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**Convergence, Confusion, Conflation**  
*An Analysis of the Intersection of Human Rights and Humanitarian Discourses*

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## Abstract

This study starts with an observation: human rights and humanitarianism are often conflated into one and the same thing, even by scholars of these respective fields. A muddled use of terminology makes this lack of clarity evident; as such, the importance and power of language and discourse lies at the centre of this project. This thesis is set out to explore intersections and map convergences of human rights and humanitarianism—as discourses, as practices, and as related bodies of law (International Human Rights Law (IHRL) and Humanitarian Law (IHL)). In doing so, it seeks to draw attention to the beneficial potential of an interaction that can—at times—be synergetic, but also to the tensions it creates, when, far from mutually strengthening, human rights and humanitarianism work in contradiction. First, this thesis analyses the rapprochement between IHL and IHRL. This initial focus on the legal frameworks sets the ground for the subsequent study of converging discourses and practices, but it is also intrinsically valuable, laying bare some of the tensions around the jurisdictions, scopes of application, and protections afforded by these bodies of law. Second, focusing on four big player—two on the human rights side (Amnesty International and Human Rights Watch), and two on the humanitarian side (the International Committee of the Red Cross and Médecins Sans Frontières), this thesis turns to analysing dominant discourses. Noting the increased overlap in scopes of activities, and thus in discourse, it studies the impacts of the *humanitarian-isation* of human rights reporting, as well as of the *human rights-isation* of humanitarian discourse and practice. Looking at the predicament between denunciation and access, central to humanitarian work, we see how the pervasion of rights-speak has influenced that dilemma, and the way humanitarian actors navigate it. Third, taking inspiration from Raymond Williams’s *keyword* approach, this study then zeroes in on the term ‘protection’, having identified it as central to this convergence. A closer analysis of this term’s evolution, (contested) meanings and uses allows us to unlock understandings of this phenomenon. This thesis considers ‘Protection’—ubiquitous in both discourses—as it partly constitutes, and furthers the convergence. This thesis studies the efforts to make its definition consensual and some of the consequences of the confusion around it. Finally, by analysing the compounded terms of ‘*protection* of civilians’ and ‘responsibility to *protect*’, it explores the ways in which ‘protection’ penetrated UN discourse, acting as a Trojan horse for the tensions created by the convergence of human rights and humanitarianism

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## Introduction

Discussing my research with friends and peers I became aware of a stark discrepancy between what ‘insiders’ and ‘outsiders’ understand human rights and humanitarianism to be. On various occasions, the description of my research interest was met with surprise: ‘but aren’t ‘human rights’ and ‘humanitarianism’ basically the same thing?’ – a statement that would outrage (most) scholars and practitioners of those respective fields, who often detest being associated with one other. I came to think about it as what Freud called “the narcissism of minor differences” (1989: 72). A phenomenon by which “it is precisely communities with adjoining territories, and related to each other in other ways as well, who are engaged in constant feuds” (*Ibid.*). For undeniably, human rights and humanitarianism share origins, objectives, and visions of the world. In fact, Anthony Pagden argues, looking as far back as the fifteenth century, that the discourse that came to be ‘human rights’ was most profoundly shaped in relationship to war and its excesses (2015: 249). While Stephen Hopgood sees human rights and humanitarianism as both taking root in form of ‘humanism’ elevated “into a set of social practices and institutions” by nineteenth-century middle-class Europeans (2013: x). Yet, they each employ different discourses, different practices, and hold different priorities, thus making impossible their conflation into one and the same ‘thing’.

Human rights and humanitarian organisations have come to work increasingly in the same contexts; as their respective fields of activities have expanded, the overlap has furthered. In parallel, the discourse of human rights has now pervaded each an every

discussion on international affairs (Chandler, 2003: 4). This has often been for the best, but has also brought about confusion as to human rights' relationship to humanitarianism. In fact, most humanitarian organisations have now had to engage in one way or another with the omnipresent 'rights-speak'. This study will explore the intersection and interaction of human rights and humanitarianism through an analysis of the legal convergence of International Humanitarian Law (IHL) and International Human Rights Law (IHRL), the discourses of human rights and humanitarian organisations, and a study of the discourse around protection, its evolution and some of its implications. In fact, having increased considerably since the 1990s, the terminology of 'protection' is now extensively used [and abused] by human rights and humanitarian organisations. Yet, that concept is seldom clearly defined and has, at times, become little more than a buzzword.

I will primarily be analysing discourses of an official nature: publicly available reports and press releases. Such discourse is outward oriented, and thus participates to framing and shaping the identity of the organisations for the outside world. As such, it purports to present the word of the organisations rather than that of individuals within these bigger entities. While I do not mean to negate the epistemological question of the intersubjective reality of such discourse (Klotz, 2007: 11); a focus on widely accessible, official, publication allows us to minimise that intersubjectivity. Quite naturally, discourse analysis will be the central methodological tool in this study. Broadly defined, discourse analysis designates methodologies "that capture the creation of meaning and accompanying processes of communication" (Klotz, 2007: 19). As Foucault has taught us, discourse acts as the meeting place for power and knowledge (in Evans, 2005: 1050). As such, discourse cannot be limited to the description of external realities, it "acts to

signify generalised, socially constructed categories of thought” to which social meanings and values are constantly (re)attributed (*Ibid*: 1049).

I will thus trace the evolution of discourses and analyse some of the notable ramifications of that evolution for the work of the respective organisations, and more broadly, for human rights and humanitarianism. In this context, I will seek to analyse trajectories of change and causation, by comparing certain uses of language, and webs of meaning at various moments in time. Drawing attention to process, and not exclusively on outcomes will allow us to present a distinct picture of the power dynamics, disparities, and capabilities at play (Klotz, 2007: 92). I will argue that human rights and humanitarianism as discourses and practices have been considerably impacted by their convergence, with the former incorporating humanitarian principles and reasoning, and the latter largely resisting rights-talk but inexorably affected by its pervasiveness. We will see that the adoption, by human rights NGOs of some humanitarian principles has allowed for an extension of the scope of protection in certain contexts. However, that same phenomenon has also presented fundamental challenges to the human rights ethic. By zoning in on the eternal predicament between maintaining access and speaking out, we will see how human rights discourses and practices have had an impact on ‘traditional’ humanitarianism.

In mapping that convergence, I have selected two big players in the fields of human rights and humanitarianism, four unavoidable actors at the forefront of the intersection between these two concepts, who inexorably play a major part in shaping the discourse: Amnesty International (AI), Human Rights Watch (HRW), the International Committee of the Red Cross (ICRC), and Médecins Sans Frontières (MSF). As Hopgood



put it, “[i]f gatekeepers like Human Rights Watch or Amnesty International or the ICRC do not adopt an issue, its chances of reaching a global audience are slim.” (2013: 172). It is important to acknowledge the limitations of such an approach. By choosing these four [Western] international organisations, this present study will undeniably focus on what Hopgood called *Human Rights* (as opposed to *human rights*), and by extension, on *Humanitarianism* (as opposed to *humanitarianism(s)*). Having colonised local claims and having often presented themselves as sole guardians of certain moral norms, such organisation have achieved a certain hegemony –in the Gramscian sense of the term. Thus, while it by no means presents a complete picture, the study of their representations of certain concepts offers a valuable insight into the discursive field, the dominant discourse.

Throughout this research, inspired by Raymond Williams’ work (1985), I have come to think of ‘protection’ as a *keyword*, in understanding the convergence of humanitarianism and human rights. Williams considers certain terms to be ‘keywords’ in two connected senses: as “significant, binding words in certain activities and their interpretations”, and as “significant, indicative words in certain forms of thought” (*Ibid*: 15). It is in that capacity that I will, in the last section of this study, present an analysis of ‘protection’, exploring the evolution of its meaning(s) for and use(s) by different stakeholders. In fact it is crucial to note that here, the question is indeed about meanings, not meaning. (Williams, 1985: 16). Because ‘meanings’ are more than general processes of ‘signification’, and because ‘norms’ and ‘rules’ are more than the properties of any abstract process or system, the analysis needs to go beyond semantics, it needs to delve into the ramification of the evolution of meanings and norms (Williams, 1985: 21). I thus

conceive of ‘protection’ as a *keyword* that can help us *unlock* new understandings of the convergence between human rights and humanitarianism. But as it is recurrently used in discourses of human rights and humanitarianism, ‘protection’ also *constitutes* these two terms, their intersection and their convergence. I must make clear, however, that this analysis is only inspired by Raymond Williams work, and does not pretend to follow his format or methodology. Stepping away from the four organisations’ discourses, I will present a more general assessment of that term’s meanings, evolutions, and uses – notably through the concept of the ‘*protection* of civilians’ and the ‘responsibility to *protect*’.

With such a focus on discourse, I situate myself toward the post-positivist end of the epistemological spectrum; where meanings are fluid and contested, not static and stable. That is not to say that no particular meaning can be treated as somewhat stable in certain circumstances. In fact, we must accept enough stability in language to employ it, describe and analyse discourse (Klotz, 2007: 14). Before going any further it is thus important to present some definitional cues for two terms at the centre of this analysis: ‘human rights’ and ‘humanitarianism’.

Again, such an initiative is not necessarily at odds with a post-positivist approach as, in Barnett terms, beyond the epistemological debates around the existence of certain concepts outside of discourse and subjectivity, one is forced to recognise that over the decades, ‘human rights’ and ‘humanitarianism’ “have had distinct meanings” (2011: 16). I will therefore present nothing more than the representations of these two concepts that this study has chosen to adopt. For our purposes, ‘humanitarianism’ primarily designates an ethic, a discourse, and a practice with the objective of alleviating human suffering and

protecting human dignity on the basis of need. Finding support and formal legitimacy in international humanitarian law, humanitarian discourse and practice exist primarily during and in the aftermath of emergencies, “in the temporal present” (Ticktin, 2014: 281), with limited pretention of longer-term resolution. This limited temporality has, however, considerably evolved, now also including longer-term activities; an evolution that can be in part traced back to the influence of the ‘rights’ discourse. Oftentimes, the definition of ‘humanitarianism’ includes a reference to the principles of humanity, impartiality, neutrality, and independence (see OECD definition, OECD, 2010: §184). Following Barnett, I contend that these principles are not essential to ‘humanitarianism’, but rather, that the ICRC has worked them into its definition of the term; a definition that the organisation crafted “in response to the constraints on its goals” (2011: 10). In fact, the ICRC has often presented itself as the “guardian of all things humanitarian” (Ibid) but represents a particular form of a broader notion. As for the term ‘human rights’ it will mainly refer to an ethic, practice and discourse the objective of which is the respect and protection of the human dignity of all, in all circumstances. Codified in international human rights law, this idea reaches further than humanitarianism, both in its scope and its temporality. ‘Human rights’ looks to correct past violations, often seeking justice for the victims and accountability for the perpetrators. It also tends to work toward policy change in the long term.

Finally, I wish to contest the often-used dichotomy in which human rights are depicted as political and humanitarianism as apolitical. This distinction is specious and dangerous; for humanitarianism, like human rights, is an utterly political phenomenon (Warner, 1999). The mere fact that the ICRC only operates in contexts in which they

have the agreement of the authorities, or that MSF (and ICRC) can use public denunciation to apply pressure, speaks to the political nature of humanitarianism. I do not mean, however, to flatten the differences in the way in which human rights and humanitarianism engage with politics.

## **I. Literature review**

The extent, nature, and dynamics of the convergence of human rights and humanitarianism as discourses and practices have been source of debate among specialists in the field. While, the literature on this topic is extremely rich and varied, I contend that it has – so far – failed to offer a convincing analysis of the evolution of the concept of protection within the evolving humanitarian/human rights nexus. An analysis that would, in turn, allow for a clearer understanding of the convergence, and open up space moving forward. By looking more closely at some seminal works I will map the current state of the debate and point at its shortcomings and limitations.

The following section will be divided as follows: first I will look at three ideological critiques of human rights. David Kennedy's *The Dark Sides of Virtue* (2004); Samuel Moyn's *The Last Utopia* (2010); and Stephen Hopgood's *Endtimes of Human Rights* (2013). Putting their central claims beside each other, I will show that all three bring in 'humanitarianism' as a counterpoint, a related field or as synonymous – often failing to appropriately define the terms and concepts central to their analyses. Second, I will turn to the work of Hugo Slim (1997, 2000, 2001), David Chandler (2001, 2002), Michael Barnett (2011), and Didier Fassin (2012, 2013). I will present how these four scholars of humanitarianism have described and analysed the intersection. All have

strong views on the origin, extent or even existence of that convergence which will allow us to get a good sense of the current debate. With a closer analysis of their respective uses of terminology, I intend to demonstrate the centrality of the concept of protection –and to a lesser extent neutrality and impartiality– in understanding the convergence. As we review these studies of human rights and humanitarianism, analyse how both sides of this convergence interact, it will become obvious that core principles have become muddled and suffer from a sloppy use of terminology.

## **1. Ideological critiques of human rights – how is humanitarianism regarded?**

In *The Dark Side of Virtue*, Kennedy offers an insightful, yet rather personal, critique of what he calls ‘international humanitarianism’. His ‘humanitarianism’ goes well beyond the traditional understanding of the term, and can be simply described as ‘compassion for other individuals’. However, one has to wait until chapter eight of his book to have that definition explicitly stated:

“I have been using the term ‘humanitarian’ in a far larger sense – to refer very generally to people who aspire to make the world more just, to the projects they have launched [...] in pursuit of that goal, and to the professional vocabularies which have sprung up to defend and elaborate these projects.” (Kennedy 2004: 236)

Throughout his work, Kennedy uses a definition of humanitarianism that encompasses all of human rights discourse and practice –and arguably goes beyond that. He uses ‘human rights’ and ‘humanitarianism’ interchangeably, perpetuating a certain lack of clarity. In fact, it is primarily the pitfalls of international *human rights* that Kennedy analyses as he criticises the international human rights movement for investing in “a vocabulary of the general good” (*Ibid*: 14) and in a knowledge of what is just and unjust (*Ibid* 21); for its

limiting relationship to Western Liberalism (*Ibid:* 18); and for its hegemonic discourse which carries the potential to de-legitimate other political voices and projects (*Ibid:* 20).

A similar muddled use of ‘humanitarianism’ can be observed in the 2013 issue of *Qui Parle?*, entirely devoted to Samuel Moyn’s resounding *Last Utopia*. Human rights and humanitarianism are –there again– used interchangeably bringing about an uneasy ambiguity and setting the stage for debates in which each side talks right past the other. This critique does not apply to Moyn himself. In fact, in his controversial rewriting of the history of human rights, in which he identifies international human rights as having only emerged in the 1970s, Moyn brings ‘humanitarianism’ into the analysis as a related yet distinct field and ideology. He describes humanitarianism as having originally developed in “historical independence of the rights talk” but slowly amalgamated “with human rights as both a utopian ideal and a practical movement” (Moyn 2010: 220). Moyn appears to align himself with the convergence thesis as he notes that today, “human rights and humanitarianism are fused enterprises with the former incorporating the latter and the latter justified in terms of the former” (*Ibid:* 221).

As Moyn argues that human rights represent the current ‘utopia’ having stepped in to replace collapsed “universalist schemes” (*Ibid:* 7), Stephen Hopgood argues that “humanism (the cultural precondition for Human Rights) was the secular replacement of the Christian god” (2013: x). In *Endtimes of Human Rights* Hopgood establishes an interesting distinction between *Human Rights* and *human rights*; the former designating a global structure of laws, norms and organisations, and the latter a local activism. While I have decided not to replicate Hopgood’s use of capitals here, this study mostly focuses on the capitalised form. Hopgood traces the origins of both human rights and

humanitarianism back to a certain humanist ideal, which leads him to argue –quite provocatively– that the ICRC is indeed the first international human rights organisation, the first “secular church of the international” (*Ibid*). It appears that certain scholars go through particular efforts to dissociate human rights from humanitarianism and vice versa. This concern does not seem to be shared by all, as some seem unwilling to invest in the idea that they are indeed distinct projects.

In light of the debate presented above, we are in a position to ask whether the distinction between humanitarianism and human rights is a useful one; to inquire what is at stake when defining these concepts; to question the desirability of fixed definitions. While the phenomenon of convergence has brought human rights and humanitarianism closer, with human rights and humanitarian actors interacting, evolving in the same environments and pursuing similar goals, I contend that their differentiation is still valuable and necessary.

## **2. Artificially divided, in need of clarification, or irreconcilable?**

The fact that the discourse of human rights has permeated humanitarianism is broadly accepted. Some view this phenomenon as dangerous and worrying, linking it to the growing acceptance for military interventions (Chandler, 2001; Stockton, 1998), some have a more enthusiastic approach, arguing that it “add[s] great strength to the humanitarian idea” (Slim, 2000: 14) and others yet, challenge the dominant timeline by offering a cautiously critical historicisation (Barnett 2011).

