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The Enlargement of Human Rights in "Situations of Exceptions"

As armed conflicts acquired extraordinarily complex features, whereby both international and non-international armed conflicts are fought while civilian authorities are trying to rebuild themselves along the lines of the respect of international norms of human rights, there appears a wide legal void between the application of international human rights law and international human rights norms.

This is because the charters of human rights or constitutional guarantees of national institutions are intended to apply at all times, but can be suspended in times of martial law, in areas such as freedom of association, etc. This "suspension" takes place in certain countries over the course of decades to maintain the government in power. Since the LOAC do not apply in cases of internal tensions, a juridical lacuna or gap results where neither international conventions nor the LOAC apply.

To remedy this situation, many have proposed systems to bridge this gap. But efforts have greatly been supported by Professor and Judge Theodor Meron who presented a project for the adoption of international instruments that would guarantee the respect of fundamental rights (e.g., the right to life). His argument is based on the fact that the LOAC, like human rights, have in large part a common root both in terms of *rationae personae* and *rationae materiae* obligations and that they are based on the same notion: that of humanity.

He proposes a convention that would state those fundamental rights that cannot be taken away under any circumstances, whether in peace or in armed conflicts. In fact, he proposes a third Protocol to GC 1949 that would list the rights of article. 3 common to the *Geneva Conventions* of 1949 and the guarantees of article. 75 of their *1977 First Additional Protocol* and article 4 of their 1977 *Second Additional Protocol*, as well as the common rights listed in regional and universal legal instruments.

This reasoning may disturb some who believe that state control and national sovereignty have already been threatened enough without creating even more obligations for all involved. But, peace and war are not separated by a thin line on the ground. There are different phases to the state of war ranging from economic wars to unlimited total war, passing through cold wars and small wars. Each hold a place on the scale of conflicts up to absolute peace. The rest of the

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spectrum includes a relative peace, in which the world is always in a state of tension, thereby justifying the preparation of international instruments for a state of armed conflict that is not what is called a "hot war" -- the use of armed force under all its forms.

Whatever our take, the trend is toward the enlargement of human rights in peacetime and the protection of victims in times of armed conflicts. Events such as the Chechen crisis of 1991 and of 1995 have already pressed the issue, but this has given the legal debate a life of its own. More recently still, the intervention in Afghanistan (2002) and Iraq (2003), and Lebanon (2006) if justified in part by a much arguable theory of pre-emptive self-defence, have been also justified on the basis of the protection of human rights at large.
Therefore, this article will explore the common understanding of the current norms of the international protection of human, their regional protections from a comparative point of view, the norms of human rights applicable in armed conflicts, the protection of human rights at all times, the *Turku Declaration* and the *Declaration of a Minimum Humanitarian Standard*. This will lead us to conclude on the state of applicable rights under contemporary norms of international, international humanitarian and international human rights law and to evaluate the project of creating a final, comprehensive and politically viable international instrument of a universal type protecting human rights through the legal void of these branches of international law.

The International Protection of Human Rights

Human rights do not cease to exist during a period of armed conflict or, even less, during periods of internal disturbance, tension or trouble such as terrorism. International conventions exist that define the minimal rights that protect human beings. The problem is that while these norms protecting human rights continue to exist, some can be suspended for the duration of an emergency.

But these instruments all possess derogatory clauses that permit to suspend some rights. Note that a suspension does not mean that it ceases to exist: on the contrary it means that it continues to exist but it *application* is suspended in part or in whole and therefore limited. Therefore, international law has international conventions (i.e. *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*[2], applicable to its members whatever their region may be, and regional conventions, applicable to only a number of states regrouped under geographical features (i.e. *American Declaration of the Rights and Duties of Man* [3], *American Convention on Human Rigths*[4], *European Convention for the Protection of*

[2] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 and the *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.
[3] *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
[4] *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

Human Rights and Fundamental Freedoms[5]*, African Charter on Human and Peoples' Rights*[6]).

The instruments that do not have derogatory clauses have limitative clauses that rest on the principle of legality. Such clauses can be found at article4 of the *International Covenant on Civil and Political Rights*[7], article 27 of the *American Convention on Human Rights*[8] and 15 *European Convention on Fundamental Human Rights and Freedoms*[9]. To these measures, one could add the proposed derogatory clauses of article 4(b) of the *Charter of the Arab States League*[10] and article 35(1) of the *Convention of the Commonwealth of Independent States* (CIS)[11].

But even instrument not possessing derogatory clauses possess limits based on the principle of legality, such as in the case of the *International Covenant on Economic, Social and Cultural Rights*[12] or the *African Charter on Human and People's Rights* at its articles 9(2) and 10[13], or with general limitation clauses such as article 30 of the *Universal Declaration on Human Rights*. The latter states : "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein"[14]. In the former case of legality clauses, the *African Charter* states: "within the law" and "provided that he abides by the law"[15].

The problem in such case is to define what an emergency consists of or what the limits imposed by the law can be. Article 27 (Suspension of Guarantees) of the *American Convention* provides such a definition, stating an emergency as one of: "time of war, public danger, or other emergency that threatens the independence or security of the States party" and follows by clearly saying that the guarantees of the *American Convention* can only be suspended "for the period of time strictly required by the exigencies of the situation"[16].

By opposition to this approach, Article 15 of the *European Convention* permits to take the derogatory measures necessary in "In time of war or other public emergency threatening the life of the nation"[17]. The problem with such a liberal definition is obviously that it leaves a large margin of appreciation to the States as to know whether there exists a public danger menacing the life of the Nation.

The most interesting example concerning the regime of the Council of Europe's *European*

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[5] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (ETS 5), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and Protocol 11 on November 1, 1998 respectively.
[6] *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986. [hereinafter *African Charter*]
[7] *International Covenant on Civil and Political Rights, supra*, note 1 at article 4.
[8] *American Convention on Human Rights*, *supra*, note 4 at article 27. Canada has not ratified it.
[9] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, supra, note 5 at article 15.
[10] *Charter of the Arab States League*, 15 September 1994, in 18 Hum. Rts. L. J. (1997) 15. It is not in force.
[11] *Convention of the Commonwealth of Independent States,* adopted in May 1995, it is not in force.
[12] *ICESCR. supra*, note 2.
[13] *African Charter*, *supra*, note 6 at articles 9(2) and 10.
[14] *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). at Article 30.
[15] *African Charter*, *supra,* note 6 at Articles 9(2) and 10.
[16] *American Convention*, *supra,* note 4 at Article 27.
[17] *European Convention*, *supra,* note 5 at Article 15.

Convention is that of the Case of *Ireland v. United Kingdom*[18]. In this affair, the reach of Article 15 was examined by the European Court of Human Rights in a State to State request of the government of Ireland, alleging that the 1922 law of the United Kingdom concerning the emergency powers on the civilian authorities and the systematic practices of the United Kingdoms' officials on Northern Ireland's soil contravened Articles 2 (Right to Life), 3 (Protection against torture and cruel and inhumane treatments), 5 (Deprivation of Liberty) and 14 (Non-discrimination) of the *European Convention*.

It must be noted that at the time of this affair, only *Protocols 1* and *2* to the *European Convention* were in force[19]. Referring to Article 15, the Irish Government argued that Her Most Britannic Majesty's measures largely over-stepped the reach of the strict exigencies of the situation, since these measures were not in accordance with international law, as stipulated by article 15[20]. In the second part of its request, the Irish Government furthermore argued that the Law of 1972 on Northern Ireland, attributing large powers to the Northern Ireland Parliament concerning the use of British Forces, contravened article 7 (*Nullum Crimen Sine Lege*). The European Court of Human Rights based itself on the previous claims of the first *Case of Cyprus*[21], the *Case of Greece*[22] and on the *Case of Lawless*[23], and judged that the state concerned was best placed to decide the necessary reaches of a derogation, even though that derogation was not unlimited and subject to judicial revision by stating:

> " It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (article 15-1) leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Article 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis (Lawless judgment of 1 July 1961, Series A no. 3, p. 55, para. 22, and pp. 57-59, paras. 36-38). The domestic

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[18] Case of Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) at 3 (1976), [hereinafter *Ireland*].

[19] By opposition, the other Protocols entered into force on: *Protocol* n° 3, 21 September 1970; *Protocol* n° 4, 2 May 1968, *Protocol* n° 5, 20 December 1971; *Protocol* n° 6, 1 March 1985; *Protocol* n° 7, 1 November 1988; *Protocol* n° 8, 1 January 1990; *Protocol* n° 9, 1 October 1994, *Protocol* n° 10, 25 March 1995 and *Protocol* n° 11, 1 November 1998.

[20] *European Convention*, *supra,* note 5 at Article 15.

[21] *Eur. Comm. HR, Application No. 6780/74 and 6950/75*, *Cyprus v.Turkey*, Report adopted on 10 July 1976, Vol. 1, although this affair did not reach a decision stage due to a joint demand at the Council of Ministers of the European Council. See Council of Europe, Committee of Ministers, *Resolution* 59(12), dated 20 April 1953; reprinted in (1953) 1 *Yearbook of the European Commission on Human Rights* 690.

[22] *Case of Greece (Greek case)*, dated of 1967, (1967) 11 *Yearbook of the European Commission on Human Rights* 701. Following four separate request by Norway, Denmark, Sweden and the Netherlands, an aborted procedure similar to that of the Cyprus case took place.

[23] *Lawless Case*, *Eur. Court HR. (Ser. A)*, n^{os} 1, 2 et 3. In this affair, the Court defined was constitute a danger menacing the life of the Nation. It came to the conclusion that it consisted in a crisis of an exceptional danger that affects the whole of the population and constitute a menace for the organised life of a community that composes the State.

margin of appreciation is thus accompanied by a European supervision. "[24].

As a result, the court refuses to allow the argument of the Irish Government and recognised that the actions of British officials did not over-step the strict necessity of the situation[25]. It follows from this decision that the States is tributary of adjudging the reach of the derogation it intends to take. This margin of appreciation left to the State makes it both judge and party, although subject to judicial revision, and therefore creates quite a dangerous precedent. As remarked the renowned Canadian jurist L.C. Green, the Court in effect : " … *held that the burden of proof was on the complainant, and that the standard to be applied was 'beyond reasonable doubt' (…) the chances of a Party being found guilty of wrongly declaring an emergency are somewhat remote*… "[26].

