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2. Human rights law and international humanitarian law between 1945 and the aftermath of the Teheran Conference of 1968

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1. INTRODUCTION

It is taken for granted today that the law of armed conflict, or international humanitarian law (IHL), and international human rights law (HRL) maintain between their respective bodies both subtle and multiple relationships, with one branch of the law complementing, strengthening or filling the other's gaps. This supposes, from a theoretical standpoint, that both branches of the law have some shared or common legal ground on which they can interact. This means, for instance, that HRL has to apply in times of armed conflict (something by no means guaranteed before the 1960s); or that HRL may apply extraterritorially, for example in occupied territory, still to some extent a controversial question,[1] albeit the practice of the sheer majority of States and of international organs admits such extraterritoriality in a wide array of cases. Thus, today, to properly analyze some subject matter, such as the law of belligerent occupation, it is impossible to do otherwise but to consider it in its complex blend between IHL and HRL.[2] However, this closeness (and for some, promiscuity)[3] of HRL and IHL has no time immemorial pedigree. It evolved slowly from the late 1940s to the present times. And indeed, it grew out of a situation where the two branches of the law stood quite unrelated one besides the other, each one championed by an international institution nourishing some mistrust for the other, and each one having its specialized set of lawyers and its particular agenda. The purpose of this short chapter is not to discuss the present situation,[4] on which there is a profusion of literature. Instead, it might be interesting to look to the past and to learn about the reasons why the two branches of the law started with separatism and why they progressively converged. This allows us to develop some deeper insights into these areas of the law and to give more critical mass to the understanding of where we stand today.

2. THE TWO DRUM-ROLLS OF 1948 AND 1949: UNIVERSAL DECLARATION ON HUMAN RIGHTS AND GENEVA CONVENTIONS ON THE PROTECTION OF VICTIMS OF ARMED CONFLICTS

Human rights law emerged in Europe in the wake of the subjectivist revolution[5] of the Enlightenment. Man, with his inalienable and pre-positive rights, was put at the center

of the new 'natural law constructions'.[6] However, for a long time, such human rights were limited to 'civil society', that is, to municipal law, where they were guaranteed by Bills of Rights[7] and municipal organs of judicial control. International society was, at least since the Westphalian Peace (1648), progressively restricted to inter-State relations. The individual had no standing in it. He could not enjoy any rights and duties directly under international law. He was at best an object of international regulation, but not a subject of international rights.[8] The turn of the tide[9] arrived with the declaration of war by President Roosevelt of the United States (5 December 1941); with articles 5 and 6 of the Atlantic Charter of 1942; with the United Nations Declaration of 15th January 1942 whereby the aims of the Atlantic Charter were generally endorsed by the Allies; with the Dumbarton Oaks proposals of 1944; and finally with the Charter of the United Nations (Preamble, articles 1, § 3; 13, § 1, lit. b; 55, lit c). It was understood that the Charter contained only some generic referrals to 'human rights'; it could not spell out the body of international human rights in the detail of a bill of rights. Therefore, it was agreed to add to the Charter first of all a solemn proclamation on human rights by the General Assembly, and later to codify in detail in a legally binding fashion the recognized rights. The first step was reached through the Universal Declaration of Human Rights of 1948.[10] The second step was significantly delayed by the outbreak, and later creeping procrastination, of the Cold War. It proved finally possible to adopt in 1966 two Covenants,[11] one on civil and political rights, the other on social, economic and cultural rights. The split into two texts was a glaring hallmark of the then division of the world into two opposite camps. The Declaration of 1948 is a non-binding resolution of the UNGA, numbered 217. It has been elaborated within the Commission of Human Rights, a subsidiary organ of the ECOSOC. It proclaims in a short and aphoristic form the essential freedoms and rights, without venturing into detail which would have been at once incompatible with the aim of solemnity pursued and also with the fact that the Declaration would have to be followed by a more specific positive law text (the 'Covenant'). Today, the Declaration is commonly held to reflect customary international human rights standards. We may thus notice that in 1948 HRL was not a new feature with respect to municipal law, where it could be traced back to the great public law codifications of the Enlightenment period; but that it was a new feature in international law, where the individual had previously been considered at best as an object of international regulation, but not as a subject of international rights (doctrine of domestic affairs or domestic jurisdiction).

International humanitarian law, or more generally the law of armed conflicts, is one of the oldest branches of public international law. Organized collectivities, which are the main object of the *jus inter potestates* called international law, have since time immemorial interacted not only peacefully but also by war; bellicose contacts generally even preceded peaceful ventures; and overall, hostilities between States covered much longer periods than peaceful relations. Hence, it is understandable that international law contained since times immemorial a bulk of rules on the law of war. In the famous and seminal treatise of Hugo Grotius, not infrequently called the 'founding father' of international law, *De jure belli ac pacis* (1625), the law of war still precedes the law of peace and is also largely predominant in the substantive developments in the book. What was new in the law of armed conflict after 1945? The main point is that this branch of the law witnessed – as it had after World War I – a profound crisis; it had

proved inadequate in some respects; and it showed terrible gaps of protection, which had to be filled. This effort has been accomplished through the Geneva Conventions of 1949.[12] Essentially, the Geneva Conventions (hereinafter: GC) transform at least partially the law of armed conflict into a 'humanitarian law'. The protection of the individual war victims becomes the pivotal centre of the system; IHL ceases to be merely (or even essentially) the old 'military law'. This new IHL, with its humanitarian outlook, would in due course necessarily come closer to the nascent and growing arm of international HRL. To be able to perform the function of protection of all the victims of modern war, the old conception of international model norms for legislation on the municipal level (19th century) or of minimum codification as in the Hague (at the turn of the centuries) had to be abandoned.[13] The law is now clearly predicated on the idea of a thorough international codification with mandatory norms of behavior, locked up against derogation and reprisals. The GC represent in this respect the ideal of 'maximal' codification with a protective aim; they are opposed to the 'minimal' codification of the Hague period, geared towards leaving the belligerent some appreciable freedom of action in situations where, as in armed conflict, vital interests are at stake. There is here a neat paradigm shift within the underlying reasons of the law.

World War II had glaringly shown that the traditional law of armed conflicts had been insufficient, especially in the protection of persons *hors de combat*. The treatment of prisoners of war (e.g. Russian prisoners in Germany or Allied prisoners in Japan) and the deportation of civilians were tragic testimony to this. For the wounded and sick military personnel and for prisoners of war, there was already a set of GC which needed only to be developed: the Geneva Conventions of 1929. However, there had been a complete absence of conventional protections for civilians, if some scattered provisions applying to occupied territories are bracketed out (Hague Convention IV, Regulations, articles 42ff.). Overall, it was therefore thought, in 1949, that a new codification effort was necessary on four accounts:

(1) The law of armed conflict had suffered since 1919 from regular attacks as to its viability: can there truly be a law in armed conflict? Is the law of armed conflict not always delayed by a war? Is it not chimerical to think that a law of armed conflict can work? That law had also suffered heavy breaches during World War II. It was thus felt necessary to solemnly reaffirm that branch of international law and to give it a new impetus starting from a clean slate.
(2) World War II had shown that there existed a considerable urgency in protecting persons *hors de combat*. Thus, the new law was centered on that humanitarian issue, largely leaving aside the properly military branch of the law of armed conflicts (conduct of hostilities). For the conduct of hostilities, the old Hague Regulations of 1907 were still applicable.
(3) World War II had shown the tendency of some belligerents to manipulate and to try to escape the law, as well as to use all the gaps and uncertainties for self-serving interpretations (e.g., on hostages). It was consequently considered in 1949 that the new law should be much more detailed than the old, summary and optimistic law of 1907. This produced a codification with a much greater number and length of provisions. Second, the drafters prohibited any opting out of the conventional protections by agreement between or among the belligerents, or

unilateral renunciation of the accorded protections by the beneficiaries (see articles 6–7 GC I-III, and 7–8, 47 of GC IV).

