

# The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions

by Robert Kolb

Today there can no longer be any doubt: international humanitarian law and international human rights law are near relations. This oft-repeated observation must now be accepted by all. Many believe that the close relationship between these two areas existed and was perceived “from the outset”. That is not at all the case. Formerly assigned to separate legal categories, it was only under the persistent scrutiny of modern analysts that they revealed the common attributes which would seem to promise many fruitful exchanges in the future.<sup>1</sup> Let us try to clarify the situation.

There are two kinds of reasons for the almost total independence of international humanitarian law from human rights law immediately after the Second World War.<sup>2</sup> The first relate to the genesis and development

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<sup>1</sup> On this point, see “The relationship between international humanitarian law and human rights law: Bibliography”, p. 572.

<sup>2</sup> For an overall view of the development of the relationship between the two branches of international law, see A.H. Robertson, “Humanitarian law and human rights”, in C. Swinarski (éd.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge/Studies and essays on international humanitarian law and Red Cross principles, en l’honneur de/in honour of Jean Pictet*, CICR/Martinus Nijhoff, Genève/La Haye, 1984, p. 793; D. Schindler, “The International Committee of the Red Cross and human rights”, *IRRC*, No. 208, January-February 1979, p. 3.

of the branches concerned.<sup>3</sup> The law of war has its roots in Antiquity. It evolved mainly during wars between European States, and became progressively consolidated from the Middle Ages. This is one of the oldest areas of public international law; it occupies a distinguished place in the writings of the classical authors of this branch. Its international aspect is also emphasized by the contributions of Christianity and the rules of chivalry and of *jus armorum*.

Human rights are concerned with the organization of State power vis-à-vis the individual. They are the product of the theories of the Age of Enlightenment and found their natural expression in domestic constitutional law. In regard to England, mention may be made of the 1628 *Petition of Rights*, the 1679 *Habeas Corpus Act* and the 1689 *Bill of Rights*; for the United States of America, the 1776 *Virginia Bill of Rights*; for France, the 1789 *Declaration of the Rights of Man and of the Citizen*. It was only after the Second World War, as a reaction against the excesses of the Axis forces, that human rights law became part of the body of public international law. The end of the 1940s was when human rights law was first placed beside what was still called the law of war. The question of their mutual relationship within the body of international law can be considered only from that moment. But human rights law was still too young and undeveloped to be the subject of analyses, which require a better-established sphere of application and a more advanced stage of technical development.

The other reasons are institutional in nature. The most important one relates to the fact that United Nations bodies decided to exclude all discussion of the law of war from their work, because they believed that by considering that branch of law they might undermine the force of *jus contra bellum*, as proclaimed in the Charter, and would shake confidence in the ability of the world body to maintain peace.<sup>4</sup> In 1949, for example, the United Nations International Law Commission decided not to include the law of war among the subjects it would consider for codification.<sup>5</sup> This

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<sup>3</sup> See for example D. Schindler, *ibid.*, pp. 4-7.

<sup>4</sup> A. H. Robertson, *op. cit.* (note 2), p. 794; D. Schindler, *op. cit.* (note 2), p. 7; A. Migliazza, "L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme", *RCADI*, Vol. 137, 1972-III, pp. 164-165.

<sup>5</sup> *Yearbook of the International Law Commission*, 1949, p. 281, par. 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

attitude can be understood only in a post-war context; it had already existed in the 1930s.<sup>6</sup> In addition to this there was a certain dichotomy between the ICRC and the United Nations, which was only partly due to the latter's elimination of the law of war from its discussions. A more profound reason was the ICRC's determination to preserve its independence, a determination which was strengthened by the political nature of the United Nations.<sup>7</sup> Human rights, which were seen as being within the purview of the United Nations and bodies specifically set up to promote and develop those rights, were thus distanced from the concerns of the ICRC, which continued to work solely in the area of the law of war. These institutional factors affected the development of the rules: the United Nations, the guarantor of international human rights, wanted nothing to do with the law of war, while the ICRC, the guarantor of the law of war, did not want to move any closer to an essentially political organization or to human rights law which was supposed to be its expression. The result was a clear separation of the two branches.

