRC's Legal Division, Claude Pilloud.⁶¹ This constitutes evidence that from the beginning of the human rights movement, the ICRC had a certain appreciation of the connection between human rights law and the law of armed conflict. It also suggests a belief on the part of the ICRC that the rights contained in the UDHR would continue to apply in times of armed conflict. Further evidence of the ICRC's position in this regard is seen in the preamble to the draft Convention for the Protection of Civilian Persons in Times of War approved in Stockholm by the 17th International Red Cross Conference in August 1948. This begins with a suggested undertaking by the High Contracting Parties 'to respect the principles of human rights which constitute the safeguard of civilisation, and, *in particular*, to apply, at any time and in all places, the rules given hereunder'.⁶² While this statement does not provide a full elucidation of the ICRC's understanding of the relationship between international humanitarian law and international human rights law, it certainly provides an indication that the ICRC thought that human rights law should be respected in times of armed conflict.

The *travaux préparatoires* to the Geneva Conventions also demonstrate that the states' delegates present at the drafting conferences believed that there was a connection between international human rights law and international humanitarian law.⁶³ The perceived relationship between the bodies of law is seen most clearly in the words of the president of the Conference during the official ceremony for the signature of the conventions. Speaking on 8 December 1949, he noted that it was very nearly the anniversary of the UDHR and stated that it was interesting to compare the UDHR and the Geneva Conventions. He said that the Geneva Conventions were

based on certain of the fundamental rights proclaimed in it [the UDHR] – respect for the human person, protection against torture and against cruel, inhuman or degrading punishments or treatment ... The Universal Declaration of Human Rights and the Geneva Conventions are both derived from one and the same ideal.⁶⁴

During the drafting process, the relationship between the two bodies of law was particularly discussed with regard to the provisions in Geneva Convention IV and Common Article 3 which give protection to civilians and persons *hors de combat*. The comments on these provisions indicate an understanding among delegates that in times of armed conflict the Geneva Conventions would apply alongside the protections in the UDHR, which had been agreed by states the year before. For example, Colonel Hodgson, the Australian delegate (who had notably also been part

Sixty-Seventh Meeting, UN Doc. E/CN.4/SR.67, 25 June 1948; and UNCHR, *Summary Record of the Seventy-Fifth Meeting*, UN Doc. E/CN.4/SR.75, 30 June 1948.

61 See note 60 above.

62 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention Relative to the Protections of Civilian Persons in Time of War*, Vol. 3, ICRC, Geneva, 1960, p. 12 (emphasis added).

63 See also R. Kolb, above note 2, pp. 413–416, for an assessment of these records.

64 Swiss Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Section B, p. 536.

of the drafting committee of the UDHR), took the view that there was no need for the Third or Fourth Geneva Conventions to have preambles referring to human rights law because the principle of human rights ‘had already been very much better said in the Preamble of the Declaration on Human Rights recently adopted by the General Assembly of the United Nations’.⁶⁵ According to Hodgson, it was not the task of the Conference to ‘re-write’ the 1948 Declaration.⁶⁶ Similarly, the Danish delegation expressed the view that a person who did not benefit from the Third Geneva Convention Relative to the Treatment of Prisoners of War would remain ‘safeguarded by the principles of the rights of man as derived from the rules established among civilized nations’.⁶⁷ These statements by Colonel Hodgson and the Danish delegation evidence a belief not only that international human rights law would continue to apply during armed conflict, but also that it might be able to complement international humanitarian law by filling gaps in protection. This being said, it is clear that the delegates who saw the two bodies of law to be related did not necessarily agree on the precise nature of that relationship. While the comments from the Australian and Danish delegations suggested a belief that the UDHR would exist alongside the Geneva Conventions,⁶⁸ it seems that other delegations saw the Geneva Conventions’ provisions as amounting to a special regime of human rights for times of conflict.⁶⁹