Not only did the Court agreed in full bench to this benchmark ruling on this score, but not even an *obiter dictum* suggested that the Court could have been convinced otherwise if, in the use of its discretionary powers, the United Kingdom had exceeded and/or continued to exceed the restrictions imposed by Article15[27]. The Court seems to have kept firmly in line with its decision of the *Case of the SS Wimbledon*[28], where it opined that it cannot, nor even should contemplate such situations where it would have to interpose its judgement *in lieu* of the States.

It is interesting to note that this is totally opposed to the approach of the Inter-American system, where the Court did not hesitate to substitute itself to States in order to determine the limits of the suspension of guarantees in the *American Convention* and to objectively define what constitute a war, a public danger or a situation of crisis menacing the independence or security of the State. In its advisory opinion of the *Habeas Corpus in Emergency Situations*[29], the Inter-American Court presented the reasons that could be invoked to claim the suspensions of Article 27.

In its opinion, the Court takes the direct approach and clearly announces that rights cannot be denied or suspended unless the circumstances leave only this sole recourse to preserve the most fundamental values of a democratic society[30]. The Court therefore puts the legitimacy of the democratic system of government as the ruling principle when it comes to the evaluation of the legitimacy of the use of derogatory measures. It further adds in the same paragraph that the suspension of guarantees may not be dissociated from the "effective exercise of representative democracy", and that any use of derogation in the aim of undermining a democratic system is an illegitimate use of Article 27. Non content with this, the Court finally opined that the exercise of democratic rights can only be suspended if the strictest conditions of Article 27 are met. By this, the Court states without the inkling of a doubt that it meant : "rather than adopting a philosophy that favors the suspension of rights, [it] establishes the contrary principle, (…) rights are to be guaranteed and enforced unless very special

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[24] *Ireland*, *supra*, note 13 at 68.
[25] A.S. Calogeropoulos-Stratis, *Droit humanitaire et droit de l'homme : la protection de la personne en période de conflit armé*, Genève, Institut Universitaire des Hautes Études Internationales, 1980, 258 at 81.
[26] L.C. Green, *Human Rights in Emergency Situations*, Conference of the Canadian Council on International Law, University of Ottawa, 1978, 19 at 5.
[27] *Id.*
[28] *Case of SS Wimbledon, (1923) I.P.C.J. (Ser. A)*, nº 1, 163 at 180.
[29] *Habeas Corpus in Emergency Situations, Advisory Opinion AO-8/87, Inter-Am. Ct. HR (Ser. A)*, 1, 27 I.L.M. 519. [hereinafter *Habeas Corpus*].
[30] *Ibid.* at 38, para. 20.

circumstances justify the suspensions of some, and that some rights may never be suspended, however serious the emergency."[31].

Contrary to the European approach, which seems to permit the wider latitude possible to the State with the reservation of judicial review, albeit only subsequently to a previous action of the State, the Inter-American Court emitted its opinion before any situation concerning such cases reached it and choose to apply a *stricto sensu* interpretation of the suspension clause of Article 27 of its *American Convention*. It is also capital to note that the Court did not authorise the proscription, full interdiction of exercise or the eradication of a right ; at the most, the Court allows the State meeting the strict condition of Article 27 to suspended the exercise or to limit the full and complete exercise of the right in question. The rights in themselves survive this regime of suspension and are deemed inherent to the human being[32], and therefore inalienable[33].

These approaches of the Inter-American and European system are distanced in part by the approach of the *African Charter*. Still, one must emphasise that it is so *in part* only because while the African Charter adopted a new approach by including the rights of collectivises into its framework, it was neither the first nor the only one to include individual, economic, social and cultural rights with obligations in a regional system of protection of human rights.

The *American Declaration on the Rights and Duties of Man* incorporate respectively these at its Articles XIII, XXIX, XXX, XXXI et XXXIV : the right to benefit from cultural life in one's community (XIII); the right to social security (XVI), the obligation of having an individual deportment permitting the development of the potential of others (XXIX); the obligation to support parents (in particular the aide of children and the honouring due to parents) (XXX); the obligation to receive at the minimum a primary education (XXXI) and the obligation to serve the community and the Nation (XXXIV)[34].

The *Draft Charter of Fundamental Rights of the European Union* [35] also incorporated some of these notions. As does, in a more restrictive measure, the rights and obligations to participate in the cultural and intellectual life of the *Charter of the Arab States League* at its Article 35: "Citizens have a right to live in an intellectual and cultural environment in which Arab nationalism is a source of pride, in which human rights are sanctified and in which racial, religious and other forms of discrimination are rejected and international cooperation and the cause of world peace are supported."[36]. Nonetheless, it is exact to claim that the *African Charter* seems to accord a prominence to these rights and that its dialectic of individual rights as opposed to collective rights in much more pronounced than in other systems.

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[31] *Ibid* at 38 and 39, para. 21.
[32] *Ibid.* at 37.
[33] A.L. Svenson-McCarthy, *The International Law of Human Rights and States of Exception*, Coll. International Studies in Human Rights, vol. 54, Boston, Martinus Nijhoff Publishers, 1998, 780 at 254
[34] *American Declaration*, *supra*, note *261*.
[30] *Charter of Fundamental Rights of the European Union*, 2000 O.J. (C 364) 1, (Dec. 7, 2000) and the *Draft Charter of Fundamental Rights of the European Union*, CHARTE 4422/00 (July 28, 2000) [hereinafter *Draft European Union Charter*]. The proposed charter of the Praesidium includes economic and social rights at Article 31. A particular attention is given there to the "familial" application of this article.
[36] *Charter of the Arab States League*, *supra,* note 10 at Article 35.

Still, the writing of Articles 9(2) and 10 forces one to ask himself if the protections of the *African Charter* are not illusionary[37]. The question is not solely or the abstract : in determining the true force of the legal limitation clauses, one can discover if the *African Charter* is a juridical instrument or a political instrument serving the ends of non-democratic regimes. The problem of the *African Charter* was, at first, that its *African Commission on Human and People's Rights* had not, for the longest time after its implementation, had the occasion of pronouncing itself on the important question. Rather, indication of its potential was given through Articles 60 and 61 as to its capacities to acquire a viable juridical strength opposable to States. Article 60 reads as directing principles : " The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members. "[38]

And Article 61 attempts to enlarge this reach by stating: " The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine. "[39].

It is important to note here that while the African Court was created following the redaction and adoption of its founding *Protocol*, its article 7 retakes *expressis verbis* the notions of the *African Charter* stating that in its deliberation: "the Court shall be guided by the provisions of the Charter and the applicable principles stipulated in Articles 60 and 61 of the Charter." [40]. There is therefore a need to set and determine the legality principle from other instruments. An extraordinary analysis of this kind was made by A.L. Svensson-McCarthy and permits to define in a large measure this principle of "legality"[41]. First, the question is to know what sources of law are included in this principle.

At the universal level, the principles invoked flow from Articles 29 and 30 of the *Universal Declaration*. The question of legality does not pose serious problems when concerning the elaboration of the both *International Covenants* of 1966[42]. When it came to refer to Articles 29 and 30, the debate concerning the legitimacy principle and its link with legality addressed mainly the notion that rights could only be limited by law.

Many countries of the British *Commonwealth* founded this sentence much too limitative in the

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[37] A.H. Robertson and A.J. Merrills, *Human Rights in the World*, New York, Manchester University Press, 1989, 314 at 209.
[38] *African Charter*, *supra,* note 6 at Article 60.
[39] *Ibid.* at Article 61.
[40] *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) following the *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights*, (1997) AU/LEG/MIN/AFCHPR/PROT.1 rev.2.
[41] Svenson-McCarthy, *supra*, note 33..
[42] *Ibid.* at 54 and 59 respectively.

residual power that it left to the States. The principal argument was that there existed more than the sole means provided by law to impose justified limits on the exercise of human rights in the Universal Declaration and that often the law itself was the very source of contravention to human rights. These countries preferred a mention to the concept of justice, which had in their eyes a superior level to that of the law. After many discussions, Article 29 incorporated nonetheless the notion of law in its paragraph 2, but the criteria of satisfaction of the just exigencies of moral, public order and general good were adjunct to it in order to complete it. Further to this debate, common law countries asked themselves whether the notion of law included solely the notion of statutory law or also the non-written notions often found in the *stare decisis* system of case law and soft law. The decision of the participants was definitive on the matter in that it included all sources of laws, whether of a traditional, case or statutory source[43].

It results from this interpretative statement that the notion of legality implies a notion of legitimacy, that is a pre-established legal norm of law originating from a competent legislative authority. This was deemed necessary in order to protect individuals from abuses and arbitrary actions of the executive and judiciary branches of governments. Also, the criteria of the exigencies cited above guarantee that the limitations are only legitimate if they meet the norms justifiable in a just and democratic society. Since the Universal Declaration made a direct reference to the *Charter of the United Nations* in its Article 29(3), by stating that these rights and freedoms cannot be fully exercised in contradiction to its aims and principles, it appears clearly that the legitimacy of the universal system has a specific and independent sense[44].

At the regional level, this question of legality has been retaken in the Inter-American System in Article 30 of the *American Convention*, whereby: "The restrictions (…) may not be applied except in accordance with the laws enacted for reasons of general interest and in accordance with the purposes for which such restrictions have been established."[45]. And this question was rapidly addressed and dealt with, at unanimity, by the advisory opinion of the Inter-American Court at the request of the government of Uruguay: "[it] means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of States Parties for that purpose "[46]. For the Inter-American Court, there exist a clear link that is inseparable between legality, democratic institutions and the rule of law. It reaffirms the notions of the *Habeas Corpus* advisory opinion[47].

The *European Convention* follows a similar line of thought when concerned with the principle of legality. In the *Case of Silver and Others*[48], the European Court of Human Rights confirmed the notion of its previous cases whereby the "conditions, restrictions or sanctions of the law" are

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[43] *Ibid.* at 58.
[44] *Ibid.* at 58 and 59.
[45] *American Convention*, *supra,* note 4 at Article 30.
[46] *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, *Advisory Opinion, AO-6/86, Inter-Am. Ct. HR (Ser. A)*, No. 6, 1 at 37. The Court further opined: "*[in] a democratic society, the principle of legality in inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention as it relates to the 'effective exercise of representative democracy', which results in the popular election of legally created organs, the respect of minority participation and furtherance of the general welfare, inter alia…* ", *Ibid.* at 35.
[47] *Habeas Corpus*, *supra*, note 29.
[48] *Silver and Others*, *Eur. Court HR, (Ser. A)*, nº 61, 1 at 33.

to be interpreted first as a reference to the fact that interferences in the exercise of human rights must have a juridical base in national law and that this must be *a priori* because the Court confirms only later that this includes common law with statutory laws.[49].