In a 2001 article, Slim uses the Kantian dichotomy of philanthropy v. rights to argue that humanitarianism is divided in its understanding of itself and needs to move away from the former to re-centre around the latter. For him, the “explicit adoption of

rights by humanitarians” allows to engage with “a proper politics that leads [...] to justice and to the development of real political contracts between people and power” (Slim, 2001: 26). Slim thus perceives the rights shift in humanitarianism as desirable; a position vehemently contested by Chandler (2001). While both scholars agree on the existence of a certain ‘human-rightsisation’ of humanitarianism, they each have very different normative judgements of this phenomenon. For Chandler, the influence of human rights discourse on humanitarianism has brought about a shift away from empathy and emergency aid and towards “mobilizing misanthropy and legitimizing the politics of international condemnation, sanctions, and bombings” (Chandler, 2001: 700). The influence of human rights NGOs has allowed the establishment of a new, rights-based, humanitarian consensus; a consensus that has resulted in the legitimisation of armed ‘humanitarian’ interventions. Chandler’s argument appears to be quite absolutist insofar as it does not account for the co-existence of various humanitarianisms, some more prone to embracing rights than others; a limitation that Barnett addresses, notably by distinguishing between ‘emergency’ and ‘alchemical’ humanitarianism (Barnett 2011: 10-11). In this dichotomy, the former focuses on symptoms, while the latter also has the ambition of addressing the root causes of suffering and is thus more prone to including human rights (*Ibid*).

The temporalities of the human rights/humanitarianism convergence also diverge. While most identify the increased rapprochement to have started in the 1990s, after the end of the Cold War, Chandler argues that this transformation occurred “during and after” the Cold War (2001: 679). Identifying the end of the Cold War as the birth moment can indeed be limiting, as it forces some important events and dynamics out of the frame.



Barnett goes further, by noting that his initial understanding of humanitarianism was greatly influenced by the dominant narrative of the post-Cold War move towards human rights; an understanding that “changed radically” after “peering into the ‘before’” (2011: 5). He argues that humanitarianism’s wariness to associate with human rights was an anomaly specific to the Cold War years, as humanitarians had not, historically, limited themselves to emergency relief but had been invested in ending “all sources of suffering” (*Ibid*). Barnett also holds that the principles of impartiality and neutrality were “not part of humanitarian’s original DNA. Rather, they had fallen into place over decades of action and debate” (*Ibid*: 6). This last statement not only recognises the importance of such principles in understanding and analysing humanitarianism, it acknowledges the need to conceive of such principles as dynamic, evolving and contested rather than fundamental and fixed.

In the work of all the scholars mentioned above, the political/apolitical dichotomy is a recurring one. All seem to invest in the idea that integrating human rights to humanitarianism is a ‘politicisation’ of a previously apolitical project. Again, such statements should not be taken to support the idea that humanitarianism exists outside of politics, but rather, that humanitarianism does not –traditionally– work towards political transformations. In fact, as Barnett notes, aid agencies have “always been political creatures in one way or another” (2011: 6). Pictet’s metaphor of the ICRC ‘s relation to politics as a swimmer who “advances in the water but drowns if he swallows it” (as cited in Leebaw, 2007: 225) is rather effective in explaining the imagined relationship between the idea of humanitarianism and politics. Didier Fassin’s intervention largely contributes to debunking the idea of humanitarianism as apolitical as it sets out to analyse the space

that humanitarianism occupies in politics (2013: 37). He develops the idea of “humanitarian reason” described as “the principle under which moral sentiments enter the political sphere” (*Ibid*). Fassin does not only argue that humanitarianism is political, but also that humanitarian reason has now become “part of our way of making politics” (*Ibid*: 39). He writes that “the humanitarian reason associated with human rights” should be understood as the third pillar of Foucault’s ‘modern government’ – alongside the police state and the liberal economy (*Ibid*). It is worth noting, here, that Fassin does not seem to invest in the human rights/humanitarian distinction. Fassin’s and Kennedy’s humanitarisms thus seems similarly defined: loosely, and with the potential of encompassing the idea of human rights.

### **3. Terminology - discordance**

In a 1997 article, Slim contests the very grounds for analysing principles associated with human rights and humanitarianism as different. By deconstructing and analysing the principles of ‘humanity,’ impartiality,’ and ‘solidarity’ he seeks to demonstrate that these ideas are –and have always been– compatible both with humanitarianism and human rights. Slim holds that the legal foundations of each field are much more similar than is usually acknowledged. Furthermore, he presents the Geneva Conventions as “full of civil and political rights” (Slim 1997: 345). The confusion would thus only stem from different organisations using the same language to describe “different positions or no positions” (*Ibid*: 345). This last point is particularly significant as it opens the prospects of harmonious cohabitation –if not merger– of these two approaches. For him, human rights and humanitarianism “were never divided in the first place”; the “truly humanitarian position” can be reconciled with “full spectrum of human

rights” (Ibid: 345-46). In other words, it is nothing but a misunderstanding. Here, Slim appears to conflate having similar end goals and core values with utilising the same operational methods and setting the same priorities. Indeed, while it is undeniable that human rights and humanitarianism share fundamental similarities in their visions of the good and are premised on similar values of humanity and dignity of the human person; they present very different roadmaps to achieving their objectives, utilise distinctive methods and prioritise differently. This argument, discounting all substantial differences between human rights and humanitarianism is thus rather unsatisfying.

In ‘The Politics of Impartial Activism’ (2007), Bronwyn Leebaw also approaches the overlap of terminologies, arguing that human rights and humanitarianism conceive differently of ‘impartiality.’ She observes that humanitarian and human rights notions of impartiality have come to designate different methods, and principles. While humanitarians have defined impartiality “in pragmatic terms, as a space apart from political conflict, designated to provide aid to the suffering without provoking the hostility of combatants” (Leebaw 2007: 224), the human rights movement has characterised impartiality as the “distance or disinterest needed to *discriminate* between victim and perpetrator” (Ibid: 227), providing “the basis for moral judgment” (Ibid: 224). Leebaw’s contribution bears out the limits of Slim’s assertion that human rights and humanitarianism were in fact never different, insofar as these distinctive understandings of ‘impartiality’ have been used to justify and develop different strategies and different practices. While these strategies and practices might all be premised on an articulation of ‘impartiality’ they are indeed rooted in different principles, values, and visions of the world, making Slim’s suggestion of their easily retrievable compatibility seem less

convincing. As James Darcy puts it, “In any situation where the civilian population is in danger, the humanitarian and human rights actors may share common cause, but their priorities may be different and the strategies they adopt may conflict” (2004: 14).

For Darcy and Chandler, the approaches to the idea of neutrality are particularly significant in studying the convergence at play. Chandler points to humanitarianism’s “retreat from the principle of ‘neutrality’” (2001: 679), while Darcy identifies that same principle as being “at the heart of debates about rights-based approaches to humanitarianism” (2004: 8). Slim presents yet another perspective, giving neutrality less importance and credit. He acknowledges that most humanitarian actors are retreating from it, but prefers to describe ‘neutrality’ as a “pragmatic operational posture” (1997: 347) only accessible to a select few. Slim argues, instead, that it is to the “emergence and re-definition of the term ‘protection’” that one should look, to find further signs of the shift to rights in NGO consciousness (2001: 19).

The meanings and practices associated to ‘impartiality’, ‘neutrality’ and ‘protection’ are far from settled and unproblematic. These concepts run through the works presented above, sometimes as clear guiding threads throughout the argument, sometimes watermarked. And while the significance and centrality of these concepts seem quasi-unanimously recognised when studying the intersection of human rights and humanitarianism, they have seldom been placed at the centre of the analysis. In this study, I intend to map that convergence, analyse the human rights and humanitarian discourses as they intersect and interact, and explore the discourse around ‘protection’, and –to a lesser extent neutrality and impartiality– to explore the evolution of the human rights and humanitarian ethics and practice.

## **II. Mapping the Convergence**

### **1. Legal convergence a related and co-dependent phenomenon**

#### **1.1 Different Normative Frameworks...**

It is important to differentiate between two phenomena at play here. On the one side, the convergence of two bodies of law: international human rights law (IHRL) and international humanitarian law (IHL). On the other, the convergence of two ethics, practices, and discourses: human rights and humanitarianism. These parallel phenomena are deeply interconnected and co-dependent but cannot be conflated. The former has brought legitimacy and credibility to the latter, while the latter has sustained and encouraged the former. The present study focuses on the interaction of human rights and humanitarianism, yet a good understanding of the evolving dynamics of these two bodies of law is a necessary precondition to such an analysis. In this section, I will thus briefly present each of these bodies of law, and their converging evolutions.

The core of IHL, or law of armed conflict, is laid out in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. For the purpose of this paper, we shall primarily focus on Article 3, common to all four Geneva Conventions (CA 3), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (commonly known as the Fourth Geneva Convention, or GC IV), as well as Additional Protocols I and II (AP I and AP II). The evolution of IHL can be observed, notably, by looking at customary law. For that, the extensive customary law study commissioned by the ICRC in 2005 is an extremely useful resource (Henckaerts and Doswald-Beck, 2005). IHRL's normative framework is principally found in what is commonly called the international Bill of Rights. That is, the United Nations' Universal Declaration of Human Rights (UDHR) (UN, 1948), the International Covenant for Civil

and Political Rights (ICCPR) (OHCHR, 1966), and the International Covenant for Economic, Social, and Cultural Rights (ICESCR) (OHCHR, 1966). This core is supported by plethora of treaties on particular sets of rights or particular vulnerable populations (i.e. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (OHCHR, 1984) or the Convention on the Rights of the Child (CRC) (OHCHR, 1989)). All conventions mentioned above enjoy a very high level of ratification with virtually all states having agreed to be bound by them.<sup>1</sup>

In situations of emergency where the life of the state is under threat, IHL allows for derogations. That is to say that it allows the state to withdraw certain rights and freedoms deemed ‘non-essential,’ within a defined framework. Some core rights however are non-derogable, and therefore remain unaffected by derogations. This group of core rights typically includes the right to life, to humane treatment, freedom from slavery, freedom from punishment without law. By allowing extreme measure and little accountability for the state, this clause of emergency is the “Achille’s heel of the human rights” protection regime (Rajagopal, 2003: 176). However, in its General Comment 29 on ICCPR article 4 (UNHRC, 2001), the Human Rights Committee introduced an important clarification to the derogability principle. It established an intrinsic connection between some non-derogable and some derogable rights thus restricting the gap between these two sets of rights. In paragraph 15, the HRC notes: “It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees” (*Ibid*: §15). In other words, the [derogable] rights to procedural and judicial guarantees are essential to

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<sup>1</sup> With the notable exception of the United States of America which has ratified neither the ICESCR, nor the CRC. Further, the USA has signed, but not ratified API and APII.

the full respect of certain non-derogable rights, such as the right to life. As such, the HRC concludes that “as article 6 [right to life] of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15 [right to procedural and judicial guarantees].” (*Ibid.*).

The right to life is formulated in the third article of the Universal Declaration of Human Rights (UDHR, 1948) and reaffirmed in the International Covenant on Civil and Political Rights (ICCPR, 1966) article 6. Under the human rights framework, that right can only be constricted in exceptional circumstances; circumstances similar to those framing law enforcement activities (ECHR, 1950: art.2(2)). The right to life is considered fundamental and is thus exempt from derogation (*Ibid.*: art. 4(2)) –except in the European Convention on Human Rights (Sassòli & Olsen, 2008: 611) that allows for a caveat to the non-derogability of the right to life, “in respect of deaths resulting from the lawful actors of war” (*Ibid.*: art. 15(2)). Article 15(2) of the ECHR therefore suggests that, when in situations of armed conflict, the scope of right-to-life protections must defer to the laws of war; a deferral that carries the risk of compromising some of the foundational principles of human rights. In fact, while human rights, by definition, afford protections to individuals<sup>2</sup> *qua* humans, IHL affords protections to individuals by virtue of their belonging to particular categories of ‘protected persons’.

IHL does not allow for any derogation as it applies, precisely, in situations of armed conflict, and thus often of emergency. This body of law was conceived to provide protections in already sub-optimal, exceptional circumstances; it can therefore incur no

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<sup>2</sup> The argument has been made that human rights also afford protections to groups of individuals. See the exchange between Kymlicka (1991; 1992) and Kukathas (1992a; 1992b) for differing accounts of the role of group rights in relation to individual rights.

derogations. Ruling situations where death is inevitable, it is far less protective of the right to life. Far from conceiving of such a right as absolute, IHL provides a series of rules and principles delimiting the lawful deprivation of life in armed conflict. As Audrey Benison puts it, on a normative level, “humanitarian law contemplates a starting point of death, violence, and destruction that is repugnant to the essence of human rights law.” (1999: 152). In Stephen Hopgood’s terms, “[w]ar is always a human rights violation waiting to be converted into a crime” (2013: 122). Most interestingly, IHL allows for an allocation of duties and responsibilities going beyond the traditionally state-centric model of human rights law. In fact, as stated in CA 3, IHL is binding to “each Party to the conflict” (GC IV, 1949: art. 3). Which, in some situations of armed conflict, includes non-state armed groups.

It is important to note that the laws of armed conflict afford weaker protections when the armed conflict is not international. From a hard law perspective, only CA 3, standing as a mini-convention, is applicable in all situations of armed conflict. AP II only applies to non-international armed conflict past a certain threshold (determined somehow arbitrarily based on the intensity, duration, and nature of the parties to the conflict). As for the rest of GCs I-IV and AP I, they only concern international armed conflict. This gap, however, has been considerably reduced by the evolution of customary law. The International Committee of the Red Cross, as a central actor in the development of protection norms, has been instrumental to that phenomenon. In fact, a thorough study commissioned by the ICRC in 2005 suggests that virtually all rules regulating international armed conflict have now reached the status of custom in situations of armed conflict not of an international character (Henckaerts & Doswald-Beck, 2005). It is the



case, for example, of the principles of precaution, proportionality, and distinction, which are of particular importance in the context of this analysis. They are laid out in AP I articles 57, 51(5) and 51(4) respectively, and reaffirmed in rules 15, 14, and 11 of the customary IHL study; where they are deemed relevant to both international and non-international armed conflict.

In short, as originally conceived, IHRL is applicable –to states– in all circumstance, but can be derogated from. As for IHL, it is solely applicable in situations of armed conflict (international or not) to all parties to the conflict, and without the possibility for derogation. IHRL is primarily based on rights while IHL is premised on legal injunctions and prohibitions (Slim 2000: 14). Finally, the application of IHL rules varies according to the qualification of the conflict as a whole while IHRL does not distinguish between different kinds of conflict (Krieger, 2006: 279).

Both IHL and IHRL have similar philosophical roots, both holding the *protection* of human dignity at the heart of their project. Even in some of the founding documents of each of these two bodies of law, these common origins are manifest. William Hitchcock identifies the Geneva Conventions of 1949 as marking a notable shift in IHL, so much so that he argues for them to be considered alongside “other documents that form ‘the human rights revolution’ of the 1940s” (2012: 98). For Hitchcock, the 1949 Conventions introduced key human rights assumptions to the laws of war, premised on inviolable individual rights of the human person, and extending protections to other, previously unprotected categories (Hitchcock, 2012).

It is indeed possible to find clear human rights inflexions in various articles of the Geneva Conventions and their Additional Protocols. The language of Common Article 3

for example, clearly echoes that of the UDHR (Meron, 2000: 246). Its first paragraph reads as follows: “Persons taking no active part in the hostilities [...] shall in all circumstances be treated humanely, *without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*” (ICRC, 1949a: art. 3) [emphasis added]. The italicised clause articulates the principle of non-discrimination at the centre of the human rights project and can be seen, in this context, as an expression of the principle of impartiality, so dear to classical humanitarian action. Similarly, Article 75 of Additional Protocol I, entitled ‘Fundamental Guarantees’ is astoundingly similar to Article 14 of the ICCPR. Conversely, humanitarian law-type provisions can be found in human rights law. The provisions on child soldiers in the Convention on the Rights of the Child and its Protocol on the Involvement of Children in Armed Conflict is an example of such provisions (Henckaerts and Doswald-Beck, 2005: xxxvii). The 1968 UN International Conference on Human Rights held in Tehran began to codify this interconnection by “establishing an official link between human rights and IHL” (Balendra, 2008: 2481). Looking more closely at the evolution of their respective scopes of application will give us a good sense of the mutual influence of IHRL and IHL.

## **1.2 ...Having experienced a rapprochement**

These distinctions seem to not be as clear-cut today as they once were. Theodor Meron has long noted a “growing convergence” (2000: 239) of IHL and IHRL, a convergence that has gained momentum since the beginning of the 1990s, pushed by a changing nature of conflicts (increasingly internal) and facilitated by a growing body of customary international law (Ibid, 243-4). In fact, IHL was initially developed for a prototypical state v. state war, far from the today’s ‘norm’. Meron describes this

convergence by studying the evolution of IHL, and describes the phenomenon as a *The Humanization of Humanitarian Law*. Similarly, Stephen Hopgood argues that human rights law has “slowly but surely colonized international humanitarian law in world politics” (2013: 120). While it undoubtedly picked up the pace after the end of the Cold War, the origins of this legal convergence are to be found much earlier, notably with the Genocide Convention of 1948. Part of the post-war efforts to develop international law, this convention codified individual criminal responsibility for acts of genocide equally in times international conflict, internal conflict, and peace (Greppi, 1999; Griffin, 2000). Furthermore, it participated to the development of the justiciability of human rights law (Kennedy, 2004: 253-54).