The fact that there was an appreciation of the conceptual overlap between international human rights law and international humanitarian law before 1968 is also seen in academic literature from the 1950s and 1960s. This is rarely noted in contemporary literature commenting on the relationship between international humanitarian law and international human rights law. Instead, it is often assumed that early academic literature on the topic supports the contention that in the years between 1948 and 1968, the two bodies of law and their respective institutions were completely separate. Reviewing literature relating to the law of war at the time the Geneva Conventions and UDHR were drafted, Kolb finds that it ‘sometimes made reference to human rights law . . . [but] never failed to stress the continuing cleavage between the two branches’.⁷⁰ Yet while a great deal of the literature of the 1970s did indeed stress the differences between the bodies of law, in literature prior to the late 1960s the situation is remarkably different. Indeed, statements by academics Kunz and Cowles, speaking and writing in the United States in these early years, make clear that there was a belief that international humanitarian law could be conceived as a ‘part’ of human rights law ‘adapted to the wartime

65 Swiss Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Section A, Committee II, p. 393. See also R. Kolb, above note 2, p. 414.

66 Swiss Federal Political Department, *ibid.*, p. 780.

67 *Ibid.*, p. 436.

68 See also the Danish delegation’s request that a clause be inserted into Article 3 making clear that the wording should not be ‘interpreted in such a way as to deprive persons not covered by the provisions of Article 3, of their human rights’, *ibid.*, p. 481.

69 At the closing ceremony, the Italian delegation stated that the drafters’ task had not been ‘to produce an ideal Convention, but one which would reconcile human rights with the requirements of war’. Swiss Federal Political Department, above note 64, p. 536.

70 R. Kolb, above note 2, p. 416.

scene'.⁷¹ Hersch Lauterpacht, who had been involved in the drafting of both the Geneva Conventions⁷² and the UDHR,⁷³ also saw the two regimes to be closely related. In 1952, he wrote that the Fourth Geneva Convention:

might be said [to be] ... in its limited sphere, ... a veritable universal declaration of human rights; unlike the Declaration adopted by the General Assembly in December 1948, it is an instrument laying down legal rights and obligations as distinguished from a mere pronouncement of moral principles and ideal standards of conduct.⁷⁴

The fact that Lauterpacht understood there to be a conceptual overlap between humanitarian law and human rights law is also made clear in his statement that:

most rules of warfare are, in a sense, of a humanitarian character inasmuch as their object is to safeguard, within the limits of the stern exigencies of war, human life and some other fundamental human rights and to make a measure of intercourse between enemies during the war and some voluntary relationship after it.⁷⁵

Against the backdrop of the statements by Kunz and Cowles above, Lauterpacht's view on the relationship between human rights law and international humanitarian law seems to have been neither radical nor exceptional.⁷⁶

The fact that there was an appreciation in academic circles of the conceptual overlap between international human rights law and international humanitarian law is also confirmed by the article by Claude Pilloud which was

- 71 'Proceedings of the Fifth Session of the American Society of International Law, Saturday April 30, 1949, at 10am', in *American Society of International Law Proceedings*, No. 43, 1949, p. 128. See Cowles speaking to the proceedings of the American Society of International Law: 'Whether or not it is logical, whether we believe that war is bad or that we should not have more of it, has nothing whatsoever to do with the existence of the international law of war. The law is here. It is very real. Incidentally, it is a part of human rights – human rights operating on the wartime scene'. See also Josef Kunz, who, citing and clearly agreeing with Cowles in two articles published in 1951, states: 'I want to emphasize strongly the fact that the laws of war are a very important part of the problem of international protection of human rights. The new Geneva Conventions of 1949 stress the basis of human rights, of the dignity of the human personality'. See Josef Kunz, above note 19, p. 121; and Josef Kunz, 'Present-day efforts at international protection of human rights: a general analytical and critical introduction', in *American Society of International Law Proceedings*, No. 45, 1951, p. 114.
- 72 Sir Hersch Lauterpacht was a member of the committee of experts that was gathered to draft a clause designed to repress violations of the Geneva Conventions. This group produced the draft articles that inspired the 'grave breaches' article which was common to all four Conventions. Geoffrey Best, *War and Law Since 1945*, Clarendon, Oxford, 1997, pp. 93–94.
- 73 UNCHR, 'Human Rights, The Charter of the United Nations and the International Bill of the Rights of Man, Preliminary Report by Professor H. Lauterpacht', UN Doc. E/CN.4/89, 12 May 1948.
- 74 Hersch Lauterpacht, 'The problem of the revision of the law of war', in *British Yearbook of International Law*, Vol. 29, 1952, p. 362.
- 75 Hersch Lauterpacht, 'The limits of the operation of the law of war', in *British Yearbook of International Law*, Vol. 30, 1953, p. 214.
- 76 Further support for this conclusion is found in the fact that shortly after the drafting of the Geneva Conventions, Joyce Gutteridge, one of the UK delegates who had attended the Diplomatic Conference, wrote that common Article 3 could be seen to impose 'such obligations as will ensure, even in internal conflicts, the observance of certain fundamental human rights'. See Joyce Gutteridge, 'The Geneva Conventions of 1949', in *British Year Book of International Law*, Vol. 26, 1949, p. 300.