(4) Experience had shown, especially through the Spanish Civil War (1936–1939), that some regulation was needed also for non-international armed conflicts (roughly speaking civil wars). Thus, common article 3 of the four GC was adopted. It provided a sort of 'minimum convention' within the Convention, granting some elementary protections in the context of non-international armed conflicts.

To these distinctive features, one further has to be added. The system of the law of war in the 19th century, and up to 1949, was based on a subjective rather than an objective trigger for determining the applicability of that body of the law. Traditionally, the application of the law of war depended on the existence of a state of 'war'. Since the concept of war was far from a clear-cut one, modulating between formal (declared) and material (intensity) war, international and civil war, the necessary legal certainty on what was going to be applied to whom was, in practice, achieved through some distinctive acts of will by the concerned States. An international war was held to exist essentially when it was declared (this being a unilateral legal act, expressing a will) or at least when there was an ascertainable subjective *animus belligerendi* of at least one State to the violent contest. This explains the extraordinary importance of the declaration of war in the 19th century.[14] It was of the essence, especially for all the neutral States and their commerce at sea, since their rights and duties towards the warring States would be altered from the declaration of war onwards. A civil war could also bear heavily on the rights of neutral States. Therefore, it was accepted that through a 'recognition of belligerency' (again a unilateral legal act embodying an expression of will) the two parties in a civil war could be treated as belligerents placed on the same footing. Hence, the laws of war, especially neutrality, would apply to both.[15] This recognition could emanate from the local government or from third States. A civil war could thus be transformed, from the legal point of view, into a fully-fledged 'war' between the recognizing State and the recognized entities. Concretely, this means that the rules of the laws of war and of neutrality would apply to such civil wars between the recognizing entities.[16] In short: the application of the law of war depended on a potestative or subjective act.

This subjective system was abandoned in 1949. With the Geneva Conventions, through their common article 2, the trigger for the applicability of the law of armed conflicts now becomes neatly objective. The law of armed conflicts applies, apart from 'declared wars', in cases of 'international armed conflicts' or 'occupation of territories without resistance' (hostile occupation even without hostilities); it also applies to 'non international armed conflicts' (common article 3). All these concepts, but the first one, 'declared war', are objectively defined and do not depend on a declaration or on an act of recognition. Thus, for example, the concept of 'armed conflict' makes reference to effective hostile contacts between armed forces, or even simply to the existence of wounded and sick, prisoners of war, enemy civilians in need of protection (international armed conflicts); or to a military organization of the armed forces and a certain intensity of the armed contest (non-international armed conflicts). If there is such a situation on the field, which is to be objectively determined through the key concept of

the modern law, i.e. effectiveness, then the law of armed conflict applies. It is not by accident that the term 'law of war' was now progressively abandoned in favor of the larger term 'law of armed conflict', in order precisely to underscore this shift from a subjective to an objective system. The concept of 'war' essentially depended on a subjective will to be at war; 'armed conflict' refers to a fact on the ground. The main aim of this shift is to ensure the applicability of the IHL to all situations of effective hostile contacts in favor of the protected persons. This reflects the already discussed major shift of the law from military matters (pre-1949) to the humanitarian protection of the victims of the war (post-1949). Lacunae in applicability could easily be accepted before 1949, when the questions turned around military matters to be sorted out between professional armies; since 1949, lacunae in protection could no longer be accepted, in view of the new paramount humanitarian aim of the law.[17] No victim may be left without protection because of legal subtleties turning around the proper concept of war![18]

Thus, overall, the Geneva law is geared towards gapless 'protection' of potential war victims from abuses by belligerents (i.e. especially for persons under the control of the adverse belligerent). It appears understandable that this new outlook of IHL predestined it to enter into fruitful relations with the growing arm of international HRL, at least from the moment that HRL became consolidated into a positive body of international law.

3. TRACES OF CROSS-REFERENCE IN THE TRAVAUX PRÉPARATOIRES: THE MAKING OF THE DECLARATION AND OF THE CONVENTIONS[19]

3.1 Universal Declaration

During the preparation of the Universal Declaration of 1948,[20] the issue of IHL was only very cursorily raised. In contrast with the Geneva Conventions and HRL, it is first of all in the general outlook offered by the Preamble that armed conflicts are mentioned. In § 2 of the Preamble, it is recalled that respect for international HR is a precondition for a lasting peace, that is, for the avoidance of war.[21] However, as can immediately be seen, it is not IHL that features in this paragraph, but rather the question of the maintenance of peace. This latter question is part and parcel of the law of peace (*jus contra bellum* of the UN Charter and related customary international law). However, IHL was implicitly raised when several delegates affirmed that the protection of international HR supposes a condition of peace. This implies the view that HR are doomed to suffer if an armed conflict erupts.[22] There was further direct reference to IHL when the delegate from Lebanon stated that the fundamental rights proclaimed in the Declaration shall also be respected in time of war.[23] This point was, however, not belabored, since the general philosophy in the UN at that time was that the organization would be able to maintain the peace, and that it was self-defeating to venture into speculations that it would not be able to do so. Moreover, the Lebanese delegate did not truly refer to IHL, but rather affirmed that HRL itself should remain applicable in times

of armed conflict. There were no further mentions of 'armed conflicts' and their legal regulation during the debates. The question of derogation of HR in periods of public emergency (including war) was left to the elaboration of the Covenant of HR; it was not thought fit to enter into such details in the context of the Declaration.

3.2 Geneva Conventions

During the making of the GC, mentions of international HRL were almost as rare as mentions of armed conflicts and IHL in the context of the Declaration. The main item on which HRL appeared was the Preamble,[24] that is, a non-operational provision stating the general aims and underlying philosophy of the four conventions. The representative of the Holy See wanted to insert into the Preamble phrases such as 'le respect de la personne et de la dignité humaines';[25] there was finally an amendment for inserting the words 'droit humain universel'[26] ('universal human law'). Moreover, a series of delegates stressed that particularly GC IV, on civilians, should be viewed in the light of the Universal Declaration, and that a mention of this fact in its Preamble would be useful.[27] Another place where the question of international HRL was raised was common article 3 to the GC. This enshrined the minimum principles of humanity applicable in all armed conflicts (and even beyond), including particularly non-international armed conflicts. The Special Committee of the Second Commission of the Conference had proposed to add a third paragraph to article 3 in the prisoners of war convention to the effect that if the benefits of the convention could not be extended to a prisoner, this person should in any event remain under the safeguard of the principles on human rights as flowing from the rules established between civilized nations.[28] The link of this proposal with the Martens Clause is apparent. The Danish delegate further underscored that common article 3 should be understood as not affecting in any way the protections an individual could hold under other sources of international law, in particular international HRL.[29] Finally, international HRL was mentioned in the context of the protection of the civilian population in occupied territories. For the Mexican delegate, a clause would have to be inserted into GC IV, providing that the occupying power could modify the local legislation only if it was contrary to the principles of the Universal Declaration.[30] The most solemn invocation of HR occurred, however, during the ceremony for signature of the GC. Mr Petitpierre, from Switzerland, stressed the parallelism and common ideals of the Universal Declaration and the Geneva Conventions. He further uttered the conviction that certain rights recognized by the Declaration had been inserted into the GC.[31]

Overall, it can thus be said that the two sets of texts were not cast into the mould of complete mutual ignorance, but it must also be recognized that the cross-fertilizations between them remained extremely marginal. In the late 1940s, IHL and international HRL were set largely on separate tracks. Their meetings were at once short, exceptional and marginal.