The concept of legality forged a minimal norm of the respect of national laws within the larger interpretative concept of international instruments when concerned with the application of derogatory norms. Still, such a norm remains incredibly fragile in the European system, in particular in the case of countries having a centralised government or a unitary method of governance. Through the concentration of power, ones concentrates the States' decision and influence in the determination of what constitute a legitimate suspension of rights and a derogation to the *European Convention*. Simply by restraining the protections given by the national legislation, a State can easily overturned or circumscribe the provision of the *European Convention*. Still, the basis of the *European Convention* is that of a voluntary system of ratification and therefore there is some understanding that States do not forgo every aspect of their sovereignty upon ratifying it and therefore interpretation is left in part to their margin of appreciation, until review by the judicial process if necessary. As such, we can therefore assert that their exist limitative systems of derogation that permits to suspend rights and that the *European Convention*'s system is in part as much as risk as even the *African Charter*'s system if one considers only its own limitation of legality. The American Convention system would seem more established that these both at first glance.

But this would not be a complete understanding of these different systems, as it would not take into account the very rights they permit to derogate from and the limitations it permits to impose. As opposed to the limitations of the general clauses and clauses of derogations of the *Universal Declaration* and of the *International Covenant relative to Economic, Social and Cultural Rights*[50] at the universal level, and of the *African Charter* at the regional level, both the *European Convention* and the *American Convention* adopt the approach of the *International Covenant Relative to Civil and Political Rights*. Article 27(2) of the *American Convention* edicts : " 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. "[51].

By contrast, Article 15(2) of the *European Convention* states : " 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph

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[49] *The Sunday Times, Eur. Court HR (Ser. A)*, n° 30 1 at p.30.
[50] *ICESCR*, *supra*, note 2 at Articles 4 et 5(2). Respectively: " The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society " and "2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.. ".
[51] *American Convention*, *supra,* note 4 at Article 27(2).

1) and 7 shall be made under this provision"[52]. This compares to the *International Covenant Relative to Civil and Political Rights* at its Article 4(2) which proclaims: "2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."[53]. On this comparative basis[54], one can represent schematically the protection offered by each system, whether universal, American or European by comparing which rights are non-derogable in all and any circumstances. These cannot be suspended, limited or otherwise infringed upon in any circumstances or for any reason whatsoever.

A synthesis of these non-derogable rights clearly shows that solely the rights which are universally recognised, and those of the two *Covenants* of 1966, due to their different reach are: the right to life, the prohibition of torture and inhumane and degrading treatment, the interdiction of slavery and the principles of legality and non-retroactivity. Within the concept of legality, it is important to note that none covers the right to an equitable judgement and that the *European Convention* does not contain the recognition of the legal personality.[55].

It is possible, on this basis, to distinguish rights protected as "fundamental rights and freedoms", which are generally protected within international universal or regional instruments, and a "minimal non-derogable core" of human rights, which can perhaps be seen as fundamental rights in a *stricto sensu* interpretation[56]. Those not part of this core may not

[52] *European Convention*, *supra,* note 5 at Article 15(2).
[53] *ICCPR, supra,* note 1 at Article 4(2).

[54]DISPOSITION	UNIVERSAL DECLARATION*	COVENANT ON POLITICAL AND CIVIL RIGHTS	COVENANT ON ECONOMIC AND SOCIAL RIGHTS	EUROPEAN CONVENTION	AFRICAN CHARTER	AMERICAN CONVENTION
Right to life	ARTICLE 3	ARTICLE 6		ARTICLE 2	ARTICLE 4	ARTICLE 4
Freedom from torture, inhuman, degrading treatments and punishments	ARTICLE 5	ARTICLE 7		ARTICLE 3	ARTICLE 4 ET 5	ARTICLE 5(1)
Freedom from slavery and servitude	ARTICLE 4	ARTICLE 8(1) & (2)		ARTICLE 4(1)	ARTICLE 5	ARTICLE 6
Legality and retroactivity	ARTICLE 11(2)	ARTICLE 15		ARTICLE 7	ARTICLE 7(2)	ARTICLES 8(1) ET 9
Legal personality	ARTICLE 6	ARTICLE 16			ARTICLE 5	ARTICLE 3 and 24
Freedom of thought, conscience and religion	ARTICLE 18	ARTICLE 18			ARTICLE 8	ARTICLE 12
Non-imprisonment for debts		ARTICLE 11				
Protection of the family					ARTICLE 18	ARTICLE 17
Right to a name						ARTICLE 18
Right of children						ARTICLE 19
Right to nationality	ARTICLE 15					ARTICLE 20
Political rights	ARTICLE 21				ARTICLE 13	ARTICLE 23
Freedom of expression	ARTICLE 19				ARTICLE 9(2)	
ECOSOC rights	ARTICLE 22		ARTICLE 1			
Right to primary education	ARTICLE 26		ARTICLES 13(2)(a) and 14		ARTICLE 17	
Right to cultural life	ARTICLE 27		ARTICLE 15			
Equality of the sexes	ARTICLE 1	ARTICLE 3	ARTICLE 3			ARTICLE 24

* This table is based upon that presented by A.S. Calogeropoulos-Stratis, *Droit humanitaire et droit de l'homme : la protection de la personne en période de conflit armé*, Genève, Institut Universitaire des Hautes Études Internationales, 1980, 258 at 131, but joins together all major instruments in one comparative schematics.
[55] *Ibid.* at 132. The protection to an equitable trial is found at Article 10 of the ICCPR, 14 of *ICESCR,* 6 of the *European Convention*, , 7 of the *African Charter* and 8 of the *American Convention*.
[56] *Ibid.* at 135.

survive limitations during periods of emergencies and situations of exceptions.

Further, the question is to know whether one can claim a universal application of these rights as their force of law remains to be proven. Indeed, in the international legal regime, only customary law is applied universally, while treaty law can only be opposed to states which have ratified the conventions and treaties under discussion. We must then discern between the rights opposable to all and those opposable to the states which have signed and ratified a treaty, this in accordance with their sources.[57].

The first source applicable to International Human Rights Law is of course the one that demonstrates the explicit consent of states to be held accountable: treaty law. It is important to distinguish between treaties, done in multilateral fashions of in a regional setting, and declarations.

A treaty is an agreement between two states or more, and/or with an international organization. It is a negotiated and agreed document, to which a state adhere freely upon ratification. A declaration is a statement issued either by a state, in the case of unilateral declaration of intent, or by an international organization to state the intentions and aspirations of such an organization and its members. A treaty is opposable to states and legal redress can be obtained for its breach because it contains formal obligations to which a state has voluntarily subscribed. A declaration is usually not opposable to states; it provides for a restatement of a will or an intention to reach some objective, but it itself, it does not carry a constraint of opposability.

This, however, is not absolute: a declaration may become opposable as would a treaty if it is recognized and adhered to by states, either because they reached such a conclusion in agreement or through the formation of a customary norm which recognizes its evolution into an opposable norm of international law. The *American Declaration of the Rights and Duties of Man* is such a declaration which started as non-opposable to states members of the Organisation of American States (OAS) in 1948 and became opposable over time because the states member adopted it as a part of the Charter of the Organisation of American States[58]. Further to this recognition, both the juridical organs of the OAS, the *Inter-American Commission on Human Rights* and the *Inter-American Court of Human Rights* have reached the legal conclusion that it has become opposable to states[59].

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[57] P.J. LaRose-Edwards, *Universal Human Rights Law*, Master's thesis, University of Wales, 1986, not published. The author presents 7 sources in a hierarchal order: treaties, customs, general principles, legal decisions, publicists (doctrine), natural law and inter-governmental organisations.

[58] *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

[59] See Inter-American Court of Human Rights, Adivsory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 18989, Ser. A No. 10 (1989), paragraphs 35-45; AICHR, James terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, September 1987, Annual 1986-1987, paragraph 46-49, Rafael Ferrer-Mazorra et al. v. United States, Report N° 51/01, Case 9903, April 4 2001. See also Article 20 of the Statute of the Inter-American Commission on Human Rights.

Universal Protections Applicable Regardless of Regions

Since there are such cases of development from non-opposable to opposable norms in a regional convention, the question becomes very important with regards to the potential opposability of the *Universal Declaration of Human Rights* made by the General Assembly of the United Nations in 1948. As the title mentions, it is a declaration and therefore, in principle, non-opposable unless there has been a development. Three theses are presented in this regard.

The first thesis presents the *Universal Declaration* as opposable in the measure whereby its dispositions are based upon the state obligations of the *Charter of the United Nations*.[60]. The second gives it a limited opposability, non imperative as such, whereby a violation to the Universal Declaration is not *ipso facto* considered as illicit under international law if the state takes corrective measures. A state which would not take such measures would then become accountable for it. Finally, the last thesis is that the Universal Declaration is opposable in full.[61]. From the 1960s, already, some commentator argued the superior character of this document since it was accepted at unanimity[62]. This acceptation without opposition is seen under this light as a common will of the states to proclaim an *opinio juris* and that its violation by a state would entail state responsibility because of its violation to a norm of international ethic. Also, these commentators argue that state practice proves with its influence on all subsequent conventions of human rights and treaties that it has by far surpassed the status of a simple decision by the General Assembly.[63].

This argument is notably supported by a portion of academics and practitioners of the time, whether from the West or the East. For example, Blishtshenko declared in 1971 that the *Universal Declaration* is not only a mandatory document with a moral value but a document with a legal force, which implies the recognition of its dispositions by states and their applications, even in case of armed conflicts.[64].

However, these seems to have been a tad premature, as it precedes in the abstract without taking the limitative clauses into account, whereby: "The Travaux préparatoires make it clear that the overwhelming majority of the speakers did not intend (…) the Declaration to become a statement of law or of legal obligations, but a statement of principles devoid of any obligatory character, and which would have moral force only."[65].

Richard B. Lillich, a most renowned jurist of human rights and humanitarian law, mentions that we can find in the debates of the *Travaux Preparatoires* a suggestion from which the

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[60] *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945

[61] Calogeropoulos-Stratis, *supra* note 53 at 120.

[62] K. Suter, "An Inquiry of the Phrase : "Human Rights in Armed Conflicts" ", *Revue de droit pénal militaire et de droit de la guerre* (Bruxelles), XV-3-4, 1976, 393 at 399 citing Louis B. Sohn who in 1969 affirmed : "*In a relatively short period, the Universal Declaration of Human Rights has thus become a part of the constitutional law of the world community and, together with the Charter of the United Nations, it has achieved the character of a world law superior to all other international instruments and domestic laws*".

