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## The Universal Declaration of Human Rights and Armed Conflicts: from Fragmentation to Complexity

XAVIER AUREY<sup>1</sup>

*“No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State”. H. Lauterpacht, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY<sup>2</sup>*

### Resumo

Nascida do horror da Guerra, a Declaração Universal dos Direitos Humanos parece ter se desvinculado de quaisquer vestígios de sua belicosa ancestralidade. Diante do Direito da Guerra, tomado como perfeita expressão da soberania dos Estados, e da comunidade internacional ainda infante, os Direitos Humanos, à primeira vista, parecem assumir a função de guiar os homens e as nações tão somente nos momentos em que as normas reguladoras dos conflitos armados quedam inaplicáveis. Não obstante, o caso Tadic nos revela como a Declaração tem, na prática, desempenhado papel muito mais abrangente, contribuindo, inclusive, para o desenvolvimento das normas referentes aos conflitos armados. A tensão do pré-guerra e de esquemas bilaterais de forças tem sido paulatinamente suplantada por um multilateralismo complexo de tendências fragmentárias. Assim, durante o século XX, a progressiva substituição das orientações calcadas na visão de Estado soberano por visões que levam em consideração uma abordagem centrada na Pessoa Humana, colocou em evidência a existência de uma revolução paradigmática. Esse novo panorama das relações entre os Direitos Humanos e Direito dos Conflitos Armados permite demonstrar a existência de um objetivo compartilhado entre os dois corpos normativos. Pretende-se neste ensaio apresentar a Declaração Universal dos Direitos Humanos como âncora desta revolução.

### Abstract

Born out of the horror of war, the *Universal Declaration of Human Rights* seems to leave outside any traces of its bellicose ancestry. As a figure of the intimate relationship between the State and its citizens, Human Rights Law reports to the sole domes-

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<sup>2</sup> H. Lauterpacht, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 430-431 (1933) (noted by P.-M. Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 *INTERNATIONAL LAW AND POLITICS* 791 (1999)).

tic sphere of States. Between a Law of War as the perfect expression of States' sovereignty and an international community still in its infancy, the *UDHR* seemed to be able to "guide" men and nations only in those periods when the law of armed conflict would not apply. However, the *Tadic* case shows us that the Declaration has, in practice, played a much more comprehensive role, including the development of the law of armed conflict. The pre-war mainly bilateral scheme was gradually supplanted by a multilateralism which tends to fragmentation, even complexity. Therefore, during the XXth century, the gradual replacement of the "*State-sovereignty-oriented approach*" by a "*human-being-oriented approach*" has highlighted the existence of a revolution, a paradigm shift. This new vision of the relationship between human rights and the law of armed conflict enable us to show the existence of a common goal between these two normative corpuses. Therefore we would demonstrate that the *Universal Declaration of Human Rights* was the anchor of this revolution.

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As we celebrated the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights, it is clear that its place in the international legal order is still debated. Originally elaborated as a mere declaration of intent, it has acquired a fundamental place over the years, which finally comforted the initial idea of one of its fathers, René Cassin<sup>3</sup>.

Adopted after the Second World War, it finds its roots in the horror of the conflict<sup>4</sup>. The same one that gave birth to the movement of human rights<sup>5</sup>, as precisely pointed out by Theodor Meron. Therefore, the post-war period has seen the materialization of an idea stated since 1941 to establish a peace based on the respect of fundamental rights<sup>6</sup>. That objective appears from the preamble of the Charter of the United Nations:

*"Determined [...] - to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and, - to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and - to*

3 Cf. notably R. Cassin, a recording made in the studios of the disk of the Union of blinds of war and beamed in Grenoble, May 17, 1948, on the occasion of the celebration of the thirtieth anniversary of the founding of the Federal Union Veterans: "Following the tradition of 1789, I want to draft an International Declaration of Human Rights, but also to prepare practical ways to enforce it under the supervision of the UN, prevailing over old sovereignties" [translation by the author].

4 See the intervention of S. L. Ménon, representative of India, United Nations General Assembly, 3rd session, 3rd commission, Four-hundred twenty-second session, Plenary Meeting, 10 December 1948, U.N. Doc. A/PV.182 : "The universal declaration of human rights was born from the need to reaffirm those rights after their violation during the war. It was now more than ever necessary to reaffirm those rights." Cf. also M. Kamto, Commission Nationale Consultative des Droits de l'Homme, *Rapport de séance. Deuxième séance, in LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME 1948-98. AVENIR D'UN IDÉAL COMMUN* 145-149 (1999).

5 T. Meron, *International Law in the Age of Human Rights. General Course on Public International Law*, 301 RECUEIL DES COURS 29 (2003): "The atrocities of World War II gave birth to the human rights movement, in the recognition of human rights as a fundamental principle in the UN Charter, in the insistence on individual criminal responsibility, in the judgment of the Nuremberg Tribunal, in the promulgation of the Universal Declaration of Human Rights (1948)". Cf. also G. Cohen-Jonathan, *Rapport introductif général, in DROIT INTERNATIONAL, DROITS DE L'HOMME ET JURIDICTIONS INTERNATIONALES* 12 (2004): "That's why the Universal Declaration of 1948 is so valuable, since for the first time, issued of the ashes of the Second World War, it brought the general response and the way to be followed by the entire international community. This was the real starting point, the foundation of international human rights law" [translation by the author].

6 Cf. F. D. Roosevelt, THE FOUR FREEDOMS (6 January 1941); ATLANTIC CHARTER (14 August 1941); UNITED NATIONS DECLARATION (1<sup>st</sup> January 1942).

*establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”*<sup>7</sup>

Although the issue of Human Rights is expressly stated in articles 1 and 55 of the Charter<sup>8</sup>, it is however only mentioned in a very general way. Even if its article 56 commits United Nations members “to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”, those rights are never defined. This was the reason why the Human Rights Commission was mandated to draft an international declaration that would determine the rights established by the United Nations System but not mentioned explicitly. In December 1948, this legal maieutic led to the adoption of the Universal Declaration of Human Rights (UDHR)<sup>9</sup>. As a Resolution of the UN General Assembly, the Declaration remains an important element. In addition, in 1962, the Human Rights Commission indicated that, generally, declarations must be used “in very rare occasions on issues of major importance, where members are expected to respect the maximum principles.”<sup>10</sup> Therefore the UDHR appears as an “authorized interpretation of the principles of the U.N. Charter. Its full legal value is based on the Charter.”<sup>11</sup>

Born out of the horror of war, the UDHR seems to leave outside any traces of its bellicose ancestry. However, René Cassin “had put all his efforts to ensure that we keep the traces of the war in the text.”<sup>12</sup> As Robert Kolb noticed, it is true that the outlaw of the war by the San Francisco Charter did not prove that it would be taken into account by the United Nations. “It seemed to be a tacit but generally consensus rule that the Declaration would only applies in peace time.”<sup>13</sup> Similarly, it appears that “in parallel, when drawing up the Geneva Convention of 1949, human rights were not at all the main question.”<sup>14</sup> As it is underlined by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1995 *Tadic case*, an armed conflict is characterized by a struggle between organized armed forces<sup>15</sup>. On the opposite, peacetime is the period that does not enter into this definition. Even in 1948, it seemed easy to unders-

7 CHARTER OF THE UNITED NATIONS Preamble (26 June 1945).

8 CHARTER OF THE UNITED NATIONS ARTICLE 1: “The purposes of United Nations are: [...] 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” and article 55: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [...] c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

9 UNIVERSAL DECLARATION OF HUMAN RIGHTS, GA Res. 217A (III) (Dec. 12, 1948).

10 U.N. Economic and Social Council, COMMISSION ON HUMAN RIGHTS: REPORT OF THE 18TH SESSION (1962), U.N. Doc. E/3616/Rev.1 §105.