3.3 Legal Writings

Legal doctrine of the 1940s, and 1950s' writing on HRL, hardly mentions IHL at all, being utterly averse to war (at most it is recalled that HRL applies or does not apply in

time of armed conflict). Legal writers specializing in IHL rarely mentioned international HRL, which they considered at once too young (and still largely non-positive), too uncertain, too impractical and too political. It was given little place in the centuries-old edifice of the law of war. At the same time, the shift of the law of war to an IHL perspective, in the narrow sense of the term – especially in GC IV dealing with civilians – slowly opened the door to building bridges. What could be closer, within IHL, to HRL, than the suffering 'civilian', the defenseless human being facing the arbitrary measures of war? To be sure, GC IV does not protect all civilians whatever their nationality; it is not about 'all human beings' as typically HRL is; it is rather mainly geared to the protection of adverse or enemy civilians. However, there is assuredly some family link between the two, the 'civilian' and the 'human being'. It is indeed in the context of GC IV that mentions of international HRL are most frequently made in the late 1940s and 1950s.[32] Another aspect over which the two bodies of the law were often linked is common article 3 to the GC.[33] Moreover, Pictet's Commentaries contain a number of mentions of HRL, for example in the context of the general treatment of protected persons, of torture or fair trial.[34] A US military lawyer in an American Society of International Law meeting also favorably mentioned HRL. He compared the GC to 'human rights operating on the wartime scene'.[35] Finally, G.I.A.D. Draper emphatically mentions HRL in the two most obvious contexts, namely the civilian Convention IV ('a legal charter of fundamental and detailed human rights in time of armed conflict'), and common article 3 (implicitly treated as a sort of declaration of human rights in miniature).[36]

4. REASONS FOR INITIAL SEPARATISM

What were the main reasons for the quite neat separatism prevailing in the 1940s and 1950s? There are a series of reasons, warranting some short analysis.[37]

(1) *Time Lag in the Modified Conception of IHL.* In the late 1940s, the law of warfare was still seen essentially through the lens of the old military law that it had previously been. The GC of 1949 were still to display their discreetly subversive action in order to transform this age-old conception and to instill into people's minds a fresh orientation towards a humanitarian law properly so called (centered on protected persons). It is manifest that a military conception of the law of armed conflict favors maintaining a gulf between it and international HRL, whereas a humanitarian conception of IHL facilitates a co-operative conjunction of both branches of the law. There is in this regard a confirmation of the well-known principle that ideological conceptions do not change overnight, but do need some time to adapt to new realities. Thus, a new conception, such as a shift from a militarily-oriented law to a protected persons-oriented law, will need some years to really take root in the minds of the policy-makers and specialized lawyers. This time lag is inevitable. It operated during the 1950s.

(2) *Infancy of International HRL.* In the 1940s and 1950s, international HRL was still in its infancy. There was hardly any positive law in this new area of regulation. The Universal Declaration is a non-binding resolution, that is, a recommendation of the UN General Assembly. The Covenants had not yet been adopted. On the universal level,

there existed only some scattered conventions dealing directly (e.g. issues of statelessness) or indirectly (e.g. genocide as a criminal offence) with human rights. The power of the UN itself to deal with HR was largely limited to 'promoting' HR,[38] a term which has led to much quibbling in the context of the domestic jurisdiction clause inserted in article 2, § 7, of the Charter. The power of the UN bodies to take a direct stand on concrete human rights violations has been contested during all the years under scrutiny here. A customary HRL hardly existed, apart from perhaps the rule of non-discrimination contained in article 1, § 3, of the UN Charter. Therefore, an international HRL was at best viewed by international lawyers as a law in *statu nascendi* which was not yet a positive part of international law. It can be understood that therefore no fruitful interactions could be constructed with a branch of the law such as the law of armed conflicts, which had a distinguished pedigree in international law, and was codified in a series of undoubtedly hard law texts. HRL would first have to leave its infancy stage and be consolidated as a true legal body, before being able to meaningfully enter into relations with IHL.

(3) *Distinct 'Guilds' of Lawyers*. IHL and HRL have initially been championed by neatly distinct classes of lawyers, who somewhat mistrust each other. The law of armed conflict (only recently shifted to IHL) was essentially the business of military lawyers working for the State. Moreover, the law of armed conflict was essentially a technical body of rules for hostile relations of a State with other polities. The lawyers practicing it were essentially pragmatic and not too politicized. These persons, in the 1940s and 1950s, were as remote as could be imagined from the world of human rights law, when they were not hostile to it. In their circles, sympathy for HR was rare; neutrality frequent; benevolent neutrality existed; and outright skepticism was not at all uncommon. Conversely, HRL had been for centuries a product of Enlightenment thinking and ultimately of political movements fighting for the causes of man in civil society. The orientation of the persons championing such causes was profoundly political. Their action was inscribed at the heart of legal-political reform of civil society. Civil society is about peace; it is not a natural society, with its endemic war. War is thus utterly disliked by HR lawyers and ideologists. Quite naturally, at the international level, the movement of HR was since its beginnings heavily politicized (notably in the UNGA debates). This could only arouse the skepticism of the military lawyers, who feared such 'pollution' of their branch of age-old law. Conversely, the HR lawyers, utterly disliking war, could not but be highly unenthusiastic about a 'law of war', considering it to be a sort of cynical misnomer. The fact cannot be escaped that the concrete law is made by human beings; their state of mind profoundly influences its shape. And the state of mind in the relevant circles in the 1940s and 1950s was favorable to the separation, not the convergence, of HRL and IHL.

(4) *Distinct Institutional Backgrounds*. International HRL was at the time under scrutiny essentially developed within the UN political organs; the ICRC guarded IHL over the same period. Both organizations at that time distrusted each other and did not seek close co-operation. The ICRC feared that an opening of IHL to the new HRL utterances at the UN would politicize this branch of the law and hence would discredit it in military circles and deprive it of its operational character. The law of armed conflict is made for a time of utmost emergency, where hostility between States and peoples is pitched at its maximum level. In such a highly delicate context, any effort to

make the law operational must strive for keeping it as aloof as possible from staunch political debates. The law of armed conflict thus has the best chance to be applied if it is considered a technical law made by specialists of war and well-tailored to the real needs of fighting armies, occupying States, etc. Conversely, the UN did not welcome the efforts of the ICRC to prepare for and draft rules for war. Such a stance somewhere suggested doubts in the capacity of the world organization to carry out its principal aim which was (and is) to maintain the peace. This quite problematic argument, known already in the League of Nations phase,[39] was indeed used in 1949 by the International Law Commission in order to refuse consideration of the law of armed conflict.[40] These institutional obstacles had first to be overcome. This would inevitably take some time.

(5) *Problems Related to the Material Scope of Application*. According to the predominant conception of the period under scrutiny, international HRL applied in peacetime, and IHL applied in times of armed conflicts. The two were thus thought to be mutually exclusive. The *jus belli* took over when the peace was breached; HRL ruled when peace was still present. It is the considerable upsurge of non-international armed conflicts (civil wars) that progressively persuaded States and international organs of the necessity to apply HRL to internal armed conflicts. That was the only way to provide some legal protection to the suffering civilians, since common article 3 of the GC IV was too sketchy to be of sufficient help (and moreover concerned mainly persons *hors de combat* in the immediate control of a belligerent, not the civilians at large). In order to affirm the applicability of international HRL to periods of armed conflict, the derogation clauses for 'times of emergency' contained in HR Conventions[41] were now read as confirming that HRL would have to apply in times of internal warfare. Why adopt a clause suggesting that HRL normally applies, since States may only derogate from certain guarantees in times of 'emergency', if HRL did from the very beginning, *ipso facto* and *ipso jure*, not apply in times of emergency? That would have been contradictory. Was 'war' not the most obvious example of an emergency situation? To the foregoing, it must be added that in the period under consideration (the 1940s and 1950s) HRL was held to apply territorially and not extraterritorially. States assumed their HRL obligations for the territories under their jurisdiction in peacetime, thus excluding occupied territories. This was interpreted narrowly as meaning the ordinary and plenary jurisdiction of territorial sovereignty. It is only later that the concept of a split and partial jurisdiction abroad was advocated, so that HRL obligations could be exported to foreign territories according to the different types of State functions performed there, such as abductions, military occupation, holding persons in captivity, raiding operations, etc. Even today, the precise extent of such an outwardly projected jurisdiction is controversial, as the unhappy ECtHR *Bankovic*-case has illustrated.[42]

All these factors, among others, explain why IHL and international HRL largely ignored each other in the formative stage of the 1940s and 1950s. The situation was, however, soon to change.