A perusal of the preparatory work for the major instruments in these areas, which were adopted almost simultaneously at the end of the 1940s, illustrates the above. The Universal Declaration of Human Rights of 1948 completely bypasses the question of respect for human rights in armed

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maintaining peace". On this point, see the more apt comments of members of the International Law Institute, in 1957, on the reconsideration of the principles of the law of war, *Annuaire de l'Institut de droit international*, Vol. 47-I, 1957, p. 323 ff., and the opinion of the rapporteur J.-P. A. François (*ibid.*, p. 367 ff.). See also J. Kunz, "The chaotic status of the laws of war and the urgent necessity for their revision", *American Journal of International Law*, Vol. 45, 1951, p. 37 ff.; J. Kunz, "The laws of war", *ibid.*, Vol. 50, 1956, p. 313 ff.; H. Lauterpacht, "The revision of the laws of war", *British Yearbook of International Law*, Vol. 29, 1952, p. 360 ff.

<sup>6</sup> See for example the remarks made by Sokal (Poland) and Politis (Greece) in the Disarmament Commission: League of Nations, *Preparatory Committee for the Disarmament Conference*, 8th Series, 1929, pp. 87 and 91; *contra*: Rutgers (Netherlands), *ibid.*, p. 90. See also the characteristic comment of K. Strupp, *Éléments du droit international public universel, européen et américain*, Vol. II, Paris, 1930, p. 503, note 1, whereby *ius in bello* is subordinated to the preventive law of war. A.P. Sereni, *Diritto internazionale*, Vol. IV, Milan, 1965, p. 1823 ff., believes this to be an "illusion". In general, see J. Kunz, "Plus de lois de la guerre?", *Revue générale de droit international public*, Vol. 41, 1934, p. 22 ff. and p. 40 ff.

<sup>7</sup> See the amendment proposed by Woolton (United Kingdom) and adopted by the 17th International Conference of the Red Cross (Stockholm, 1948). It urged the ICRC, "in view of the non-political character of the constituent bodies of the International Red Cross, to exercise the greatest care in regulating [its] relationship with intergovernmental, governmental or non-governmental organizations". *Seventeenth International Red Cross Conference, Report*, Stockholm, 1948, p. 48.

conflicts, while at the same time human rights were scarcely mentioned during the drafting of the 1949 Geneva Conventions.<sup>8</sup>

### The 1948 Universal Declaration of Human Rights

During the drafting of the Universal Declaration of 1948,<sup>9</sup> the question of the impact of war on human rights was touched on only in exceptional cases. Paragraph 2 of the Preamble describes respect for human rights as a condition for the maintenance of peace.<sup>10</sup> This is *jus contra bellum*. There was a shift towards *jus in bello* when a few delegates indicated in passing, in a very secondary way, that the rights envisaged by the Declaration presuppose a state of peace. In the long debates in the Third Committee of the United Nations, for example, Jiménez de Aréchaga expressed the view that human rights have to “govern, in times of peace, an international community based on the principles of the United Nations”.<sup>11</sup> A similar comment was made by Campos Ortiz, the Mexican delegate, in the plenary meetings of the Third Session of the United Nations General Assembly, when he used the expression “in a peaceful world”.<sup>12</sup> Only the delegate of Lebanon, Mr Azkoul, explicitly went further. Speaking on Article 26 of the draft,<sup>13</sup> he said that fundamental human rights, as set out in the Declaration, should also be guaranteed in time of war.<sup>14</sup> The absence of any discussion of the problem of war can be explained by the general philosophy which prevailed within the United Nations at the time. There

<sup>8</sup> D. Schindler, *op. cit.* (note 2), p. 7. See also J. G. Lossier, “The Red Cross and the International (sic) Declaration of Human Rights”, *IRRC*, No. 5, May 1949, p. 184-189.