11 E. Decaux, *Une Déclaration au fondement de la communauté internationale*, 34 LABEL FRANCE (1998) [translation by the author]. Cf. also K. Azkoul, United Nations General Assembly, 3rd session, 3rd commission, Ninety-first meeting, 2 October 1948, U.N. Doc. A/C.3/SR.91: “Nor was it mere pious talk, for no State could violate its principles without also violating the terms of the Charter. In actual fact, the resolution for its adoption was more than a recommendation because there already existed a place in the Charter for a declaration of human rights”; J. Oraá, HUMAN RIGHTS IN STATE OF EXCEPTION IN INTERNATIONAL LAW 214 (1992): “The 1948 Universal Declaration of Human Rights contains a list of rights ; but as a General Assembly resolution the instrument was not binding as such. None the less, it has been considered as an authoritative guide to the interpretation of the provisions in the Charter”. *A contrario*, notably, H. Lauterpacht, INTERNATIONAL LAW AND HUMAN RIGHTS, LONDON, 408-417 (1950).

12 Cf. C. Fauré, CE QUE DÉCLARER DES DROITS VEUT DIRE 212 (1997) [translation by the author].

13 R. Kolb, *Relations entre le droit international humanitaire et les droits de l’homme*, 831 REV. ICR 437-447 (1998) [translation by the author].

14 *Id.*

15 Prosecutor v. Dusko Tadic, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1 § 70 (Oct. 2, 1995): “we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.

tand that international humanitarian law would apply to periods of armed conflict, and human rights in other cases<sup>16</sup>.

Based on the voluntarism of Bodin and on the realism of Machiavel, the vision of the modern State confirms this approach. This theory emerges in the international scene with the peace treaty of Westphalia in 1648, which posed sovereignty and equality as the fundamental principles of international relations. In contrast to Suarez<sup>17</sup> or Grotius<sup>18</sup> theories, Hobbes has thus been able to limit the field of “international” law to the only States. The *Jus Gentium* became the natural law applying to States<sup>19</sup>, a natural law as the mere expression of power relations that are prevalent in a world deprived of an upper and all-powerful entity, in the absence of a universal Leviathan. Similarly, with Vattel, any nation able to govern itself without dependence to another foreign state is a sovereign State. The *Jus Gentium* has therefore been considered as the Law of the sovereigns. In the famous *Lotus case* of 1927, the International Permanent Court of Justice supported this argument by stating that “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will.”<sup>20</sup> As underlined by Professor Denis Alland, those States “formally equal and basically rival, [...] find in the confrontation of their mutual powers a limit to their own liberty. So their situation creates mechanical calculations of reciprocity.”<sup>21</sup> In the early XX<sup>th</sup> century, we were still confronted to this model of the strict sovereign independence of States or “*Westphalian model*”<sup>22</sup>, also defined as the *State sovereignty paradigm*. It was at that time the most widely accepted *system of representation of the international community*.

If “war is merely a continuation of politic by other means”<sup>23</sup>, it aims to international normativity and its reglementation is therefore the reflection of this balance of power. On the contrary, as a figure of the intimate relationship between the State and its citizens, Human Rights Law reports to the sole domestic sphere of States<sup>24</sup>, to their Constitutional Law. Between a Law of War as the perfect expression of States’ sovereignty and an international community still in its infancy, the UDHR seemed to be

16 With this nuance of the sole application of the minimum humanitarian principles contained in articles 3/3/3/4 common to the Geneva Conventions of 1949 in case of internal armed conflicts.

17 Inspired by Christian theology, Suarez made the *jus gentium* as a positive law, namely each nation’s belief of of what should be the application of God natural law. This voluntary law must still be consistent with the immutable natural law which remains a higher standard. In his writings, Suarez also spoke of the necessary existence of a League of Nations.

18 Guided by the thinkers of the Second Spanish Scholastica, Grotius based his theories on *jus gentium* on the existence of a universal society founded by nature and reason. Closely linked to natural law, the *jus gentium* is not a State creation. It is a set of objective rules inherent to nature, i.e. the solidarity of peoples. States do not create it by an act of will, but they discover it by an act of intelligence. There is next to this ideal normative law, a constructive law issued of the willingness of States, which must respect the natural law.

19 T. Hobbes, *DE CIVE*, II, XIV, IV.

20 *France v. Turkey, Lotus case*, PCIJ, Serie A, No 10, 18 (Sept. 7, 1927).

21 D. Alland, *Droit international public*, in *DICTIONNAIRE DE CULTURE JURIDIQUE* 498 (D. Alland & S. Rials (ed.), 2003) [translation by the author].

22 Cf. A. Cassese, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1989).

23 C. von Clausewitz, *ON WAR* (2008).

24 *HABEAS CORPUS, UNITED STATES DECLARATION OF INDEPENDENCE, French DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN...* Cf. R. Kolb, *Relations entre le droit international humanitaire et les droits de l’homme*, 831 *REV. ICR* 437 (1998): “Human rights deal with the relationship between the state power and the individuals. They are the product of Enlightenment’s theories on the State and have naturally found their expression in the domestic constitutional law” [translation by the author].



able to “guide” men and nations only in those periods when the law of armed conflict would not apply.

However, the *Tadic* case shows us that the Declaration has, in practice, played a much more comprehensive role, including the development of the law of armed conflict:

*“[T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.”<sup>25</sup>*

Based in particular on this finding, the ICTY concludes that “in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.”<sup>26</sup> According to this chamber, international law continues to preserve “the legitimate interests of States”, but it “must gradually turn to the protection of human beings.”<sup>27</sup> This gradual replacement of the “*State-sovereignty-oriented approach*” by a “*human-being-oriented approach*”<sup>28</sup> covers up actually more than just an evolution of international law<sup>29</sup>. We would indeed demonstrate that the UDHR is the anchor not of a quasi-linear evolution of international law, as seems to be understood by the ICTY, but of a revolution, a paradigm shift, using Thomas Samuel Kuhn’s words<sup>30</sup>. This radical change occurs in three stages: firstly built on an awareness of an anomaly unsolved by the State-sovereignty paradigm; then on a theoretical and practical instability linked to efforts to resolve this crisis, including the possible readjustment of the original model; and finally on the establishment of a new conceptual framework.

<sup>25</sup> *Dusko Tadic*, ICTY, IT-94-1 § 97.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Cf. also L. Despouy, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*, 23 June 1997, U.N. Doc. E/CN.4/Sub.2/1997/19 §1: “Of the major changes that have occurred in this century, there is no doubt that one of the most transcendent and revolutionary has been the gradual shift in the area of human rights away from the leading role traditionally played by the State and towards a new vision focused more on human beings than on the authorities wielding power.”

<sup>30</sup> T. S. Kuhn, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3rd Edition, 1996). According to this author, a paradigm is the anchor of any science. This paradigm is a coherent model based on a system of hypothesis. It is therefore a superstructure adapted to a certain state of scientific development. While scientists are not faced with an anomaly that can not be solve by their model, the paradigm remains. Otherwise, we are facing a crisis. In most cases, scientists develop new versions and appropriate modifications of their theory in order to eliminate any apparent conflict. But if the crisis continues, the model is questioned and we could see the emergence of a new paradigm as a possible response to the crisis.