The ICRC’s two-volume customary IHL study maps –and has arguably strengthened– the-said ‘humanization’ (or ‘humanrights-ization’) of IHL (Henckaerts and Doswald-Beck, 2005). By compiling this set of rules from general practice, the Geneva-based institution contributed to filling the gaps left by treaty law, offering a more thorough protection to victims. In that study, as mentioned above, the large majority of customary IHL rules are presented as applying to both international and non-international armed conflict. Henckaerts and Doswald-Beck notably mention the “extensive practice by States and by international organisations” to comment “on the behaviour of States during armed conflict in the light of human rights law” (Ibid: xxxvii) thus acknowledging the influence of IHRL on the development of customary IHL.<sup>3</sup> In *Humanity’s Law*

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<sup>3</sup> It is important to acknowledge here, that the ICRC customary law study has faced significant criticism for the nature of the evidence it presented in justifying the customary nature of certain rules of international humanitarian law. Most notably, Bellinger and Haynes (2007), two lawyers presenting the official U.S. response to the study, have voiced concerns about its rigour. They notably point to the insufficient density of the evidence in determining settled state practice. Furthermore, they argue that the study relies too much “on written materials, such as military

(2011), Ruti Teitel takes the convergence argument further, contending that IHL and IHRL have progressively merged to create a hybrid: ‘humanity’s law’; a legal regime that “reaches beyond states and their interests and obligations, to the rights and responsibilities of persons and peoples” (*Ibid*: 16). It is worth noting here that Teitel goes as far as the Renaissance in the mapping of that convergence. In a similar vein, David Kennedy argues that international lawyers have “developed an integrated way to thinking about warfare, which combines elements of the human rights tradition, as well as the tradition of humanitarian law and collective security”, an integrated approach that he calls “the modern law of force” (Kennedy, 2004: 237).

This convergence has led to a blurring of the protections afforded in international or non-international armed conflict, as well as between those that apply in times of war, or peace (Leebaw, 2014: 263). This can be observed in the jurisdiction of the ad hoc tribunals for the former Yugoslavia and Rwanda, where –unlike at Nuremberg– the application of IHL is not limited to situations where a ‘nexus’ to an international armed conflict could be established (see UN, 1945: art. 6(c)). In other words, the jurisdiction of the ICTY and ICTR also extend to systematic abuses against civilian populations whether technically committed in times of armed conflict or not (Leebaw, 2014: 263).

It is worth noting that often, the legal convergence is analysed by mapping the changes in IHL exclusively, leaving out part of the story. In fact, human rights law has also been affected by the convergence, notably with regional courts and commissions

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manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict” (*Ibid*: 445). One of the authors of the study offered a response to their remarks (see Henckaerts, 2007). As Geoffrey Best put it when discussing the discrepancy between the law and practice around the prohibition of reprisals: “Did not protective enthusiasm here run riskily ahead of armed-conflict practicality” (1994: 393). While settling such a debate is far beyond the scope of this study, we must keep in mind some of the potential limitations of customary IHL developments.

incorporating IHL principles in their reasoning. The Inter-American system has since the late 1990s appealed quite consistently to the principle of *lex specialis*, turning to IHL for guidance in situations of armed confrontations.<sup>4</sup> For example, in the seminal *Tablada* case, The Inter-American Commission on Human Rights (IACHR) held that “civilians [...] who attacked the Tablada base [...] are subject to direct individualized attack to the same extent as combatants” (IACHR 1998a; §178) and then exclusively applied humanitarian law (applicable to international armed conflicts) to those attackers (Sassóli & Olson, 2008: 611). What is more, in its decision in *Bamaca Velasquez v. Guatemala*, the IACHR declared acknowledging the “normative and interpretative convergences between International Law of Human Rights and International Humanitarian Law” (2000: §27).

In some cases relating notably to the situation in Northern Cyprus and in South-Eastern Turkey, the European human rights bodies have also turned to IHL. In *Varnava and Others v. Turkey*, the Court ruled that the right to life (article 2) “must be interpreted in so far as possible in light of the general principles of international law, *including the rules of international humanitarian law*” (ECtHR, 2009: §185) [emphasis added]. Similarly, in *Benzer and Others v. Turkey*, the court identified CA3 of the Geneva Conventions as “relevant international material” (ECtHR, 2013: §89). The Court then went on to declare that the “indiscriminate aerial bombardment of civilians and their villages cannot be reconcilable [...] with the customary rules of international humanitarian law” (Ibid: §184). Going beyond the direct references to IHL – namely the Geneva Conventions, its Additional Protocols, and customary IHL – one can thus notice

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<sup>4</sup> *Abella v. Argentina* [aka *Tablada* case] (1998a), *Saavedra v. Peru* (1998b), *Bamaca Velasquez v. Guatemala* (2000), *Las Palmeras v. Colombia* (2002) are all cases in which the Inter-American Commission appealed to article 3 common to the four Geneva Conventions.

that IHL language has been used rather consistently when adjudicating in situations of armed conflict or occupation. The Inter-American and European Commissions and Courts have indeed used concepts clearly borrowed from IHL, such as ‘proportional use of force’, ‘disproportionate use of a combat weapon’, or ‘indiscriminate aerial bombing’ (Reidy, 1998; Balendra, 2008: 2484). This phenomenon also indicates the convergence of IHL and IHRL. One could argue that it is even more significant than the direct references to IHL provisions, as in these cases IHL is truly incorporated into IHRL.

Another manifestation of this convergence can be found in the ECtHR’s decision to use IHL in its determination of the extraterritorial applicability of human rights. This question has been brought to the court on various occasions when petitioners have claimed that their human rights were violated in situations of international armed conflict, and foreign occupation.<sup>5</sup> As article 1 of the European Convention on Human Rights states that the High Contracting Parties “shall secure to everyone within their jurisdiction” the rights and freedom it then lays out (Council of Europe, 1950: art.1), the European Court of Human Rights has had to use IHL principles to determine whether the human rights law framework applied extraterritorially, to determine whether the petitioners were ‘within their jurisdiction’. Similarly, according to the second article of the ICCPR, states have an obligation to ensure and respect the rights of “all individuals within its territory and subject to its jurisdiction” (OHCHR, 1966: art.2(1)), making the establishment of jurisdiction a precondition to any further decision. In most situations these provisions do not represent a particular challenge to determining the jurisdiction of the court adjudicating on such issues. However, when courts are asked to take decisions

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<sup>5</sup> See *Loizidou v. Turkey*, 1995; *Bankovic and Others v. Belgium and 16 Other Contracting States*, 2002; *Al-Skeini and Others v. United Kingdom*, 2011

on alleged human rights violations committed during an international armed conflict, on the territory of another state or under occupation, the exact significance of this single word, 'jurisdiction', takes paramount importance (Milanovic, 2012: 122). As Lubell notes, the problem of extraterritorial obligations is "primarily of relevance to international armed conflict, since it is in such situations that a State is likely to be operating outside its borders" (2005: 739).

There are three main models to interpret 'jurisdiction': a spatial (based on determining effective control over a territory), a personal (based on determining effective control over an individual), and a mixed one (see Milanovic, 2011: 119-228). Most relevant for our purposes, the *Al-Skeini* case, concerning six men killed during the British occupation of Basra (Iraq) (ECtHR, 2011). In its decision, the Grand Chamber cited IHL in its reasoning (*Ibid*: §89) to determine Basra's status as occupied territory and determine the duties of the occupying power under international humanitarian law. Finally, the court established that there was indeed a "jurisdictional link between the deceased and the United Kingdom" (*Ibid*: §149), and ruled that "the applicants' deceased relatives fell within the jurisdiction of the respondent State" and thus dismissed "the Government's preliminary objection as regards jurisdiction" (*Ibid*: decision 4). In a decision informed by IHL, the court thus found that the protections of the ECHR extend to occupied territories under clearly established control of a contracting party.

This growing legal convergence has to be analysed in parallel with the convergence of human rights and humanitarian praxes as exemplified by the adoption in 1990 of the Declaration of Minimum Humanitarian Standards or Turku Declaration (IFRC, 1990); a declaration that draws heavily on human rights considerations with the

aim of – as its name indicates – codifying a number of minimum humanitarian standards to be followed in all circumstances, including those to which IHL is not technically applicable (Abi Saad, 1997: 118-9). Thus human rights seem to have permeated humanitarian standards of action while an IHL-informed approaches have allowed human rights courts and commissions to sharpen their analyses of violations in situations of conflict –by, for example, taking into consideration issues of proportionality, discrimination, and precaution. The law cannot and should not be considered independently of narrative or of the “norms that give sad and sentimental tales their resonance” (Laqueur 2009: 37). The two are mutually constitutive and co-dependent.

## **2. Convergence in the discourse**

First, there has been an increased overlap in the thematic and geographical areas of interest and action of humanitarian and human rights organisations. On one side humanitarian organisations traditionally working mostly in situations of armed conflict have extended their scope of activities to include contexts that cannot be characterised as armed conflicts. For example, there has been an upsurge of ICRC activities in ‘other situations of violence’; situations that the ICRC itself does not qualify as armed conflicts and thus where the bulk of IHL does not apply – in fact, most of the GC and AP provisions fall short in protecting victims in situations of internal strife. In such contexts, the ICRC has a right of ‘humanitarian initiative’ – set out in the Red Cross Statutes (ICRC, 2006: art. 5(3)) – whereby it can offer its services to the governments in question, but its activities are not grounded in IHL in the same way. As a recent ICRC policy document acknowledges, the fundamental rules protecting persons in ‘other situations of violence’ are “for the most part contained in international human rights law and domestic



legislation” (ICRC, 2014b: 289). This expression ‘other situations of violence’ is a recent evolution of ICRC discourse, and designates “situations in which acts of violence are perpetrated collectively but which are below the threshold of armed conflict” (*Ibid*: 278). Incorporated into the ICRC Mission Statement in 2008, the expression came to replace ‘internal disturbances’ and ‘internal tensions’; terms that tended to describe situations very similar in nature to non-international armed conflict but that had not reached the necessary threshold of intensity or duration to be qualified as such (ICRC, 2008). The 1986 Red Cross Statute sets out the ICRC’s role “to endeavour *at all times* [...] to ensure the protection of and assistance to military and civilians” (ICRC, 2006: Art. 5(2)(d)) [emphasis added], thus leaving the door open for the institution to act in situations that do not pass the threshold of an armed conflict. This recent increase in the ICRC’s actions in ‘other situations of violence’ can notably be explained by the need to adapt to the changing nature of armed conflict. In a 2011 report on ‘IHL and the challenges of contemporary armed conflict’, the ICRC notes, for example, that “recent situations of civil unrest in North Africa and the Middle East have in contexts such as Libya degenerated into NIACs [non-international armed conflict (*sic.*)]” and “[i]n other contexts such as Iraq and Yemen, civil unrest has occurred against the backdrop of pre-existing armed conflicts” (ICRC, 2011: 7). This muddling of lines between non-international armed conflict and ‘other situations of violence’ has pushed the ICRC to use its right of ‘humanitarian initiative’ more frequently, and prop up its action in situations that do not meet the threshold of applicability of Common Article 3. The cases of persons detained in the context of the so-called ‘war on terror’ also present an institutional challenge for the ICRC, as their status is not necessarily obvious when their capture does

not occur in the context of an armed conflict. The ICRC often uses its right of humanitarian initiative to offer its services to the detaining authorities and monitor their conditions of detention. True to its needs-based approach, the ICRC thus increased its presence, responding to identified growing humanitarian needs in ‘other situations of violence’. But this gap in IHL protection is not new. Already identified at the 1949 diplomatic conference called to adopt the new GCs (Momtaz, 1998), it was further addressed by Theodor Meron in his 1984 plea for a ‘Humanitarian Declaration on Internal Strife’; a declaration that eventually materialised in 1990, at Turku. In his article, Meron notes the “frequency and cruelty of situations of internal strife, the widespread denial of applicability of humanitarian law, the limited number of ratifications of some of the human rights instruments, the inadequacy of the nonderogable provisions, and the abuse of the right of derogation” (Meron, 1984: 859). His observations are echoed in the Preamble of the Turku declaration as it states:

“Considering that situations of internal violence, disturbances, tensions and public emergency continue to cause serious instability and great suffering in all parts of the world;[...]

Noting that international law relating to human rights and humanitarian norms applicable in armed conflicts to not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency” (IFRC, 1990).

According to the ICRC, the term ‘other situations of violence’ allows the inclusion of other forms of violence such as gang, cartel or mafia violence – often international in nature (ICRC, 2008: 280). Actions like that of the ICRC on urban gang violence (Pfanner, 2010) is a fitting example of the organisation’s involvement in ‘other situations of violence’.

MSF's action has – by nature – included contexts in which IHL is not a framework of reference. A primarily medical organisation, MSF does not have a mandate limited to situations of armed conflict. As former MSF President Jean-Hervé Bradol notes, MSF's philosophy is that “[w]ar is not the only arena where the death of a part of humanity is played out” (2004: 7) and therefore, there is no valid reason for the organisation's activities to be limited to such contexts (*Ibid*: 8-9).

On the other side, Human Rights Watch and Amnesty International have given increased attention to situations of armed conflict. Prototypical international human rights organisations, these two actors do not have a mandate rooted in law; they tend to favour openly accusatory advocacy strategies and do not –historically– focus on the protection of civilians in armed conflict. However, both organisations have reported on situations of conflict since the 1980s and have increasingly incorporated such situations in their scope of action. Amnesty established a Mandate Review Committee (MRC) in 1988, to explore the possibility of extending the scope of the organisation's mandate (Hopgood, 2006: 95). Notably, AI came under pressure to undertake crisis response and include more situations of armed conflict in its mandate (*Ibid*: 75). Only in its more recent general mandate review concluded in 2001, did Amnesty gain “the flexibility to respond to human rights abuses in armed conflict in various ways” (AI Archive, 2002: 18). It is worth noting, however, that the role of the organisation in situations of armed conflict has been a subject of internal discussion since at least 1984, as shown by an internal memorandum between Steve Abrams and the AI USA's board of November 14, 1984 (AI archive, 1984: box I.1 6), and by a resolution unanimously adopted at the International Committee Meeting (ICM) in 1985. That resolution entitled ‘Amnesty International's Role In

Situations Of Armed Conflict And Internal Strife’ welcomed the thorough study on the subject prepared by the International Secretariat, and recommended that “the IEC [international Executive Committee *sic.*] continue to keep this matter under study” (*Ibid*). Since 2008, AI’s website has included ‘armed conflict’ in its list of ‘human rights topics’ (AI, 2008). Today, AI devotes an entire section to the issue under the ‘What We Do’ tab of its website (AI, 2016). Under that section, AI goes on to describe the rules that apply in such situations, enumerating the IHL principles of proportionality, distinction and precaution.

HRW, while not identifying it as a discrete thematic focus, has reported extensively on situations of armed conflict, rooting its reporting in IHL as well as IHRL. We can also notice an evolution in HRW’s focus on situations of armed conflict. While in 1984, already, it reported on violations in such situation, and supported its findings with international humanitarian law provisions; it has since developed a much more elaborate use of IHL. Looking through the archived files of ex-HRW executive director Jeri Laber, I was surprised to find, in a box of material around a 1984 report on Afghanistan, a folder entitled ‘Geneva Conventions’ with a single photocopied sheet of paper of common article 3 in it (HRW Archive, 1984: Box 2). While merely anecdotal, this episode shows that HRW initially made quite rudimentary use of IHL in its work. By contrast, Kennedy reveals that in 2012, HRW had recently hired “the man who had assessed the proportionality of American targeting for the Pentagon to do the same exercise for Human Rights Watch” (2012: 31). Since 2014, HRW’s website states that its work is guided “by international human rights *and humanitarian law*” (HRW, 2014) [emphasis added]. And its more recent reports are often deeply rooted in IHL, with some

exclusively appealing to that body of law. The 2015 report on Yemen entitled ‘Targeting Saada’ (HRW: 2015b), for example, mentions international humanitarian law 20 times, and human rights law only once in the main text. In addition, that same report only mentions ‘human rights’ when naming an organisation (i.e. Human Rights Watch, OHCHR, the Yemen Center for Human Rights...) or when citing UNSC resolution 2140 (*Ibid*: 5). In 2015, Amnesty International and Human Rights Watch have respectively mentioned, or appealed to IHL in over 22% and just under 25% of their English language research publications; giving us an idea of the propensity of these two organisations to use IHL in their work today.<sup>6</sup> But beyond this quantitative data, it is important to study *how* HRW and AI appeal to IHL principles in their reporting and the different consequences of using such discourse.