[63] Calogeropoulos-Stratis, *supra,* note 53 at 121.

[64] I.P. Blitchenko, « Conflits armés et protection des droits de l'homme », (1971) 18 *Revue de droit contemporain* (Bruxelles) 23 at 27. Based on the conclusion of the International Conference that underlined that the Universal Declaration translates a general accord of the peoples of the world as to the inalienable and inalterable rights of each and every human being and constitutes a commitment from the members of the international community.

[65] R.B. Lillich, *International Human Rights*, 2nd ed., Toronto, Little, Brown & Company, 1991, 1062 at 121.

Universal Declaration is considered a complement to the *United Nations Charter*., or as an interpretative instrument, or finally as the formulation of the general principles of law recognised by civilised nations, as understood under Article 38(1)(c) of the *Statute of the International Court of Justice*[66].

This later argument suffers from a lack of solid bases. As Lillich remarks, the General Assembly of the United Nations does not have the authority to interpret the Charter of the United Nations. Furthermore, its recognition as a formulation of the general principles of law also suffers from profound deficiencies. Indeed, while one may take a liberal interpretation of article 38(1)(c) of the *Statute of the International Court of Justice* to recognise many sections of the *Universal Declaration* as general principles or law, one cannot use this argument to explicitly recognise by it a codification of these principles[67]. As a result, one must distinguish between the force of law of treaties and of declarations. While treaties may be opposed to states, declarations cannot unless one can prove that its status has evolved in international law either through custom, practice or *opinion juris* of states.

Of course, the *Universal Declaration* remains a matter of controversy. And it is the more so because it has been adjuncted a surveillance mechanism through *Resolution 1503*[68]. This resolution gives the Human Rights Commission a procedure by which it can examines complaints of violations to human rights and fundamental liberties. However, this procedure has a limited reach and the extent of its resolution is often misunderstood as all-encompassing. In fact, it does not give the Economic and Social Council a power of condemnation over states, but rather a softer power of inquiry and reconciliation. One cannot invoke the force of law over a power of inquiry as this mechanism rests on the cooperation of states[69]. Therefore, invoking *Resolution 1503* to argue for the force of law of the *Universal Declaration* would be erroneous in premises. Therefore, one must conclude with the fact that, for the foreseeable future, the *Universal Declaration* does not have force of law.

However, this is not the cases of the *1966 Covenants*, which have been ratified by states and are treaties; as such, they are clearly and unarguably opposable to states. It is true that the universal mechanism it establish is weak[70], since the Commission examining the communications made to it can only draw the conclusion of the existence of a violation only after all the national recourses have been exhausted[71]. Nonetheless, such a conclusion may lead to a reference to the Security Council if the breaches are serious enough to entail a breach of peace or a menace to international peace and security. Nonetheless, the best hope of applying human rights, even though their sources are mainly universal at first, seems to rest with the regional instruments, such as those we have seen above.

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66 *Statute of the international Court of Justice*, 1U.N.T.S. xvi, at article 38(1)(c).
67 Lillich, *supra,* note 65 at 122.
68 Economic and Social Council, *Procedure for dealing with communications relating to violations of human rights and fundamental freedoms*, Off. Doc. UNESC, 1970, 1693e sess.., U.N. Doc. E/1970/1503/SR.1693.
69 M. El Kouhene, *Les garanties fondamentales de la personne en droit humanitaire et en droit de l'homme*, Boston, Martinus Nijhoff Publishers, 1986, 258 at 221.
70 Through the *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, (*entered into force* March 23, 1976), today completed by the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), (*entered into force* July 11, 1991). Canada ratified the first *Optional Protocal* on 19 May 1976.
71 El Kouhene, *supra,* note 69 at 214.

Regional Protections

For example, as one can see from the table of comparison of non-derogable rights seen above, apart from the *International Covenant Relative to Economic, Social and Cultural Rights*, it appears at first that the *European Convention* protects fewer rights than any other instruments. Indeed, solely the four rights enumerated above can be seen as being non-derogable.

In the case of the European system of protections, the case law does provide for a mature set of protections and does appear to have proportionality and due diligence well-entrenched within its *corpus juris* when concerning the right to life. Whether from the Commission's previous decisions, such as in the cases of *Steward*[72], of *Farrell*[73], or of *Cyprus v. Turkey*[74] or the Court's decisions such as in *McCann*[75], the differentiation between lawful deprivation of the right to life and unlawful ones has been extensively explored and have resulted in a solid and logic system of law.

In the case of the right to freedom from slavery and servitude, the Court has rarely had to deal with cases of forced or compulsory labour and many of the cases sent to it were either frivolous or groundless. Overall, the best known example is that of Van Droogenbroeck, which concerned the obligation for a prisoner to earn money during his detention in order to save a certain amount prior to his release from prison[76]. In most other cases, it is clear that the member States of the Council of Europe have had a low ceiling of tolerance for slavery and servitude and have enacted and implemented the proper legislation to curb abuses at the national level[77].

Where the *European Convention* is weak is definitely where it concerns judicial guarantees. While the first two sentences of its Article 7(1) are very comparable to that of Article 15(1) of the *International Covenant Relative to Civil and Political Rights*, its third sentence lacks the protection of guilty parties to benefit from the lighter penalty available. Still, the guarantees do provide for

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[72] *Eur. Comm. HR, Application No. 10044/82, K. Steward v. the United Kingdom*, decision of 10 July 1984 on the admissibility, 30 DR, 162 at 167, determining the criteria of "absolute necessity" on the use of force resulting in a deprivation of the right to life.

[73] *Eur. Comm. HR, Application No. 9013/80*, *O. Farrell v. the United Kingdom*, decision of 11 December 1982 on the admissibility, 30 DR, 96 at 97, also is determining the criteria of "absolute necessity" on the use of force resulting in a deprivation of the right to life, but settle out of court by friendly settlement upon admission of State responsibility.

[74] *Eur. Comm. HR, Application No. 6780/74 and 6950/75*, *Cyprus v.Turkey*, Report adopted on 10 July 1976, Vol. 1, 110-119 at paras. 315-329, differentiating between lawful acts of war and unlawful deprivation of the right to life.

[75] McCann and Others judgement, Series A, No. 324, 46 at 62, where the Court determined that while the actions of agents of the State sincerely believing the dangers against which they were advise to shoot to kill was lawful in itself, the lack of good intelligence – or indeed the very intent of agents of the State to deceive other agents – can lead to violations of Article 2.

[76] *Eur. Court HR, Van Droogenbroeck judgement of 24 June 1982, Series A, No. 50*, 17 at 18.

[77] That is not to say that such abuses do not exists in States Parties to the *European Convention*: it means that in most States, the abuses are dealt with under national law and that not many issues arise from this and that in cases of States where such legislation and execution of the laws are weak, cases do not succeed in getting through the national system and exhaust available remedies before reaching the Court. The case of sexual slavery and immigrant servitude to repay illegal immigration fees to organized crime remain intractable problems even in such progressive places as the United Kingdom or the Netherlands, and are even more pronounced in places such as Bulgaria, Romania, Bosnia or the Ukraine.

protection of *ne bis in idem* with the addition of Article 4 of *Protocol 7*[78], and does provide for the principle of *nullum crimen, nulla poena sine lege*[79]. Overall, these protections certainly are limited compared to that of the Inter-American regime.

Perhaps where the Court held on the longest to a wrong interpretation of the *European Convention* is where it concerned itself with the right to freedom from torture, inhuman, degrading treatment and punishment at Article 3. Too long did the Court uphold its own interpretation of the case of *Ireland v. United Kingdom* and too long did it impose an unduly strict interpretation of a severity/intensity test. Too long it interpreted the *European Convention* within its own syllogisms, and forgot to add interpretative additions from applicable international law such as the *Convention against Torture*. Only with the *Case of Aksov* a breakthrough was achieved and the threshold of what constitute torture has been lowered, finally applying not the *Declaration against Torture*, but the *Convention against Torture*.

Meanwhile, both the Inter-American and the African systems are developing, now with increasing speed since the adoption of enhancing instruments[80]. As such, through the development of regional systems, whole regions have been stabilised in the application of human rights whether in times of peace and troubles, such as Western Europe through the 1950s through the 1990s, despite the Cold War and terrorism, and then in Central and Eastern Europe through the transitions of the 1990s after the end of the world bipolarity, or again in the Americas after the end of 'international socialism' and the development of democratic regimes. Even Africa, long-plagued by the war by proxy and the trampling of human rights everywhere, does progressive development of the respect of human rights appear to be on the up-take.

However, these developments are in times of peace or internal disturbances. The real question becomes to know what protections of human rights do exist in times of armed conflicts.

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[78] *Protocol 7*, *supra,* note 14.

[79] The principle of non-retroactivity includes as much the very existence of a delinquent conduct in accordance to national laws as well as a proper definition and understanding of such possible violation by the reading of the law from the point of view of a reasonable person. See *Kokkinakis judgement, Series A*, No. 260-A, 22 at para 52.

[80] *Protocol to the African Charter on Human and Peoples' Rights*, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), *entered into force* January 25, 2004, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); *reprinted in* 1 Afr. Hum. Rts. L.J. 40, *entered into force* Nov. 25, 2005, the *Inter-American Democratic Charter*, Inter-American Democratic Charter, OAS Doc. OEA/SerP/AG/Res.1 (2001); 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001), 40 I.L.M. 1289 (2001) and the *Human Rights and the Environment*, AG/RES. 1926 (XXXIII-O/03), Adopted at the fourth plenary session held on June 10, 2003 are recent additions that further enhance and solidify the legal regimes of human rights protections piece by piece in their respective jurisdictions.

Human rights applicable in armed conflicts

As opposed to universal or regional norms of human rights law, the existence of an armed conflict is the *sine qua non* condition for the law of armed conflict to apply. If the existence of a conflict is not proven, one cannot invoke the protection of its legal regime. Furthermore, the existence of an armed conflict, especially in the early stages, is always difficult to prove. Let us take as an example the most recent violence between Israel and Lebanon, starting on June 25, 2006 by a raid of Hamas fighters against an Israeli position on the border with Gaza and killing 2 Israeli soldiers and kidnapping one as hostage for a prisoner exchange.

At that stage, there was a use of force whereby terrorists crossed a border from the territories of the Palestinian Authority by use of a tunnel, emerged on Israeli soil, engaged Israeli forces and retreated after accomplish parts or all of their objectives. Was this an act that would fall under the premises of the law of armed conflicts?