5. REASONS FOR PROGRESSIVE CONVERGENCE

A variety of motives progressively led to an increasingly stronger convergence of IHL and international HRL. The uncertainties and gaps of IHL have been filled by an increasingly strong international HRL during the 1960s and 1970s. After the two Covenants of 1966 had been adopted, international HRL had become a fully-fledged positive international law. The sweeping character of the Covenants decisively rolled back the notion of domestic jurisdiction in this area. Gone were the debates of the 1950s to determine to what extent the UN could act in the context of the 'promotion' and 'study' of human rights. The heyday of HRL was beginning. The fact that warfare occurred during this later time-span mainly in the form of non-international armed conflicts, for which there existed hardly any norms of applicable IHL, explains why HRL quickly took the lead in the progressive legal development of the protection of persons during armed conflict. As one author[43] wrote in 1972, the law of armed conflict or IHL evolved since 1949 (and up to the 1970s) essentially under the banner of human rights law and of resolutions of the UN General Assembly. Let us consider what political, ideological and legal tectonic shifts built up an initially narrow bridge between the two bodies of the law, before that bridge expanded into a comfortable six-lane highway.

(1) *The Gently 'Subversive' Action of the Geneva Conventions of 1949*. The adoption of the GC, and especially of GC IV on civilians, progressively ventilated a new conception of the old law of warfare, namely a 'humanitarian' law for protected persons. A common ground was thus created for HRL and IHL, both predicated, totally or at least partially, on the protection of the human. As already discussed, GC IV most visibly bears the hallmark of the shift: it codifies a 'non-military' subject-area; the civilian is typically the innocent (*non nocentes*), the person not bearing arms, the defenseless individual facing military violence. This situation of persons to be protected against State-originating violence corresponds quite ideally to the genetic code of many HR. Seminal relationships could thus be constructed between IHL and HRL in this area. It therefore comes as no surprise that the General Assembly of the UN could build on both sources, GC IV and international HRL, in its resolutions about the occupied territories resulting from the 1967 Israeli–Arab war. The new conceptions of the GC thus went a long way to prepare and then to foster a closer knit of relationships between the two branches of the law considered here.

(2) *The Upsurge of Non-International Armed Conflicts*. Due to the intricate Cold War equilibrium of powers, international warfare was quite rare in the period under review. Some international armed conflicts erupted, such as those in Korea (1950), India–China (1962), Morocco–Algeria (1962), India–Pakistan (1965), or in the Vietnam of the 1960s. However, non-international armed conflicts (sometimes partially internationalized) were incomparably more frequent, especially in Asia and Africa. These were, to some extent, 'wars by proxy' of the two Superpowers, who confronted each other through governments and rebel movements in the so-called third world.[44] At the time, IHL contained only common article 3 for dealing with these highly complex civil wars which caused intense suffering (e.g. the well-known Nigeria/Biafra war in 1967). It was here strongly felt that the growing arm of international HRL could fill some gaps left glaringly open by IHL.

(3) *Other 'Untrue' Gaps in IHL*. Under the lead of the international HRL movement, other gaps within the law of armed conflict were identified and subjected to an attempt at closing them. These gaps were not true gaps, that is, an absence of legal answers on questions where such a legal answer should exist. They were rather untrue or ideological gaps, since the answer provided by the traditional law of armed conflicts was no longer thought to be appropriate, rather than simply lacking. The law was held to be defective with respect to the enhanced level of protection desired for war victims. Such defaults were identified in the prohibition of certain weapons of indiscriminate reach; or through the attempt at narrowing the scope of 'military necessity' clauses, of allowed reprisals, etc.[45] Overall, the HRL movement was used to push back the State-centeredness of the old law of warfare, ushering in a more welcome, new, individual-oriented approach.[46] HRL here exerted pressure on IHL.

(4) *The Fading Away of the old Mistrust Between the ICRC and the UN*. Faced with the enormous suffering of the civilian population in the protracted conflicts in Africa and Asia, the UN showed increasing interest in providing them with some material, but also some legal, assistance. Its old, somewhat naïve, conception, whereby the UN should not deal with wartime protections but only fight, *en amont*, for maintaining the peace, had had its time. Thus, the UN now convened the Teheran Conference – on 'human rights in armed conflicts' (1968)[47] – at the very time of the Nigerian disaster. Following that Conference, a series of reports by the Secretary General and resolutions of the General Assembly of the UN were devoted to the topic of furthering human rights in times of armed conflicts.[48] It had become accepted that HRL does not apply only in times of peace. By this process within the UN, the question of relationships between the two branches of the law had been plainly posed and could no longer be escaped. It is also from this time that the normalization of the relations between the UN and the ICRC dates. The ICRC could not remain aloof from the discussions in the UN on a subject matter, which interested it at the highest degree. Thus, an agreement for close collaboration was eventually concluded at the end of the 1960s.[49]

(5) *The Adoption of the Two Human Rights Covenants of 1966*. With the adoption of the Covenants on Civil and Political Rights (Covenant II), and on Social, Economic and Cultural Rights (Covenant I), the universal HRL movement has taken the last step to become a fully-fledged positive law. The question of the application of this HRL in times of armed conflict now appeared on the very level of positive law. Thus Covenant II on Civil and Political Rights contains a clause, in article 4, for suspension of some of its HR guarantees in times of public emergency.[50] It thereby supposed that the rights enshrined in the Convention would apply also in states of emergency, unless and to the extent that a State party had made a declaration of derogation within the limits imposed by article 4. This was quickly turned into an admission that HR applied in times of armed conflict.[51] The new interpretation just presented was emphatically confirmed in the Tehran Conference. This evolution brought HRL plainly in the halls hitherto reserved for the law of armed conflict. At least, the question of interactions between the two bodies of the law could no longer be ignored.

All these factors, among others, pulled consistently towards a convergence and some form of co-operation between both branches of the law. It will be left to the future to figure out the exact lines of that co-operation. It must be said that this has not been entirely successful up to now. We are still in the phase where the two tectonic plates are

shifting and adjusting to one another. Probably, the question is too complex and shifting to ever receive a definitive answer.

6. CONCLUSION: OUTLOOK ON THE RELATIONSHIPS BETWEEN HRL AND IHL

The IHL of the Geneva period is rooted in the ideal of 'humanitarianism'. Hence, progressive interrelationships with HRL quickly became unavoidable. The interaction of the two areas of the law, IHL and HRL, has today become at once pervasive, intimate and highly sophisticated.[52] In some areas, HRL complements IHL; in other areas, IHL strengthens or inspires HRL. One branch of the law frequently serves to interpret the other. This is the case with respect to the detention of protected persons, fair trial, occupied territories, etc. The question as to the limits of the relationship is also asked: where does welcome co-operation end and where does self-defeating promiscuity start? Where do fruitful complements stop and where do cancerous metastases begin? Should it not be said: co-operation yes, fusion and erasing of the differences no? But if that is accepted, where is the line to be drawn? Moreover, the issue of *lex specialis* (in a '*compleat*' version rather than in a '*derogat*' version, that is, as mutual complements not as mutual derogations) has been raised by the ICJ and then by legal doctrine.[53] It opens up an array of further intricate questions.