In the world of international law since the end of the First World War, the objective was to achieve universal peace. Basing its efforts on the only State-sovereignty model, the League of Nations had tried to reach that goal. But Nazism and Facism were the first elements of a global *crisis*, which had undermined this model<sup>31</sup>. Thus, the Second World War seems to demonstrate that the paradigm in force at this time was not able to resolve this *anomaly* of the international system, in a Kuhnien meaning. It was this awareness that led to the creation of the United Nations and the drafting of the Universal Declaration of Human Rights.

Facing this crisis of the international system, the first step, symbolized by the adoption of the UDHR, was a readjustment of the traditional model of sovereignty (I). But the development of the United Nations and the emergence of new forms of conflict would again endanger this interpretation and see the emergence of a possible new paradigm (II), thus promoting a systemic approach of the International Society (III).

#### **The UDHR or the expression of a mere readjustment of the traditional paradigm of sovereign State after the Second World War**

Based on a network of mutual relations, States concerns are the only source of obligation under international law from the early twentieth century. After the First World War, western States were willing to achieve a universal and durable peace through the creation of an international entity in charge of its preservation. But nipped in the bud by both the absence of some major powers and of real States obligations, the League of Nations was not able to prevent the war. Given the paradigm of State sovereignty and its goal of universal peace, this failure cannot be seen as something else than a major *crisis*. The question is to understand the consequences of this failure and the responses choosen to react to it.

As stated in the introduction, this war is at the origin of the creation of the United Nations and the UDHR. Nuremberg and Tokyo trials have deeply affected the international community by revealing to the world the horror of crimes committed by the Nazis and their allies. Beyond the military aspect, all exactions of Hitler's, Hirohito's and Mussolini's regime had been a thread for the drafters of the Declaration of 1948. Johannes Morsink also explained that at the third United Nations General Assembly "[a]ll the delegations generally agreed that the pattern of gross human rights abuses which occurred during World War II was the major impulse behind the drafting of the Declaration."<sup>32</sup> This author focused on detailing the drafting process of the UDHR related to the experience of Nazism and fascism and highlighted the influence of the war on the future of human rights at an international level.

Indeed, this war has internationalized human rights as a discipline. Previously of the sole jurisdiction of States, human rights are now carried by an unprecedented mo-

<sup>31</sup> Cf. also M. Delmas-Marty, LE FLOU DU DROIT 347 (2004). This author see the Second World War as "a turn, a mutation".

<sup>32</sup> J. Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357 (1993).

vement<sup>33</sup>. In a course at the The Hague Academy of International Law in 1951, René Cassin had emphasized this fundamental change:

*“Thus, the breakdown was on the vital issue of human rights. And one of the key challenges of the tragedy that followed was to know whether human beings should remain or become a thing or, as a possible individual victim or culpable under international law, they have to be recognized as an “international law person”, and therefore be subjected to obligations but also benefitiate from legal protections and guarantees by the jus gentium.”*<sup>34</sup>

The Universal Declaration was a turning point for States that decided to go further than the protection of their own interests<sup>35</sup> and changed the configuration of international law itself. Years preceding the war had seen millions of deaths because of violations of human rights principles and the failure of international law to respond to those violations. Thus, René Cassin was entitled to request that “the United Nations should again proclaim to mankind those principles which had come so close to extinction and should explicitly reject the abominable doctrine of fascism.”<sup>36</sup> In the view of the drafters of the Declaration and the representatives of Member States, crimes and aggressions of Nazi and fascist regimes found their origins in the denial of human rights in their own country<sup>37</sup>. Peacekeeping at the international level had seemed to be conditioned by a prior declaration of fundamental principles<sup>38</sup> inherent to Mankind, the only solution to avoid any return of these doctrines. To ensure a durable world peace, States had agreed to follow an international guide, a simple manifesto limiting their national action. However, the international community was not ready yet to adopt binding rules<sup>39</sup>.

For this reason, we can deduce that the paradigm of State sovereignty was not questioned here. Things have changed little since Hobbes founded the legitimacy of Leviathan sovereignty on its ability to prevent people from dying of violent death.

<sup>33</sup> Cf. notably AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN (known as the Bogota Declaration), Organization of American States, 2<sup>nd</sup> May 1948; CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, GA Res. 260 A (III) (Dec. 9, 1948)...

<sup>34</sup> R. Cassin, *La Déclaration universelle et la mise en œuvre des droits de l’homme*, 79 RECUEIL DES COURS 242 (1951) [translation by the author].

<sup>35</sup> Cf. A. Migliazza, *L’évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l’homme*, 137 RECUEIL DES COURS 194 (1972): “Human rights have highlighted the fundamental aim pursued by the law of war, namely the protection and safeguarding of human values. Thus, they have focused on the protection of the individuals involved in conflicts whereas according to the traditional doctrine, the law of war rather deal with the protection of human groups and state interests” [translation by the author].

<sup>36</sup> United Nations General Assembly, 3<sup>rd</sup> session, 3<sup>rd</sup> commission, Ninety-sixth meeting, 7 October 1948, U.N. Doc. A/C.3/SR.96.

<sup>37</sup> UDHR Preamble 2<sup>nd</sup> recital: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.” Cf. also R. Cassin, *Note au Quai d’Orsay* (Feb. 27, 1947): “From the beginning of the war, we realized it was the war of human rights. We then aimed to make the victory to the fore the rights of the individual. Because we must not forget that Hitler began by crushing the human being at home before launching its assault abroad.”; UN S.G., *Report on the respect of human rights in armed conflicts*, U.N. Doc. A/7720 §16 (Nov. 1969): “The Second World War showed conclusively the close relationship that exists between the revolting attitude of a government against its own nationals and the aggression perpetrated against other nations and, therefore, between respect of human rights and peacekeeping.”

<sup>38</sup> This idea of a mere Manifesto was formally proposed on January 28<sup>th</sup>, 1947 by the representative of the United States (V.E./CN.4 4/4).

<sup>39</sup> Cf. C. Ortiz (Mexico), United Nations General Assembly, 3<sup>rd</sup> session, 3<sup>rd</sup> commission, Ninetieth meeting, 1<sup>st</sup> October 1948, U.N. Doc. A/C.3/SR.90: This declaration “would not involve legal obligations, but that would not diminish the value of the document. It would define the human rights which States undertook to recognize and would serve as a criterion to guide and stimulate them. At the moment it would be difficult to go further.”



In 1948, despite the will of some members of the Human Rights Commission, this paradigm was only readjusted and its foundations had by no means been overthrown. Thus, by leaving aside the law of armed conflicts, the Charter of the United Nations and the UDHR had endorsed for a while the dichotomy between human rights and the law of armed conflict as the main expression of this Westphalian model.

A strict application of the paradigm of State sovereignty could in effect only lead to a strict separation of these two sets of law. Everything seemed to differentiate them: domestic sphere *versus* international scene, peacetime *versus* wartime...

Sometimes called “differentialist”, “autonomist” or “separatist”, this theory is based on the structural differences between those two bodies – related to history, to their means of implementation and to their scope – in order to assert the gap separating them<sup>40</sup>. As highlighted by Amna Guellali, analyzing this current of thought, “Human Rights aim at creating a model of harmony and cohesion in human society, while humanitarian law applies in the regulation of situations of extreme violence.”<sup>41</sup>

Yet the negotiations that took place at the United Nations between 1947 and 1948 could have influenced, even indirectly, those held shortly after in Geneva regarding the four Conventions of 1949. For instance, several draft preamble to the Conventions also referred directly to the Declaration of 1948<sup>42</sup>, but “lacking an agreement to be found, the Conventions of 1949 remained without preamble.”<sup>43</sup>

In his book on Human Rights and Humanitarian Law, René Provost still notes an influence of the UDHR on the text of the Geneva Conventions “in the provisions prohibiting discriminations (Arts. 12/12/16/27) [or] in other provisions dealing with torture, cruel, unusual and degrading treatment or punishment, arbitrary arrest or detention, and due process.”<sup>44</sup> René-Jean Wilhelm is more nuanced. He notes only two Geneva Conventions rules “where we implicitly feel the influence of the Universal Declaration of Human Rights and of the Charter of the United Nations”<sup>45</sup>, namely, “the one that prohibits attacks on dignity of persons, including humiliating and degrading treatment” and “the rule of Article 3 which prohibits discrimination”<sup>46</sup>, which he said would be directly based on Article 2 of the UDHR.