<sup>9</sup> For a synoptic table of the stages in the preparatory work, see A. Eide *et al.* (eds), *The Universal Declaration of Human Rights: A commentary*, Oslo, 1992, p. 3. On the debates in the Third Committee, see doc. A/C.43/SR.88-116, 119-170, 174-178. On the older literature: Economic and Social Council, *Bibliography on the Protection of Human Rights*, E/CN.4/540 (1951), pp. 36-40.

<sup>10</sup> See the *Report of the Drafting Committee to the Commission on Human Rights, suggestions submitted by the representative of France* (R. Cassin), doc. E.CN.4/21, pp. 48 and 68; see also the comment of Mexico, doc. E/CN.4/85, p. 8.

<sup>11</sup> Doc. A/C.3/SR.116, p. 268.

<sup>12</sup> “...in a peaceful world, it was essential to ensure respect for human rights.” *UN General Assembly, Plenary sessions, Third session, 181st meeting*, p. 886.

<sup>13</sup> Draft Article 26 read as follows: “Everyone is entitled to a good social and international order in which the rights and freedoms set out in this Declaration can be fully realized”. See *Economic and Social Council, Third Year, Seventh Session, Supplement No. 2*, p. 11.

<sup>14</sup> Doc. A/C.3/SR.152, p. 639.

seemed to be a tacit but nevertheless general consensus that the Declaration was intended for times of peace, of which the United Nations was the guarantor.

In addition, there was a more technical reason: the draft codification of human rights law covered two branches. On the one hand, the aim was to proclaim a solemn and succinct declaration modelled on the great declarations of national rights. As a proclamation of the United Nations General Assembly, the text would have been devoid of binding legal force. On the other hand, what was needed was a binding instrument, a much more detailed text taking up all the rights proclaimed previously, giving them full weight and expressing them in the form of a positive rule of law. That was a draft international covenant on human rights.<sup>15</sup> It was often emphasized during the preparatory work that the Declaration was not a legislative text, that it was not the Covenant, and that consequently, if it was to preserve its force and its own specific role, it had to be brief and concise and contain no ponderous and unnecessary elaboration.<sup>16</sup>

The question of the scope of application of a codification of human rights was subsequently raised only in the context of the Covenant, which was intended to be a truly legal (in the strict sense) regulation of the issue. Article 4, paragraph 1, of the draft covenant related to this problem, stating that “in time of war or other national emergency, a state may take measures derogating from its obligations under Article 2 above”; paragraph 2 stipulated a State’s duty to inform the Secretary-General of the United Nations accordingly.<sup>17</sup> The drafting of this provision was not taken further. Shortly thereafter, work on the draft Covenant was interrupted.

### **The 1949 Geneva Conventions**

Similarly, in the preparatory work for the 1949 Geneva Conventions, references to human rights were few and far between. It was principally outside the operational provisions that they were mentioned, mostly in passing and in vague terms, or as a never superfluous profession of faith.

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<sup>15</sup> R. Cassin, “La déclaration universelle et la mise en œuvre des droits de l’homme”, *RCADI*, Vol. 79, 1951-II, p. 297 ff. The Covenant on human rights was finally adopted in 1966.

<sup>16</sup> See, for example, the observations of Australia (doc. E/CN.4/85, p. 5) and the United States (*ibid.*, p. 6).

<sup>17</sup> Report of the Drafting Committee, doc. E/CN.4/21, p. 31; also doc. E/CN.4/95, p. 17, E/CN.4/85, p. 59 ff., E/600, Annex B, p. 32 ff. and E/800, p. 17.

