

Fordham International Law Journal

Volume 22, Issue 2

1998

Article 1

1948-1998 : The Universal Declaration of Human Rights and the Statute of the International Criminal Court

Adriaan Bos*

*

Copyright ©1998 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

1948-1998 : The Universal Declaration of Human Rights and the Statute of the International Criminal Court

Adriaan Bos

Abstract

I am pleased to comply with the request of the Editorial Board of the Fordham International Law Journal to introduce the readers to Book II of Volume 22, devoted to international human rights. This year we celebrate two important events: the adoption in Rome of the Statute of the International Criminal Court ("Rome Statute"), and the Fiftieth Anniversary of the Universal Declaration of Human Rights ("Universal Declaration"). Both events are very closely linked to one other. The adoption of the Rome Statute can be considered an implementation of part of the Universal Declaration. Many articles of the Rome Statute can easily be traced back to articles of the Universal Declaration. It may be interesting to explore more in-depth the relationship between the rules regarding the protection of human rights and the international humanitarian rules, and to clarify the value of the additions of the Rome Statute. It is clear that the roots of the two legal regimes are completely different.

This article will first define the different types of international humanitarian rules and the purpose behind them. Then the article will briefly discuss the purpose of human rights. Next, the article will explain the similarities between the Geneva Convention and the conventions laid out under the International Committee of the Red Cross. Lastly, the article will focus on the Rome Statute for the Establishment of an International Criminal Court and its contributions to bettering the protection of fundamental human rights.

INTRODUCTION

1948-1998: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

*Adriaan Bos**

INTRODUCTION

I am pleased to comply with the request of the Editorial Board of the *Fordham International Law Journal* to introduce the readers to Book II of Volume 22, devoted to international human rights. This year we celebrate two important events: the adoption in Rome of the Statute of the International Criminal Court¹ ("Rome Statute"), and the Fiftieth Anniversary of the Universal Declaration of Human Rights ("Universal Declaration").² Both events are very closely linked to one other. The adoption of the Rome Statute can be considered an implementation of part of the Universal Declaration. Many articles of the Rome Statute can easily be traced back to articles of the Universal Declaration. It may be interesting to explore more in-depth the relationship between the rules regarding the protection of human rights and the international humanitarian rules, and to clarify the value of the additions of the Rome Statute. It is clear that the roots of the two legal regimes are completely different.

INTERNATIONAL HUMANITARIAN LAW

International humanitarian rules have their origin in relations between states. The purpose of these rules is to limit the suffering from armed conflicts. The rules define *ius in bello* (jus-

* Legal Advisor to the Ministry of Foreign Affairs, the Netherlands. The author served as the Chairman of the Preparatory Committee for the Establishment of an International Criminal Court.

1. UNITED NATIONS, DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT'L CRIMINAL COURT, *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, U.N. Doc. A/CONF.183/9 (1998) (adopted by the United Nations on July 17, 1998) <<http://www.un.org/icc>> (visited Jan. 2, 1998) (on file with the *Fordham International Law Journal*).

2. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810 (1948).

tice in war), indicating what means and methods of warfare are still acceptable in the eyes of humanity. Conventions, concluded in Geneva under auspices of the International Committee of the Red Cross ("ICRC" and "Geneva Conventions"), have expanded the concept of *ius in bello*, as contained in the Hague Convention Respecting the Laws and Customs of War on Land of 1899,³ and the Hague Convention Respecting the Laws and Customs of War on Land of 1907⁴ (together the "Hague Conventions"), by additionally covering those who are no longer actively involved in armed conflicts including wounded soldiers, the sick, prisoners of war, and other persons not engaged in the hostilities. Military necessity was balanced against humanity, but with an emphasis upon the interests of individuals.

The Geneva Conventions of 1949⁵ and the 1977 Protocols Additional to the Geneva Conventions of Aug. 12, 1949⁶ (together the "Additional Protocols of 1977") elaborated and expanded parts of the Hague Conventions. In particular, after the adoption of the Additional Protocols of 1977, these rules contained the totality of *ius in bello* with a few exceptions. In the light of these developments, the distinction between the concept of *ius in bello*, as laid down in the Hague Conventions and in several other instruments, on the one hand, and in the Geneva rules, on the other hand, was no longer very relevant. Today, the rules contained in the Hague Conventions and other declarations of *ius in bello*, together with the Geneva Conventions and the Additional Protocols of 1977, are referred to as international

3. Convention Respecting the Laws and Customs of War on Land, July 29, 1899, 23 Stat. 1803, 187 Consol. T.S. 429, 1 A.J.I.L. Supp. 129 (1899).

4. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, 2 A.J.I.L. Supp. 90 (1907).

5. Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1949).

6. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1291; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, 16 I.L.M. 1442.

humanitarian law and are deemed to constitute an autonomous branch of international law.

HUMAN RIGHTS

The purpose of human rights is to protect the fundamental rights of individuals within a state from government abuse. Human rights originally had no place in international law. Human rights were embedded in national law. Since World War II, a growing number of conventions have been concluded for the protection of human rights to strengthen the position of ordinary citizens vis-à-vis their own government. This process—benefitting from the “Four Freedoms” announced by President Franklin D. Roosevelt in 1941⁷—started with the adoption of the Universal Declaration in 1948. The Universal Declaration’s roots lay in the failure of governments to respect human rights and the realization that human rights violations can jeopardize the peace and security of mankind. The protection of human rights increasingly became an international concern.