Eventually, the drafters of the Geneva Conventions referred little to the fundamental principles proclaimed less than a year earlier. Even in the context of common Article 3 on internal armed conflicts, the inspiration has been found more in the humanitarian tradition and in the spirit of the four Geneva Conventions<sup>47</sup> than in Human

40 Cf. notably R. Abi-Saab, *Human Rights and Humanitarian Law in Internal Conflicts*, in HUMAN RIGHTS AND HUMANITARIAN LAW – THE QUEST FOR UNIVERSALITY 107 (D. Warner (ed.), 1997); Y. Dinstein, *The International Law of Inter-State Wars and Human Rights*, 7 ISRAEL Y.B.HUM.RTS. 139-153 (1977); H. Meyrovitz, *Le droit de la guerre et les droits de l’homme*, 88 R.D.P. 1059-1104 (1972).

41 A. Guellali, *Lex specialis, droit international humanitaire et droits de l’homme : leur interaction dans les nouveaux conflits armés*, 111/3 R.G.D.I.P. 540 (2007) [translation by the author].

42 Cf. ACTES DE LA CONFÉRENCE DIPLOMATIQUE DE GENÈVE DE 1949, vol.III A 761-766, vol.III 96-100 (1949).

43 S. Junod, *Les droits de l’homme et le Protocole II*, 739 REV.ICR 254-255 (1983) [translation by the author].

44 R. Provost, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 6 (2002).

45 R.-J. Wilhelm, *Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international*, 137 RECUEIL DES COURS 366 (1972) [translation by the author].

46 *Id.*

47 *Id.* at 365-366.

Rights. Yet at this time it was the most conducive frame for reference to the UDHR: within the domestic sphere, the regulation of non-international armed conflicts shares with the UDHR the same concerns regarding the protection of individuals against their own State.

Beyond the issue of the influence of the UDHR on the law of armed conflict, arose in 1948 an issue much more confrontational, namely the possible application of the rights proclaimed in the declaration during wartime. On this point, the reasoning of Henri Meyrowitz<sup>48</sup> is very interesting. Partisan of the differentialist vision, he refutes those theories, which considering the Declaration as a response to crimes against humanity and war crimes committed during the Second World War, would make it a common element for Human Rights and humanitarian law. He stated that:

*“Its inapplicability to wartime is both the result of philosophical assumptions, the object and purpose of the document and of the content of the human rights proclaimed. Because the authors of the Declaration had considered the respect of human rights inside each state as a capital condition to the peace safeguard they had considered these rights only for a peaceful context and worked to define them [...]. Despite the “naturalist” spirit of some of its content, the Declaration is intended to apply mainly to “civil” relations, i.e. the relationship between an individual citizen and the State and, primarily his State.”*<sup>49</sup>

Replaced in the context of 1948, we cannot refute this analysis. Indeed, in the spirit of the majority of its drafters, the Declaration was aimed to create the conditions for a universal peace by promoting “the establishment of a uniformed minimum constitutional law, based on a common vision of human rights and fundamental freedoms.”<sup>50</sup>

By prohibiting the war, the United Nations had at first focused their attention on the internal development of States. Even if some authors see *a posteriori* the UDHR as a driving force of an evolution of the law of armed conflicts<sup>51</sup>, it seems anachronistic in view of the international system at that time to reach such a conclusion. Without denying the reciprocal influences between those two sets of law, the real evolution or *revolution* will come several years later with the reappropriation by the United Nations of a part of the law of armed conflict. This movement within the United Nations seems to be suitable to make the UDHR the starting point of a new model of international law.

48 Cf. H. Meyrovitz, *Le droit de la guerre et les droits de l’homme*, 88 R.D.P. 1059-1104 (1972).

49 *Id.* at 1082 [translation by the author].

50 *Id.* at 1083 [translation by the author].

51 T. Meron, *The Humanization of Humanitarian Law*, 94-2 AJIL 245 (2000): “Despite these early signals [Lieber Code and Martens Clause], it is the Universal Declaration of Human Rights and other post-Charter human rights treaties and declarations that explain the focus of the Geneva Convention and Additional Protocols on individuals and populations. In matter such as the prohibition of torture and cruel, inhuman, or degrading treatment and punishment, arbitrary arrest and detention, and discrimination, as well as the guarantees of due process of law, human rights have exercised vast influence on instruments of international humanitarian law, producing a large measure of parallelism between norms, and a growing measure of convergence in their personal and territorial applicability.”

### **The UDHR, from a custom to a *Lex generalis* or the emergence of a new paradigm**

At the 108<sup>th</sup> meeting of the 3<sup>rd</sup> Committee of the UN General Assembly responsible for drafting the Declaration, the representative of Belgium, Fernand Dehousse, delivered a statement on the future legal significance of this text<sup>52</sup>. He made a distinction between the articles that only summarize the rules already contained in the customary law of nations, and those, which expresses new rules. Boris Mirkin-Guétzévitch<sup>53</sup> also used this distinction in a course at The Hague Academy of International Law in 1953. Regarding the first set of standards, Mr. Dehousse concluded that “[t]he act of inscribing them in an international declaration could not deprive these rules of the binding character they already possessed”<sup>54</sup> under customary law. As highlighted by the International Court of Justice (ICJ) few years later in the case *Military and Paramilitary Activities in and against Nicaragua*, “even if two norms belonging to two sources of international law appear identical in content, [...] these norms retain a separate existence.”<sup>55</sup> Adopted on the issue of a conflict between treaty-law and customary law, this statement should, *a fortiori*, be applied to a conflict between declaratory law and customary law.

On the other hand, regarding the reference to non-customary rules in a resolution of the General Assembly, the ICJ explained that these resolutions can “provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”<sup>56</sup> Thus, almost predictive, F. Dehousse concluded that by its legal status the Declaration of 1948 “would create the beginning of an obligation for United Nations Member States.”<sup>57</sup> Because the Court also stated that “a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”<sup>58</sup>, we can conclude in conformity with Sean McBride that the UDHR, so many times reaffirmed and cited in decisions of the General Assembly and in international conventions, “can certainly be regarded as enunciating “the principles of the law of nations, derived from the usages established among civilized peoples from the laws of humanity and from the dictates of the public conscience”.”<sup>59</sup> Nowadays, it appears that the customary nature of the UDHR is not a debatable issue anymore, at least regarding its implementation in peacetime.

Nevertheless, in 1967, a document of the UN Security Council explicitly combines human rights and the law of armed conflict in a resolution on the Arab-Israeli con-

52 Cf. F. Dehousse, United Nations General Assembly, 3rd session, 3rd commission, One hundred eighth meeting, 20 October 1948, U.N. Doc. A/C.3/SR.108.

53 B. Mirkin-Guétzévitch, *Quelques problèmes de la mise en œuvre de la Déclaration universelle des droits de l'homme*, 83 RECUEIL DES COURS 310-311 (1953) [translation by the author].