## **2.1 Appeal to IHL norms by human rights INGOs**

I shall now focus on Human Rights Watch and Amnesty International reports on situations of armed conflict, with the objective of studying these organisations’ approach and utilisation of humanitarian principles. As Ron Dudai points out, the language, parameters, and type of material included or excluded from human rights reports can tell us a lot “about the assumptions, ambitions, and state of mind of the human rights movement” (2009: 247). The way in which the law is included in the narrative is an important indicator. For the human rights report genre, substantive engagement in legal frameworks constitutes a “necessary anchor on policy and practice” (McEvoy as cited in, *Ibid*: 249). The law is in fact never independent from narrative. Narrative gives laws and

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<sup>6</sup> Amnesty International has 164 English language research publications for 2015 listed on its website. 37 of which mention IHL at least twice. Human Rights Watch has 73 reports in English for the year 2015 (excluding its 2015 world report) listed on its website. 18 of which mention IHL provisions and/or appeal to IHL principles.

norms their meaning, transforming them into “a world in which we live”. The relationship is thus reciprocal; the two are mutually constitutive (Laqueur, 2009: 37).

In general, it appears that Amnesty has embraced the use of IHL later than HRW – or, rather, than the ‘Watch Committees’ that predated HRW. In fact, we can see that AI reports seldom referred to specific IHL provisions before the 1990s. Having looked at over 30 publicly available reports on situations of armed conflict between 1985 and 1997, it appears that 19 make no mention of IHL whatsoever, while only three (one published in 1992 and two in 1996) seem to substantially engage with provisions and principles of that body of law. It is a rather different picture with HRW, which embraced laws of war as a framework earlier. While we are far from today’s systematic and detailed use of IHL, among 20 reports on situations of armed conflict published by HRW between 1984 and 1997, eleven make references to specific provisions of the Geneva Conventions and/or their Additional Protocols. By comparing the two organisations’ coverage of the First Gulf War of 1991, we see that in all of its six publications on the subject, HRW supports its findings and recommendations with IHL provisions, while Amnesty only mentions the Geneva Conventions once –in passing– in one of its five publications around the conflict. In two of its publications, Amnesty does however use humanitarian legal terminology through the mention of ‘indiscriminate bombardment’ of civilian targets. HRW does so, much more systematically, mentioning for example the “rule of proportionality as it applies to collateral civilian casualties” (HRW, 1991a). In the report *Needless Deaths In The Gulf War* (HRW, 1991b), Human Rights Watch devotes an entire chapter to “the legal regime governing the conduct of air warfare’ in which are outlined in detail, the provisions of IHL applicable in that particular situation. The principles of military

necessity, of civilian immunity, of distinction, of proportionality, and of precaution are all outlined, and applied to the conflict in question. It thus suggests that HRW generally adopted a more legalistic approach than AI, and embraced the use of IHL with less reticence. This different degree of reliance on the law can be traced back to the two organisations' origins, with HRW –or rather its predecessor Helsinki Watch– having been specifically created to monitor the application of the Helsinki Accords, and AI having been created to defend “transcendent principles” (Hopgood, 2006: 217). This observation brings Hopgood to argue that AI is “not first and foremost a human rights organization at all”, but a “Free Church” championing “the cause of human rights [...] as a means to broadcast that moral authority” (*Ibid.*). As such, Amnesty has tended to rely much more on grassroots mobilisation in pushing for change, while HRW, preferring an elitist model, has tended to focus on bringing about change from above, influencing those with the power to make important decisions. As some HRW employees like to say, AI will work to mobilise thousands on the steps on Congress, while HRW will work to getting the right advocate to sit down with Congressmen and women. With different target audiences, these respective models have called for different styles of reporting. Yet, the distinction between the two groups' approaches has considerably diminished in recent years. If we look at their reporting on the more recent invasion of Iraq in 2003 (see annexes 3 and 4), we see that Amnesty has fully incorporated IHL in its legal framework. For instance, it published a report entitled *Respecting International Humanitarian Law* (AI, 2003a) in which no less than sixteen articles of the Geneva Conventions or its Additional Protocols are cited.

This convergence in the discourse and the appropriation/use of IHL principles and terminology by human rights organisations has some notable repercussions on the way these organisations present themselves, the wider human rights movement, and human rights as an ideal. First, the increased interest of human rights organisations for situations of armed conflict, and the growing acceptance of the IHL framework have contributed to considering non-state actors as an advocacy target with humanitarian and human rights duties. This inclusion of non-state armed groups was usually introduced in human rights reports through IHL's applicability to 'all parties to the conflict'. As such, while non-state armed groups could not technically be held accountable for human rights violations, they could be condemned for their non-compliance with IHL. In fact, we see both in AI and HRW publications that non-state actors are now commonly called upon, with a number of recommendations targeting them. Recent examples include HRW reports on abuses committed by militias in Iraq (HRW, 2015a; 2015c), as well as AI's coverage of the conflict in Yemen, and its focus on the Houthis' "crackdown on human rights defenders and NGOs" (AI, 2015). As this last quote suggests, non-state groups are now not only denounced for violating their obligations under IHL, but also for committing *human rights* abuses. This inclusion of non-state armed groups is the result of a gradual evolution. To study this evolution at Amnesty one must look at the evolution of the organisation's mandate. In fact, AI's work is guided by a statute that can only be amended by a two-thirds majority vote of the International Council. Such an amendment of the mandate occurred through the 1988-1991 Mandate Review Committee mentioned above. In that process, the AI's International Council agreed to bring within its purview quasi- and non-governmental entities that are political in nature, and to hold them to the



same standards as states (Hopgood, 2006: 120). While AI had been considering armed groups since 1983, the definition with which the organisation was working at the time limited its action to quasi-governmental entities with a certain degree of control over a territory and a certain organisational structure (Dudai & McEvoy, 2012: 8). Thus AI's principled position allowing it to campaign on armed groups more consistently [only] dates from the 1991 mandate review (*Ibid*). This inclusion of non-state armed groups definitely bore the mark of the convergence with humanitarian principles as IHL was mentioned recurrently when discussing the new qualifying threshold of armed political group (AI archives, 1989: Box I.1 12 IC Minutes – Nov.18). Furthermore, in a 1993 publication entitled *Putting the Spotlight on Armed Opposition Groups*, Amnesty restated the importance of IHL in the rationale to address abuses by non-state groups:

“The principles of humanitarian law, which apply to international and non-international armed conflict alike, do, in fact, apply both to governments and to any political movement fielding armed forces in open conflict. As a consequence, Amnesty International will increasingly be placing before the public eye violations of these fundamental principles both by opposition groups -- and by governments which are nominally pledged to the rule of law” (Amnesty, 1993: 4).

While not bound by the same constraints as Amnesty regarding the evolution of the statute, Human Rights Watch followed a similar trajectory. The Watch Committees initially did not cover non-state actors, but in the mid-1980s, Americas Watch began researching abuses committed by groups in Central America (Dudai & McEvoy, 2012: 8). It is also in those reports addressing abuses of the Salvadorian FMLN and the

Nicaraguan ‘Contras’ that the organisation began to rely on IHL provisions and principles (*Ibid.*).<sup>7</sup>

This evolution in reporting has had far reaching consequences as it has gradually extended to issues beyond IHL (Clapham, 2006), and has had “knock-on consequences for local human rights organizations throughout the world” (Dudai & McEvoy, 2012: 2). In fact, while IHL played an important role in supporting this expansion through the ‘all parties to the conflict’ clause, human rights organisations are now going beyond the normative framework of humanitarian law to include recommendations about child soldiers, denial of freedom of expression, and abuses against humanitarian workers (Clapham, 2006: 511).<sup>8</sup> It is worth noting here that Clapham’s observations are not as applicable to HRW as they are to Amnesty. HRW, arguably more attached to the letter of the law, seems to be warier of allocating human rights obligations to non-state actors. However, reaching beyond the NGO community, the issue of accountability for non-state actors has also been taken up by some United Nations Special Rapporteurs. In a report published in March 2006, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston argued that as a non-state actor, the Sri Lankan LTTE

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<sup>7</sup> This shift at Americas Watch occurred in a very politicised environment, as the organisation felt the need to rebut criticism of bias from the Reagan administration (Dudai & McEvoy, 2012: 8), and counteract the administration’s narrative presenting the FMLN and the Contras as blameless and respectful of the law (Goldman, 1993: 89-94).

<sup>8</sup> Examples of such recommendations can be found in Amnesty’s 2003 report on the DRC, *On the Precipice* (AFR 62/006/2003), in which armed groups are asked to “immediately cease unlawful killings and other human rights abuses against civilians” (AI, 2003b: 28) [emphasis added]; in Amnesty’s 2005 Iraq report, *In Cold Blood* (MDE 14/009/2005) in which armed groups are asked to “[e]nd immediately the harassment, death threats and violent attacks against women who exercise their *rights to freedom of expression and to freedom of religion*” (AI, 2005: 54) [emphasis added]; in HRW’s 2003 briefing paper on *Aceh Under Martial Law*, in which it refers to a war in which “both sides have violated international human rights and humanitarian law with impunity” (HRW, 2003: 2); and HRW’s 2005 report, *No Exit*, on human rights abuses carried out by MKO leaders against dissident members as well as some of their own members (2005b).

“does not have legal obligations under ICCPR but [...] remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights” (Alston, 2006: §25).

A few months later, a group of four Special Rapporteurs published a report concerning the 2006 Israel/Hezbollah war in which they used the exact same terminology to justify holding Hezbollah accountable to human rights norms (in Dudai & McEvoy, 2013:4). One of these rapporteurs was Philip Alston. We can thus see that we are presented here with a norm that has considerably developed and reached a good level of acceptance. Addressing non-state actors allows to move past the traditionally state-centric approach of human rights – or at least to begin to challenge it. All sorts of non-state actors are expected, more and more, to comply not only with principles of humanitarian law, but also of human rights law (Clapham, 2006: 491).

Yet, the challenge is not absolute, as often, the language used to condemn non-state actors is not the same as that used to address states; nor are the denunciations followed by the same sustained advocacy campaigns. As Petrasek puts it, in “the human rights universe, states are still seen as the primary, ‘legitimate target’ of human rights scrutiny” (2012: 133). To support this claim, he presents an interesting paradox, stemming from the legalistic approach of the human rights NGOs. He argues rather convincingly, that while these organisations need the law to support and give credence to their reporting, these legal rules continue to be limiting in nature. They mostly place obligations on governments, because only states that can sign and ratify these treaties (*Ibid*: 133). Also interesting for the purpose of this study, Petrasek analyses the discourse of HRW and AI. He notices that, in a sampling of public reports published between 2003

and 2006, on a dozen countries where armed groups were active, only about ten per cent of the words were devoted to abuses by armed groups (*Ibid*: 130). Similarly, HRW and AI tend to prefer the terminology of ‘abuses’ when addressing exactions committed by non-state actors, as technically only signatory states can commit ‘violations’. Again, this does not apply to reports concerning violations of IHL given that IHL can be ‘violated’ by any and all parties to the conflict. The highly legalistic nature of that distinction become apparent when we take into account the recent trend of customary international law, greatly diminishing the gap between the protections afforded in situations of international and non-international armed conflict. In fact, today, as noted by the 2005 ICRC customary law study a large majority of basic rules on the protection of civilians are deemed customary in international as well as international armed conflict, and as such, binding to armed groups as well as states. These basic rules often find resonance with fundamental human rights. For example, the fundamental guarantees outlined in Additional Protocol I Article 75 echo almost word for word, article 14 of the ICCPR. Some of the fundamental guarantees found in API article 75 are reflected in rules 87 to 93 of the ICRC customary law study and deemed customary both in international and non-international armed conflict (Henckaerts & Doswald-Beck, 2005). And yet, most international human rights NGOs persist in drawing a distinction, where non-state armed groups can violate their IHL obligations but can [only] commit human rights ‘abuses’. To some extent, this perpetuates the state-centrism it claims to challenge, as there remains a bias towards focusing on states (Petrasek, 2012: 134). This is all the more puzzling when we see that HRW’s and AI’s reporting has contributed to advancing customary IHL. In *Endtimes of Human Rights*, Hopgood cites HRW-executive director Ken Roth at length

on the organisations' decision to use IHL in its work. Roth explains that HRW applied provision of API to internal conflicts instrumentally, "recognizing that this wasn't technically right from a legal perspective" (Roth in Hopgood, 2013: 121). The goal was to have a set of norms "that would persuade public opinion that certain military conduct was wrong [...], it didn't matter whether the law technically applied or not" (*Ibid*). Roth goes on, admitting the conscious decision to participate in a positive evolution of IHL:

"Very frequently we would use this broader principled approach to *push the boundaries of the law*, even when the law had not caught up. [...] In recent years, international tribunals have done the same thing that we were doing at an informal level in 1980s." (*Ibid.*) [emphasis added].

The impact of HRW on international jurisprudence is a subject in its own right and cannot be covered in the scope of this study. However, the above-cited passage speaks to the paradox of HRW working to extend the protections of IHL and place further constraints on non-state actors, while perpetuating a state-centric human rights system by employing different language to qualify exactions committed by states and non-state actors, and according disproportionate attention to state abuses and violations.

The impact of human rights organisations' use of IHL on international jurisprudence can also be seen as positively advancing the protection of civilians in armed conflict. The often creative and sometimes unorthodox fashion in which human rights organisations use IHL principles can be seen as co-opting the original IHL logic. Indeed, some argue that humanitarian law is originally conceived to protect the interests of the parties to the conflict, while human rights law protects the interests of the individual (Krieger, 2006: 279). If we were to accept that premise, human rights organisations can be said to use the IHL framework in the interest of individuals. By

embracing humanitarian law, the human rights community has participated in transforming the “standard for evaluating treatment into rights” thus conceiving of civilians as “having a ‘right’ to be distinguished from combatants” (Kennedy, 2004: 261). It has participated to giving humanitarian norms more “political authority” (Hopgood, 2013: 121) employing IHL as it would human rights law, as a direct challenge to the state’s authority (*Ibid.*). While beyond the scope of this study, it is important to point out that Krieger (2006) has presented that convergence from the perspective of the ICRC customary law study, by analysing the [limited] results of the incorporation of human rights jurisprudence and reasoning to bridge the gap between the protections afforded.

However, we can also legitimately ask whether the enthusiastic adoption of IHL principles and norms by human rights organisations does not indeed betray – or at least contradict – some principles of human rights. We have already established that the humanitarian law and human rights law approaches to the right to life are rather distinct, with IHL being much more permissive in the deprivation of life (taking the loss of combatant life as a given and allowing killings of civilians as collateral damage, when attacks pass the proportionality and precaution tests) (Andreopoulos, 2010: 229). And yet, while HRW systematically reiterates the applicability of human rights law in situations of armed conflict when setting out its legal framework, it then goes on to apply humanitarian norms and principles. By adopting the IHL framework, human rights organisations buy into the civilian/combatant dichotomy. Adopting this dichotomy has two far-reaching consequences. First, it logically follows that civilians are understood to be protected because of their civilian status. This appears to be at odds with the very core of human rights: affording protections to individuals on the sole basis on their humanity.

Second, accepting the principles of proportionality and precaution as frameworks of analysis renders the killing of innocent civilians permissible in certain situations. In a 2005 HRW report on the war in Iraq, one can read: “If the destruction of a bridge is of paramount importance for the occupation of a strategic zone, [...] it is understood that some houses may be hit, but not that a whole urban area be levelled”.” (HRW, 2005a: 128). Such a statement seems quite far from human rights conceptions of the right to life, conceding to the destruction of ‘some houses’. As IHL is much more permissive than human rights law when it comes to depriving someone of their life, the question becomes: do these pragmatic concessions compromise human rights principles?

Likewise, there has been a tendency for human rights reporting – and HRW and AI are of course no exception – to adopt the ‘moral equivalence’ approach. This approach, premised on the idea that all violations should be addressed according to their gravity, completely disregards power dynamics and/or intent in appraising a particular situation. Such a situation is deemed necessary for humanitarian organisations who wish to maintain access to the populations in need but is less intuitive for human rights organisations who do not have that same constraint. Bradol, giving the MSF perspective on the issue notes that refraining from “judging the combatants’ motives and goals can certainly be frustrating, but it is the price humanitarian organisations must pay if they are to gain access to the battlefields and assist all the victims, to whatever side they belong” (2004:14). Here too, the increasing reliance on the IHL ‘all parties to the conflict’ clause, and on humanitarian principles can be seen as having contributed to this relative ‘de-politicisation’ of human rights. Using the South African Truth and Reconciliation Commission (TRC) as an example, Leebaw argues that “the focus on crimes committed

by all parties to the conflict functioned to divorce certain forms of extreme abuse from the broader political and historical context” (2007: 231). The TRC used IHL as part of the legal framework within which it made its findings (TRC, 1998: 597-602). In such situations, and in the name of ‘fairness’, an artificial equivalence is created; an equivalence that flattens some of the human rights considerations of morality, and power. In the case of South Africa, the TRC refused to differentiate state crimes from crimes committed against the apartheid regime (*Ibid.*) thus implicitly abstaining from condemning apartheid as a structural system of violence, and failing to address the issue of causation. As Cohen puts it, it creates “a convenient symmetry to disguise very different social realities” (1995: 35).<sup>9</sup> A similar conclusion can be drawn from the increased focus on means and methods of warfare in human rights reporting. We have noted, notably regarding reports on Iraq, or Yemen, that both HRW and AI increasingly frame their investigations in relation to *jus in bello* and humanitarian norms. Leebaw lays bare the paradox in that shift, as she argues that “whereas human rights investigations are legitimated as a basis for moral judgment and the pursuit of justice, the humanitarian focus on conduct in war, or *jus in bello*, was historically a basis for minimizing the effects of war by avoiding moral judgment of political systems engaged in conflict.” (2007: 231). And although some of these developments must be linked back to these organisations’ constant fight for credibility, and an aura of impartiality, they undeniably narrow down human rights aspirations. Aside from the external ‘influence’ of IHL logic,

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<sup>9</sup> In its final report, the South African TRC addresses some of these criticism, arguing that while “it was obliged by statute to deal even-handedly with all victims”, it “did not suspend moral judgment and drew a distinction between the actions of the state and those of the liberation movements” (TRC, 1998: 644§12); neither did it treat “the conflict as a conflict between equal parties” (*Ibid.*: 644§14)



Evans observes a phenomenon endogenous to human rights: “the hegemony of law within human rights discourse” (2005: 1049). After having identified three overlapping discourses within the human rights discourse, namely “the philosophical, the legal, and the political” (*Ibid*: 1050-51); Evans argues that the domination of the legal tends act as a “mask” that “conceals the true causes of many human rights violations” (*Ibid*: 1067). Therefore, while the incorporation of humanitarian principles and approaches into human rights reporting has expanded human right organisations’ scope of action, this phenomenon has also come to challenge some of the foundations of human rights.