published in 1949 and which has already been cited above.⁷⁷ The stated purpose of the article was to review the relationship between the UDHR and the 1949 Geneva Conventions. During the course of this review, Pilloud not only made it clear that he understood the UDHR to apply in times of armed conflict, but having reviewed the correlation of norms in the Geneva Conventions and the UDHR, he further concluded:

we would like to emphasize that their co-existence does not present a setback. On the contrary, this will result in a strengthening of the humanitarian Conventions since many of their principles are valid at all times and places.⁷⁸

Pilloud's words in this respect provide further evidence that there was not such a strict cleavage between the two bodies of law in the years after the drafting of the Geneva Conventions and UDHR as has sometimes been suggested. In fact, together, these academic writings provide strong indications that in the late 1940s and early 1950s, there was a common view that the two bodies of law were conceptually connected and complementary in their scope.

Overlapping spheres of operational competence of the UN and the ICRC in the late 1940s and 1950s

In light of this revised picture, it is perhaps not surprising to discover that the institutional divide between the UN and the ICRC was also not as absolute as is often suggested. Many accounts of the relationship between international human rights law and international humanitarian law suggest that between the years 1948 and 1968, the two institutions had no overlap in mandate or areas of common interest. Indeed, the ICRC and UN are often depicted as having maintained a distance from each other during these years even though they had a degree of normative similarity.⁷⁹ In fact, this seems to overstate the situation, for there were numerous occasions during these years on which the two organisations worked in cooperation in areas of the mutual competence.⁸⁰ For example, in November 1948, the Secretary-General requested the ICRC and the League of Red Cross and Red Crescent Societies to assist in implementing a General Assembly resolution calling for the facilitation of the return to Greece of Greek children.⁸¹ In November 1949, the General Assembly expressed its 'warm appreciation' for the efforts made by the two international Red Cross organisations in this regard.⁸² There is also evidence that the ICRC took an active role in the development of human rights law that was relevant to its mandate. It sent high-level delegates not only to the drafting sessions

77 C. Pilloud, above note 41.

78 *Ibid.*, p. 258. [translation from the original text in French by the editorial team] Original text: 'Nous voudrions souligner que leur coexistence ne présente aucun inconvénient. Au contraire, il est certain qu'il en résultera un renforcement des Conventions humanitaires puisque de nombreux principes qu'elles contiennent sont déclarés valables en tout temps et en tout lieu'.

79 O. Ben-Naftali and Y. Shany, above note 9, p. 47.

80 For cooperation between the UN and the ICRC on the issue of prisoners of war, see below.

81 UNGA Res. 193 (III) C, 27 November 1948.

82 UNGA Res. 288 (IV) B, 18 November 1949.

of the UDHR in 1947 and 1948,⁸³ but also to at least six of the eighteen sessions of the UN Commission on Human Rights (UNCHR) between 1949 and 1968, some of which were in New York.⁸⁴ It also submitted comments to the UNCHR in the context of studies which the Commission carried out on arbitrary detention and the right to asylum.⁸⁵