Today, the existence of the many HRL monitoring bodies and tribunals also accounts for the contribution of HRL to the protection of persons in the context of armed conflicts. Since there are no true monitoring bodies (and even fewer tribunals) for the respect of IHL, it is quite natural to bring abuses of force during armed conflicts within the ambit of HRL, and to seek the jurisdiction of a HRL court in order to ensure a sanction.[54]

Legal doctrine has ventured subtle and multiple comments upon the relationships of the two areas, and although it is beyond the scope of this introductory and historical chapter to go into them, many of these aspects will be discussed in subsequent topical contributions to this Handbook. The only point which needs to be stressed at this juncture, is how the two areas of the law under consideration have undergone a profound technical, ideological and structural transformation since 1945, which in turn has cast their mutual relations in an entirely new light. Hardly any branches of international law have undergone such changes; hardly any have proved to be so chameleon-like. Thus, dealing with the relations of IHL and HRL is first of all dealing with the profound nature and vision of each of these branches at a given moment in history. It allows, by contrast, a greatly enhanced understanding of where we stand today and why. Essentially, IHL shifted at least partially from 'military' law to 'humanitarian' law (protection of war victims); this humanitarian law progressively opened itself to human rights law. The Martens Clause now found a fertile soil for growth and grew in importance, whereas the rule for residual freedom of the State was resolutely pushed back (i.e. the old rule that 'any act not prohibited is permitted'). Conversely, international HRL shifted from an 'aspiration-law', enmeshed in politics, into a fully-fledged branch of positive international law, albeit with some specificities (e.g. the existence of monitoring organs, their mostly recommendatory actions, etc.).

The 'humanization' of the law of armed conflict and the 'positivation' of HRL opened the way for a partial merger of the two areas of the law, each one making its distinct but joint contribution to the attempt to create an optimum protection for persons and property during the distressing reality of armed turmoil. Overall, this represents the most powerful attempt of humanity to impose some barriers to the barbarity of war by providing some humane regulation to wartime situations. This in turn responds to the quest of modern man towards securing, as far as possible, the goal of human dignity. We are here confronted with a distinct cultural effort, fitting so graphically the civilization ideals of the end of the 19th and the second half of the 20th centuries. It remains to be seen to what extent the man of the 21st century will remain indebted to this outstanding (if not always efficient or effective) edifice of legal-political craftsmanship.

NOTES

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1. For quite obvious political reasons the US government has shown restraint and fear in the face of such an extension of HRL, e.g., in occupied territories or in Guantanamo situations. See H.J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law* 99 (2005): 119ff.
2. See, e.g., R. Kolb and S. Vité, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuels* (Brussels: Bruylant, 2009).
3. H. Meyrowitz, 'Le droit de la guerre et les droits de l'homme', *Revue du droit public et de la science politique en France et à l'étranger* 88 (1972): 1095ff.
4. To this effect, see the present writer's presentation in the EPIL, online: 'Human Rights and Humanitarian Law', in *Max Planck Encyclopaedia of Public International Law* (2008), available at http://www.mpepil.com (accessed 5 February 2012). See also this contribution for an extended bibliography.
5. See, e.g., E. Opocher, *Lezioni di filosofia del diritto* (Padua: CEDAM, 1983), 101ff., 135ff.
6. See, e.g., J. Locke, *Two Treatises on Government* (1690), II, 123ff. On the subject-matter, see P. Pavan, 'Diritto dell'uomo e diritto natural', *in Apollinaris* XXXIX (1996), 355ff.; F. Castberg, 'Natural Law and Human Rights', *Revue des droits de l'homme* 1 (1968): 14ff.; R. Marcic, *Geschichte der Rechtsphilosophie* (Freiburg im Breisgau: Rombach, 1971), 67ff.; E.B.F Midgley, 'Natural Law and Fundamental Rights', *American Journal on Jurisprudence* 21 (1976): 144ff.; G. Oestreich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriss*, 2nd edition (Berlin: Duncker & Humblot, 1978); M.C. Peces Barba, *Teoria dei diritti fondamentali* (Milan: Giuffrè, 1993); D. Merten and H.-J. Papier, eds., *Handbuch der Grundrechte*, Vol. I, *Entwicklung und Grundlagen* (Heidelberg: Müller, 2004), 3ff.; A. Facchi, *Breve storia dei diritti umani* (Bologna: Il Mulino, 2007); F. Rigaux, 'Les fondements philosophiques des droits de l'homme', *Revue trimestrielle des droits de l'homme* 18 (2007): 307ff.
7. E.g., the Petition of Rights (England, 1628) or the Habeas Corpus Act (England, 1679); the Virginia Bill of Rights (1776); or the *Déclaration des droits de l'homme et du citoyen* (France, 1789). Such a Bill of Rights was proposed also for international law (and it became reality with the Declaration of 1948): H. Lauterpacht, *An International Bill of the Rights of Man* (London: Columbia University Press, 1945). On the English Bills of Rights, see W. Hubatsch, *Die englischen Freiheitsrechte* (Hanover: Pfeiffer, 1962). On the US Bills of Rights, see R.A. Rutland, *The Birth of the Bill of Rights*, 1776–1791 (Chapel Hill: University of North Carolina Press, 1955); G. Ostrander, *The Rights of Man in America, 1606–1861* (Columbia: University of Missouri Press, 1960). On the French Declaration, see G. Del Vecchio, *La déclaration des droits de l'homme et du citoyen dans la révolution française* (Paris: Librairie générale de droit et de jurisprudence, 1968); S.J. Samwer, *Die französische Erklärung der Menschen-und Bürgerrechte von 1789–91* (Hamburg: Heitmann, 1970); S. Rials, La déclaration des droits de l'homme et du citoyen (Paris: Hachette, 1988); J. Morange, *La déclaration des droits de l'homme et du citoyen* (Paris: PUF, 1988); C.-A. Colliard, ed., *La Déclaration des droits de l'homme et du citoyen de 1789* (Paris: Documentation française, 1990).