## **2.2 Human rights pervading humanitarianism?**

### **2.2.1 *Rights-based humanitarianism***

Hopgood argues that human rights norms – to what I would add, discourse – have colonised international humanitarianism (2011: xiv). In the previous section, we have seen how the two bodies of law on which these practices are premised have converged, and how human rights organisations have made some IHL provision and humanitarian discourse theirs. By presenting and analysing these phenomena I hope to have offered a compelling account of one side of the convergence. Now turning to its mirror image, we shall study the gradual incorporation of human rights discourse and norms into humanitarian discourse and practice. This evolution, championed by the United Nations, has been, by in large resisted by the two humanitarian actors at the centre of the present study: Medecins Sans Frontières and the International Committee of the Red Cross.

What is usually referred to as ‘new humanitarianism’ or ‘rights-based humanitarianism’, is characterised by a shift from a focus on needs to the “defence and fulfilment of rights” (Darcy, 2004: 4). In that new iteration of humanitarianism,

‘impartiality’, and mostly ‘neutrality’ seem to sit oddly with the displacement of needs by rights. As Hilhorst and Jansen rightfully point out, rights language “contain[s] certain ways of understanding society, including its organisation and the distribution of power” (2012: 894). Therefore, “[l]anguage – and especially its normative elements – plays an important role” in understanding that convergence (*Ibid.*).

Rights discourse truly bloomed after the end of the cold war, seeping into “every nook and cranny of world affairs” (Barnett, 2011: 167). However, the first openings for international norm convergence in the UN context seem to date back to the late 1960s. Following Resolution XXIII on ‘Human Rights in Armed Conflict’ adopted at the 1968 International Conference on Human Rights in Teheran, the UN General Assembly adopted resolution 2444 on the ‘Respect of human rights in armed conflict’ (UNGA, 1968). These two documents are framed in human rights terms, presented under a human rights heading but turn out to contain very little human rights provisions or even discourse, in substance. On the contrary, they principally outline principles and provisions of international humanitarian law for states to comply with. Since the 1990s, human rights have been incorporated into the work of the United Nations Security Council, but also into that of the United Nations Development Programme (UNDP), and the Office for the Coordination of Humanitarian Affairs (OCHA) (Barnett, 2011: 167). We can indeed see in the ‘Manual for practitioners’ on humanitarian negotiations with armed groups published in 2006, that OCHA not only focused on an engagement with non-state actors –bringing us back to a point made above– but also used the human rights discourse and framework extensively. There is thus considerable overlap between humanitarian and human rights ‘speak’ at the UN. As Darcy notes, today, a look on the

“virtual home of humanitarians”, *ReliefWeb*, suffices to show the extent to which “human rights and humanitarian discourses now coexist” (2004: 5). Human rights speak has thus rapidly “turned into one of the constituent elements of humanitarian action. Humanitarian crises are framed with reference to rights” (Hilhorst & Jansen, 2012: 902). The language of humanitarianism has been in part co-opted, reworked; to pursue human rights ends (Chandler, 2001: 678).

This development of a more rights-based humanitarianism has had far-reaching consequences on humanitarian ethics and practice, largely redefining humanitarian policy. Notably, as Talal Assad argues, it has worked towards transforming a “conception of moral rightness into a positive right” (2015: 409). That is to say that if the objective of humanitarianism can be understood as the defence and restoration of human rights, we incur “a rearrangement of the relations among violence, ethics, and sovereignty” (*Ibid.*). Chandler in fact argues that it is this transformation of humanitarianism into a rights-based ethic that has legitimised the “politics of international condemnation, sanctions, and bombings” (2001: 700), thus facilitating the “mainstreaming of rights-interventionist policies” (*Ibid.*, 2002: 22-3). Focusing on the respective discourses and guidelines of the ICRC and MSF, we will now see how two big humanitarian players have navigated this convergence, engaging or not with it, embracing or rejecting the discourse of rights.

### ***2.2.2 ICRC’s and MSF’s relation to rights speak***

The International Committee of the Red Cross has played a major role in humanitarian norm formation and evolution, seen by some as having had “a monopoly on the definition and elaboration of humanitarian principles” until the 1990s (Leader, 1998: 295). Since then, and in the context of convergence described above, the Geneva-based

institution, guardian of IHL and last bastion of Dunantism, has had to engage with the ubiquitous rights discourse. Its relation has tended to be one of rejection, avoiding it as much as possible (Darcy, 2004: 6). The fact the ICRC mission statement, in which the organisation's work is described as "*exclusively* humanitarian" [emphasis added] implicitly participates in distancing the ICRC from human rights. Some humanitarian organisations – including the ICRC – see "a critical difference between what they do and what human rights organizations do" (Barnett, 2011: 16). For that reason, they spend considerable energy on that differentiation, as the safeguard of their humanitarian space is often contingent to it. As Jean Pictet famously stated, "[o]ne cannot be at one and the same time the champion of justice and charity. One must choose, and the ICRC has long since chosen to be a defender of charity" (as cited in Chandler, 2001: 695). Forsythe explains that the "carefully constrained" way in which the ICRC engages in public reporting – avoiding pointing the finger at particular actors – is premised on avoiding rights-discourse and ultimately dictated by the need to maintain its "major comparative advantage": access (Forsythe, 2005b: 466). Making a similar point, Darcy notes that a humanitarian organisation like the ICRC would not feel comfortable using the traditional human rights advocacy vocabulary such as 'investigate and expose', 'challenge', 'bring to justice' or 'stand with' (2004: 9). In order to safeguard its exceptional position, the ICRC is often wary of being associated with human rights organisations (Ferris, 2011: 101). As an ICRC staff member once admitted to me, some delegates take this so far that they try to avoid their human rights counterparts in the corridors of the UN headquarters, take different routes to conference rooms and make sure that they are not seen together.

Despite their careful avoidance of rights discourse, the ICRC continues to play a leading role in a crowded humanitarian field. As such, it has worked towards creating better coherence and cooperation between rights-based and needs-based agencies. As we will see in the next section, it is mostly around the concept of ‘protection’ that such discussions about coherence and cooperation have taken place.

Now turning to MSF, we will see that the organisation’s relation to human rights has gone through various stages, embracing that discourse during a period, but partly distancing itself from it in recent years. In a 2000 publication entitled ‘Raising Awareness’, MSF says that it “sets out to alleviate human suffering, to protect life and health and to restore and ensure respect for human beings and their fundamental human rights” (MSF, 2000). Such discourse, while by no means radical or particularly controversial would not be imaginable in an ICRC official publication. In fact, it is precisely on a fundamental disagreement with the ICRC on the issue of speaking out against the “genocidal intentions” and “violations of human rights” by the Nigerian government in Biafra that rests the founding myth of MSF (Fox, 2014: 258). This duty to speak out, *témoignage*, came to hold a central place in MSF’s ethos from the late 1970s to the end of the 1990s. It is worth noting here that unlike what is commonly believed *témoignage* was not included in MSF’s mission from the onset. This practice recently came under criticism from within the organisation, as it became clear that *témoignage* had the potential to legitimise so-called humanitarian interventions. As Weissman points out, “Since 2009, MSF has been more hesitant than ever to speak out on the crises in which it intervenes, out of fear that its words will be used to justify war or international criminal prosecutions, thus jeopardising its presence” (2011). Here we can clearly see

‘access’ and ‘speaking out’ being weighed against each other. The discourse of human rights is not particularly prominent in the work of MSF, but it is not avoided at all costs, as appears to be the case –at times– with the ICRC. Interestingly, the outcome document of its 1997 international reunion – also known as the *Chantilly Principles*, presents the ‘defence of human rights’ as the movement’s fourth guiding principle. It states that MSF subscribes to:

“the principles of human rights and humanitarian law, notably the duty to respect the fundamental freedoms of each individual, including the right to physical and mental integrity, freedom of thought, freedom of movement, as outlined in the Universal Declaration of Human Rights of 1948.” (Ibid.)  
[my own translation]

It then goes on to mention the *right* to humanitarian assistance, as well as the *right* of humanitarian organisations to provide assistance in certain conditions (*Ibid.*). We can thus see a shift towards a rights discourse, and an inclusion of human rights in its guiding principles.

Following Chandler’s argument, we can see that in some cases, MSF’s condemnations were taken to the – some would say logical – point of calling for military intervention. Thus, then-President Rony Brauman famously called for an intervention in Bosnia in 1992, when declaring on a French radio that “it’s the hills of Sarajevo that should be bombed” (in Binet, 2015: 42-3). And, in June 1994 MSF called for an intervention in Rwanda, coining the phrase “doctors and nurses cannot stop genocide” (Phelan, 2009: 16). Contrasting with Jean Pictet’s quote mentioned above, Alain Destexhe, former MSF General-Secretary argues: “humanitarian action is noble when

coupled with political action and justice. Without them, it is doomed to failure” (in Chandler, 2001: 695).

With this in mind, it may appear unsurprising that some have described MSF as “the leading advocate of the new human rights humanitarianism” (Fox, 2002: 25). A qualification that is in fact not accurate – at least not anymore. Barnett argues that MSF’s initial adoption of the practice of *témoignage* was not necessarily connected to a broader human rights agenda. But by breaking with the traditional silence of humanitarians, this aspect of MSF’s action indubitably became its identity mark (2011: 210). In the decades following its creation MSF went from “being a trend-setter to being part of a pack of rights-bearing agencies who believed that human rights and humanitarianism were the same thing” (*Ibid.*). While rights are part of its mandate, MSF does not see itself as a human rights organisation, insisting in its texts, documents, and public events on the impartial, neutral, and independent nature of its work (*Ibid.*). MSF’s Nobel Lecture (Orbinski, 1999) is a good example of such discourse, devoting a great deal of attention to “the moral necessity of the humanitarian maintaining its ‘independence’ from the political” (Fox, 2014: 69). The lecture does not appeal to human rights as a normative framework to MSF’s action or as a moral compass. Contrasting with the earlier calls for intervention, Fabrice Weissman (Head of MSF’s think tank ‘CRASH’) published in 2010 an article explaining the organisations decision *not* to support the responsibility to protect (R2P) doctrine (Weissman, 2010).

Today, MSF appears to want to reconcile its principle of *témoignage* with the more ‘traditional’ humanitarianism embodied by the ICRC. In Barnett’s words, “the more political humanitarianism became, the more that MSF wanted to defend a ‘pure’

humanitarianism that never really existed, at least not at MSF” (2011: 209). This endeavour proves to be rather delicate, as *témoignage* has come to be associated with rights discourse and rights-based approaches. As former President of MSF international, Christophe Fournier stated, “when humanitarian goals and activities are lumped together with this larger, broader, and more future-oriented agenda, the direct result is confusion and even contradiction” (as cited in *Ibid*: 211-12)

### ***2.2.3 To speak or not to speak – balancing access and public denunciation***

On today’s wildly diverse – and arguably overcrowded – humanitarian scene, MSF and ICRC are no small players. With activities in respectively 63 (MSF, 2015) and 80 (ICRC, 2015) countries around the world they each provide crucial assistance on the ground. Their action and their history are intricately intertwined, as MSF sprung from the rib of ICRC in what is now considered a cornerstone of modern humanitarianism’s evolution: the Nigeria-Biafra conflict of 1967-70. At the source of this split was the dilemma around whether to speak out or stay quiet in the face of atrocities; an issue intricately linked to access and rights discourse. And yet, MSF’s founding charter of 1971 did *not* include the principle of *témoignage*. As we will see below, we will have to wait until 1978 for the witnessing policy to be incorporated, and 1997 to see *témoignage* enshrined in the organisation’s ‘*Principes de référence*’.

The ICRC’s mandate places it in an exceptional position vis-à-vis states, conferring it a hybrid identity somewhere between an international organisation and an NGO. MSF on the other hand was created [only] fifty years ago, when a collective of French doctors and journalists decided to come together in response to the horrors of Biafra. As Brauman puts it, “[s]peaking out, denouncing, standing up for victims against



their murderers, such was to be the thrust of the new humanitarian commitment embodied by MSF” (2012: 1524). This declaration has strong human rights inflections, and describes an approach quite different from Dunantist humanitarianism.

In situations of intense fighting, at the height of the violence, MSF and ICRC are often amongst the last [international] players standing. Such situations have arisen all the more frequently since the early 1990s (Brauman, 2012: 1525). Thus, in situations of fierce fighting MSF and ICRC are often amongst the rare witnesses with direct access to the outside world, the power to reach out to the public and the international community. It is this shared exceptional position that brings the two organisations together in facing the dilemma of *témoignage*. The ICRC holds an absolute commitment to remaining in close proximity to the victims of armed conflict. In the words of its former President Jakob Kellenberger “[a]ll other considerations – with the exception of security – are strictly subordinated to this goal” (2004: 594). While much of MSF’s action is premised on proximity to the victims, it does not hold access in the same sacrosanct manner as the ICRC does. Darcy’s observation that “the need to maintain presence may dictate their chosen mode of influence” (2004:9) is still valid for both organisations, but applicable to different degrees. Aptly illustrating this nuance, is the example of these two organisations’ response to the Taliban’s position on women, in 1997 Afghanistan. While MSF (together with Oxfam, UNICEF and UNHCR) suspended their activities in Taliban-controlled areas in protest of the decrees suspending women from their jobs, thus adopting a rights-based position defending the human rights of women; ICRC refused to join the movement of protest and swiftly adapted its programs to comply with the Taliban’s instructions and remain present (Ignatieff, 1998: 140-8). As Ignatieff

summarises, the ICRC “is not a human rights organization. It does not campaign against injustice” (*Ibid*: 146). While not a ‘human rights organisation’ either, MSF does see itself as campaigning against injustice. This imperative to maintain access often proves to be at odds with the use of human rights discourse and approaches. MSF and ICRC’s operational choices and public expressions when confronted to exactions committed during armed conflict appear to be decided –quite pragmatically– in the interest of institutional survival (Slim, 2000: 7) and continued access.

The action of ICRC and MSF is principled. Analysing these principles and operational guidelines side-by-side I will attempt to show that speaking out or quietly working in the midst of massacre are not necessarily the two terms of a simple dichotomy. While impartiality and neutrality are clearly enshrined at the heart of the ICRC’s work philosophy, its discretion is far from absolute, upheld only in the interest of gaining and maintaining access to the victims. As for MSF, the myth of the ever-loquacious French doctors placing ‘*témoignage*’ over all else has proven to be just that, a myth.

*Humanity, Impartiality, Neutrality, Independence, Voluntary Service, Unity, and Universality* – Here are the seven fundamental principles adopted by the ICRC in 1965 (Pictet, 1979); principles that have kept guiding the institution’s action to this day. The second and third principles of this list are those that have the potential of coming into conflict with public denunciation. Often confused, conflated or misrepresented, it is important to disambiguate some of these terms. Impartiality as defined by the ICRC is to “endeavour[] only to relieve suffering, giving priority to the most urgent cases of distress”, “making no discrimination as to nationality, race, religious beliefs, class or

political opinions” (*Ibid*). In other words, it represents a philosophy of action, a “humanitarian ethos” (Labbé, 2012: 3), and can be compared to the human rights ‘non-discrimination’ principle. Neutrality on the other hand is the principled position to “not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature” (Pictet, 1979). Impartiality is a “substantive” tenet; in Pictet’s terminology that is to say that it “stand[s] above all contingencies and particular cases [...] inspire the organization and determine its acts” (*Ibid*). Neutrality carries a particular instrumental character; its core stated purpose is to enable the ICRC to “keep everyone’s trust [...] make more contacts and gain access to those affected” (ICRC, 2009). For Slim, this makes neutrality a “pragmatic operational posture” that allows – some– humanitarian organisations to implement their ideals (1997: 347). *Inter alia*, neutrality manifests itself on the ground by the reluctance to publically denunciate except as a last resort. Neutrality thus serves impartiality. With this in mind the link to the dilemma of bearing witness and the tension around the increased convergence of human rights and humanitarian discourses become obvious. In Ignatieff’s words, for the modern human rights tradition, war is a moral violation “and, between the war maker and his victim, human rights activists cannot remain neutral.” (1998: 119).