Just as it is possible to find early instances of the ICRC taking an active interest in human rights law, so there is evidence of the UN taking an early interest in humanitarian law and working together with the ICRC. In particular, in the early 1950s, the General Assembly is seen urging states to assist with the repatriation of prisoners of war after World War II. The law relating to prisoners of war plainly relates to international humanitarian law rather than human rights law and falls squarely within the core mandate of the ICRC. As a result, if cooperation between the two agencies had been minimal in these years, we would expect that the issue of prisoners of war would have been an obvious one to have been dealt with exclusively by the ICRC.⁸⁶ Yet instead, two General Assembly resolutions in 1950 and 1953 show the General Assembly directly invoking the Third Geneva Convention Relative to the Treatment of Prisoners of War in its call upon governments to act in conformity with these international standards.⁸⁷ In its 1950 resolution, the Geneva Assembly asks the Secretary-General to convene a commission composed of three qualified and impartial people chosen by the ICRC, or failing that, the Secretary-General himself, to settle the question of prisoners of war in a humanitarian spirit. This is a clear indication that the UN appreciated that its mandate overlapped with that of the ICRC, and another indication that the two organisations were often prepared to cooperate to see those mandates fulfilled.

Likewise in 1953, the General Assembly is seen invoking international humanitarian law relating not only to prisoners of war, but also to the conduct of

83 See above notes 60 and 61.

84 UNCHR, *Report to the Economic and Social Council on the Seventh Session of the Human Rights Commission*, Geneva, 16 April–19 May 1951, UN Doc. E/CN.4/640 (Claude Pilloud attending); UNCHR, *Report to the Economic and Social Council on the Thirteenth Session of the Human Rights Commission*, Geneva, 1–26 April 1957, UN Doc. E/CN.4/753 (Henri Coursier attending); UNCHR, *Report to the Economic and Social Council on the Sixteenth Session of the Human Rights Commission*, Geneva, 29 February–18 March 1960, UN Doc. E/CN.4/804 (Henri Coursier and Claude Pilloud attending); UNCHR, *Report to the Economic and Social Council on the Nineteenth Session of the Human Rights Commission*, New York, 11 March–5 April 1963, UN Doc. E/CN.4/857 (Henri Coursier attending); UNCHR, *Report to the Economic and Social Council on the Twenty First Session of the Human Rights Commission*, Geneva, 22 March–15 April 1965, UN E/CN.4/891 (Claude Pilloud and Serge Nesi attending); UNCHR, *Report to the Economic and Social Council on the Twenty Third Session of the Human Rights Commission*, New York, 20 February–23 March 1967, UN Doc. E/CN.4/940 (Serge Nesi and François de Reynol attending). It is noted that the ICRC's attendance at some of these meetings was likely also motivated by the discussion of war crimes on the agenda.

85 UNCHR, *Declaration on the Right of Asylum, Comments of Non Governmental Organizations, Note by the Secretary-General*, UN Doc. E/CN.4/794, 6 January 1960, pp. 2–3; UNCHR, *Study of the right of arrested persons to communicate with those whom it is necessary for them to consult with in order to ensure their defence or to protect their essential interests*, UN Doc. E/CN.4/836, 27 December 1962, p. 8.

86 Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 states that 'Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities'.

87 UNGA Res. 427 (V), 14 December 1950; UNGA Res. 804 (VIII), 3 December 1953.

hostilities. This is another early example of the General Assembly addressing issues that classically fall within the ICRC's mandate and explicitly referring to international humanitarian law. In its resolution on the conflict in Korea, the General Assembly recalled:

the basic legal requirements for *humane treatment of prisoners of war and civilians in connection with the conduct of hostilities* are established by general international law and find authoritative reaffirmation in the Geneva Conventions of 1929 and 1949 relative to the treatment of prisoners of war and in the Geneva Convention of 1949 relative to the protection of civilian persons in time of war.⁸⁸

Stating that it desired to 'secure general and full observance of the requirements of international law and of universal standards of human decency', the General Assembly went on to express its grave concern at reports that North Korean and Chinese Communist forces were employing 'inhuman practices' against soldiers under UN command and against the civilian population of Korea. With a clear reference to Common Article 3 of the Geneva Conventions, the General Assembly went on to:

condemn ... the commission by any governments or authorities of murder, mutilation, torture, and other atrocious acts against captured military personnel or civilian populations, as a violation of rules of international law and basic standards of conduct and morality and as affronting human rights and the dignity and worth of the human person.⁸⁹

This General Assembly resolution is significant because it shows the UN – long before 1968 – directly invoking international humanitarian law relating not only to protected persons but also to the conduct of hostilities. It is also significant because it categorises violations against prisoners of war and civilians as being breaches of both international humanitarian law and human rights law. This not only confirms an understanding on the part of the General Assembly that human rights law applies in times of conflict, but is also a clear indication that the General Assembly saw the two bodies of law as having overlapping application at times. It is also further evidence that the institutional divide between the ICRC and the UN was not as profound – before 1968 – as is often suggested.