54 F. Dehousse, United Nations General Assembly, 3rd session, 3rd commission, One hundred eighth meeting, 20 October 1948, U.N. Doc. A/C.3/SR.108.

55 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Reports 178 (June 27).

56 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Report 70 (July 8).

57 F. Dehousse, United Nations General Assembly, 3rd session, 3rd commission, One hundred eighth meeting, 20 October 1948, U.N. Doc. A/C.3/SR.108.

58 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Report 70 (July 8).

59 S. MacBride, *Human Rights in Armed Conflict. The Inter-Relationship between the Humanitarian Laws and the Law of Human Rights*, IX-1 REV.DROIT PEN.MIL. & DROIT GUERRE 378 (1970). Cf. also: UN G.A., *Respect of Human Rights in Armed Conflicts*, S.G. second report, U.N. Doc. A/8052 Annex I (Sept. 18, 1970).

flict. This text affirms that “*essential and inalienable human rights* must be respected even in the vicissitudes of war.”<sup>60</sup> Correlatively, in 1968, after asking Israel to “respect and apply the Universal Declaration of Human Rights and the Geneva Conventions of 1949 in occupied territory”<sup>61</sup>, the International Conference on Human Rights held in Teheran concluded its work stating that “[t]he Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning *the inalienable and inviolable rights* of all members of the human family and constitutes an obligation for the members of the international community.”<sup>62</sup>

By a simple substitution of words, the United Nations Secretary-General was able to deduce, in his second report on *Human Rights Respect in Armed Conflict*, that the “respect of rights enshrined in the Universal Declaration of Human Rights in peacetime and armed conflict is now an important obligation for States, including States engaged in armed conflict.”<sup>63</sup> It seems that in 1970, Mr. U Thant believed that the Declaration had become a custom both in peacetime and in time of armed conflict. This was the first stage of reappropriation by the United Nations of the issue of monitoring of armed conflicts.

Therefore, with its resolution 2675 (XXV) of the 9<sup>th</sup> December 1970<sup>64</sup> welcoming the second report of the Secretary-General cited above, the United Nations General Assembly affirmed the “basic principles for the protection of civilian populations in armed conflicts”<sup>65</sup>, in which the Assembly included the “fundamental human rights, as accepted in international law and laid down in international instruments” and therefore “continue to apply fully in situations of armed conflict.”<sup>66</sup> Although the UDHR is not explicitly mentioned, the terms used in this resolution are very close to the ones used by the Secretary General in its conclusions. Hence, customary human rights laws, “codified” by the UDHR, are fully applicable to civilians during armed conflicts<sup>67</sup>. Although, according to the General Assembly, these provisions do not *a priori* seem to apply to combatants, it is inappropriate to talk about “confusionism”<sup>68</sup>, as stated by Henri Meyrowitz. According to this author, Arab States have taken advantage from the Teheran conference to link politically human rights with international

60 UN S.C., *Res. 237 (1967)*, U.N. Doc. S/RES/237(1967) (June 14, 1967) [we highlight].

61 International Conference on Human Rights at Teheran, *Resolution I: Respect and application of human rights in occupied territories* 4 U.N. Doc. A/Conf.32/41 (May 12, 1968).

62 International Conference on Human Rights at Teheran, *Proclamation of Teheran 2*, U.N. Doc. A/CONF.32/41 (May 13, 1968) [we highlight].

63 UN G.A., *Respect of Human Rights in Armed Conflicts*, S.G. second report Annex I, § 5, U.N. Doc. A/8052 (Sept. 18 1970). A still reaffirmed approach thirty years later by the UN Secretary-General : Commission on Human Rights, Sub-commission on prevention of discrimination and protection of minorities, *Minimum humanitarian standards*, Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, U.N. Doc. E/CN.4/1998/87 §48 (Jan. 5 1998): “It is widely accepted that the Universal Declaration of Human Rights, though it is not a treaty per se, creates obligations on all States Members of the United Nations. Most importantly, as the Universal Declaration states, human rights are “inalienable”, individuals are “born free and equal in dignity and rights” - it follows that we possess these rights regardless of whether the countries we live in are at war or at peace.”

64 UN G.A., *Res. 2675 (XXV) – Basic principles for the protection of civilian populations in armed conflicts*, U.N. Doc. A/RES/2675(XXV) (Dec. 9, 1970).

65 *Id.*

66 *Id.*

67 A position confirmed by the UN Secretary-General. *Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict*, U.N. Doc. S/1999/957 §3 (Sept. 8 1999) : “*International humanitarian and human rights law set out the rights of civilians and the obligations of combatants during time of conflict.*”

68 H. Meyrowitz, *Le droit de la guerre et les droits de l’homme*, 88 R.D.P. 1069-1070 (1972).

humanitarian law. Therefore this conference would have provided “to Arab States the opportunity to bring to the world public opinion, the accusations against the conduct of Israel in the occupied territories.”<sup>69</sup> Beyond this assertion, this period is, according to him, the starting point “of an escalation in the confusion of the law of war and human rights Law”<sup>70</sup>, particularly with the adoption of resolution 2675 (XXV). From his point of view, this confusion would be harmful to the law of armed conflicts, even for the resolution of such conflicts<sup>71</sup>.

But far from the amalgam between these two normative sets, the possible concurrent and simultaneous application of human rights and humanitarian law highlights, first of all, the existence of common norms<sup>72</sup> developed on behalf of a common aim. The fact that human rights are taken into account during armed conflicts shows the relationship between the UDHR and the new principles of international humanitarian law. Thus, at the first conference of experts on the development of humanitarian law standards of 1971 – convened by the ICRC – to draft a protocol to the Geneva Conventions, its members were able to say that human rights and humanitarian law share a common purpose, namely to ensure proper protection of individuals and their fundamental rights<sup>73</sup>. However, to achieve this protection, “international humanitarian law devotes special attention to the characteristics of the armed conflict and to the fact that, in these situations, the normal conditions of life in the nation are completely modified.”<sup>74</sup> The experts concluded that all developments and the strengthening of this normative *corpus* contribute to the protection of individual fundamental rights without the need to make direct reference to human rights law. Thus, as stated by Marc Schreiber, representative of the UN Secretary-General at the second session held a year later: “[to] the first session of the Conference, many governmental experts referred to the fact that these rules [Human Rights] are applicable not only in peacetime but also in times of armed conflicts, particularly in situations of armed conflict not of an

69 *Id.* at 1061 [translation by the author].

70 *Id.* at 1069 [translation by the author].

71 M. A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 *MILL.REV.* (2007). According to this *Judge Advocate General* jurist, this confusion “could make winning wars nearly unachievable for those who try to comply with its strict requirements, and “[e]xcessive” humanization might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode the credibility of the rules.” Furthermore, humanization also could serve to unnecessarily prolong armed conflict, and thereby increase the evils of war that it purports to eradicate. Therefore, the unconstrained expansion of human rights law into matters of war must be stopped, for the sake of Soldiers and humanity alike.” This unfortunately reminds us of a famous thought of F. Nietzsche, *BEYOND GOOD AND EVIL* §146 (2000): “He who fights with monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee.”

72 *Celebici Case*, ICTY, No. IT-96-21, Appeal Chamber, Judgement §149 (Feb. 20, 2001): “The universal and regional human rights and the Geneva Conventions share a common “core” of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted. The object of the fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilized nations in all circumstances.”