The ICRC thus strives to act in a neutral manner to uphold its principle of impartiality, but also needs to be perceived as neutral in order to carry out its actions of humanitarian protection and assistance as thoroughly and efficiently as possible. The institution’s policy is one of consensual and cooperative intervention, where the ICRC works with the agreement of the warring parties and thus has a direct vested interest in maintaining a relationship of trust and entertaining an image of neutrality. In this

perpetual quest for access, discretion plays an active part. Bringing its concerns and grievances to the relevant authorities rather than the world media, the ICRC favours behind-the-scenes criticism – as long as the dialogue is constructive and brings about better protection. A policy choice reinforced by the organisation’s “special immunity from the obligation to testify in a court of law” first established by the International Criminal Tribunal for the former Yugoslavia (ICTY) in a ruling on the *Simic* case (ICTY, 1999). In fact, recognising the unique role of the ICRC in situations of armed conflict and its concern to be denied access if the authorities think that the ICRC personnel might later testify in criminal proceedings, the court decided to exempt the ICRC from testifying, thus creating important jurisprudence. By contrast, it is worth noting that both HRW and AI published, before and after the establishment of the ICTY, a number of reports, naming perpetrators and demanding justice for victims of the armed conflict (AI, 1993, 1999; HRW, 1992, 1993, 1994), and that Fred Abrahams, a HRW researcher, testified in front of the ICTY (ICTY, 2006). As for MSF’s approach to testifying in front of international tribunals, the organisation has stated publically that “international justice is an essential response to the trivialisation of war crimes, of crimes against humanity and of genocide” (in Dachy, 2004: 322) thus adopting a positive approach to justice and suggesting an openness to collaborate fully with the courts when confronted to such crimes (*Ibid.*).

As Forsythe rightfully notes, “it is difficult for the ICRC to be a fully fledged guardian for humanitarian standards if it rarely speaks out in its favour” (Forsythe, 2005b: 179). I am not suggesting that the institution follows a policy of strict silence; rather, it uses its voice with parsimony and extreme caution –arguably making its

intervention more impactful. The institution's confidentiality is not without limits, but "proportional to the willingness of the authorities to take into account the ICRC's recommendations" (ICRC, 2008: 758). In cases where dialogue does not bear fruits, the ICRC reserves the right to explore alternatives, public denunciation being one of them. Identifying "raising awareness of responsibility" as one of its "modes of action" (*Ibid*: 760), the ICRC has inscribed denunciation in its policies – admittedly only when particular circumstances are met. 'Denunciation', is used only in cases where all else has failed, where the institution is confronted to authorities refusing to uphold or purposefully violate their obligations. It is worth noting that the ICRC has also used that tool when its findings and recommendations are misrepresented by the authorities.<sup>10</sup> Even when such a decision to publicly denounce is taken, it is further governed by a set of conditions. There is thus a window for the ICRC to engage in public denunciation - a narrow, well-guarded window but a window no less.

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<sup>10</sup> In situations where authorities publish a truncated version of an ICRC report, giving the impression that all is for the best in the best of all possible worlds, the ICRC will typically address the situations by making available the complete report. As then-deputy Director of Operations Dominik Stillhart notes, "if a detaining authority issues excerpts from one of our confidential reports – without our consent – we reserve the right to publish the entire report in order to prevent any inaccurate or incomplete interpretations of our observations and recommendations" (Stillhart, 2010). Furthermore, the November 2004 controversy around a leaked ICRC report on Guantanamo gives insight into the institution's cautious approach to public denunciation. On November 30, 2004, the New York Times leaked the ICRC report (NYT, 2004). In that same article, the NYT cited General Hood, the commander of the Gitmo detention and interrogation facility saying "I'm satisfied that the detainees here have not been abused, they've not been mistreated, they've not been tortured in any way" (*Ibid.*). On that very same day, the ICRC issued a News Release in which it refused to "publicly confirm or deny whether the quotations in the article [...] reflect findings reported by the ICRC" (ICRC, 2004). However, it declared that it remained "concerned that significant problems regarding conditions and treatment at Guantanamo Bay have not yet been adequately addressed" (*Ibid.*). This particular sentence can be seen as the ICRC taking on the Bush Administration for its repeated misrepresentation of ICRC findings (at Guantanamo, but also at Abu Ghraib).

MSF's founding charter, written in 1971 directly echoes a number of Dunantist principles and, somehow surprisingly, does not mention a duty of *témoignage*, but does enumerate “neutrality, “impartiality” and “independence” as founding principles (MSF, 1971), thus bearing resemblance with the founding principles of the ICRC (Darcy, 2004). It appeals to universal medical ethics and the right to humanitarian assistance for moral grounding (MSF, 1971). Thus, while choosing to formulate humanitarian assistance as a ‘right’, the charter does not reference ‘human rights’. As Brauman notes, the charter affirmed that MSF staff must “refrain from passing judgement or publicly expressing an opinion – favourable or unfavourable – with regard to events and to the forces and leaders that accept their aid” (Brauman, 2012: 1526). This initial document thus gave priority to ensuring access, upholding the principles of neutrality and impartiality over that of ‘*témoignage*’, thus silencing those who had found the ICRC too quiet in Biafra (Phelan, 2009: 4).

Only six years later was this confidentiality commitment broken. As Claude Malhuret returned to France after a mission on the Thai border he condemned, on the country's main TV station the crimes committed by the Khmer regime. This rogue act led to tumultuous debate among the MSF staff and directors in Paris. Eventually, in 1978 Malhuret – who had by then been elected President of the movement – announced a reform of the witnessing policy. From then on, MSF staff would report “*human rights violations* and unacceptable events they witnessed to the bureau” [emphasis added] that would then “make an executive decision on whether to inform the public, in cases where MSF was the sole witness” (in Weissman, 2011). These guidelines depart from the

founding charter, notably by explicitly bringing ‘human rights violations’ under the scope of action of MSF.

In the ‘*Principes de référence du mouvement*’ of 1997, commonly known as the Chantilly principles, MSF reaffirmed its duty of witness (Phelan, 2009: 17). These principles, still guiding MSF’s action today, present medical action as the utmost priority of the movement, the first principle. *Témoignage* comes second, presented as the inseparable and integral complement to medical action (MSF, 1997). The association of *témoignage* with the impartiality principle has been described by some to create an ‘active impartiality’ characterised by speaking out and condemning any party (Slim, 1997: 349) – reminiscent of Amnesty’s conception of that same principle.<sup>11</sup> Principle seven, ‘*un esprit de neutralité*’ outlines the conditions under which MSF can abandon the strict observance of neutrality to mobilise public opinion and try to stop massive human rights violations. ‘Neutrality’ thus appears to have undergone a downgrade, from absolute principle to guiding spirit, operational tool. Here, access is not an end in itself but something that is sought if and when it is the most effective way to better a humanitarian –and human rights– situation.

In 2006, after a two-year-long consultation process, MSF adopted a document aimed “to better define the basic *raison d’être* of MSF, its roles and limitations” (Fox, 2014: 101). Known as the *La Mancha Agreement*, this document notably states that while MSF actions “coincide with some of the goals of human rights organizations”. Their goal is medical-humanitarian action, and not “the promotion of such rights” (MSF, 2006: 4).

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<sup>11</sup> For Amnesty, ‘impartiality’ means that it should “work for victims of human rights violations regardless of the ideologies of governments or the views of victims” (IEC subcommittee as cited in Hopgood, 2006: 97). But it is also co-dependent with the idea of a certain *balance* in condemnation both across and within contexts.

Here we can see a will for MSF to differentiate itself from human rights organisations, but also from some humanitarian organisations that have come to fully embrace human rights as both an ethic and a guiding framework. As Hopgood argues, “in a world that is all about profane politics, making credible claims to be impartial becomes both harder and more valuable.” (Hopgood, 2013: 168)



### **III. ‘Protection’ in human rights and humanitarianism discourse**

#### **1. ‘Protection’, a central concept in the convergence**

Originally, and until the 1990s, ‘protection’ was understood to primarily refer to legal activities and had relatively more limited application in humanitarian and human rights circles. Protection activities were mostly restricted to the ICRC and the United Nations High Commissioner for Refugees (UNHCR) – both mandated with such activities international conventions. Strikingly, UN resolution 44/182 (UNGA, 1991), pivotal in the evolution of the UN’s humanitarian policy, does not mention the term ‘protection’ at all (Slim, 2004: 154). And yet, that term went on to shape the greatest strategic challenge faced by international humanitarianism and human rights through the 1990s. As Slim notes, in just over 10 years, “protecting the human rights of civilians in armed conflict” became a major concern for international humanitarianism (*Ibid*: 158). Furthermore, today, and since 1999, the mandate of the “protection of civilians” is consistently provided to UN peacekeeping missions (Willmot & Sheeran, 2013: 521)

Through the 1990s, the use of term ‘protection’ surged, within and beyond the walls of the UN. For example, on average, ICRC annual reports contained more than twice as many times the term ‘protection’ between 2010 and 2014 than between 1990 and 1994 [numbers accounting for the lengthier reports in more recent years]. A similarly – yet less stark– phenomenon can be observed in Amnesty International’s annual reports for that same period.<sup>12</sup> Plethora of actors joined the field of action and of discourse. Its

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<sup>12</sup> Between 1990 and 1994 (included), the word ‘protection’ appeared, on average, 0.43 times per page. Between 2010 and 2014, that same word appeared on average 0.95 times per page. As for

meaning was inexorably expanded, making it describe virtually all forms of action in support of civilians in war (*Ibid*: 159). This spreading and re-definition of ‘protection’ in NGO consciousness is, furthermore, a sign of the impact of human rights on the discourse and practice of humanitarianism (Slim, 2001: 19). As Sergio Vieira De Mello – former UN High Commissioner for Human Rights, and Special Representative to Iraq killed in Baghdad in 2003 – writes, “[t]he concept of protection inextricably links human rights and humanitarian action” (2004: 171). In a similar vein, Ferris argues that today, “the issue of protecting people, at least among humanitarians, is framed largely in the language of human rights” (2011: 40). Thus I contend that the way ‘protection’ has been defined, interpreted, implemented is central to the rapprochement between human rights and humanitarianism. For not only is today’s discourse of ‘protection’ a result of that convergence; it has also actively contributed to it, even partly constituted it. I will thus endeavour to analyse how some of the “networks of usage, reference and perspective” (Williams, 1985: 23) have developed, around this concept.

It is interesting to note, that mappings of the convergence of human rights and humanitarianism, and mappings of the evolution of ‘protection’ discourse in these fields often have very similar timelines, and identify the same trigger-events. In fact, the wide body of scholarship about the convergence tends to point to the end of the Cold War as the pivotal point, and to the crises in Bosnia and Rwanda as symptomatic of the broader crisis of ‘traditional humanitarianism’, prompting the incorporation of a rights-based approach (Slim, Barnett). In parallel, we can see that the body of scholarship studying the evolution of protection discourse appears to draw a very similar timeline and point to the

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Amnesty International, for these same periods, the occurrence of the term ‘protection’ was respectively of 0.22 and 0.36 times per page (see Annexes 1 and 2).

same trigger moments. For example, in *The Politics of Protection* (2011) Elizabeth Ferris maps the evolution of that concept identifying the 1990s as the key decade, and “widespread bloodshed in Somalia, Bosnia, and Rwanda” as triggers pushing humanitarians to rethink their approach to ‘protection’ (Ferris, 2011: xi). The shift to rights in humanitarian discourse and action and the evolution of protection discourse thus seems inextricably intertwined.

## **2. Coming to ‘terms’ with protection**

Despite the recent surge in its usage, the concept of ‘protection’ remains a contested term, and that contestation has crucial significance when attempting to understand the converging tendencies of human rights and humanitarianism. In this section, we shall briefly explore the different understandings of protection and present the concerted efforts to consolidate and homogenise these understandings. This lack of clarity on what exactly is meant by ‘protection’, and on what activities it includes, has raised coherence and complementarity challenges (Willmot & Sheeran, 2013). As such, the concept of ‘protection’ epitomises the tensions brought about by the convergence between the discourses of human rights and humanitarianism. Borrowing from Raymond Williams, we can say that different actors “just don’t speak the same language”. While they use the same word, ‘protection’ and while none of them is “‘wrong’ by any linguistic criterion,” they have “different immediate values or different kinds of valuations”; they “are aware, often intangibly, of different formations and distributions of energy and interest” (Williams, 1985: 11). Extensively used – and misused – in the fields of human rights and humanitarianism (Howen, 2007), the term ‘protection’ tends to be used by default, to describe any and every human rights and humanitarian activity. Marc

DuBois has wittily described protection as the ‘new humanitarian fig-leaf’ (2010). From a rather pessimistic perspective, he argues that the humanitarian community has built, with “enthusiastic support from major donors”, a “protection bureaucracy” that has made protection the focal issue in any given emergency (*Ibid*: 2-3). Today, human rights and humanitarian NGOs, many UN agencies, and civil society organisations (CSOs) carry out protection activities targeted at civilians in situations of armed conflict. Due to the lack of strategic coherence and the absence of concerted political action, each set of actors seems to frame different narratives of protection and have different conceptions of what it entails practically and programmatically (Willmot & Sheeran, 2013: 517). Activities branded as ‘protection of civilians in armed conflict’ have included – but have not been limited to: human rights monitoring, advocacy, reporting, humanitarian mediation, aid distribution, social, economic and legal support, and military intervention (*Ibid*: 518). The lumping together of such diverse and at times conflicting activities under the banner of ‘protection’ has created confusions. Confusions that were notably laid bare in 2011, when the United Nations Security Council (UNSC) authorised the NATO-led intervention in Libya under the declared objective to “protect civilians and civilian populated areas under the threat of attack” (UNSC, 2011: §4). It is safe to assume, on the basis of what followed, that the ins and outs of ‘protection of civilians’ there differed from a traditional human rights – or humanitarian – conception of that same term.

This complex and crowded discursive field reflects the need to proceed with great caution when analysing the various actors present and their respective activities. First, the concept of ‘protection’ is at the root of both IHL and IHRL. A point worth making as the two discourses and practices under study here take root, as we have established, in these

respective bodies of law. As Ferris notes, the concept of protection was central to the development of IHL as each of the Geneva Convention, and its Additional Protocols gradually extended protections to particular population – first to the wounded and sick on the battlefield (GCI), the wounded and sick at sea (GCII), prisoners of war (GCIII), civilians in international armed conflict (GCIV and API), and finally civilians in non-international armed conflict (APII). In fact, while the first three conventions used the language of “amelioration of the conditions of” (GCI and II) or “relative to the treatment of” (GCIII) in their title, GCIV and both Additional Protocols preferred “relative” or “relating to” the “*protection* of” [emphasis added]. In *War and Law since 1945*, Geoffrey Best also argues that the fourth Geneva Convention represented an important shift in that it extended ‘protection’ to a population for which it is much more difficult to ‘deliver’.

Here it is worth quoting Best at length:

“The same word [protection] is used in relation to wounded, sick, and shipwrecked combatants and to combatants who have been taken prisoner, and in those connections makes good enough sense, as it does also in respect of enemy (or ‘occupied’) civilians who have been interned. In those contexts it is realistically achievable and it has a moral integrity which is not so apparent in its other uses. But civilians at large, civilians in general: how far can they actually enjoy the protection it promises must largely depend, as it always has done, on circumstances, politics, personalities, accident, luck, and so on; things which the soldier never forgets, but which the civilian hardly ever remembers” (1994: 256).

This “protective enthusiasm”, with a certain ‘human rights’ inflexion thus carries the risk of ultimately making protection unachievable. For Best, protection should thus be understood “in relative terms” (*Ibid*: 257).

We can note here that unlike the preceding conventions, GCIV was drafted after World War II, contemporaneously to the UDHR, at a time when human rights were in the

air. In fact most legal scholars and historians refute Krieger's argument that "the Universal Declaration of Human Rights of 1948 and the 1949 Geneva Conventions were separately drafted without taking account of one another" (2006: 267). Hitchcock notes that a detailed historical analysis of the Geneva Conventions of 1949 "reveals a critical link between the laws of war and human rights" (2012: 95). And Best, also looking at the legislative history, makes the point that the delegates in Geneva knew very well what had happened in 1948 with both the Genocide Convention and the United Nations Universal Declaration of Human Rights (UDHR) (Best, 1994: 70-79). The UDHR, precisely, refers to 'protection' ten times (Ferris, 2011: 3). The Declaration sets out basic protections to which all individuals have a right; protections that would then be set out in more detail, sometimes for particular groups, in the subsequent human rights treaties. For Ferris, "much of the modern human rights movement is about expanding the scope of protection" (*Ibid*). Thus IHRL and IHL pursue the same objective, "seeking the protection of the same people at the same time from the same sort of armed abuse" (Best, 1994: 69). But when 'protection' is not always taken to mean the same thing, or to translate into the same activities, coherence and complementarity become paramount.