While this may be arguable as being so, it is not clear and the argument to the opposite may be made. Indeed, while there has been a clash of arms, there has not been a mention of a state of armed conflict at that time. Since the attack came from another semi-autonomous territories' national, and since Hamas and the Palestinian Authority are not High Contracting Parties to the *Geneva Conventions*, nor the *Additional Protocols*, they cannot claim its application to their fighters.

What would remain is solely the application of Article 3/common GC 1949, as this applies in contradistinction to international armed conflicts to encompass all other kinds of armed conflicts[81]. This would however be a double-hedge protection for Hamas fighters as this article also prohibits the taking of hostages, which their member clearly committed and claimed after the fact. Regardless, it is clear that the intensity and the seriousness of that particular incident created an armed conflict, albeit one only covered by the protections of Article 3/common GC 1949.

Following this incident, Israel undertook military actions on June 28, 2006 by entering the Gaza strip in an effort to rescue the kidnapped soldier, root out insurgents and take out positions from which Palestinians had been firing home-made Quassam rockets into Israeli territory. On July 12, 2006, bolstered by the Hamas action of June 25th, Hizballah fighters attacked an Israeli position from Lebanon in Northern Israel. In this attack, 8 Israeli soldiers were killed and 2 kidnapped. Again, as for the events of June 25th, Hizballah is not a High Contracting Party and the sole applicable instrument would be Article 3/common GC 1949, for the same reason as above.

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[81] *Hamdan vs. Rumsfeld, Secretary of Defense and al.*, 548 U.S._(2006) available at *www.supremecourtus.gov/opinions/05pdf/05-184.pdf*, at 68, which refers in its foonote 63 in the following: "See also GCIII Commentary 35 (Common Article 3 "has the merit of being simple and clear. . . . Its observance does not depend upon pre-liminary discussions on the nature of the conflict"); GCIV Commentary 51 ("[N]obody in enemy hands can be outside the law"); U. S. ArmyJudge Advocate General's Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) (Common Article 3 "serves as a'minimum yardstick of protection in all conflicts, not just internal armed conflicts' " (quoting *Nicaragua* v. *United States*, 1986 I. C. J. 14, ¶218, 25 I. L. M. 1023)); *Prosecutor* v. *Tadić*, Case No. IT–94–1, Deci-sion on the Defence Motion for Interlocutory Appeal on Jurisdiction,¶102 (ICTY App. Chamber, Oct. 2, 1995) (stating that "the characterof the conflict is irrelevant" in deciding whether Common Article 3 applies)".

Israel then undertook harsh retaliation measures against Hizballah targets and other targets that supported Hizballah. This resulted in effect in attacks against the whole infrastructure of Southern Lebanon and attacks on ports, airports and the capital of Bayreuth in an effort to destroy means of displacements of the kidnapped soldiers to recuperate them, destroy the support of Hizballah's infrastructure and stocks of munitions, destroy Hizballah's credibility and cripple its organisation and personnel while also pressuring the Lebanese government to disarm Hezbollah. This situation was further compounded by the fact that Hezbollah is linked to Hamas and both are supported financially and logistically by Syria and Iran. Furthermore, Hezbollah does have 23 elected member of the Lebanese parliament on a total of 128 members, has the only standing force beside the Lebanese army in Lebanon and, at the time of the beginning of the hostilities, had two cabinet members of the Government of Lebanon.

By the end of July 12, 2006, Israel had already retaliated and warned of continuing military attacks. By the 13th, it had bombarded Bayreuth's airport and begun bombing the road infrastructures and ports. By the 19th of July, ground incursions took place along the border to secure an area against Hezbollah rockets launching places.

By this point, Israel's armed forces had used bombardments against coastal installations, civilian infrastructure used for military purposes (roads, bridges, electrical generation plant), destroyed the offices of Hezbollah, deliberately targeted the head of Hezbollah, destroyed over half of Hezbollah ammunition and rockets, and continued its incursions within Lebanon, while stating that troops will withdraw once the destruction of Hezbollah has been accomplished. On the morning of July 21st, news reports indicated 258 civilian killed with 582 wounded in Lebanon, while Israel stated 19 military personnel dead and 15 civilian killed by Hezbollah rockets targeting the tourist industry in Haifa and other coastal cities of the north of Israel.

At that point, one notices that Israel does not 'as such' deliberately target Lebanese forces; its target is Hezbollah. Nonetheless, the Lebanese army attempts to defend its territory against the incursions of Israeli forces and against warplanes. The result is that of a double conflict, asymmetrical in nature, but nonetheless amounting to a international armed conflict, to which the full regime of the *Geneva Conventions* and/or *Additional Protocols* may apply (Lebanon has ratified both *Additional Protocols*, while Israel has not signed nor ratified either).

The conflict ended with Hezbollah's victory in strategic terms against Israel (since its only objective was to survive the onslaught and therefore point out Israel's failure in its eradication of the group) after a month of fighting and 116 Israeli soldiers, 43 Israeli civilian lives, 530 Hezbollah's fighters and over 1500 Lebanese civilians killed. United Nation Security Council Resolution 1701 put an end to the fighting, but Israel looks occupied a 'buffer' zone until such time as the reinforced UNIFIL mission fills its ranks with European Union forces and South-Asian troops, all the while living with the illusion of disarming Hezbollah and keeping Israel at bay.

The United Nations High Commissioner for Human Rights, Louise Arbour, warned that both parties could be held liable for possible war crimes[82]. Therefore, the regime protection would apply to all after the events of July 12th, 2006. But what of the populations within these two

[82] "U.N. rights boss slams war on terrorism abuses", CNN, 23 June 2006 available at http://www.cnn.com/2006/ WORLD/europe/ 06/23/geneva.human.rights.reut/index.html

countries. During this state of war, what can Israel and Lebanon do to their citizens, residents and foreigners and what are they prohibited to do?

This is the whole dialectic of armed conflicts, whereby the rights of combatants are protected and civilians are afforded protections by the opposing forces, but whereby a state may decide to impose harsh conditions such as evacuation, forced labour or conscription on its own citizens.

This is because of the separation of the jurisdiction of international humanitarian law, resting on the "Geneva stream" and the protection from means and methods of combat from the "Hague stream", both applying only in periods of armed conflicts under *rationaes conditionis*, *tempi* et *loci*. They attempt to offer the maintenance of fundamental rights and freedoms through their conventions and protocols[83]. However, its jurisdiction is limited to four situations: international armed conflicts, non-international armed conflicts, 'internationalised' non-international armed conflicts and situations of crisis. The application of the law of armed conflicts depends on the intensity of the conflict, its geographical spread and its belligerents.

In the case of international armed conflicts, the *Geneva Conventions* apply to all states which have ratified them (all but 2, if one excludes new states to which the law of treaty succession applies or might be contested), and which edicts its jurisdiction in article 2 common to these conventions, as well as to *Additional Protocol I* under its article 1(3)[84]. In the case of non-international armed conflicts, which are more and more predominant, the situation becomes even harder as one must evaluate the intensity of the conflict and the organisation of the belligerents to know whether article 3 common to the *Geneva Conventions* of GC 1949 applies and if it is complemented by *Additional Protocol II*. This latter consideration is not only concerning whether or not a state has ratified the protocol, but because the level of intensity it requires is much higher than the level required for the application of *Protocol II*[85].

As for article 3 common to the *Geneva Conventions* of 1949, it is often qualified of mini-convention, as it contains the rights of protected persons in all situations during an armed conflict of any kind[86], enumerating the basic protections against which combatants and civilians are all entitled[87]. It is an unreductible minimum and is composed of four basic sets of

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[83] *Geneva Conventions of 1949*: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950),; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950),; *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 ; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950),.and *Additional Protocols of 1977: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

[84] *Ibid*., *Geneva Conventions of 1949* at article 2.

[85] *Additional Protocol II of 1977*, supra note 83 at Article 1.

[86] See *Hamdan*, *supra*, note 81

[87] Article 3 common to the *Geneva Conventions of 1949*: "*Article 3*- In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a inimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness,

protections that we have identified above in times of peace or of internal troubles[88] and enlarging its reach to other protections, such as that against mutilations. *Protocol II* enlarges even more these protections through its article 4[89].

But again, one must be clear. While article 3 common to the *Geneva Conventions* of 1949 applies to all conflicts, *Protocol II* only applies under the conditions of its article 1(1) which edict : "1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and *which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups* which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." [90]. Only if under a responsible command and controlling effectively a territory permitting the conduct of sustained and continued military operations can the protections of *Protocol II* be invoked. This is only attained by insurgent forces at the operational stage of the "liberation phase"[91].

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wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

[88] *Supra*, note 85.

[89] *Protocole II*, *supra* note 83 at article 4 : "*Article 4.-Fundamental guarantees* - 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f)Slavery and the slave trade in all their forms; (g) Pillage; (h) Threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular: (a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; (b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated; (c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; (d) The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; (e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being."

[90] *Ibid.* à l'article 1(1).

[91] L.P. Rouillard, *Precise of the Laws of Armed Conflicts, iUniverse, Lincoln (NE), 2004* at 188. The development of the

This is complicated enough in cases of non-international armed conflicts, but become even more difficult to decide upon in the case of 'internationalised' armed conflicts. This springs also from *Nicaragua*[92] and was confirmed in *Tadic*[93].

In effect, the problem sprung from the Cold War's 'war by proxy', whereby a third-party state supports one or the other of the protagonists. This was the case in Nicaragua, when the United States supported the Contras rebels against the Sandinista regime during its civil war. The International court of Justice differentiated in this affair the dependence of the contras from the effective control of the American government on their actions[94]. From this differentiation, it determined that in an armed conflict, the participation of a third state can implicate the 'internationalisation' of a conflict, but with regards to this state only.

In this case, the Contras were deemed to be subject only to article 3 common to the *Geneva Conventions* of 1949, while the United States were subject to the application of the full range of the Geneva Conventions[95]. The applicable regime must therefore be established with regards to the party concerned and the offence concerned.

This was confirmed in the first instance of the *Tadic* case. As in *Nicaragua* by the ICJ, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), analysed the conflicts in the former Bosnian territories of Yugoslavia in the light of knowing whether the Serbian forces of Bosnia-Herzegovina remained under the effective control of the government of the Federal Republic of Yugoslavia (RFY), in order to determine

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guerrilla is mainly done in four phases : 1) preparations, 2) organisation 3) liberation and 4) imposition of an administrative system. If the insurgents cannot breach phase 2 to attain phase 3, it is condemned to die as it cannot make the government forces lose control over the territory. If so, it remains a terrorist organisation can cannot claim the protections of article 1(1) of Protocol II, although the application of article 3/common GC 1949 might apply, depending on the type of activity. For example, the suicide bombing of a pub frequented by servicemen would not be considered as covered by article 3/common GC 1949, and conspirators of the suicide bombers would be accused of conspiracy to murder and accessory while the attack of a military armoury might fall under article 3. This interpretation springs from article 1(2) of *Protocol II* : "2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

92 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, [1986] I.C.J. Rep. 14.