Although the delegates attending the two conferences were generally not the same,<sup>18</sup> some delegates—for example the Australian ambassador Hodgson and the Mexican plenipotentiary de Alba—did take part in both. It is therefore not surprising to find in their statements references to the work being carried out under the auspices of the United Nations. The highly contentious issue of the preamble to the Conventions gave rise to many references to human rights. The representative of the Holy See, Msgr Compte, wanted the preamble to contain an appeal to the “divine principle” on which the rights and duties of man were based,<sup>19</sup> or a call for “respect for the human person and for human dignity”.<sup>20</sup> We are not far here from the more general formulations used in the same context, such as “respect for suffering humanity”.<sup>21</sup> In the end it was proposed that a reference to “universal human law”<sup>22</sup> be included in the preamble. The borrowing from the 1948 Declaration is particularly evident here. Several delegates also emphasized that the Fourth Geneva Convention, on the protection of civilians, should be taken together with the Universal Declaration, and that the establishment of such a link in the preamble would be welcome.<sup>23</sup> The Australian delegate, Hodgson, said it would be sufficient to refer to the preamble of the Declaration, without drafting a new one for the Convention on prisoners of war.<sup>24</sup> He made similar comments regarding the preamble for the Convention on civilians, adding dryly that the Conference “was not called upon to re-write” the 1948 Declaration.<sup>25</sup>

Quite naturally, Article 3 common to the four Conventions also gave rise to references to human rights. The Special Committee nominated by Committee II of the Conference had proposed, for the Convention on

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<sup>18</sup> R. Quentin-Baxter, “Human rights and humanitarian law—confluence or conflict?”, *Australian Yearbook of International Law*, Vol. 9, 1985, p. 101.

<sup>19</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A, p. 165.

<sup>20</sup> *Ibid.*, p. 323.

<sup>21</sup> Jean Pictet (ICRC), *ibid.*, p. 166.

<sup>22</sup> *Ibid.*, pp. 813 and 691 ff.

<sup>23</sup> De Alba (Mexico), *ibid.*, p. 692; de Geouffre de la Pradelle (Monaco), *ibid.*, p. 693; Cohen-Salvador (France), *ibid.*, p. 696; Nassif (Lebanon), *ibid.*, p. 695. See also the comments of the rapporteur, *ibid.*, p. 777 ff.

<sup>24</sup> *Ibid.*, p. 393.

<sup>25</sup> *Ibid.*, p. 780.

prisoners of war, a third paragraph containing a kind of Martens clause.<sup>26</sup> It had been said in the Special Committee that even when a person did not benefit under the provision of the Convention, that person would nevertheless remain “safeguarded by the principles of the rights of man as derived from the rules established among civilized nations ...”.<sup>27</sup> In the view of the Danish delegate, Cohn, Article 3 should not be interpreted in such a way as to deprive individuals of any rights they may have acquired from other sources, in particular human rights.<sup>28</sup>

Another context in which human rights were mentioned was the protection of the civilian population in territory occupied by the enemy. Mr de Alba said that wording should be adopted to the effect that the Occupying Power could modify the legislation of an occupied territory only if that legislation violated the principles of the Universal Declaration.<sup>29</sup> That would constitute a narrow exception to a guaranteed legislative status quo in such territories. Elsewhere, the Mexican delegate made mention in passing of the “fundamental rights of man”.<sup>30</sup>

Incontestably the most solemn reference to human rights came from the President of the Conference, Max Petitpierre, during the signing ceremony, when he spoke of the parallelism between and the common ideal of the Geneva Conventions and the Universal Declaration. He noted that the text of the Conventions incorporated and expressed in concrete terms some of the rights proclaimed by the Declaration. “The day after tomorrow, we shall celebrate the anniversary of the Universal Declaration of the Rights of Man which was adopted by the General Assembly of the United Nations on December the 10th, 1948. It is, we think, interesting

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<sup>26</sup> See the preamble to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 1907.

<sup>27</sup> *Final Record* (*supra*, note 19), p. 466. The special nature of the Martens clause stems from the fact that it mentions the rights of man rather than the principles of international law. Elsewhere this reference to human rights was replaced by the term “humanitarian principles” (Devijver, *ibid.*, p. 480; see also the Report of Committee II, *ibid.*, p. 562).