## **2.1 Efforts to create a shared definition**

There have been, however, a series of concerted efforts to address this confusion and get closer to a common understanding of protection. Such efforts, spearheaded by the ICRC, are paramount to creating an environment more conducive to the protection of civilians in armed conflict. This norm entrepreneurship materialised in a series of workshops held at the organisation's headquarters in Geneva, between 1996 and 2000. According to ICRC's Danielle Coquoz, this initiative sprung from the lack of discussion

between human rights and humanitarian organisations on their respective practices in helping the victims (2004: 178-79). It is in response to that gap that the ICRC decided to convene a meeting between representatives of “humanitarian and human rights organisations, to explore a concept of protection [...] to talk over differing practices and compare similar ones – or at least achieve a better understanding of the way their organisations work” (*Ibid.*). Bringing together these different actors to promote shared principles and improve the level of professionalism and effectiveness, these working groups eventually produced the following definition of protection:

“all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law. Human rights and humanitarian organizations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender)” (in Caverzasio, 2001).

This very broad definition identifies IHL, IHRL and refugee law as relevant normative frameworks for protection activities.<sup>13</sup> It reiterates the centrality of the principle of impartiality but does not posit that protection activities must exclusively be carried out by neutral actors, on the contrary. Most importantly for our purposes, the definition is rights-based. Quite surprisingly, the ICRC itself sees that definition as having “helped to establish a greater understanding between humanitarian and human rights actors, and prompted the former to increasingly adopt a rights-based approach” (ICRC, 2013a: 12). This statement, apparently welcoming the increased adoption of a rights-based approach by humanitarians seems to be at odds with the institution’s traditional reluctance with

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<sup>13</sup> While the inclusions of refugee law/refugee protection perspectives would be interesting and valuable, this study being primarily about the convergence of human rights and humanitarianism, I have taken the decision to exclude these perspectives.

regards to rights-talk. Hopgood notes this paradox when he writes that the ICRC contributed to creating a human rights based definition of protection when it has itself “survived precisely by *not* speaking out about human rights” (2013: 168) [emphasis in original]. Furthermore, the ICRC’s statement reinforces the centrality of ‘protection’ in understanding the dynamics of the convergence of human rights and humanitarianism.

Rapidly, this norm cascaded, with the Inter-Agency Standing Committee (IASC), UN agencies, Red Cross/Crescent societies and NGOs taking it on as the standard definition of protection (Ferris, 2011: 17). The adoption of that terminology by the UN system, which plays a central role in humanitarian norm evolution, has undeniably contributed to the term’s prominence in humanitarian discourse. Beyond defining the concept, this initiative also outlined three types of activities that make up the protection framework (commonly referred to as ‘the egg framework’): responsive action, remedial action, and environment-building action (*Ibid*). These discussions around protection were folded into the Sphere Project initiative (1997-2011) that sought to develop a humanitarian charter and protection principles, setting minimum standards for actors in the field. Culminating in the publication of a ‘handbook’, first published in 2000 and re-edited in 2004 and 2011, the Sphere Project also divided protection into three areas of action: preventive, responsive, and remedial (Sphere Project, 2011: 32). As we understand ‘environment-building’ activities to be of primarily ‘preventive’ nature, the two frameworks are considered essentially identical. These three sets of activities are not intended as a chronological sequence of actions but rather can be carried out simultaneously as well as sequentially (Hoven, 2007: 40). By conceiving of protection as translating into such a broad set of activities, to be carried out across temporalities, this



framework clearly reaches beyond ‘emergency humanitarianism’ – and arguably challenges some of the central tenets of humanitarianism at large.

The ‘Humanitarian Charter’ contained in the Sphere handbook is “an explicit call to a rights-based humanitarianism” (Slim, 2001: 18), notably as it associates human rights techniques such as “violations monitoring, accompaniment and presence” to more “traditional humanitarian assistance work” (Slim, 2004: 161). Furthermore, it presents the three core humanitarian principles as being “the right to life with dignity, distinction between combatants and non-combatants, and the refugee principle of non-refoulement” (*Ibid.*). Humanitarian work is thus defined in terms of humanitarian law but also of human rights law and refugee law; directly echoing the conception of protection presented above, rooted in these three same bodies of law. This suggests that by (re)defining ‘protection,’ a concept so central to both humanitarianism and human rights, these successive initiatives indeed participated in unsettling humanitarianism’s foundations, challenging our understanding of it. In that human rights-infused definition, with added justice-oriented inflexions, the “urgency of need is no longer the sole consideration in setting the agenda” (Leebaw, 2007: 228).

In that context, the questions of “means rather than ends,” of “strategy and complementarity of action” are crucial (Darcy, 2004: 3). The definition provided above is indeed far too broad and all encompassing to offer any operational guidance. Addressing Darcy’s comments, The Overseas Development Institute’s (ODI) Active Learning Network on Accountability and Performance (ALNAP) produced a protection “guide for *humanitarian* agencies” [emphasis added] in 2005 (Slim & Bonwick, 2005). In that document, the ODI presented protection with “an emphasis on safety, personal dignity,

integrity and empowerment,” understood “in terms of rights” (*Ibid:* 33). But more importantly, it set out to “identify the key elements of basic programming that enable agencies to be more protection-focused in their work,” and “alert agencies to the risk of pursuing protection objectives” (*Ibid:* 15). With the declared goal of operationalising protection, the ODI thus offered important insight into what activities are commonly understood as ‘protection,’ and helped us better understand some tensions susceptible to arise from a broadly defined –rights-based– protection. Adopting the ‘egg framework’ the document then presented five “modes of action”: denunciation, mobilisation, persuasion, capacity building, and substitution (*Ibid:* 83). By using this model, it reaffirms its conception of humanitarian action as rights-based, acting much beyond its traditionally defined boundaries. The now widely accepted definition of protection is thus very broad. As such, it allows for enough leeway for individual protection actors to elaborate their own distinct definitions, within that overarching framework. Turning now to some of the more targeted and specific conceptions of that term, we will notably look at the ICRC’s conception of protection and the impact its reframing has had on the organisation’s discourse and action. As the ICRC is often construed as the ultimate bastion of ‘traditional’ humanitarianism, it is particularly interesting to see how the Geneva institution acted, and reacted in the face of these evolutions.

## **2.2 Right-based ‘protection’ for all?**

We have thus seen that protection has been used more and more by an exponentially growing number of actors. This surge in use happened simultaneously –and was arguably encouraged by– initiatives to elaborate a consensual definition of the concept, enacting a rapprochement between human rights and humanitarian actors. But

under this umbrella definition, “differences in approaches and aspirations still exist” (ICRC, 2013a: 11).

Unlike the ICRC and MSF, Amnesty and HRW are not organised to meet a need or provide a service (Hopgood, 2006: 7). They have researchers on the ground but beyond that research, they do not carry out field activities. Human rights activism can –in some situations– be effectively carried out at a distance and is thus not premised on access in the same way that humanitarian action is. This distinction is important when we come to think of their conception of the ‘protection’. As Wilmot and Sheeran note, the ‘protection of civilians’ concept is “somewhat superfluous” from a human rights perspective, since the human rights framework “underwrites a general concept and specific aspects of the protection of individuals through respect for the wide spectrum of human rights” (2013: 533). In line with the traditional human rights understanding presented in the respect-protect-remedy framework (Ruggie, 2008), these organisations also see protection obligations as falling primarily on states (and increasingly, non-state actors exerting a certain power over particular areas or populations). That is to say that human rights organisations do not to carry out protection-of-persons activities per se, rather some of their action is often conceived as working toward the protection and promotion of IHRL (Willmot & Sheeran, 2013: 533), notably by calling on –primarily state– entities to ensure the protection of particular populations. Human rights monitoring and reporting, advocacy, and efforts to ensure accountability for international human rights violations are examples of such ‘protection-related’ activities (*Ibid.*).

Interestingly, MSF makes much less use of the term ‘protection’ – totally absent from the ‘About MSF’ section of its international website as well as from its Charter and

principles. This can be explained in part by MSF's quite different relation to the law –be it human rights or humanitarian law. We have in fact seen that 'protection' largely appeals to legal obligations under human rights, humanitarian, and refugee law. MSF is, as we know, a non-mandated organization. As such it has had more liberty in shaping its relationship to it. As Bradol notes, MSF's appeal to law has been used to "exert pressure on political authority" as a means "of staving off suffering and death". But far from a systematic approach, he argues that MSF's use of the law has been, and "must remain", "purely opportunistic" (2004: 7). Far from providing the absolute and definitive explanation of MSF's more timid use of 'protection', this observation gives it some context and helps us understand some of the dynamics at play.

The ICRC has its own definition of that concept, a definition that has also incorporated rights inflexions in recent years. The institutional definition of the concept is one that gives the ICRC mostly indirect protective duties. In other words, the ICRC itself is not seen as directly 'protecting' populations; rather, its role is to ensure that "authorities and other constituted groups comply with their obligations" under IHL and other relevant bodies of law (ICRC, 2010). Thus ICRC protection is originally comprised of those efforts to prevent, avoid the recurrence of, and put a stop to actual or potential violations (ICRC, 2012: 46). Traditionally, the ICRC presents its activity as divided into two categories: assistance, and protection. A dichotomy that, as Leader noted back in 1998, gained prominence among humanitarian actors: "the responsibility to promote protection as well as assistance is beginning to be recognised by most serious agencies. [...] Médecins Sans Frontières (MSF) has also worked to bring the two constituencies together" (Leader, 1998: 296). ICRC publications usually present protection as mostly

pertaining to detention visits (Forsythe, 2005a: 167). But gradually, as the concept of protection gained prominence, pervading the discourse –notably through the ‘protection of civilians’ terminology– this dichotomy has lost some of its rigidity. As Slim notes, many activities traditionally labelled ‘relief’, and subsequently ‘assistance’, have now been repackaged as “humanitarian protection” (2001: 19). Today, the ICRC refers to ‘protection’ both as separate from assistance and as including certain forms of assistance (Forsythe, 2005a: 92), which can lead to some confusion. In the strictest sense, protection refers specifically to the efforts concerned with preventing, stopping and avoiding recurrence of violations of IHL and other bodies of law and normative standards that protect people at risk. In the broad sense, it is seen as a process that combines actions related to the causes of violations with actions that aim to alleviate the resultant suffering. Thus if assistance is provided in a certain fashion, actively participating in re-building capacity, strengthening resilience, and allowing the populations to remain in relatively safe areas, it can arguably be considered to participate in their ‘protection’. Protection activities concern themselves with –and address– specific threats; assistance activities do not necessarily do so. For the ICRC, assistance work is intrinsically linked to and inseparable from protection (ICRC, 2008), but the two cannot be collapsed into each other.

As we have seen, the ICRC has been a leader on initiatives for the development of the definition of protection, and for the subsequent operationalisation of that definition. Most notably, in 2009 and 2013, the institution published ‘Professional standards for protection work carried out by humanitarian and human rights actors in armed conflict and other situations of violence’ (2013a). In that document the ICRC openly uses the

language of rights in describing protection work. While the use of such terminology is not necessarily inconsistent with the organisation's principle and *modus operandi*, it is uncommon enough to be noted. Recognising the potentially "positive synergies" brought about by the simultaneous presence of human rights and humanitarian actors on the protection field, the document expresses the "conviction that there is enough common ground to establish a firm, shared basis" for protection work (*Ibid*: 11). Further, protection actors are encouraged to "prefer a longer-term strategy that builds on the capacity of affected populations to organize themselves, and engages the authorities at all levels, to see their rights respected." (*Ibid*: 28). This formulation is interesting in that IHL (from which, as we know, the ICRC gets its mandate) is not usually understood to be a body of law outlining rights for individuals, but obligations for belligerents. It thus suggests that protection work should appeal to other bodies of law, notably human rights law. In that sense, following Leader, we can see that in a way, a notion of humanitarianism that includes protection is bound to be, in certain respects, "rights-based" (Leader, 1998: 298).

For assistance activities to be fully recast as protection [according to the master definition] they need to be reconceptualised as ensuring basic rights, rather than (just) responding to essential needs. Such a 'repackaging' carries some risk. If done uncritically, without a deeper questioning of the impact of certain forms of assistance, it carries the risk of being nothing more than a renaming, a rebranding, limited to a question of semantics. The advent of protection-speak cannot bring about an automatic relabeling of all assistance activities as 'protection'. As Dubois writes, we would risk falling into the absurd situation where "a blanket takes on the garb of protection work"; where

“distributing sacks of corn flour equates to protecting people’s right to food.” (2010: 3). One of the consequences would be a false sense of security for the victims, and of achievement for the donors and the general public. He continues: “[l]imited risk reduction or raising awareness should not be branded ‘protection’ activities when we know the word conveys so much more to the public” (*Ibid*: 4). While there has been some “semantic manoeuvring” (Slim, as cited in Fox, 2002: 24) around the concept of protection, notably by the instillation of a more rights-based understanding; it is encouraging to see that ‘protection’ has also become a rallying cry for humanitarian and human rights organisations. Discussions around ‘protection’ (Sphere Project 2011; Slim & Bonwick 2005; ICRC 2013a) have brought about important developments for further coherence, collaboration and complementarity.

### **3. Some (other) implications of the rebranding of ‘protection’**

Because protection remains so broadly defined, it can arguably be made to encompass some activities potentially detrimental to the very populations it is set out to protect. For example, with ‘denunciation’ and ‘mobilisation’ identified as ‘modes of action’ by the ALNAP guidebook, we can easily imagine a situation where forceful advocacy may constitute a great risk to the humanitarian access to people in crisis (Dubois, 2010). This brings us to the obvious but crucial need for a careful analysis of potential backlash. But even with the best practice in the world, there remains contexts where humanitarian – or human rights – organisations “no longer control the *meaning* of their protection activities as interpreted by those with power, guns or blood [on] their hands” (*Ibid*). Discourse – taking Foucault’s conception of it as encompassing more than language – is never limited to the creation of meaning. It necessarily extends into the

process of communication, during which the meaning is always interpreted; an interpretation not always aligned with intention. Thus, as ‘protection’ remains that overarching umbrella under which numberless actors can congregate and elaborate extremely diverse strategies, we incur the risk of seeing two protection activities proving to be mutually detrimental.

### **3.1 From ‘humanitarian intervention’ to Responsibility to *Protect***

The ‘Responsibility to Protect’ framework and doctrine epitomise some of the potential outcomes of such a broad definition of protection and the subsequent divergences. By perpetuating the idea of ‘humanitarian’ intervention [terminology that already co-opted the idea of ‘humanitarianism’], and justifying it in terms of human rights, it stands out as a product of the convergence between human rights and humanitarianism; a product of the ubiquity and vagueness of protection discourse. By mapping the discursive journey from ‘humanitarian intervention’ to the ‘Responsibility to Protect’ doctrine the present section will argue that the shift in discourse has failed to engage in a deep reassessment of the relation between humanitarianism and intervention, and instead has merely rebranded the problem through the discourse of ‘protection’. This phenomenon has played a central role in framing the meaning of ‘protection’ at the United Nations, and beyond. It has also “enabled the interveners to use human protection-related arguments to justify policies and practices that have nothing, or little, to do with human protection advocacy” (Andreopoulos & Lantsman, 2010: 85)

In its final report, published in December of 2001, the International Commission on Intervention and State Sovereignty (ICISS) laid the foundations for R2P, rooting this doctrine in a redefinition of sovereignty as conditional to the state’s responsibility to



protect its people. From there, R2P is made of a continuum of duties for individual states as well as for the international community, ranging from prevention to rebuilding. It thus broadens the scope of what was commonly understood as intervention. However, it has kept at its crux the responsibility to intervene militarily for humanitarian purposes (Massingham, 2009: 815). In fact, no further than in the foreword's first phrase, the project is described as being about "the so-called 'right of humanitarian intervention'" (ICISS, 2001: vii), seeking to answer the "question of when, if ever, it is appropriate for states to take coercive [...] action" (*Ibid.*) for the purpose of human protection. Wary of the heavy baggage that the term 'humanitarian intervention' carried, the ICISS engaged in an important shift in terminology. This shift intended to address two concerns. On the one hand, that of humanitarian organisations worried about the militarisation of humanitarianism; on the other, the concern that using "an inherently approving word like 'humanitarian'" would "prejudge the very question" (*Ibid.*: 9) of legitimacy. As a result, the term "military intervention for human *protection* purposes" (*Ibid.*) [emphasis added] was preferred. This reformulation attempted to decouple 'intervention for human protection purposes' from 'humanitarianism', thus seeking to move beyond the 'humanitarian intervention' debate (Weiss, 2014: 10)

The United Nations (UN) has internalised R2P through a series of debates and discussions, resolution 60/1 of 2005 being the first official UN document to outline the organisation's understanding of this doctrine. Following up with the ICISS' works, the UN successfully abandoned the language of 'humanitarian intervention', preferring that of "timely and decisive" "collective action" for the protection of civilians or populations from "genocide, war crimes, ethnic cleansing and crimes against humanity" (UN 2005,

2009). This change in terminology appears to reformulate rather than rethink a problematic concept. In his 2009 report on the implementation of R2P, the Secretary General defended the abandonment of ‘humanitarian intervention,’ arguing that the concept posed a “false choice between two extremes” (UN, 2009: §7). As the UN’s version of R2P focuses on preventive efforts (Pommier, 2011: 1066) it is arguably “deep[er]” (*Ibid*: §10c) than the notion it has replaced and offers a guide to manoeuvre space between those two extremes. But in certain specific cases where this in-between has been attempted, R2P does call for timely and decisive intervention – military if necessary (UN, 2009: §56) – bringing us back to that same predicament. The most recent report of the Secretary General on R2P (UNSG, 2014) focuses solely on capacity building and prevention, ignoring the potential for military action. Turning away from the contentions will not make them disappear. As Andreopoulos and Lantsman simply put it, “the doctrine of HI is ‘alive and well’ and it is conditioning the prospects for operationalizing R2P” (2010: 85).