93 *Prosecutor v. Dusko Tadic* (1995), Case nº IT-94-1-AR72 (International Criminal Tribunal for the Former Yuoslavia, Trial Chamber), available athttp://www.un.org/icty/tce14.htm. [Hereinafter *Tadic*].

94 *Nicaragua, supra, note 92* at para. 115 : "United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian (…). Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed".

95 *Ibid.* at para. 219 : "The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; while the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflict".

if grave breaches of the law of armed conflict was imputable to it.[96]. It found that the RFY was not. However the Appeal Chamber took another approach, asking instead if acts accomplished by non-state agents can bring about state responsibility, 'internationalising' a non-international armed conflict and in fact making it an international armed conflict. This would bring about state and personal responsibility of grave breaches of the law of armed conflicts[97].

Confronting the test of responsibility of *Nicaragua*, the Appeal Chamber of the ICPY distinguished situations where a state mandates individuals to commit illegal acts from situations where a state mandates a states to commit legal acts, but where such individuals act *ultra vires* (outside of their range of devolved powers). The Appeal Chamber concluded that article of the International Law Commission's Project on State Responsibility imputed such responsibility on the Federal Republic of Yugoslavia[98]. It did so not because of a mandate of actions, legal or otherwise, of the FRY over Bosnian-Serb forces in Bosnia-Herzegovina, but because it found that the FRY had effective control over the Bosnian-Serb forces[99]. As such, this created an internationalisation of the conflict, since it now implicated directly the FRY as a party to the conflict and made Tadic an agent of the state[100]. Therefore, the *Geneva Conventions*

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[96] *Tadic*, *supra*, note 93 at para. 588 : "must consider the essence of the test of the relationship between a *de facto* organ or agent, (…) and its controlling entity or principal, as a foreign Power, namely the more general question whether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS, including its occupation of opstina Prijedor, can be imputed to the (…)Yugoslavia".

[97] *Procureur v. Dusko Tadic*, (1999), Case n° IT-94-1-AR72, (International Criminal Tribunal for the Former Yuoslavia, Appeal Chamber), available at http://www.un.org/icty/tadic/appeal/judgement/main.htm, at para. 104: "the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a state, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international". [Hereinafter *Tadic Appeal*]

[98] *Report of the International Law Commission on the work of its Thirty-second session*, 5 May - 25 July 1980, Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10, 32e sess., UN A/35/10, (1980) 31 at article 10, which provides that: "The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.". The Appeal Chamber of the ICTY specifies in *Tadic (Appeal)*, *supra* note 363 that: "121. This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission,[139] a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives."

[99] *Tadic (Appeal)*, *supra* note 97 at para. 121 : "This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for ultra vires acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities.".

[100] *Ibid.* at para. 167: "167. In the instant case the Bosnian Serbs, including the Appellant, arguably had the same

applied in full. If Protocols I or II had been ratified, their regimes might have been applicable, depending on the *rationaes conditionis*, *tempi* and *loci*.

As we can see, there is no doubt that there is a basic protection of fundamental rights guaranteed in the legal regimes applicable to all armed conflicts, albeit with major differences of jurisdiction and application. The question is now to know what protections are offered whilst no armed conflicts are taking place, but rather during times of internal troubles, disturbances and emergencies, which will be referred to as "situations of exception".

In these cases, human rights may be limited or suspended and the protections of international humanitarian law remain inoperative. There is what is called the 'gap', the legal void, between international human rights law and international humanitarian law.

The Protection of Human Rights at All Times

The legal void that exists in situations of exceptions is due to the difference of application of the treaties pertaining to international humanitarian law and international human rights law as described above. However, not solely the jurisdiction is an obstacle to the establishment of minimal norms of protection of human rights applicable at all times, or "minimal humanitarian standard".

Added to the limitation and derogation contained in the human rights instruments we have seen with regards to international humanitarian law, we must also consider the legal status of the non-state entities it's the context of the systems of protections of human rights, and the fundamental limitation they carry with their limitative clauses and derogation clauses[101].

Such groups are not bound by international or regional treaties; the universal and regional mechanisms have only effects upon states parties to their constituting treaties. Furthermore, human rights treaties protect human rights in the context of the relation between the individual and the state, not between individuals themselves. While the preamble of the *Universal Declaration* and the *1966 Covenants* recognise the individual obligation to promote human rights, it does not explicitly give a legal responsibility between individuals even in relation to a violation of this obligation[102].

While individual responsibility in international exists in some treaties (e.g. slavery, genocide, international court of justice), the United Nations' Secretary-General has warned against seeing an over encompassing obligation as this would give incentive for repression against members of armed groups and this repression itself would be contrary to the principles of the protection

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nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were "protected persons" as they found themselves in the hands of armed forces of a State of which they were not nationals."

[101] *Minimum Humanitarian Standards, Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21*, Doc. off. CES NU, 53e sess., Doc. NU E/CN.4/1998/87 (1998). [Hereinafter *Analytical Report*].

[102] *Ibid., at* para. 62.

of human rights[103].

Also, the protection systems are themselves limited in effect because they lack specificity in the breadth and width of the rights protected. In fact, international humanitarian law provides a clearer outlay of the rights protected than do most of the treaties pertaining to human rights, but as they do not apply in situations of exception, this does not help in providing for a clear protection. In international human rights law, most rights and freedoms are mentioned in general terms and are free to be interpreted liberally or conservatively[104]. This legal void leaves an abyss where rights are lost to individual.

This situation has been known for long. Already in 1968, this problem is recognised in Resolution XIII of the International Conference on Human Rights held in Teheran from 22 April to May 1st of that year[105]. For the next twenty years, the problem has been mentioned and cursorily examined, but precious little was accomplished.

Under the efforts of Hans-Peter Gasser and Theodor Meron, and many others who brought forth their contribution, efforts were made to identified the rights to be protected. These authors converged together at the Institute of Human Rights of the University of Turku, Finland, and drafted the *Turku Declaration*[106].

The approach taken was that, under the quasi-universal character of the *Geneva Conventions* of 1949[107], the norms of human rights' protection that it contained have become opposable to all, even those states not party to the Geneva Conventions, and even those who would attempt to denounce them since the *Vienna Convention on the Law of Treaties* prohibits denunciation or interpretative declarations incompatible with the aims and principles of a treaty[108]. This *lex specialis* is even clearer as article 60(5) prohibits such denunciation against treaties of a humanitarian character with regards to the protection afforded by them to protected persons[109].

This reasoning is further pursued by stating also that no state shall be absolved from responsibility for violations of obligations of international law despite a denunciation if that obligation exists independently of the denounced treaty, for example an obligation of *jus cogens*

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[103] *Ibid.* at para. 64.
[104] *Ibid.* at para. 66.
[105] *Proclamation of Teheran, Final Act of the International Conference on Human Rights*, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968) at article 10 : "10. Massive denials of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold human misery, engender reactions which could engulf the world in ever growing hostilities. It is the obligation of the international community to co-operate in eradicating such scourges". This was also preceeded by the *Protocol to the Convention on Duties and Rights of States in the Even of Civil Strife*, Opened for signature on 1st May 1957, but this protocol strictly concerned the responsibility of states with regars to one another with due regards to the notion of the principle of non-intervention.
[106] *Declaration of Turku*, 2 December 1990 [Hereinafter *Turku Declaration*].
[107] With the adhesion of Eritrea in 2000 only the Nauru and the Marshalls Islands have not ratified the Geneva Conventions bringing 191 on 193 recognised states. None of these countries have armed forces apart from a constabulary.
[108] *Vienna Convention on the Rights of Treaties*, (1969) 331 U.N.T.S 1155, at article 18 (entered in force on 27 January 1980). [Hereinafter *Vienna Convention*].
[109] *Ibid.* at article 60(5).

or contained in another treaty not denounced[110]. Even if a customary norm is codified and that the treaty containing this codification is denounced, the customary norm continues to exist parallel to the treaty norm and must be submitted to[111].

This recognition of the customary norm is recognised in the Martens Clause seen above[112] to remain under the principles of humanity and from the dictates of public conscience[113]. These principles of international law are the *lex corpus* in which custom evolves. But the Martens' clause goes further by associating this to the public conscience. To many who drafted the *Turku Declaration*, amongst which Professor Meron, this weights if not legally, at least morally, in a manner to force states to recognise as universal the protections of human rights .

He bases his opinion on the *Barcelona Traction Case*[114], in which the International Court of Justice recognised the *erga omnes* obligations, meaning those obligations applicable to all at all times. The interpretation from this case suggests that the obligation to respect and to ensure respect contained in article 1 article common to the *Geneva Conventions* of 1949 would be such *erga omnes obligations*, as applying to all and are already accepted in the *lex corpus* of international law since they have a quasi-universal recognition[115].

Since article 3 is recognised in a quasi-universal manner, it is argued that the rights it contains are of such an elementary ethical order and retake in so many international treaties of human rights and humanitarian law that the convergence of these norms forms the basis of a customary right applicable in situations of exceptions[116]. It is therefore aimed to bring together the fundamental rights seen in the case of international human rights law and bring them together with the basic human rights' protections contained in international humanitarian law in order to created a non-derogable 'minimal humanitarian standard', that is a core of fundamental right that cannot be limited, suspended or violated at all times.