73 ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, vol. 1, 30, document CE/1b (1971). Cf. also: Prosecutor v. Anto Furundzija, ICTY, Trial Chamber Judgement, No. IT-95-17/1 § 183 (Dec. 10, 1998): “The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law”; Prosecutor v. Zlatko Aleksovski, ICTY, Trial Chamber, Judgement, No. IT-95-14/1 §54 (June 25, 1999): “it is difficult to conceive of a more important value than that of respect for the human personality. It can be said that the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle”; *Celebici Case*, IT-96-21 §149; T. Meron, *International Law in the Age of Human Rights. General Course on Public International Law*, 301 *RECUEIL DES COURS* 30 (2003): “The fact that the law of war and human rights law have different historical and doctrinal roots has not prevented the principle of humanity from becoming the common denominator of both systems.”

74 ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, vol. 1, 31, doc. CE/1b (1971).

international character.”<sup>75</sup> To solve the problem, Marc Schreiber suggested to “include in the Protocol an explicit reference to the fact that the Protocol applies without prejudice to the human rights principles and rules established by the United Nations.”<sup>76</sup> Without filing a proposal in this regard, several experts joined that opinion, “because in the application of international law we cannot ignore these instruments [UDHR, the International Covenants...].”<sup>77</sup> But even if the Protocol II recalls in its preamble that “international instruments relating to human rights offer a basic protection to the human person”<sup>78</sup>, Protocol I only evokes, in its Section III on the treatment of persons in power of a Party to the conflict, “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.”<sup>79</sup> It consequently leaves some doubt on the actual content of these rules and on the possible inclusion of human rights in those “*other rules*”.

In the advisory opinion on the *Legality of Threat or Use of Nuclear Weapons*, the International Court of Justice tried to clarify the issue stating that “the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant.”<sup>80</sup> In this case, the right to life is not subject to derogation, and should also be respected in conflict situations. Thus, no one shall be arbitrarily deprived of life in peacetime or during an armed conflict. However, the Court based its reasoning on the doctrine of *Lex specialis*. Therefore the Court posed human rights law as the *Lex generalis* to which derogates “the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”<sup>81</sup> In case of armed conflict, the arbitrary nature of death caused by the use of a certain type of weapon under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) should therefore be interpreted according to the applicable rules of international humanitarian law<sup>82</sup>.

This vision of the doctrine of *Lex specialis* diverges from the traditional view. Indeed, the ICJ did not dismiss the human rights rule in favor of humanitarian law but the Court interpreted the right to life provided by the ICCPR in light of the laws regulating armed conflict<sup>83</sup>. On this point it seemed to follow some remarks of the Conference of Governmental Experts of 1971. These experts established a link between human rights and humanitarian law, stressing that “the provisions of the Geneva Conventions protecting prisoners of war when questioned by the enemy, or forbidding the latter to hold them in dangerous zones, may be attached to the general rule for-

<sup>75</sup> ICRC, CONFERENCE OF GOVERNMENTAL EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT, SECOND MEETING, vol. I § 2.69 (1972).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at § 2.539.

<sup>78</sup> PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), Preamble al. 2 (June 8, 1977).

<sup>79</sup> PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), art. 72 (June 8, 1977).

<sup>80</sup> Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion, 1996 ICJ Report 25 (July 8 1996).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> While it is true that one can rightly criticize the marginal role left to human rights in this advisory opinion, cf. V. Gowland-Debbas, *The Right to Life and Genocide: The Court and International Public Policy*, in INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 321-326 (L. Boisson de Chazournes & P. Sands (ed.), 1999).

mulated in Article 7 of the Covenant on Civil and Political Rights forbidding cruel or inhumane treatment.”<sup>84</sup> Besides, they specifically stated that the rules of humanitarian law “extend beyond, detail, or develop certain of the rules set forth in the Covenants on human rights”<sup>85</sup>, because they are not sufficiently detailed to consider specific situations related to armed conflict. Thus, the use of this interpretative maxim does not reflect an antagonism between these two normative *corpus*. In fact:

*“Interpretative maxims and conflict-solution techniques such as the lex specialis, lex posterior or lex superior [...] enable seeing a systemic relationship between two or more rules, and may thus justify a particular choice of the applicable standards, and a particular conclusion. They do not do this mechanically, however, but rather as “guidelines”, suggesting a pertinent relationship between the relevant rules in view of the need for consistency of the conclusion with the perceived purposes or functions of the legal system as a whole.”*<sup>86</sup>

From these interactions between international human rights law and the law of armed conflict seems to gradually grow a coherent system of rules, a new conceptual framework.

### **The UDHR and armed conflicts or a systemic approach of the International Society**

In his speech to the UN General Assembly on the 19<sup>th</sup> November 1998, Judge McDonald, president of the International Criminal Tribunal for the Former Yugoslavia, described the two international tribunals as “the guardians of the rights as enshrined in the Universal Declaration.”<sup>87</sup> This quotation reminds us the tail anchor of the international system established after the Second World War. The network of reciprocal relationships developed at the beginnings of international law tends to find a common purpose. The interactions between different international law branches show an overall coherence of the normative body. Because it can be seen as the expression of a custom whose application in time of armed conflict seems to be possible, the UDHR serves as a framework for the emergence of an International Society<sup>88</sup>.

This study of the relationship between the Declaration of 1948 and the Law of armed conflict has enabled us to show the existence of a common goal between these

<sup>84</sup> ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, vol. 1, 30-31, doc. CE/1b (1971).

<sup>85</sup> *Id.*

<sup>86</sup> M. Koskenniemi, International Law Commission, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW §36, U.N. Doc. A/CN.4/L.682 (Apr. 13 2006).

<sup>87</sup> G. K. McDonald, ICTY President, *Address to the United Nations General Assembly*, at <<http://www.un.org/icty/pressreal/SPE981119.htm>> (Nov. 19 1998): “In a sense, our Tribunal was created to fill the gap left by the drafters of the Universal Declaration. When the Security Council established the International Tribunal in 1993, no one could have predicted that within one year a second Tribunal – for Rwanda – would be necessary. The establishment and success of these Tribunals played no small role in the signing, in July, of the Rome Treaty, creating a permanent International Criminal Court. Together, these courts are the guardians of the rights as enshrined in the Universal Declaration”.

<sup>88</sup> In his PhD, Olivier de Frouville see human rights as dans the driving force behind the “*expansion of the law of the universal human Society to the detriment of the law of the Society of sovereign States*”, cf. O. de Frouville, L’INTANGIBILITÉ DES DROITS DE L’HOMME EN DROIT INTERNATIONAL 48 (2004) [translation by the author].

two normative corpus, a goal that mirrored an International Society still in germ in 1918. Thus understanding the International Society as a system, ie “a series of elements in dynamic interaction, organized according to a common purpose”<sup>89</sup>, we can grasp its evolution by observing the interactions between each of its subsystems.

Originally linked to the State sovereignty paradigm, “the behaviour of the system was the result of the interactions between equipotential parties”<sup>90</sup>, but “gradually became a clear subordination to the dominant parties.”<sup>91</sup> The pre-war mainly bilateral scheme was gradually supplanted by a multilateralism, which tends to fragmentation<sup>92</sup>, or perhaps to complexity. Meanwhile, “*the progressive specialization*” of the system has been “closely connected with the progressive centralization expressed by the evolution linked to a dominant element.”<sup>93</sup> This systemic analysis seems to be an interesting angle of attack for a more comprehensive approach of this new international law paradigm that emerges from the years 1970-80.