<sup>28</sup> “Nothing in the present Article shall be interpreted in such a way as to deprive persons not covered by the categories named in the said Article of their human rights and in particular of their right to self-defence against illegal acts as it is contained in their national legislation in force before the outbreak of hostilities or occupation”, *ibid.*, p. 480 (Danish amendment). On this subject see the critical comments of Gardner (United Kingdom), *ibid.*, p. 408, and Cohn’s reply, *Final Record* (*supra*, note 19), Vol. II, Section B, p. 267 ff.

<sup>29</sup> *Ibid.*, Vol. II, Section A, p. 671.

<sup>30</sup> *Ibid.*, Vol. II, Section B, p. 333.

to compare that Declaration with the Geneva Conventions. Our texts are based on certain of the fundamental rights proclaimed in it—respect for the human person, protection against torture and against cruel, inhuman or degrading punishments or treatment. Those rights find their legal expression in the contractual engagements which your Governments have today agreed to undertake. The Universal Declaration of the Rights of Man and the Geneva Conventions are both derived from one and the same ideal ...”<sup>31</sup>

The implications of those statements should not be overestimated; they were very sporadic and rarely placed in an operational context. The scope of the Conventions remains dependent on the objective concept of the protected person, defined according to his status in relation to the events of war (sick, wounded, prisoner of war, civilian), with very little room for the idea of attributing supreme subjective rights, without any distinction, deriving solely from the quality of being human.<sup>32</sup> On the other hand, even in very likely contexts, such as the protection to be afforded to those who have violated the law of war and the presumption of innocence, human rights are not mentioned at all.<sup>33</sup>

It may be concluded from the above that, although it would be wrong to say that total mutual ignorance prevailed during the drafting of these texts, nor would it be right to assert that any real reciprocal influence affected the choices made or the wording selected by the negotiators. What we see is that after saluting the flag of principles, each camp tackled its subject-matter on the basis of its own rules and methods. A technical and cultural gap separated these branches of the law which the vicissitudes of two very different paths had happened to bring relatively close to each other within the body of international law.

### **Legal literature**

At the time of the adoption of the Geneva Conventions and the Universal Declaration of Human Rights, literature relating to the law of war sometimes made reference to human rights. However, it never failed to stress the continuing cleavage between the two branches, although the

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<sup>31</sup> *Ibid.*, p. 536.

<sup>32</sup> *Ibid.*, Vol. II, Section A, p. 813 ff.

<sup>33</sup> *Ibid.*, p. 321.



similarity of their aims gives the impression of being closely related. Such is the case for the rules contained in the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War. Commentaries, including the most recent, place these rules close to human rights because they concern the protection of individuals who do not have any military status.<sup>34</sup> This also applies to Article 3 common to the four Conventions, which lays down certain standards of treatment in non-international armed conflicts; these rules resemble human rights guarantees.<sup>35</sup>

In 1949 a British author considered that common Article 3 should be understood as imposing “such obligations as will ensure, even in internal conflicts, the observance of certain fundamental human rights”.<sup>36</sup> He concluded by stating that the whole of the Fourth Convention is in harmony with the fundamental human rights proclaimed by the Universal Declaration of 1948.<sup>37</sup>

Various discreet references to human rights appear in the commentaries on the four Geneva Conventions published under the editorship of Jean Pictet between 1952 and 1960.<sup>38</sup> They relate mostly to areas in which the protection afforded by the Conventions is similar to safeguards that

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<sup>34</sup> See G.I.A.D. Draper, “The relationship between the human rights regime and the law of armed conflict”, *Israel Yearbook on Human Rights*, Vol. 1, 1971, p. 205.