Possible explanation for the entrenchment of the dominant narrative

If this revised view of the historical relationship between the two bodies of law and the ICRC and UN is accepted, one wonders why the perception that the two bodies of law and their two institutions were completely separate in the years between

88 UNGA Res. 804 (VIII), 3 December 1953 (emphasis added). See also UNGA Res. 910 (X) B, 29 November 1955, on the problem of ex-prisoners of the Korean War.

89 *Ibid.*

1948 and 1968 has become so entrenched in contemporary academic literature. The answer likely lies in the fact that the relationship between international humanitarian law and international human rights law was little mentioned – as an issue worthy of any debate or discussion – in academic literature before 1968. Indeed, the issue only began to be debated – at an academic level – after the Tehran conference in 1968 and the adoption of Resolution XXIII on Respect for Human Rights in time of Armed Conflict as well as the Reports of the Secretary-General entitled ‘Respect for Human Rights in Armed Conflicts’ that followed in 1969 and 1970.⁹⁰ Evidence of the debate’s importance is illustrated by the fact that when the San Remo Institute of Humanitarian Law was established in 1970, its first ever congress in the September of that year was given the theme ‘Human Rights as the Basis of International Humanitarian Law’. One imagines that this theme, so worded, would have been controversial to commentators at the time. Certainly, in 1984, Robertson, who presented a paper on the topic of this headline theme, recalled that ‘strong criticism of [his paper] was expressed by a number of experts’.⁹¹ And clearly, as the 1970s wore on and the drafting of the Additional Protocols to the Geneva Conventions prompted more reflection on the relationship between the two bodies of law, there was an increasingly large body of academic literature addressing this relationship. Evidence of the increased intensity of the debate, and the polarisation of views that accompanied it, can also be seen in a chronological reading of three articles on the topic during the 1970s by Professor Colonel Draper, a distinguished academic, Nuremberg prosecutor, and fellow speaker at the San Remo conference in 1970. In 1971, Draper appears relatively supportive of the proposition that international humanitarian law and international human rights law ‘have met [and] are fusing together at some speed, and that in a number of practical instances the regime of human rights is setting the general direction and objectives for revision of the law of war’.⁹² Yet in 1974 and 1979, Draper’s articles on the subject become markedly more critical of the proposition that human rights law and international humanitarian law might have parallel application in times of armed conflict. By the end of the decade, he takes pains to set out his view that the two bodies of law are ‘diametrically opposed’.⁹³

A review of the academic literature from the 1970s reveals that the 1968 Tehran resolution was probably the catalyst for a subsequent academic debate that created a dramatic polarisation of views between what was later referred to as the ‘separatist’ approach and the ‘integrationist’ approach.⁹⁴ Those who fell more into the integrationist camp expressed views that tended to see international

90 UNGA, ‘Respect for Human Rights in Armed Conflicts’, Report of the Secretary-General, UN Doc. A/7720, 20 November 1969; UNGA, ‘Respect for Human Rights in Armed Conflicts’, Report of the Secretary-General, UN Doc. A/8052, 18 September 1970.