To clarify things, we have to complete our analysis of the relationship between the UDHR and armed conflict. We need to resume where we stopped, namely the idea of a *lex generalis*, but highlighting the centralizing dominant elements that are, as we will see, the possible derogable rights. Despite that, as pointed out by Mireille Delmas-Marty, the 1948 Declaration does not mention these derogable rights,

*“Article 29-2 of the Declaration allows “limitations” at the double condition that they are prescribed by law and to meet the requirements “of respect for the rights and freedoms of others” or morals, public order and general welfare in a democratic society. It accepts the existence of potential conflicts between a person’s rights and the rights of the others. It is mainly the possibility to have a space for negotiation of collective value, generally associated with political demands of raison d’Etat, a space widely opened by the words used: morality, public order and general welfare. The question arises as to whether all rights stated are subjected to such limitations or if some of them escape and enjoy absolute protection.”*<sup>94</sup>

The U.N. Secretary-General provides an early response when he stated: “a situation in which a State is involved in an armed conflict can justify certain temporary restrictions on the exercise of certain human rights proclaimed in the Declaration.”<sup>95</sup> However, by definition, the restrictions do not have the same scope as derogations. Thus, as recalled by R. Ergac, “the restrictions are powerless to affect the substance

<sup>89</sup> J. de Rosnay, *THE MACROSCOPE: A NEW WORLD SCIENTIFIC SYSTEM* (1979).

<sup>90</sup> L. von Bertalanffy, *GENERAL SYSTEM THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATIONS* (1976).

<sup>91</sup> *Id.*

<sup>92</sup> Cf. notably P. M. Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791 (1999); Gerhard Hafner, International Law Commission, *RISKS ENSUING FROM FRAGMENTATION OF INTERNATIONAL LAW*, annex 321-339, U.N. Doc. A/55/10 (2000).

<sup>93</sup> L. von Bertalanffy, *GENERAL SYSTEM THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATIONS* (1976).

<sup>94</sup> M. Delmas-Marty, *Le crime contre l’humanité, les droits de l’homme et l’irréductible humain*, 1994-3 REV.SC.CRIM. 485-486 (1994) [translation by the author].

<sup>95</sup> UN G.A., *Respect of Human Rights in Armed Conflicts* § 24, U.N. Doc. A/7720 (Nov.20, 1969).



of the guaranteed rights” while “the concept of derogation includes the possibility of interferences in theory, free of any physical barrier.”<sup>96</sup> But according to him, the Universal Declaration “contains in its Article 29 a general limitative clause which could serve as a derogation clause.”<sup>97</sup> It therefore appears that Mireille Delmas-Marty, referring to the rights that were granted an “absolute protection”<sup>98</sup>, moved on to the ground of the derogation.

Commonly, the non-derogable rights are those to which no license is left to the States to exclude their application in some cases provided in advance and in any of the circumstances. Hence, those are the rights referred to in Article 4 of the ICCPR, 15 of the European Convention on Human Rights (ECHR) and 27 of the American Convention on Human Rights (ACHR). As rightly pointed out by Jean Salmon, it deals with the possibility for States parties to the convention to plan “exceptions to the rule”<sup>99</sup> in case of exceptional circumstances. However we have to understand that the *lex specialis* principle do not intervene on the same level. When the special law derogates from the general law, it should be understood that it would replace a normative regime by another<sup>100</sup>, while the exception is “the restriction by a unilateral (legislative) act.”<sup>101</sup> Contrary to the situation of exception or limitation, we are not in front of a vertical relationship between a norm of international law and a domestic act, but in a horizontal relationship of substitution of an international rule by another one. In the end, only the existence of a *jus cogens* norm can prevent the implementation of this principle in the resolution of normative conflicts. Indeed, *jus cogens* “according to the traditional view, serves as a principle of neutralization of the effectiveness of the *lex specialis derogat legi general* principle by declaring the opposite agreement void. The *jus cogens* is the pure anti-derogation principle, it is the antimatter of the derogation.”<sup>102</sup>

But the problem of understanding the relationship between human rights law and the law of armed conflict becomes more complicated because of the inclusion of armed conflicts in the broader exceptional circumstances, and thus because of the possible identity of cases enabling the rule of exception or the application of the *lex specialis* principle.

Applying this to the case of the ICJ advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, we are confronted to the right to life, recognized as not subjected to exceptions under the Article 4 of the ICCPR. If exceptional circumstances do not allow states to temporarily violate this rule, thanks to the principle of *lex specialis*, an armed conflict would normally lead to the

96 R. Ergéc, LES DROITS DE L'HOMME À L'ÉPREUVE DES CIRCONSTANCES EXCEPTIONNELLES. ETUDE SUR L'ARTICLE 15 DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 34 (1987) [translation by the author].

97 *Id.* at 222.

98 Following Nicole Questiaux, Olivier de Frouville refers to “*absolutely intangible rights*” and to “*relatively intangible rights*.” Even in exceptional period the first ones are those that do not support any infringement, while the second would accept limitations in some circumstances. Cf. O. de Frouville, L'INTANGIBILITÉ DES DROITS DE L'HOMME EN DROIT INTERNATIONAL 70 (2004); N. Questiaux, UN. Subcommission on Prevention of Discrimination and Protection of Minorities, STUDY OF THE IMPLICATIONS FOR HUMAN RIGHTS OF RECENT DEVELOPMENTS CONCERNING SITUATIONS KNOWN AS STATES OF SIEGE OR EMERGENCY 15, U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982).

99 J. Salmon (ed.), DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 326 (2001).

100 Cf. R. Kolb, *Jus Cogens, intangibilité, intransgressibilité, dérogation “positive” et “négative”*, 109-2 R.G.D.I.P. 322 (2005).

101 *Id.* at 323 n. 47.

102 *Id.* at 323.

applicability of humanitarian law standards. As pointed out by the ICJ, the period of armed conflict should not involve the complete inapplicability of the ICCPR, but the Court should have made prevail humanitarian law standards in case of the competing applicability between rules of the two corpus - in this specific case the right to life. An element seems to lack in this case to understand the jurisprudence of the ICJ. The non-derogable character of the right to life under ICCPR cannot explain by itself the interpretation of Article 6 of the ICCPR in light of the law of armed conflict, and indeed the applicability of this rule of the human rights *corpus* in case of an armed conflict.

It is therefore logical to assume that the ICJ has implicitly considered as *jus cogens* the prohibition of arbitrary deprivation of life, as set out in Article 6 of the ICCPR, and thus has moved this right to life from a non-derogable right to an intangible right, namely a rule which combines at least the elements of a non-derogable character and of *jus cogens*. However, considering from our point of view a systemic approach of international law, the Court has interpreted the arbitrary deprivation of life under the standards of humanitarian law. This approach can be described as systemic in the sense that the interests of the whole system prevail on the individuality of the rule. Thus, “if discontinuity excludes subordination between different normative sets, it does not mean their absolute autonomy. Relationships in which the topology remains to be found are established. This term refers to the mathematical theory, applicable both in geometry and in algebra, which studies neighbourly relations between apparently discontinuous spaces.”<sup>103</sup>

Facing a few years later multiple violations of individual rights guaranteed by the ICCPR, the ICJ explained that:

*“More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”*<sup>104</sup>

<sup>103</sup> M. Delmas-Marty, LE FLOU DU DROIT 26 (2004) [translation by the author].

<sup>104</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, 2004 ICJ Report 106 (July 9).

Forgetting to remind the *lex specialis* character of humanitarian law, the Court reiterated this interpretation in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* of 19<sup>th</sup> December 2005<sup>105</sup>.

In view of this jurisprudence, we have therefore to identify three situations referred to by the Court. Firstly, in case of armed conflicts, the rights that are not in “conflict” with a more specific humanitarian rule fall exclusively in the corpus of human rights<sup>106</sup>. Those rights apply regarding the possible escape clauses in international instruments. Secondly, the opposite scheme applies to those situations governed exclusively by the law of armed conflict, either because the State has claimed for the application of an escape clause provided by a human rights instrument, or because the rule is specific to a situation of armed conflict (for example, the rules on the distinction between civilians and combatants).