<sup>35</sup> See, for example, R. Quentin Baxter, *op. cit.* (note 18), p. 101; S. Junod, “Human Rights and Protocol II”, *IRRC*, No. 236, September-October 1983, p. 246; D. Schindler, *op. cit.* (note 2), p. 8; L. Doswald-Beck/S. Vité, “International humanitarian law and human rights law”, *IRRC*, No. 293, March-April 1993, p. 119 ff.; W. A. Solf, “Human rights in armed conflict: Some observations on the relationship of human rights law to the law of armed conflict”, in H. H. Han (ed), *World in Transition: Challenges to Human Rights, Development and World Order*, Washington, 1979, p. 43.—Even authors hostile to any convergence of the traditional law of war and human rights law admit that Article 3 common to the four Geneva Conventions constitutes “the sole meeting point” between the two branches of law: 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*, Vol. 88, 1972, p. 1104.

<sup>36</sup> J. A. C. Gutteridge, “The Geneva Conventions of 1949”, *British Yearbook of International Law*, Vol. 26, 1949, p. 300.

<sup>37</sup> *Ibid.*, p. 325.

<sup>38</sup> Commentary published under the general editorship of Jean S. Pictet: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, ICRC, Geneva, 1952; *Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)*, ICRC, Geneva, 1960; *Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, ICRC, Geneva, 1960.

the law places in the category of human rights or public freedoms. Examples are the inalienability of rights,<sup>39</sup> the treatment of protected persons in general,<sup>40</sup> the prohibition of torture and corporal punishment,<sup>41</sup> penal procedure,<sup>42</sup> civil capacity<sup>43</sup> and complaints and petitions from internees.<sup>44</sup>

Obviously, the most frequent references to human rights are to be found in the Fourth Geneva Convention relating to civilians. In the commentary on Article 79,<sup>45</sup> however, the emphasis is placed very firmly on the essential difference between the two branches of law: it is stated that the Convention, true to the traditional conception of international law, does not apply to the relations of a State with its own nationals.<sup>46</sup> Its sole objectives are to govern relations between a belligerent and enemy civilians who, as a result of the occupation of the territory of the State of which they are nationals, are under the control of the adverse power. The international aspect, which is inherent in the traditional notion of war, therefore continued to predominate. Protection was to be accorded only in a situation of belligerence. The commentator concludes that a doctrine which "is today only beginning to take shape"—human rights—could one day broaden the scope of international humanitarian law and afford protection for all, irrespective of nationality.<sup>47</sup>

### Final remark

This was an astute reading of the course of future developments, in view of the fervent efforts made to bring the two branches closer to each

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<sup>39</sup> Article 7 and *Commentary on the First Geneva Convention*, p. 82; Article 7 and *Commentary on the Third Geneva Convention*, p. 91; Article 8 and *Commentary on the Fourth Geneva Convention*, p. 78.

<sup>40</sup> Article 27 and *Commentary on the Fourth Geneva Convention*, p. 200.

<sup>41</sup> Article 32 and *Commentary on the Fourth Geneva Convention*, p. 223.

<sup>42</sup> Article 99 and *Commentary on the Third Convention*, p. 470; *Article 71 and Commentary on the Fourth Convention*, p. 353 with, in note 1, a reference to the Universal Declaration.

<sup>43</sup> Article 80 and *Commentary on the Fourth Geneva Convention*, p. 374.

<sup>44</sup> Article 101 and *Commentary on the Fourth Geneva Convention*, p. 436.

<sup>45</sup> Articles 79 ff. of the Fourth Geneva Convention deal with the internment of civilians.

<sup>46</sup> *Commentary on the Fourth Geneva Convention*, p. 372 ff.

<sup>47</sup> *Ibid.*, p. 373.

other from the end of the 1960s. From an historical standpoint, it must be emphasized that this common front hardly existed before the adoption of Resolution XXIII by the International Conference on Human Rights (Teheran, 1968), entitled *Respect for human rights in armed conflict*. It certainly does not date back to the period reviewed in this article.

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