### **3.2 ‘Protection of civilians’ and the spectre of a resilient amalgam**

The ICISS and the UN have brought about a change in semantics by virtually banning the expression ‘humanitarian intervention’. This shift in discourse allowed them to bypass the debate on the oxymoronic nature of the concept, by dropping the explicit claim of humanitarianism. Dropping the terminology allowed R2P to do away with this principled straightjacket. However, the preferred semantics of ‘intervention for the *protection of civilians*’ has dragged with it the tensions that ‘humanitarian intervention’ had created in its time.

The 2011 intervention in Libya is a particularly fitting illustration of this point. Resolution 1973 (UN, 2011) by which the intervention was authorised explicitly refers to the “responsibility...to protect” and grounds its legitimacy in the response to what “may amount to crimes against humanity”<sup>14</sup> (*Ibid.*). Perhaps most importantly, the resolution allows military intervention “to protect civilians” (*Ibid.*: §4). This intervention was therefore a case in which the use of military force was legalised, invoking the responsibility to protect.

As we have seen, ‘protection of civilians’ is a concept now deeply rooted in humanitarian discourse. From this perspective, what is at stake is how to best protect civilians in times of conflict. As used in reference to the 2011 intervention in Libya, ‘protection of civilians’ was rooted in political interpretations, justified in human rights terms, and posed the question of when it would be legitimate to go to war. Thus while in the first instance ‘civilian protection’ is about the means and practices of warfare (*jus in bello*) in the second one, it is about a legitimate reason to go to war (*jus ad bellum*) (Pommier, 2011: 1073). The conflation of these two ideas under a single denomination has recreated a dangerous confusion between the humanitarian, human rights, and the politico-military agendas of the actors involved (Daccord, 2011; Pommier, 2011). Furthermore, the tensions identified earlier with regards to ‘protection’ logically find themselves transposed in the R2P framework. Bronwyn Leebaw sums up this tension when she writes:

“Contemporary formulations of humanitarian intervention fuse the urgency and immediacy of humanitarian rescue with the justice claims associated with human rights. At the same time, this logic necessarily abandons the pragmatic modesty

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<sup>14</sup> One of four instances in which R2P can be invoked, with war crimes, genocide and ethnic cleansing (UN, 2005)

once associated with humanitarianism as well as the lengthy deliberations that human rights advocates have championed as the basis for establishing criminal accountability” (2007: 229)

In this compelling passage, Leebaw presents R2P like a sort of failed hybrid, having tried to draw from both human rights and humanitarianism for legitimacy but ultimately consistent with neither.

We have thus observed a shift from the semantics of ‘humanitarian intervention’ to ‘protection of civilians’. This move was principally orchestrated from within the United Nations, and supported by the work of the ICISS. The 1999 UNSG report on the protection of civilians constitutes one of the first re-articulations of the ‘humanitarian intervention’ concept without the ‘humanitarian intervention’ terminology. In that document, the UNSG recommends that “[i]n the face of massive and ongoing abuses”, the UNSC “consider the imposition of appropriate enforcement action” (UNSG, 1999: 22). Antedating the ICISS report by two years, this document is symptomatic of the move toward a ‘protection of civilians’ framework characterised – in part – by the possible recourse to armed intervention, and thus paving the way for the R2P doctrine. However, much of the discussion on R2P was still “based on the ‘humanitarian’ framework” (Chandler, 2004; 62) and failed to address the nature and dynamics of the interaction between politico-military and humanitarian objectives. In the case of ‘humanitarian intervention’ as well as ‘protection of civilians’ the UN has assigned meanings to certain terms; meanings often at odds with their humanitarian –and arguably human rights– roots. This phenomenon has made these terms subject to political interpretation and linked them with military action.

## Conclusions

Coming back to Freud's 'narcissism of minor differences' we can now see that though minor in the grand scheme of things, some of the differences between human rights and humanitarianism have brought about confusion, and tensions in the intersection of these two discourses and practices. As such, they cannot and should not be ignored.

In this study, we have first presented *a* mapping of the convergence of human rights and humanitarianism. Looking at the evolving intersection between two bodies of law (IHRL and IHL) we saw some of the fundamental differences between them, such as their respective scopes of application (spatial as well as temporal), their respective constituencies, and the degrees of protection they provide in particular circumstances (derogability, nature of conflict). We then presented some of the efforts to make these differences less fundamental, looking notably at attempts to make human rights more justiciable, the 'human-rightsisation' of IHL through the evolution of customary law, and the extraterritorial application of IHRL.

Turning to the associated discourses of human rights and humanitarianism as performed by four international organisations we have explored other manifestations of that growing convergence. Most significantly, we saw how Human Rights Watch and Amnesty International's gradual adoption of humanitarian principles and lenses of analysis in their reporting has contributed to broadening their scope of activity, notably by including non-state actors. Such reporting has also participated in diminishing the differences between protection afforded in peacetime and wartime. Yet, this phenomenon has posed some fundamental challenges to the human rights ethos. By favouring humanitarian frames of analysis, these organisations have compromised on some crucial

aspects of human rights. By buying into the civilian/combatant dichotomy, they implicitly defy their universality; by adopting the ‘moral equivalence’ clause and focusing on *jus in bello* aspects, they narrow the aspirations of human rights and appear to settle for a minimal interpretation of that ambitious framework.

Conversely, we have looked at MSF and ICRC’s relative resistance to rights discourse, in part through the predicament of maintaining access. MSF’s relationship to human rights and speaking out in their defence can be compared to the movement of a pendulum. Rather opposed to it at its genesis, it embraced it enthusiastically in the 1980s and 1990s, before retracting from it again in more recent years. More consistent in its reticence to such discourse, the ICRC has nonetheless shown –some– inflections. We can note for example, that in its most recent strategy document the ICRC recognised human rights law as a “major framework of reference in assessing the legality of the conduct of parties to armed conflict and other situations of violence” (ICRC, 2014a: 8). We can thus see that rather than adopting a human rights lens to analyse ‘traditional’ humanitarian situations, these organisations use human rights frameworks in order to branch out, to touch on issues usually construed as outside their reach, broadening their protective range. We must continue to watch this as it develops. As human rights and humanitarian scopes of activity increasingly overlap, existing tensions will inexorably be exacerbated.

How will this convergence impact the future developments of human rights or humanitarianism? Moyn has famously argued that human rights as we know them only really crystallised “in the moral consciousness of people” in the 1970s, making them much younger than is usually thought (Moyn, 2014: 57). Qualifying them of *‘Last Utopia’*, he conceives of human rights as the latest form of idealism, stepping in as other

inspiring utopias failed (Moyn, 2010). As such, human rights can be construed as “the spirit of the age” (Inge as cited in Slim, 2001: 26), a spirit that –some argue– is on the decline (Hopgood, 2013). These arguments bring up important questions regarding human rights’ convergence with humanitarianism: will human rights’ influence on humanitarianism recede? Will the convergence lend it the tools for resilience? Or will the language of human rights dissolve into other legal and moral discourses that will continue to bear its traces?

In its last section, the present study focused on the concept of ‘protection’, approaching it like a *keyword* that unlocks new understandings of the convergence, as one of its constitutive terms. We identified a clear surge of its use in both humanitarian and human rights discourses from the 1990s onwards, a timeline that corresponds to most accounts of their convergence. We studied the evolution of that terminology as it incorporated human rights and humanitarian elements, epitomising the intersection of these discourses in the UN setting and beyond. We looked at the successive initiatives to disambiguate that contested term, identifying the lead role of the ICRC. ‘Protection’ was also analysed as a vector through which rights-speak has penetrated humanitarian discourse and practice, exposing the pervasive potential of human rights discourse. In fact, the discussions around protection have participated to the rapprochement at the centre of this analysis. If we were to think of human rights and humanitarianism as the two circles of a Venn diagram, ‘protection’ would be somewhere in the intersection of the two circles. But beyond its mere existence in that intersection, I would argue that it could be seen exerting a form of traction, of magnetism, bringing the circles to further overlap.

Thinking of the intersection through the evolution of the ‘protection’ terminology, also lays bare some of the remaining tensions between human rights and humanitarianism. Following Chandler’s argument (2001) we have explored how the ‘Responsibility to Protect’ doctrine, and its legitimisation of military intervention – as seen in the Libyan case – incarnates some of the inconsistencies of the rights-based humanitarian logic, stemming from the ‘politicisation’ of humanitarianism. Notably, it has allowed for the collapsing of *jus in bello* and *jus ad bellum* considerations into each other.

Human rights and humanitarian organisations have looked to each other for ways to better address certain situations, they have borrowed each other’s language, and at times practices. By doing so they have furthered the converge between two concepts, two strands of the humanist vision, and laid bare some the challenges this overlap brings about. In its 1993 document regarding non-state actors, Amnesty International described international humanitarian law as the framework through which human rights are protected in war (AI, 1993). This statement is not wrong *per se* but it is symptomatic of some of the shortcomings of an uncritical convergence in which IHL comes to simply substitute human rights even in the work of human rights organisations. For human rights and humanitarianism are different projects, with similar objectives but ultimately distinct aspirations

Throughout this project, I have attempted to read together numerous scholarly works on the intersections of human rights and humanitarianism, weighing claims against each other in an effort to make sense of that convergence. By having done that, I do not claim to have resolved the tensions it has created. But perhaps, as Raymond Williams



taught us, studying an issue by focusing on the language we use to discuss it can give us “just that extra edge of consciousness” that helps us understand it as “a shaping and reshaping, in real circumstances and from profoundly different and important points of view” (Williams, 1985: 24-5). For language is never a mere reflection of already constituted processes, it constitutes them, actively participating in their shaping and reshaping. Social and historical changes also “occur *within* language, in ways which indicate how integral the problems of meanings and of relationships really are” (*Ibid*: 22).

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## Appendices

### Appendix 1.

#### Mentions of the term ‘protection’ in ICRC annual reports

Year	Number of times ‘protection’ is mentioned	Total number of pages	Number of mentions / number of pages	Average over 5 years	
1990	56	124	0.452		
1991	94	172	0.546		
1992	56	220	0.254		
1993	131	304	0.431		
1994	153	328	0.466	0.430	(1990-1994)
1995	141	352	0.401		
1996	130	356	0.365		
1997	132	380	0.347		
1998	119	420	0.283		
1999	149	460	0.324	0.344	(1995-1999)
2000	175	312	0.561		
2001	232	480	0.483		
2002	229	433	0.529		
2003	234	366	0.639		
2004	266	382	0.696	0.582	(2000-2004)
2005	271	412	0.658		
2006	299	444	0.673		
2007	287	467	0.615		
2008	297	476	0.624		
2009	311	496	0.627	0.639	(2005-2009)
2010	395	584	0.676		
2011	414	516	0.802		
2012	549	564	0.973		
2013	681	624	1.091		
2014	741	622	1.191	0.947	(2010-2014)

## **Appendix 2.**

### **Mentions of the term ‘protection’ in Amnesty International annual reports**

Year	Number of times ‘protection’ is mentioned	Total number of pages	Number of mentions/ number of pages	Average over 5 years	
1990	55	308	0.179		
1991	67	300	0.223		
1992	73	322	0.227		
1993	88	368	0.239		
1994	88	367	0.240	0.221	(1990-1994)
1995	99	368	0.269		
1996	81	372	0.218		
1997	108	391	0.276		
1998	105	409	0.257		
1999	130	417	0.312	0.266	(1995-1999)
2000	145	303	0.478		
2001	104	311	0.334		
2002	125	316	0.396		
2003	129	320	0.403		
2004	160	347	0.461	0.414	(2000-2004)
2005	158	324	0.488		
2006	180	322	0.559		
2007	118	246	0.480		
2008	162	398	0.407		
2009	173	424	0.408	0.468	(2005-2009)
2010	166	429	0.387		
2011	172	432	0.398		
2012	137	444	0.309		
2013	121	328	0.369		
2014/15	149	423	0.352	0.363	(2010-2014/15)

### Appendix 3.

## **IHL provisions and principles in Amnesty International's reports on the 2003 Gulf War**

Title, and number of pages	Mention of IHL provisions	Mentions of IHL principles/terminology
<i>Respecting International Humanitarian Law - Iraq (2003a)</i> (19 pages)	'humanitarian law' x21; 'IHL' x3; Article 1 of GCs; Articles 4,5,13,14 of GCIII; Articles 48; 50(3); 51(4)(5)(6)(7); 52(1)(2)(3); 53(c); 54(2)(4); 55(2); 56(4); 57(2) 51; 55; 52; 53; 54; 75; 90; 90(2)(a)(d) of API	'civilian' x117; 'combatant' x8; 'indiscriminate' x19; 'disproportionate' x6; 'precaution' x9; 'disctinction'/'distinguish' x11.
<i>Civilians Under Fire - Iraq (2003b)</i> (7 pages)	'international humanitarian law' x 14; Articles 51(7); 50(3) of API	'civilian' x78; 'combatant' x3; 'indiscriminate' x5; 'disproportionate' x2; 'distinguish/distinctive/distinction' x5; 'precaution' x1
<i>Responsibilities of the occupying powers - Iraq (2003c)</i> (15 pages)	'IHL' x 14 'Fourth GC' x21; Prootcol I x4; Articles 1 of GCs; Articles 27, 46, 7, 49, 55, 56, 59, 60, 64, 64(2), 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78 of GCIV; Article 75 of API; Articles 42, 43 of the Hague regulations;	'civilian' x11; 'distinction' x1; 'principles of necessity and proportionality' x1

## Appendix 4.

### IHL provisions and principles in Human Rights Watch's reports on the 2003 Gulf War

Title, and number of pages	Mentions of IHL provisions	Mentions of IHL principles and terminology
<i>Human Rights Watch Briefing Paper: International Humanitarian Law Issues In A Potential War In Iraq - Iraq (2003a)</i> (14 pages)	'IHL'/'international humanitarian law' x 33; Articles 2, 4, 13, of GCIII Articles 15, 17, 33, 34, 42, 43, 64, 71, 72, 73 147, of GCIV Articles 20, 35, 48, 51, 52, 54, 55, 57, 58, 59, 60, 62, 63, 70, 79, 85 of API	'civilian' x136 '(non-)combatant' x12 '(in)discriminate' '(in)discriminately' x8 'precaution' x2 'distinction' x5 'proportionality' / '(dis)proportionate' / '(dis)proportionally' x5 'all parties to the conflict' / 'warring parties' x13
<i>Basra: Crime And Insecurity Under British Occupation - Iraq (2003b)</i> (26 pages)	'international humanitarian law' x1 ; 'laws of war' x1 Articles 6, 27, 55, 56, 63-77 of GCIV	'civilian' x30 'proportionality' / '(dis)proportionate' / '(dis)proportionally' x1
<i>Violent Response: The U.S. Army In Al-Falluja - Iraq (2003c)</i> (31 pages)	'international humanitarian law' x 7; Mentions U.S. Army regulations manual articles	'civilian' x12 '(in)discriminate' '(in)discriminately' x4 'proportionality' / '(dis)proportionate' / '(dis)proportionally' x6
<i>Off Target The Conduct Of The War And Civilian Casualties In Iraq - Iraq (2003d)</i> (157 pages)	'IHL' / 'international humanitarian law' x 53; 'laws of war' x2 Articles 18, 19 of GCIV Articles 12, 13, 35, 38, 48, 51, 52, 53, 54, 55, 57, 58, 59, 60, 70 of API Mentions U.S. Army regulations manual articles	'civilian' x514 '(non-)combatant' x28 '(in)discriminate' '(in)discriminately' x24 'precaution' x34 'distinction' x17 'proportionality' / '(dis)proportionate' / '(dis)proportionally' x16 'all parties to the conflict' / 'warring parties' x18
<i>Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by U.S. Forces - Iraq (2003e)</i> (72 pages)	'IHL' / 'international humanitarian law' x 13; 'laws of war' x1 Mentions 'Fourth Geneva Convention' but no specific articles Mentions U.S. Army regulations manual articles	'civilian' x107 '(non-)combatant' x1 '(in)discriminate' '(in)discriminately' x13 'distinction' x4 'proportionality' / '(dis)proportionate' / '(dis)proportionally' x13