91 A. Robertson, above note 7, p. 797.

92 G. I. A. D. Draper, above note 7, p. 191.

93 G. I. A. D. Draper, above note 15, pp. 141 and 149.

94 See *The Red Cross and Human Rights*, report prepared by the ICRC in collaboration with the Secretariat of the League of Red Cross Societies, October 1983, p. 27, which identifies three schools of thought: ‘integrationist’, ‘separatist’ and ‘complementarist’. The third, ‘complementarist’ theory advocated that human rights law and international humanitarian law were two distinct systems which complement each

humanitarian law as a sub-category of international human rights law or which advocated a merging of the two bodies of law.⁹⁵ The articulation of these views prompted a counter-movement of writings by academics like Draper, who, afraid that the two bodies of law were being confused and that the effectiveness of international humanitarian law was thereby being compromised, emphasised the differences between them.⁹⁶ It is in the early literature from this ‘separatist’ camp that we see frequent claims that human rights instruments have no relevance to armed conflicts⁹⁷ and that the institutions of the UN and ICRC had previously had little or no interest in each other’s work,⁹⁸ and the repeated identification of 1968 as the first instance in which the two bodies of law were deemed to have any commonality.⁹⁹ It is these separatist claims which have subsequently been repeated the most often in literature addressing the relationship between the two bodies of law, so much so that they have become an integral part of the accepted narrative of that relationship.

Conclusions

The purpose of this article was to show that these claims in fact exaggerate the reality of the legal landscape before 1968 and place too great an emphasis on the existence of a substantive and institutional separation between the two bodies of law before this date. First, the article has shown that international human rights law and international humanitarian law were not completely separate before the Tehran conference in 1968. The preceding sections have shown that at the time of the drafting of the UDHR and the Geneva Conventions, there was already a strong belief that human rights law would continue to apply in times of armed conflict. Support for this contention has been found in UN Security Council and General Assembly resolutions, academic literature, the *travaux préparatoires* of the Geneva

other. This is the way in which the relationship between the two bodies of law is today most commonly understood.

- 95 See A. Robertson, *Human Rights in the World*, Manchester University Press, Manchester, 1982, p. 225, where he states: ‘Our contention is that humanitarian law is one branch of the law of human rights, and that human rights afford the basis for humanitarian law’. It is noted that elsewhere Robertson’s vision of the relationship between international humanitarian law and international human rights law seems to adhere more to the ‘complementarity’ thesis. See A. Robertson, above note 7, p. 802. The merging of the two bodies of law was also thought by some writers to be inherent in the General Assembly resolutions under the title ‘Respect for Human Rights in Armed Conflict’ and the texts of the Additional Protocols. See for example, G. I. A. D. Draper, above note 15, pp. 147 and 149. See also Keith D. Suter, ‘An enquiry into the meaning of the phrase “human rights in armed conflict”’, in *Revue de droit pénal militaire et de droit de la guerre*, Vol. 15, No. 3–4, 1976, pp. 397 and 404.
- 96 See G. I. A. D. Draper, above note 15; and K. D. Suter, above note 95, p. 397. Suter is responding in particular to the writings and speeches of Sean MacBride, who he states regularly equated the phrase ‘human rights in armed conflict’ with the phrase ‘humanitarian international law of armed conflicts’.
- 97 G. I. A. D. Draper, above note 15, p. 143; K. D. Suter, above note 95, p. 398; Henri Meyrowitz, ‘Le droit de la guerre et les droits de l’homme’, in *Revue du droit public et de la science politique en France et à l’étranger*, Vol. 5, 1972, p. 1059.
- 98 K. D. Suter, above note 95, pp. 406–410.
- 99 G. I. A. D. Draper, above note 15, pp. 143 and 149; K. D. Suter, above note 95, p. 407; H. Meyrowitz, above note 97, p. 1071.

Conventions, minutes of the meetings from the UNCHR, and statements of those involved or present during the drafting of the UDHR, such as Colonel Hodgson of Australia and Claude Pilloud of the ICRC. Many of the same sources also indicate that in the late 1940s and 1950s there was already a clear appreciation of the conceptual overlap between the two bodies of law in legal circles and that the institutional divide between the UN and the ICRC was not so pronounced as has often been suggested. The article has shown that both the UN and the ICRC took an active interest in each other's work and legal mandate during these years. The ICRC attended meetings relating to the drafting of the UDHR and was a regular non-governmental presence at meetings of the UNCHR in New York and Geneva. Conversely, the UN is seen to have appealed to the ICRC for assistance on issues of mutual competence and on rare occasions to have invoked international humanitarian law on matters related to both protected persons and the conduct of hostilities.