What is attempted is to created, through the unifying of the Martens' Clause, the inclusion of recognised norms of *jus cogens* and of *erga omnes* obligations, is a renewed and modernised version of the *jus gentium*[117]. This means that what is attempted is to create an ethical law system based upon rules of natural law applicable to all at all times. It is argued that an advantage of such a system would be to formally recognise the international legal norms of natural law, which are inherent to the individual[118], leading to its absolute non-derogable character. This approach is further supported by the *American Declaration*, which recognises explicitly the

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110 *Ibid.* at article 43.
111 *Corfu channel case (United Kingdom v. Albania)*, [1949] I.C.J. Rep. 4.
112 See : Hague Convention II of 1899, the preamble of the Hague Convention IV of 1907, the preamble of the 1980 UN Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, as well as in articles 63/GC I, 62/GC II, 142/GC III and 158/GC IV. It is supplemented by articles1(2)/AP 1 and paragraph (4) of the Preamble of AP 2. It edicts that in cases not covered by either treaties or customs: "civilians and combatants remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity and from the dictates of public conscience".
113 *Geneva Conventions of 1949, supra*, note 83 at articles 63 of the *First Convention*; 62 of the *Second Convention*; 142 of the *Third Convention* and 158 of the *Fourth Convention.*
114 *Barcelona Traction, Light and Power Co., Ltd.* (Belgium v. Spain), [1970] I.C.J. Rec. 3, 32.
115 Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon, Oxford, 1989 at 31.
116 *Id.*
117 *Ibid.* at 188, affirming the existence of *erga omnes* obligations as dating from at least Hugo Grotius' period.
118 *Ibid.* at 80.

principles of natural law[119] and of the *African Charter* which permits the African system to found its applicable principles in other instruments as interpretative sources in order to find the most favourable to the individual safeguarding of human rights[120]. In so doing, this brings forth a universal interpretation of the rights to be recognised and of their application.

This becomes even more so if one interprets *erga omnes* under the guiding lights of articles 55 et 56 of the *Charter of the United Nations*[121]. Still, it is the lack of specificity that remains problematic. While the *Charter of the United Nations* and the *Universal Declaration* draw the overall rights, it is the multi-lateral and regional treaties, to which a relative few states are part of, that determine the reach and jurisdiction of the protections contained thereof.

This is why it is argued that norms applicable in situations of exceptions should be found through the powers contained at article 38(1)(c) of the Statute of the International Court of Justice[122]. By applying general principles of law, the ICJ can bring about the maturation of these norms so they can be incorporated as *jus cogens* in this new *jus gentium*. The advocated approach therefore aims at multiplying the references from one treaty to another in order that the norms contained wherein are progressively incorporated in international judgements and therefore that their opposability to states be recognised as coming from their status as *jus cogens* in international law. One step of this approach was to draft the rights to be recognised and this was done in a large part through the *Turku Declaration*.

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[119] *American Declaration*, *supra*, note 4 at the second paragraph of its introductive considerations ('Whereas'): "The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the *essential rights of man* and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness", recognising from the ouset the existence of essential rights of man, on the premisse of natural law, as understood in the theological sense of Christianity's perspective."

[120] *African Charter*, *supra*, note 6 at article 60.

[121] *United Nations Charter*, *supra*, note 60 at articles 55(1)(c) and 56, where article 55(1)(c) edicts that the United Nations shall promote "c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" while article 56 extend this commitment in an *erga omnes* obligation by stating: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

[122] *Statute of the international Court of Justice*, *supra* note 332 at article 38(1)(c) stating that the Court is subject to "c. the general principles of law recognized by civilized nations."

The Turku Declaration

The *Turku Declaration*[123], as stipulated in the *Background Paper to the Declaration of Minimum Humanitarian Standards*[124], aims at the concept of a declaration on a 'minimal humanitarian standard', which emerged at the beginning of the 1980. It led to a preparatory document was made by the *Norwegian Institute of Human Right* in Oslo in 1987. This document was examined by a second committee of experts at *Abo Akademi University Institute for Human Rights* in Turku, Finland from November 30 to December 2, 1990.

This first document contained 18 articles incorporating the essential elements necessary to its recognition as established previously. First, one notes its preamble, which establishes a clear notion of universality and a direct link with the Charter of the United Nations as well as with the Universal Declaration by stating: "Recalling the reaffirmation by the Charter of the United Nations and the Universal Declaration of Human Rights of faith in the dignity and worth of the human person…"[125].

From there, the reach and scope of the declaration is made to define situations of exceptions, all the while specifying that the rights contained in the declaration these rights remain applicable and absolutely non-derogable at all times, in all situations and everywhere, whether a state of emergency or has been declared or not[126].

Article 2 specifies that the norms contained are to be respected by all, including individuals, states, entities and authorities of all kinds without regards to their juridical status and without

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123 Institute for Human Rights, *Declaration of Minimum Humanitarian Standards of 2 December 1990*, Âbo Akademi University, Turku/Âbo, 1991, 17 and published in T. Meron, "A declaration of Humanitarian Standards", (1991) 85 A.J.I.L. 375. Declaration of Turku, 2 December 1990 [Hereinafter *Turku Declaration*]. The project of 1990 was transmitted to the Human Rights Committee of the Economic and Social Council of the following resolution E/CN.4/1994/26 of the Sub- Commission on Prevention of Discrimination and protection of Minorities, and was subsequently adopted as its *Declaration of minimum humanitarian standards, revised by an expert meeting convened by the Institute for Human Rights*, Déc. CES, Doc. off. CES NU, 1995, Doc. NU E/CN.4/1995/116. [Hereinafter *Declaration of Minimum Humanitarian Standards*]. This was based upon professor Meron's series of articles on the subject of the legal void over a period of 15 years, among which on can find T. Meron, "On the Inadequate Reach of Humanitarian and Human Right Laws", (1983) 77 *A.J.I.L.* 589; T. Meron, "Towards a Humanitarian Declaration of Internal Strife", (1984) 78 A.J.I.L. 859; T. Meron, "Combatting Lawlessness in the gray zone", (1995) 89 *A.J.I.L.* 215. These resulted in part or in a symbiotic manner from and with the previous work on the matter made by Nicole Questiaux, *Study on the Implications for Human Rights of Recent Developments Concerning Situations Known as State of Siege or Emergency*, drawn up for the Sub-Commission on Prevention of Discrimination and protection of Minorities of 27 July 1982 (E/CN.4/Sub.2/1982/15), which further brought about the publication of International Commission of Jurists, *States of Emergency, Their Impact on Human Rights*, 1983, and also led much publications in the International Review of the Red Cross, in particular by Hans-Peter Gasser, then Legal Advisor to the Directorate of the International Committee of the Red Cross and later editor of the International Review of the Red Cross, which provided much inspiration for this project in is article "A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct" (1988) 262 *International Review of the Red Cross* 38. Like many such projects, some individuals are recognized more than others, but it should not be forgotten that the impetuous actually sprang from the UN's effort and these were afterward appropriated by academics, leading to them smith-working the formula and finally re-proposing the idea to its original source.

124 *Declaration of minimum humanitarian standards, revised by an expert meeting convened by the Institute for Human Rights, supra,* note 123 at 8.

125 *Turku Declaration u*, *supra* note 123 at preamble.

126 *Ibid.* at article 1.

discrimination, establish a clear precedent in international by explicitly stating individual responsibility at all times for the violation of norms of human rights.

Article then proceeds to defining the precise rights protected and to which derogations are prohibited at all times. It retains the protections of humanitarian law concerning the humane treatment of persons without discrimination as found in article 75(1) of *Protocol I* and of article 4(1) of *Protocol II*[127]. However, to these are added the notions of freedom of thought, conscience and religious practice, usually find in human rights instruments, although the right to observe religious practices is contained in humanitarian law for those interned or detained during hostilities[128].

It is interesting to note that the *Turku Declaration* follows the structure not of human rights treaties, but of humanitarian law instruments, principally of the *Geneva Conventions of 1949*, in that its first article immediately defines the obligations to respect and ensure respect of the declaration, the second article defines its reach and scope of application, while the third enumerates the rights protected.

From there, however, it adopts another structural approach, whereby from article 3(2)(a) et (c) covers as much points (a), (b) et (c) of the article 3(2) common to the *Geneva Conventions* 1949 as well as the ones enumerated in articles 11 and 75(2) of *Protocol I* and 4(2) of *Protocol II* but with two major exceptions: the protection against corporal punishment edicted at article 75(2)(a)(iii) of *Protocol I* and the protections against terrorism and slavery found in article 4(2)(d) and 2(g) of *Protocol II*. Nor do we found in them the judicial guarantees and special protections normally devolved to women and children under the age of 18. Instead, the *Turku Declaration* has opted for the formulation of *Protocol II* that separates these articles in specific dispositions. It does, however, include the notion of protection against involuntary disappearances, which is was first found in an instrument of human rights and is now also found under the International Criminal Court's Statute[129], as well as the protection against privation of goods necessary for survival, as found in articles 54 of *Protocol I* and 14 of *Protocol II*.

Following on the case of judicial guarantees as mentioned with regards to article 3 above, article 4 immediately specifies the rights of detainees to obtain recognition of their detention in order to avoid disappearance and the granting of the rights of communication with the exterior, as well as the notion of *habeas corpus*. This brings about a potential problem as it enlarges the provision of the rights of communications, which can be restricted under article 5 of the *Fourth Geneva Convention* in the case of spy, saboteur and persons under definite suspicion of hostile activities. No reconciliation with this enlargement problematic has been proposed either by providing for a definite period of possibility of being held *incommunicado* (i.e. a month), which would be preferable than a blanket prohibition since it would allow states to agree to a norm that provides for its own security while also providing true and verifiable relief for the individual. This, as we will see in the following article of the *Turku Declaration*, remain

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127 See *supra,* note 83.

128 At articles 18 of the *Universal Declaration* and of the *European Convention*, article 8 of the *African Charter* and 12 of the *American Convention*.

129 But is the object of the *Declaration on the Protection of All Persons from Enforced Disappearances*, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992).

one of the major problem that would prevent its adoption at large as a treaty, rather than as a non-opposable declaration, as it now stands.

Carrying on, article 5 concentrates on the principles of the protections of humanitarian law: the inviolabilityof persons not taking part in hostilities and, in the case of those taking part, the application of proportionality[130]. However, while it is the aim of the Turku Declaration to merge the protections of international humanitarian law and those of human rights in one set of norms, an anomaly takes place at its article 5(3). There are enumerated means and methods of combat prohibited in armed conflicts and that cannot be employed in any circumstances. This is not a 'child' of humanitarian law as understood in the sense of the Geneva stream, and therefore not a typical notion of human rights contained in humanitarian law, but rather a descendant of the Hague stream concerning means and methods of warfare. This anomaly is somewhat worrisome as it states: "Weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances."[131].