8. L. Oppenheim, *International Law*, Vol. I, *Peace*, 3rd edition, ed. R.F. Roxburgh (London: Longmans, Green & Co., 1921), 460.
9. See R. Cassin, 'La déclaration universelle et la mise en œuvre des droits de l'homme', *Receuil des cours de l'Académie de droit international de La Haye (Hague Recueil)* 79 (1951-II): 237ff.
10. On this important Declaration, see A. Eide et al., eds, *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992). See also Cassin, *supra* note 9, at 237ff.; A. Verdoort, *Naissance et signification de la Déclaration universelle des droits de l'homme* (Leuwen and Paris: Société d'Études Morales, Sociales et Juridiques, 1964); N. Robinson, *The Universal Declaration of Human Rights* (New York: Institute of Jewish Affairs, World Jewish Congress, 1958). On the draft Declaration, see R. Brunet, *La garantie internationale des droits de l'homme* (Geneva: Ch. Grasset, 1947), 197ff. For a recent account, see U. Villani, ed., *A tutti in membri della famiglia umana, Per il 60 anniversario della Dichiarazione universale* (Milan: Giuffrè, 2009).
11. See, at the time of the conclusion, J. Mourgeon, 'Les Pactes internationaux relatifs aux droits de l'homme', *AFDI* 13 (1967): 326ff.
12. On the Geneva Conventions of 1949, see J.A.C. Gutteridge, 'The Geneva Conventions of 1949', *British Yearbook of International Law* 26 (1949): 294ff.; L. Orcasitas Llorente, 'La Conferencia de Ginebra de 1949 para mejorar la suerte de la victimas de la guerra', *Revista española de derecho internacional* 2 (1949): 605ff.; F. Siordet, 'La Conférence diplomatique de Genève', *Revue internationale de la Croix-Rouge* 31 (1949): 475ff., 554ff.; J. Pictet, 'La Croix-Rouge et les Conventions de Genève', *RCADI* 76 (1950-I): 1ff.; M. Bourquin, 'Les Conventions de Genève du 12 août 1949', *Revue internationale de la Croix-Rouge* 32 (1950): 90ff.; E. Djafari, *Les Conventions de Genève du 12 août 1949 sur la protection des victimes de la guerre* (thesis, Paris, 1950); S. Tschirkovitch, 'Les nouvelles Conventions internationales de Genève relatives à la protection des victimes de la guerre du 12 août 1949', *RGDIP* 54 (1950): 97ff., 525ff.; P. De La Pradelle, *La Conférence diplomatique et les nouvelles Conventions de Genève du 12 août 1949* (Paris: Les éditions internationales, 1951); R.D. Paine, *The 1949 Geneva Conventions Concerning War Victims* (thesis, Northwestern University, Evanston, Illinois, 1951); A. Schickelé, 'L'avenir des Conventions de Genève', *Revue internationale de la Croix-Rouge* 33 (1951): 496ff.; R.T. Yingling and R.W. Ginnane, 'The Geneva Conventions of 1949', *American Journal of International Law* 46 (1952): 393ff.; J. Kunz, 'The Geneva Conventions of August 12, 1949', in *Law and Politics in the World Community*, ed. G.A. Lipsky, Part III (Berkeley and Los Angeles: University of California Press, 1953): 279ff.; E. Lodemann, 'Die Genfer Rotkreuzabkommen vom 12. August 1949', *Archiv des Völkerrechts* 4 (1953): 72ff.; G.I.A.D. Draper, *The Red Cross Conventions* (London: Stevens & Sons Limited, 1958); H. Coursier, *Cours de cinq leçons sur les Conventions de Genève* (Geneva: ICRC, 1963); G.I.A.D. Draper, 'The Geneva Conventions of 1949', *RCADI* 114 (1965-I): 59ff.; A. Maresca, *La protezione internazionale dei combattenti e dei civili: Le Convenzioni di Ginevra del 12 agosto 1949* (Milan: Giuffrè, 1965); D. Schindler, 'Die Anwendung der Genfer Rotkreuzabkommen seit 1949', *ASDI* 22 (1965): 75ff.; C. Pilloud, 'Les Conventions de Genève 1949–1969. Bilan et perspectives', *Revue internationale de la Croix-Rouge* 51 (1969): 465ff.; C. Pilloud, 'Les Conventions de Genève, 1949–1969', *Revue internationale de la Croix-Rouge* 51 (1984): 465ff.; T. Meron, 'The Geneva Conventions as Customary Law', *American Journal of International Law* 81 (1987): 348ff.; F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre* (Geneva: ICRC, 1994), 354ff.; G. Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994), 80ff.; Y. Sandoz, 'Le demi-siècle des Conventions de Genève', *Revue internationale de la Croix-Rouge* 81 (1999): 241ff.; C. Rey-Schyrr, 'Les Conventions de Genève de 1949: une percée décisive', *Revue internationale de la Croix-Rouge* 81, no. 834 (1999): 209ff.; F. Bugnion, 'Les Conventions de Genève du 12 août 1949', *RSDIE* 9 (1999): 371ff.; D. Schindler, 'Significance of the Geneva Conventions for the Contemporary World', in *A Manual of International Humanitarian Laws*, ed. N. Sanajaoba (New Delhi: Regency Publications, 2004), 42ff.; D. Forsythe, '1949 and 1999: Making the Geneva Conventions Relevant after the Cold War', in ibid., 56ff.; C. Rey-Schyrr, *De Yalta à Dien Bien Phu, Histoire du Comité international de la Croix-Rouge, 1945–1955* (Geneva: Georg, 2007), 239ff. One may further consult the commentaries to the four Geneva Conventions edited by the CICR under the direction of Jean Pictet in the 1950s: J. Pictet, ed., *Commentary I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: International Committee of the Red Cross, 1952); J. Pictet, ed., *Commentary II, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Geneva: International Committee of the Red Cross, 1960); J. Pictet, ed., *Commentary III, Geneva Convention relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1960); J. Pictet, ed.,

Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva: International Committee of the Red Cross, 1958). For the Additional Protocols of 1977, see essentially Y. Sandoz, C. Swinarski and B. Zimmermann, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987); M. Bothe, K.J. Partsch and W. Solf, ed., *New Rules for Victims of Armed Conflicts* (The Hague, Boston and London: Martinus Nijhoff Publishers, 1982).

13. See R. Kolb, 'The Main Epochs of Modern International Humanitarian Law since 1864 and their Related Dominant Legal Constructions', in *Sixty Years of Humanity: Anniversary of the Geneva Conventions of 1949*, ed. Norwegian Centre for Human Rights (forthcoming).
14. The Congress of Paris of 1856 (after the Crimean War) recognized that the declaration of war is necessary and thus required, except in the case of invasion and spontaneous self-defense: see C. Calvo, *Le droit international théorique et pratique*, 5 éd. (Paris, 1896), t. IV, 47. Declarations of war have completely fallen into disuse since 1945: see A. McDonald, 'Declarations of War and Belligerent Parties: International Law Governing Hostilities Between States and Transnational Terrorist Networks', *NILR* 54 (2007): 279ff., 287ff.
15. E.C. Stowell, *International Law* (New York: Holt, 1931), 401: '[S]ome intercourse with the insurrectionists is often necessary. In the troubled conditions of civil warfare it becomes especially urgent for other States to look out for the protection of their nationals within the zone of operations, and the economic demands of war greatly increase the trade in contraband and a variety of articles. In these circumstances, forced by the necessity of providing for effective protection of their nationals, and urged by the desire to continue and extend an authorized trade with all portions and parties of the state engaged in the conflict, other states accord what is called Recognition of Belligerency.' See also H. Wheaton, *Elements of International Law*, 8th edition (Oxford: Oceana, 1866), 35.
16. These two devices (declaration of war, recognition of belligerency) fitted perfectly into the sovereignist and positivist frame of the 19th century:(1) Humanitarian protection was not paramount – thus, gaps in protection were not felt as being inadmissible; if a particular violent contest was not formally classified as 'war' (e.g., armed reprisals), the law of war would simply not apply. The formal aspect dominated the material one.(2) The sovereign will of the different States was decisive, each State remaining free in the application of the legal rules according to its vision of a particular violent struggle (if it declared or recognized the war, there was applicability of the law of war; if not, there was no applicability of the law of war).(3) This will is expressed through a unilateral act (declaration of war, recognition of belligerency), not through an agreement between the belligerents. We here confront again a projection of the 'I' which reflects very well the already discussed paradigm of the primacy of municipal law.(4) The legal picture ensuing from such a system is fraught with relativity: the war formally exists or does not exist according to the will of each State. Thus, the war does not exist objectively but only subjectively. It must be added that the sharp edges of such a doctrine were sometimes smoothed in legal writings, e.g., by the development of a category of 'material war' to be treated as war analogously to a 'formal' or declared war. However, the essence of the system was subjective in the described sense and therefore material criteria could take hold only with many difficulties.
17. H.J. Taubenfeld, 'The Applicability of the Laws of War in Civil War', *in Law and Civil War in the Modern World*, ed. J.N. Moore (Baltimore and London: Lawbook Exchange, 1974), 502ff.
18. It may be added that the subjective aspects have, however, not completely disappeared, especially in the context of non-international armed conflicts. The governments fighting internal rebellion are often reluctant to accept that an 'armed conflict' is ongoing; they prefer to claim that they face at most internal disturbances. By this device, they seek to evade the application of international obligations under the Geneva Convention; the droit de regard of the international community and of the ICRC which this inevitably triggers (resented as interventions in internal affairs in an extremely sensitive moment); and the granting of an unwelcome political and legal status to the insurgents, henceforth treated as 'belligerents'.
19. For the details, see R. Kolb, 'Relations entre le droit international humanitaire et les droits de l'homme. Aperçu de la Déclaration universelle des droits de l'homme et des Conventions de Genève', *Revue internationale de la Croix-Rouge* 80 (1998): 437–447 (English version in R. Kolb, 'The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration on Human Rights and the 1949 Geneva Conventions', *International Review of the Red Cross* 38 (1998): 409–419). See also C. Pilloud, 'La Déclaration universelle des droits de l'homme et les Conventions internationales protégeant les victimes de la guerre', *Revue internationale de la Croix-Rouge* 31 (1949): 252ff.; J.-G. Lossier, 'La Croix-Rouge et la Déclaration

universelle des droits de l'homme', *Revue internationale de la Croix-Rouge* 31 (1949): 259ff.; D. Schindler, 'Le Comité international de la Croix-Rouge et les droits de l'homme', *Revue internationale de la Croix-Rouge* 61 (1979): 7.