CONVERGENCE OF THE TWO LEGAL SYSTEMS

The view that the two legal systems had more in common than previously thought was inspired by the belief that the rules of humanitarian law should extend to a wider circle of beneficiaries, in particular to the civilian population. The revolutions in Europe, in particular the civil war in Spain, served as eye-openers and highlighted the suffering of civilians in internal conflicts. This increased awareness led to the conviction that international rules were needed for internal conflicts. The inclusion of Article 3, common to the four Geneva Conventions (“Common Article 3”), was a result of this development. The process was accelerated as internal conflicts came to outnumber traditional wars between nations. The human suffering caused by these internal conflicts is no less than the suffering caused by traditional wars.

The celebration of the twentieth anniversary of the Universal Declaration in Tehran in 1968 was the start of a closer cooperation between the ICRC and the United Nations: the ICRC

7. President Franklin D. Roosevelt, Annual Message to Congress, State of the Union Address (Jan. 6, 1941).

dealing with international humanitarian law and the United Nations remaining active in the protection of human rights. This cooperation led to a growing awareness that reliance on humanitarian rules can help combat human rights violations in armed conflicts more effectively and that the two approaches should go hand in hand.

There are many similarities between the Common Article 3 of the Geneva Conventions, applicable in cases of non-international armed conflicts, and the fundamental principles laid down in the Universal Declaration and subsequently codified in the International Covenant on Economic, Social and Cultural Rights⁸ and the International Covenant on Civil and Political Rights⁹ (together the "International Covenants"). Both the Common Article 3 and the fundamental principles are applicable within the territory of states. The protection afforded by the International Covenants does not cease in time of war. Only certain derogations are permissible in times of an emergency. No such derogations, however, are permitted from the fundamental rights. Governments must respect the fundamental rights in relation to all nationals and others present in their territory at all times.

*ROME STATUTE FOR THE ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL COURT AND THE
PROTECTION OF HUMAN RIGHTS*

The Rome Statute refers to serious violations of the Common Article 3 as part of the definition of war crimes, falling under the jurisdiction of the International Criminal Court ("ICC"). It also refers to other serious violations of the laws and customs applicable in armed conflict of a non-international character within the framework of international law. The content of the Rome Statute is taken from the Hague Conventions, the Geneva Conventions, and the Additional Protocols. Compared to the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II"), deal-

8. International Covenant on Economic, Social and Cultural Rights, Dec. 18, 1966 999, U.N.T.S. 171, 6 I.L.M. 360 (1967).

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

ing with internal armed conflicts, the threshold in the Rome Statute is lower. The condition in Additional Protocol II that the armed forces of the government must always be party to the protracted armed conflict is omitted from the language of the Rome Statute.

By lowering the threshold for internal conflicts in the Rome Statute, its application becomes wider. This threshold lowering is important because it reduces the chances that a situation arises in a state that can be qualified neither as an internal conflict nor as an emergency as provided for in the human rights conventions. A better protection of human rights may be achieved because of this reduction.

Another important contribution of the Rome Statute to better protection of fundamental human rights is its definition of crime against humanity. The linkage of this crime with an international armed conflict, as provided for in the Charter of the International Military Tribunal¹⁰ ("Nuremberg Charter") and in the Statute for the International Criminal Tribunal for the Former Yugoslavia,¹¹ is no longer present. "It is by now an established rule of customary law that crimes against humanity do not have to be connected to any conflict at all."¹² This language of the International Criminal Tribunal for the Former Yugoslavia has now been confirmed in the text of the Rome Statute. The reason for the inclusion of the crime against humanity in the Nuremberg Charter was to encompass the atrocities committed by the government against its own civilian population. In the early Draft Code of Offences Against Peace and Security,¹³ the International Law Commission referred to this crime as "systematic or mass violations of human rights." This language is an indication of the origin of the elements of the crime in the Rome Statute. In fact, the definition of the crime against humanity in

10. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (entered into force Aug. 8, 1945), annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279.

11. *Statute for the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

12. Prosecutor v. Dusko Tadic, Case No. IT-94-1-T (May 7, 1997), Opinion and Judgment, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber.

13. *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. GAOR, 6th Sess., U.N. Doc. A/1858 (1951).

its present form may be seen as an effort to embrace the violations of fundamental human rights committed within a state, without the restrictions attached to the application of human rights instruments in times of emergency.

In discussing the relationship between international humanitarian law and human rights, one should also pay due attention to Article 21 of the Rome Statute. It states that the ICC's application and interpretation of the law must be consistent with internationally-recognized human rights, without any distinction founded on grounds such as gender, age, race, color, etc. In so far as human rights instruments are universally recognized as part of international customary law, the ICC must respect them in its proceedings. This is, of course, a very important safeguard, guaranteeing the respect for human rights throughout the proceedings before the ICC.

Article 21 of the Rome Statute also may have an impact on the applicability of international rules in armed conflicts. The major obstacle to applying the relevant international rules to internal armed conflicts is the insurgent party's status under international law. How can the insurgent party be held responsible for violating the rules of internal armed conflicts? As we have seen, these international rules are fundamental human rights, as laid down in Common Article 3 as a minimum safeguard. The ICC may consider Common Article 3 to be an additional indication of the applicability of fundamental human rights in internal armed conflicts and of the fact that violations of these rules by the parties, including the insurgents, to the internal armed conflict may be dealt with as crimes under international law. As regards the protection of human rights, there are of course other paragraphs in the Rome Statute that are clearly an improvement over earlier texts on the same subject.¹⁴

CONCLUSION

Let me conclude by saying that the adoption of the Rome Statute is an achievement contributing to the entitlement of everyone to a social and international order in which the rights and

14. The Rome Statute contains paragraphs dealing with procedural standards for the accused, victims, and witnesses; sexual violence against women; enlisting, conscripting, and using children in armed forces and in hostilities; enforced disappearance of persons, to mention a few.

freedoms, as set forth in the Universal Declaration,¹⁵ can be fully realized.

15. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., art. 28, U.N. Doc. A/810 (1948).