In bringing these historical sources to light, one of the purposes of this article is to adjust the historical record that has been created by the large body of academic literature affirming that human rights law was never originally intended to apply in times of armed conflict. It also seeks to challenge the widespread belief that before 1968, there was no cooperation between the ICRC and the UN and no conceptual links between international humanitarian law and international human rights law. In highlighting these misreadings, it is hoped that this article may assist in challenging the views of the few nations who still do not acknowledge that human rights law applies in times of armed conflict.¹⁰⁰ It may also serve to lend human rights law a greater legitimacy when it is applied in the sphere of armed conflict, for it is noted that there are many areas where the conceptual parameters of the two bodies of law remain uncertain – for example, the parameters and application of the *lex specialis* principle, the extraterritorial application of human rights, and the application of human rights law in times of occupation. In discussions relating to these areas, it is remarkable how extensively the historical and philosophical underpinnings of international human rights law and international humanitarian law are referred to and relied upon.¹⁰¹ And it is also clear that lawyers seeking to restrict or scale back the application of human rights law often make much of the fact that human rights law was not originally intended to apply to situations of armed conflict.¹⁰² While there is no doubt that international humanitarian law will

100 See above note 1.

101 See for example, N. K. Modirzadeh, above note 5; O. Ben-Naftali and Y. Shany, above note 9; Michael Dennis, 'Non-application of civil and political rights treaties extraterritorially during times of international armed conflict', in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 453–502; Hans-Joachim Heintze, 'On the relationship between human rights law protection and international humanitarian law', in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, p. 789; H. Krieger, above note 2; C. Droegge, above notes 2 and 7; Danio Campanelli, 'The law of military occupation put to the test of human rights law', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 653.

102 Literature taking the view that the application of human rights law to situations of armed conflict should be restricted or scaled back varies greatly in degree and argument. For example, see the Israeli position set out in Israel's Second Periodic Report to the Human Rights Committee, UN Doc. CCPR/C/ISR/2001/2, 20 November 2001, para. 8; Michelle A. Hansen, 'Preventing the emasculation of warfare: halting the

very often be the *lex specialis* in times of armed conflict,¹⁰³ as long as we are told that human rights law was not intended to apply in times of armed conflict at all, there is a danger that its application in this field will be unduly limited. It has been shown that it does not do justice to human rights law's heritage to conceive of it as only being relevant in the context of a fully functioning relationship between the governor and the governed. A historical perspective and jurisprudence from human rights tribunals show that human rights law is more than this, both in origin and in current practice.¹⁰⁴ This article has shown that the cooperation that increasingly exists between lawyers practising international humanitarian law and international human rights law is part of a long tradition of cooperation between these fields that has in fact existed since the drafting of the UDHR in 1948.

expansion of human rights law into armed conflict', in *Military Law Review*, Vol. 194, Winter 2007, pp. 8, 26, and 61; and N. K. Modirzadeh, above note 5.

103 See International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, p. 226, para. 25; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports 2004*, p. 136, para. 106. For literature on the relationship between international human rights law and international humanitarian law, see, for example, Noam Lubell, 'Challenges in applying human rights law to armed conflicts', in *International Review of the Red Cross*, Vol. 87, No. 860, pp. 737–754; and Marco Sassoli and Laura M. Olson, 'The relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflict', in *International Review of the Red Cross*, Vol. 90, No. 871, pp. 599–627.

104 This is demonstrated not only by the fact that human rights law was intended to apply during times of armed conflict but also by case law in which state agents have been found to have violated international human rights law outside the territory of that state. In instances where state A is held responsible for wrongful acts perpetrated against citizens of state B, the human rights relationship clearly goes beyond that of the governor and governed. See, for example, ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, *ICJ Reports 2005*, p. 168, paras. 178–180. See also *Al-Skeini v. The United Kingdom*, Application No. 55721/07, Grand Chamber Judgment, 7 July 2011, paras. 131–140, for a summary of the European Convention of Human Rights case law on instances when the exercise of jurisdiction of a Contracting State outside its territorial boundaries may give rise to the exercise of 'jurisdiction' for the purpose of Art. 1 of the Convention.