20. For a synopsis of these works, see Eide et al., *supra* note 10, at 3. The work of the Third Committee of the UN General Assembly can be added: A/C.3/SR. 88–116,119–170,174–178. See also Cassin, *supra* note 9, at 271ff. Verdoort, *supra* note 10, at 45ff.; Robinson, *supra* note 10, at 25ff.; J.P. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character', in *Human Rights: Thirty Years after the Universal Declaration*, ed. B.G. Ramcharan (The Hague, Boston and London: Martinus Nijhoff, 1979), 21ff. One may also mention the *Yearbook on Human Rights for 1947* (New York: United Nations, 1949), 430ff.
21. This was proposed by France (R. Cassin): UN Doc. E/CN.4/21, 29; UN Doc. E/CN.4/21, 36; and the reaction of Mexico, UN Doc. E/CN.4/85, 8.
22. E.g., UN Doc. A/CN 3./SR. 116, 268.
23. UN Doc. A/CN.3/SR. 152, 639.
24. See also Best, *supra* note 12, at 70–71.
25. *Actes de la Conférence diplomatique de Genève de 1949*, Vol. II, sect. A, 313.
26. Ibid., 797, and see also, 676ff.
27. De Alba (Mexico), ibid., 676; De Geouffre de la Pradelle (Monaco), ibid., 677; Cohen-Salvador (France), ibid., 681, Nassif (Lebanon), ibid., 679–680. See also the remarks by the Rapporteur, ibid., 762–763.
28. Ibid., p. 455.
29. Ibid., 468: 'Rien dans le présent article ne peut être interprété de manière à priver les personnes qui tombent en dehors des clauses de cet article, de leurs droits de l'homme et notamment de leur droit de légitime défense, vis-à-vis des actes illégaux, sanctionnés par leur législation nationale en vigueur avant le commencement des hostilités ou de l'occupation' (Danish Amendment). See the critical remarks of Mr Gardner (United Kingdom), ibid., 398 and the response of Cohn, Actes … [*supra* note 25], Vol. II, sect. B, 260–261. The UK delegate indeed admitted the point: 'Le délégué au Danemark a ensuite commenté cette déclaration. Je me permets toutefois d'observer que son argumentation n'est pas tout à fait pertinente. En effet, le but de l'article 3 n'est pas de priver qui que ce soit de quoi que ce soit, mais de déterminer les personnes qui, en vertu de l'article 3, peuvent bénéficier de la protection de la Convention' (Sir R. Craigie, *Actes* …, Vol. II, sect. B, 261).
30. *Actes* … [*supra* note 25], Vol. II, sect. A, 655.
31. *Actes* … [*supra* note 25], Vol. II, sect. B, 541: 'Après-demain, nous célèbrerons l'anniversaire de la Déclaration universelle des droits de l'homme, qui fut adoptée par l'Assemblée générale des Nations Unies le 10 décembre 1948. Il nous paraît intéressant de rapprocher cette déclaration des Conventions de Genève. Certains des droits fondamentaux proclamés par elle sont à la base de nos textes: ainsi le respect de la personne humaine, garantie contre la torture, les peines ou traitements cruels, inhumains ou dégradants. Ces droits trouvent donc une sanction juridique, au moins partielle, dans les engagements contractuels que vos Gouvernements ont accepté de prendre aujourd'hui. La Déclaration universelle des droits de l'homme et les Conventions de Genève procèdent du même idéal … .'.
32. See, e.g., Gutteridge, *supra* note 12, at 325.
33. Ibid., 300: these provisions are the 'expression of concern that even in internal conflicts the observance of certain fundamental human rights be guaranteed'.
34. See R. Kolb, 'Aspects historiques de la relation entre le droit international humanitaire et les droits de l'homme', *Canadian Yearbook of International Law* 37 (1999): 74–75.
35. *Proceedings of the American Society of International Law* 43 (1949): 121.
36. Draper, *supra* note 12, at 48, see also 45. Quoted in Best, *supra* note 12, at 72.
37. See also R. Kolb, *Ius contra bellum – Précis de droit international relatif au maintien de la paix*, 2nd edition (Bâle and Brussels: Helbing & Lichtenhahn, 2009), 127–129.
38. See, e.g., U. Villani, 'La Dichiarazione 60 anni dopo', in *A tutti i membri della famiglia umana*, ed. U. Villani (Milan: Giuffrè, 2008), 20–21.
39. See Anonymous, 'The League of Nations and the Laws of War', *British Yearbook of International Law* 1 (1920–1921): 114–115; E. Dickinson, 'The New Law of Nations', *West Virginia Law Quarterly* 32 (1925–1926): 25, 29; M. Huber, 'Der Wert des Völkerrechts', *Neue Zürcher Zeitung* (20 November 1916). For the argument that devoting attention to the *jus in bello* may weaken the belief in *jus contra bellum*, see Politis (Greece) and Sokal (Poland) in the disarmament commission of the League of Nations, *Documents de la Commission préparatoire de désarmement*, series VIII (Société des Nations, 1929): 87 [Sokal], 91 [Politis]. *Contra*, Rutgers (Holland), ibid., 90. For a criticism, see A. De La

Pradelle, 'Négligera-t-on longtemps encore l'étude des lois de la guerre?', *Revue de droit international* (Paris) 12 (1933): 511ff.; J. Kunz, 'Plus de lois de la guerre?', *RGDIP* 41 (1934): 22ff., the perplexity of both authors emerging clearly through the use in both cases of question marks.