Finally, the main question comes from the concurrent application of both normative bodies. As seen above, a first response was given by the ICJ for intangible rights, namely the application of human rights rules but interpreted under the norms of armed conflict law<sup>107</sup>. In other cases, when there is no contradiction between the two standards dealing with the same subject, a simultaneous application is possible<sup>108</sup>. This solution was the one used by the ICJ in the *Armed Activities on the Territory of the Congo Case*<sup>109</sup> where the Court found a violation of both Article 7 of ICCPR and Article 32 of Geneva Convention IV of 1949<sup>110</sup>. In contrast, if the two norms are contradictory but the human rights rule is not an intangible right, we apply the *lex specialis* principle, but with an interpretation of the humanitarian standard in the light of the general human rights system. Thus, the Trial Chamber of the ICTY judged in this sense the *Celebici case*:

*“It would, indeed, be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law [...].”*

105 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, ICJ, §216 (Dec. 19, 2005)

106 We do not come back here on the extraterritorial applicability of human rights, a condition obviously necessary to understand the relationship between human rights and the law of armed conflict. For more details, *See*, notably N. Lubell, *Challenges in applying human rights law to armed conflict*, 860 REV.ICR 739 (2005); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, 2004 ICJ Report 109-111 (July 9).

107 The European Court of Human Rights seems to develop a similar jurisprudence on this issue. Cf. notably the analysis of the *Issaieva c. Russie* case of 2005 by M. Divac Öberg, *Le suivi par le Conseil de l'Europe du conflit en Tchétchénie*, 50 A.F.D.I. 761-762 (2004)

108 This possibility has been highlighted by the Commission on Human Rights, *Res. 2005/63, Protection of the human rights of civilians in armed conflicts* 40-42, U.N. Doc. E/CN.4/2005/L.11/Add.7 (Apr. 20, 2005): “conduct that violates international humanitarian law, including grave breaches of the Geneva Conventions, of 12 August 1949, or of the Protocol Additional thereto of 8 June 1977 relating to the Protection of Victims of International Armed Conflicts (Protocol I), may also constitute a gross violation of human rights.”

109 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, ICJ, §219 (Dec. 19, 2005).

110 GENEVA CONVENTION (IV) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, art. 32 (Aug. 12 1949): “Prisoners of war who, though not attached to the medical service of their armed forces, are physicians, surgeons, dentists, nurses or medical orderlies, may be required by the Detaining Power to exercise their medical functions in the interests of prisoners of war dependent on the same Power. In that case they shall continue to be prisoners of war, but shall receive the same treatment as corresponding medical personnel retained by the Detaining Power. They shall be exempted from any other work under Article 49.”

*This interpretation of the Convention is fully in accordance with the development of the human rights doctrine which has been increasing in force since the middle of this century. It would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of article 4, that was apparently inserted to prevent interference in a State's relations with its own nationals. Furthermore, the nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949. In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken.”<sup>111</sup>*

Despite human rights law that apply to any individual in his relation with the State, the ICTY has chosen to apply implicitly the Law of Armed Conflict as a *lex specialis*, but interpreting it under the “the whole concept of human rights.”

This passage seems to be symptomatic of the need felt by international courts for a systemic approach of the International Society<sup>112</sup>. The terms “*complexity*” and “*paradigm*” used by the ICTY reflect its concern for the unity of international law against the fragmentation of this legal order. It seems that the relationship between human rights law and humanitarian law is treated in a coherent way by different judicial decisions<sup>113</sup>. And even if it does not specifically use the words *lex specialis*, complexity or paradigm, the Human Rights Committee had a similar approach to the issue. In general comment No 29<sup>114</sup>, it stated that:

*“The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>115</sup>*

<sup>111</sup> Prosecutor v. Zejnil Delalic, Zdravko Mucic a/k/a “Pavo”, Hazim Delic, Esad Landzo a/k/a “Zenga”, ICTY, Trial Chamber, No. IT-96-21 §§263, 266 (Nov. 16, 1998). Cf. also T. Meron, *International Law in the Age of Human Rights. General Course on Public International Law*, 301 RECUEIL DES COURS 26-27 (2003).

<sup>112</sup> If we share with P. Meyer-Bisch the idea of a systemic approach of normative bodies, it seems impeding that the author claims that human rights in itself constitute “a system that must be complete” [cf. P. Meyer-Bisch, *Méthodologie pour une présentation systématique des droits humains*, in CLASSER LES DROITS DE L’HOMME 47-85 (E. Bribosia & L. Hennebel (ed.), 2004)]. We believe that this reduction of the analysis to the only human rights is a mistake given the complexity of the international order.

<sup>113</sup> *A contrario* : A. Guellali, *Lex specialis, droit international humanitaire et droits de l’homme : leur interaction dans les nouveaux conflits armés*, 111-3 R.G.D.I.P. 544-547 (2007): According to the author, the ICJ had made a detailed assessment, a “pragmatic approach” of the relationship between international humanitarian law and international law of human rights in order not to prohibit the use of nuclear weapons. She concluded that “*lex specialis* appears as a technical rule used by the Court in each case to resolve a concrete conflict of norms, and not to resolve a theoretical position on the absolute and general relations between international humanitarian law and human rights” [translation by the author]. Then is presented an evolution of the vision of the ICJ on this issue. Thus as this author stated, in the opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court did not choose the “exclusive use of humanitarian law in relation to human rights. But the Court examined the provisions of two sets of norms equally.” [translation by the author]. Finally, in his recent arrest *DRC v. Uganda*, the ICJ have failed to recall the *lex specialis* character of humanitarian law and it kept the only implementation of the two corpus rule.

<sup>114</sup> Human Rights Committee, *General Comment No 29: Article 4 (Derogations during a state of emergency)* §3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001)

<sup>115</sup> Human Rights Committee, *General Comment No 31: The nature of the general legal obligation imposed on States parties* §11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

Hence, the asserted and displayed complementarity between these two standards<sup>116</sup> is based on reciprocal interactions made possible by a common set of rule. These elements correspond to the first two of a systemic relationship between these bodies. What we finally call the International Society or the *paradigm of complexity* also requires understanding the aim of the organization that gives it its signification, guides its process and defines its means. This teleological dimension is inherent to any normative system.

It is ultimately useful to recall here the purpose of the drafters of the Declaration: namely, as highlighted Eleanor Roosevelt in 1948, to draft “a statement of basic principles of inalienable human rights, setting up a common standard of achievement for all peoples and all nations.”<sup>117</sup> Thus, to paraphrase Mireille Delmas-Marty, the Universal Declaration has become “a way to generate legal awareness [...] by giving, not the content of the rule, but the law of the law, i.e., the rule that allows to draw the line between what can or cannot be the law.”<sup>118</sup>

116 A complementarity recently highlighted by the Commission on Human Rights, *Res. 2005/63, Protection of the human rights of civilians in armed conflicts* 40-42, U.N. Doc. E/CN.4/2005/L.11/Add.7 (Apr. 20, 2005): “Acknowledging that human rights law and international humanitarian law are complementary and mutually reinforcing, Considering that all human rights require protection equally and that the protection provided by human rights law continues in armed conflict situations, taking into account when international humanitarian law applies as *lex specialis*.”

117 Eleanor Roosevelt, United Nations General Assembly, 3rd session, 3rd commission, Eighty-ninth meeting, 30 September 1948, document A/C.3/SR.89.

118 M. Delmas-Marty, LE FLOU DU DROIT 348 (2004) [translation by the author].