40. *YbILC* (1949): 281, sect. 18: 'It was considered that if the Commission, at the very beginning of its work, were to undertake this study [on the laws of war], public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace'. See the criticisms in *Ann. IDI* 47-I (1957): 323ff., and the opinion of the Rapporteur, J.-P.A. François ibid., 367ff. See also J. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision', *American Journal of International Law* 45 (1951): 37ff.; J. Kunz, 'The Laws of War', *American Journal of International Law* 50 (1956): 313ff.; H. Lauterpacht, 'The Revision of the Laws of War', *British Yearbook of International Law* 29 (1952): 360ff.; A.P. Sereni, *Diritto internazionale* IV (Milan: Giuffrè, 1965), 1823–1826.
41. E.g., Article 4 of the Covenant on Civil and Political Rights (1966). See M. Nowak, *UN Convention on Civil and Political Rights*, 2nd edition (Kehl and Strassburg: N.P. Engel, 2005), 83ff.
42. *Bankovic and others v. Belgium and others*, ECtHR, Application No. 52207/99, Decision on Admissibility, 12 December 2001. On extraterritorial application of HRL, see in this volume: Robert K. Goldman, 'Extraterritorial application of the human rights to life and personal liberty, including habeas corpus, during situations of armed conflict'; V. Gowlland-Debbas and G. Gaggioli, 'The relationship between international human rights and humanitarian law: an overview'. See also R. Kolb, G. Poretto and S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales, forces de paix et administrations civiles transitoires* (Bruxelles: Bruylant, 2005), at 419–428.
43. A. Migliazza, 'L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme', *RCADI* 137 (1972-III): 141ss, 189.
44. B. Duner, 'Proxy Intervention in Civil Wars', *Journal of Peace Research* (Oslo) 18 (1981): 353ff.
45. Migliazza, supra note 43, at 192ff.
46. Ibid., 207–208.
47. See D. Schindler and J. Toman, *The Law of Armed Conflicts* (Leiden and Boston: Martinus Nijhoff Publishers, 2004), 347–348. See also F. Capotorti, 'La Conferenza di Teheran sui diritti dell'uomo', *Comunità internazionale* 23 (1968): 609ff.; A. Cassese, 'La Conferenza internazionale di Teheran sui diritti dell'uomo', *Rivista di diritto internazionale* 51 (1968): 669ff.; R. Cassin, 'The Teheran Proclamation', *Revue des droits de l'homme* 1 (1968): 325ff.; V. Chkhikvadze and Y. Ostrovsky, 'International Human Rights Conference', *International Affairs* (Moscow) 14 (1968): 16–21; G. Rulli, 'La Conferenza di Teheran – La Dichiarazione universale dei diritti dell'uomo', *Civiltà cattolica* 119 (1968): 598–604; E. Lawson (ed.), *Encyclopedia of Human Rights*, 2nd edition (Washington: Taylor & Francis, 1996), 1433–1434.
48. A/RES/2444 (XXIII), 19 December 1968; A/RES/2597 (XXIV), 16 December 1969; A/RES/2674 (XXV), 9 December 1970; A/RES/2675 (XXV), 9 December 1970, A/RES/2676 (XXV), 9 December 1970; A/RES/2677 (XXV), 9 December 1970; A/RES/2852 (XXVI), 20 December 1971; A/RES/3032 (XXVII), 18 December 1972; A/RES/3102 (XXVIII), 12 December 1973; A/RES/3103 (XXVIII), 12 December 1973; A/RES/3318 (XXIX), 14 December 1974. As to the reports of the Secretary General: Report of 20th November 1969, A/7720 and 18th September 1970, A/8052. See also the reports under: Doc. A/8589 (3rd Committee, 1971); Doc. A/8966 (6th Committee, 1972); Doc. A/9412 (6th Committee, 1973); Doc. A/9948 (6th Committee, 1974); Doc. A/10463 (6th Committee, 1975). See also Docs A/31/295 (1976) and A/32/396 (1977). See also the Reports of S. McBride at the San Remo Institute: *Actes du Congrès international de droit humanitaire*, Conférence internationale sur le droit humanitaire de San Remo, 1970, San Remo, 1971. For more details, see the brief account in Kolb, supra note 37, at 130–132.
49. See Migliazza, *supra* note 43, at 171, 231.
50. Nowak, *supra* note 41, at 83ff.
51. Ibid.
52. See, among so many other authors, L. Doswald-Beck and S. Vité, 'International Humanitarian Law and Human Rights Law', *International Review of the Red Cross* 293 (1993): 94ff.; R. Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002); H.P. Gasser, 'International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture or Mutual Exclusion?', *German Yearbook of International Law* 45 (2002): 149ff.; T. Meron, 'International Law in the Age of Human Rights', *RCADI* 310 (2003): 68ff.; H.-J. Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian

Law', *International Review of the Red Cross* 856 (2004): 789ff.; F.F. Martin, S.J. Schnably, R. Wilson, J. Simon and M. Tushnet, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge: Cambridge University Press, 2006); R. Arnold and N. Quénivet, ed., *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Boston: Brill, 2008). The ICJ itself analyses situations under both headings, HRL and IHL, adding one perspective to the other. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, sect. 89ff., 102ff.; and *Armed Activities on the Territory of the Congo case* (D.R. Congo v. Uganda), Judgment, I.C.J. Reports 2005, sect. 181ff., 216ff.

53. On the Court's treatment of lex specialis, see *Threat or Use of Nuclear Weapons*, Advisory Opinion to the UNGA, I.C.J. Reports 1996, sect. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, sect. 106; *Armed Activities on the Territory of the Congo case* (D.R. Congo v. Uganda), Judgment, I.C.J. Reports 2005, sect. 216. See also G. Gaggioli and R. Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights', *Israel Yearbook on Human Rights* 37 (2007): 118 et seq.

54. As to the contribution of the ECtHR, see, e.g., G. Gaggioli and R. Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights', *Israel Yearbook on Human Rights* 37 (2007): 115ff. See generally the case-law of these tribunals, in particular: (1) UN Human Rights Committee: *Pedro Pablo Camargo v. Colombia* [known as the *Guerrero case*], HRC, 31 March 1982 (UN Doc. CCPR/C/15/D/45/1979); *Baboeram et al. v. Suriname*, HRC, 4 April 1985 (UN Doc. CCPR/C/24/D/146/1983); Concluding Observations on Israel, HRC, 21 August 2003 (UN Doc. CCPR/CO/78/ISR); Concluding Observations on United States, HRC, 15 September 2006 (UN Doc. CCPR/C/USA/CO/3); (2) European Commission of Human Rights: *Cyprus v. Turkey*, Application Nos 6780/74 and 6950/75, Judgment of 10 July 1976; (3) European Court of Human Rights: *Kaya v. Turkey*, ECtHR, Application No. 22535/93, Judgment of 19 February 1998; *Ergi v. Turkey*, ECtHR, Application No. 23818/94, Judgment of 28 July 1998; *Ahmet Özkan and others v. Turkey*, ECtHR, Application No. 21689/93, Judgment of 6 April 2004; *Isayeva, Yussoupova and Bazayeva v. Russia*, ECtHR, Application No. 57947/00, Judgment of 24 February 2005; *Isayeva v. Russia*, ECtHR, Application No. 57950/00, Judgment of 24 February 2005; *Khatsiyeva v. Russia*, ECtHR, Application No. 5108/02, Judgment of 17 January 2008; *Akkum and others v. Turkey*, ECtHR, Application No. 21894/93, Judgment of 24 March 2005; (4) Inter-American Commission of Human Rights: *Arturo Ribon Avila v. Colombia*, IACommHR, Case 11.142, Report No. 26/97, 30 September 1997; *Juan Carlos Abella v. Argentina* [known as the *La Tablada case*], IACommHR, Case 11.137, Report No. 55/97, 18 November 1997; *Guerrero et al. v. Colombia*, IACommHR, Case 11.519, Report No.61/99, 13 April 1999; *Coard et al. v. United States*, IACommHR, Case 10.951, Report No. 109/99, 29 September 1999; *Report on Terrorism and Human Rights*, IACommHR, 22 October 2002; (5) Inter-American Court of Human Rights: *Bámaca-Velásquez v. Guatemala*, IACtHR, Merits, Judgment of 25 November 2000; *Mapiripán Massacre v. Colombia*, IACtHR, Merits, reparations and costs, Judgment of 15 September 2005; *Pueblo Bello Massacre v. Colombia*, IACtHR, Merits, reparations and costs, Judgment of 31 January 2006; *Ituango Massacre v. Colombia*, IACtHR, Preliminary objections, merits, reparations and costs, Judgment of 1 July 2006; *La Rochela v. Colombia*, IACtHR, Merits, reparations and costs, Judgment of 11 May 2007; *Myrna Mack Chang v. Guatemala*, IACtHR, Merits, reparations and costs, Judgment of 25 November 2003; *Plan de Sánchez Massacre v. Guatemala*, IACtHR, Merits, Judgment of 29 April 2004; *Moiwana Community v. Suriname*, IACtHR, Preliminary objections, merits, reparations and costs, Judgment of 15 June 2005; (6) African Commission of Human and People's Rights: *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, Communication No. 74/92 (1995); *Free Legal Assistance Group and others v. Zaïre*, Communication No. 25/89, 47/90, 56/91, 100/93 (1995); *Organisation Mondiale Contre La Torture v. Rwanda,* Communication Nos 27/89, 46/91, 49/91, 99/93 (1996); *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication No. 218/98 (1998); *Amnesty International and others v. Sudan*, Communication No. 48/90, 50/91, 52/91, 89/93 (1999); *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001).