In so doing, it further muddles the differentiating regimes set in the Hague stream of the laws of armed conflicts on the uses of some methods and means of combat since the aim of the declaration would be to be applicable at all times. It would supplement and enlarge the scope of application of previous treaties which provided for clear limitations on the restrictions of uses of certain weapons. One only needs to think of the *Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*[132]. This convention prohibits the use of gases at all times, but provides for exceptions concerning 'tear gas'and cayenne pepper spray[133]. These are permitted for uses of the maintenance of public order by police forces. If the Turku Declaration was to apply at all times by prohibiting the uses of tear gas and pepper spray in armed conflict, which international humanitarian law does, then it follows that the use of tear gas and pepper spray would become forbidden at all times, especially in situations of exceptions. But it is precisely in these situations that this anti-crowd tool is mostly used and necessary as it prevents the escalation of violence and permits a relatively 'mild' method of dispersing crowds, therefore saving lives instead of resorting to brute force or even live fire with either rubber or real bullets.

To accept the text of this article would in fact be to deny police forces and anti-riot squads the most potent and least lethal of method to de-escalate a rising challenge, leaving them to resort either to the baton and water-canon, or to the use of charges and fire-power.

Article 5 is therefore in need of revision, which must allow for a drafting that accepts that the limitations that apply to treaties applying in international humanitarian would see their limitations transposed into this merged minimal humanitarian standard. Such a drafting would

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130 By far a fundamental precept, proportionality states that there must be a clear equilibrium reached between the means used and the objective aimed. If the foreseeable consequences are disproportionate in effects, then the attack must be suspended.

131 *Turku Declaration*, supra note 123 at article 5(3).

132 *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction*, Paris 13 January 1993 at http://www.icrc.org/ihl.nsf/WebFULL?OpenView.

133 *Ibid.* at article 1(5), which prohibits the use of anti-riot means as means of warfare or combat and at its article 9(d) which edicts: " 'Purposes Not Prohibited Under this Convention' means: (…) (d) Law enforcement including domestic riot control purposes. ».

not be easy; for example, one could also think of the case of hired security forces, which are in fact 'guns for hire'. Under the law of armed conflicts, mercenaries are illegal combatants and therefore proscribed of used in an international armed conflict[134] under *Protocol I*, but which are not illegal under the Geneva Conventions, as long as they are incorporated within the structure of the armed forces of a country or assimilated as one of the combatants categories of article 4 of the *Third Geneva Convention*, nor illegal under *Protocol II*[135]. This would take the larger prohibition of *Protocol I* and apply it to those states which have not ratified it, or even opposed it. One can obviously argued that such an enlargement of protection can only be good for the consolidation of the legal regimes and the standardisation of the applicable law, but this does not take into account the political reality of international politics.

A state which has not consented to be bound by *Protocol I*, the example of the United States being foremost, can hardly be tempted into adhering to a declaration not only applying a notion of international humanitarian law to human rights violations, but further enlarging in to any and all situations of armed conflicts where it surely does not want it to apply. For example, the current use of private security forces in Iraq under the term 'civilian contractor' is not illegal as such: the United States have signed but not ratified *Protocol I* and while the notion of an 'authorized' 'supply contractor' who "accompany the armed forces without actually being members thereof" as contained at article 4(A)(3)/GC III[136] might be a stretch of its meaning, it is not altogether an unreasonable interpretation. At the very least, no positive notion of the law of international armed conflict short of *Protocol I* prohibits the use of mercenaries, and even less of those private contractors which provide security services without answering to the full definition of mercenaries as understood in article 47 of *Protocol I*.

For these examples, which might very well not be the sole in existence, there is a definite need to revise article 5 of the *Turku Declaration* in a manner that addresses the need to incorporate the limitations of international humanitarian law into the minimal humanitarian standard.

This declaration then follows through article 6 by prohibiting the use of terror, menace of or act of violence. This adopts the notions of articles 51(2) of *Protocol I* and 13(2) of *Protocol II*. It does so in conjunction with its article 7 that prohibits forced movements of the civilian population, as do articles 49 of the *Fourth Geneva Convention* and 58(1)(a) of *Protocol I* (as relating to article 49/GC IV) and as does article 17 of *Protocol II*. These articles present no difficulties of interpretation as such, but extend their reach to not only the 'enemy' civilian population in occupied territories, but also to one's own population, which is not the case under the law of armed conflicts. This has a gigantic impact; had it been applicable at the time, this would have applied to Stalin's deportation of Cossacks, Georgians and others, which tallied to an estimated 14 million deaths over the length of his rules[137], would have applied to mass deportations by

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134 See article 47 of *Protocol 1* and *The International Convention against the Recruitment, Use, Financing, and Training of Mercenaries*, G.A. Res. 34, U.N. GAOR, 44th Sess., Supp. No. 43, at 590, U.N. Doc. A/44/43 (1989), 29 I.L.M. 91, which, although not in force, represent a statement of intention by many to recognise the illegality of their use.

135 This would however be enlarged in scope and reach for Africa, due to the *OAU Convention for the Elimination of Mercenaries in Africa*, O.A.U. Doc. CM/433/Rev.L, Annex 1(1972), which has been ratified by 13 African states so far (see list available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20 Protocols/List/Convention%20for%0the%20Elimination%20of%20Mercenarism.pdf.

136 *Third Geneva Convention*, *supra* note 83 at article 4(A)(3).

137 While no numbers will ever have any precisions, Stalin can bee seen as the 'acting' element of the 'Communist block' and his influence can be attributed to all and any actions of the communist regimes in Eastern and Central

Nazi Germany of Jews, Gypsies and others (which is the root of article 49of the *Fourth Geneva Convention*), and more recently to Serbian, Croatian and Bosniak 'ethnic cleansing' as well as to Iraqi actions against the Kurd population. This extension of the notion to times outside of the reach of non-international armed conflicts having the application of Protocol II or to international armed conflicts would greatly enhance the protection regimes of human rights, but again it ignores political reality and its interpretation can be objected to numbers of states having indigenous populations, such as American and Canadian Indians as well as Australian Aboriginals, which would be ill at ease with their policies of 'reservations' for tribes and/or peoples. This article could become a potent legal weapon against these official policies and internal legal regimes. As a result, most of these countries could only with difficulties attach their ratifications to such a declaration.

Then comes the novelty of its article 8, which defines the rights against the death penalty. It prohibits the execution of a death sentence against pregnant women, mothers of young children as well as of children under 18 years of age and stipulates a 6 months stay of execution for people nonetheless subjected to the death penalty as do articles 68 of the *Fourth Geneva Convention*, 76(3) and 77(5) of *Protocol I* and article 6(4) of *Protocol II*. However, one has to wonder whether this formulation is not a pace backwards when compared to the notions of the law of armed conflict.

Indeed, while article 68 of the *Fourth Geneva Convention* prohibits the pronouncing a sentence of death against children of less than 18 years of age, article 76(3) of *Protocol I* prohibits the execution but not its pronouncement. And article 77(5) *Protocol I* follows the lines of article 68 of the *Fourth Geneva Convention*. Further, article 6(4) of *Protocol II* prohibits this pronouncement against children under 18, but not against pregnant women nor women with young children.
This might seem like semantics, but it is in reality an important point: a guiding principle of the law of armed conflict is that in no circumstances can one allow the bar to be lowered against the *'acquis'* of this legal regime. Doing so establishes a precedent that can be used for justification in another completely different protection of the legal regime. As with the sources of international law, the accumulation of argumentative elements can have the effect to slowly unravel parts of the legal regime and this effect is unacceptable.

Furthermore, article 8 suffers from a serious deficiency in the way it is written when it states: "In countries which have not yet abolished the death penalty, sentences of death shall be carried out only for the most serious crime…"[138]. The aim being to diminish the use of the death penalty or at least to strongly regulate its process, the use of the verb *shall be* instead of *may be* actually dictates that states *must use* the death penalty for the most serious crimes, instead of giving them a choice. This was a serious mistake guaranteed to please some countries, but not advocates of international human rights and humanitarian law.

Afterwards, one finds at the declaration's article 9 the all important judicial guarantees. This further retakes the notions of articles 3(d) common of the *Geneva Conventions*, of article 75(4) of *Protocol I* and article 6(2) of *Protocol II*. While the norms presented in the declaration encompass all that are enumerated in article 6(2) of *Protocol II*, simply inversing its sub-paragraphs (c) with

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Europe for the length of his rules. For one estimate, see Robert Conquest, *The Great Terror: Stalin's Purge of the Thirties*, The Macmillan Company, New York, 1968, pp. 711-12.

[138] *Turku Declaration*, *supra* note 123 at article 8(3).

its sub-paragraph (g), it remains worrisome that once more the bar has been lowered comparatively with article 75(4) of *Protocol I*. Indeed, article 75(4) has four of the most important notions of law attached into it, these being: *litis pedentes* or that of thing already judged upon or being pursued in the courts in another case; the right to cross-examination of witnesses; the right of a public sentence; and the right to being informed of the appeals recourses available as well as being permitted the use of these recourses after condemnation[139]. While the notions of article 9 contains most of the notions of article 6(2) of *Protocol II*, it does not incorporate the four principles contained in article 75(4) of *Protocol I*, including the notion of article 6(2) of *Protocol II*, which does required the accused to be informed of his appeal recourses.

Article 10 then takes on the principles of the rights of children stating that they must be granted protections as required by their status. This mostly retakes the notions of the *Fourth Geneva Convention*, but the problem with this article is that it chooses to adopt the general guidelines of the Geneva Conventions, while the aim of the declaration is precisely to adopt specific and clear enunciation of the rights to be protected at all times. Doing so defeat the purposes of the declaration[140]. On the positive side, it does specify the clear prohibition of enrolling children under the age of 15 in armed forces (implicitly including all types or military, paramilitary, insurgent or even terrorist organisations)[141].

Article 11 then addresses the internment conditions for state security reasons, thereby re-stating the terms of article 5 of the *Fourth Geneva Convention*.

Following this, article 12 combines the protections to be afforded to the wounded and sick with the right to a humane treatment as well as that to receive medical treatment. It edicts that these rights are due to a persons, whether or not he or she has taken part in the violence, thereby establishing the link with the notion of combatant of article 4 of *Third Geneva Conventions* and 41 of *Protocol I*, as well as with the notion of humane treatment contained in articles 3/common GC 1949, 75(1) of *Protocol I* and 4(1) du *Protocol II*. Are also retaken the notion of *triage*, making it once more the sole legitimate criteria in determining the order of provision of treatment by adjudging the gravity of the wounds[142]. This is intrinsically linked to the obligation to search and care for wounded and sick as well as missing persons in the best delays possible, as enumerated in article 13 of the declaration[143].

In the same manner of logic, article 14 of the declaration recognises the right of medical and sanitary as well as religious personnel to help and care for wounded and sick, as well as to be

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139 *Protocole I*, *supra* note 82 at article 75(4), sub-paragraphs (g), (h), (i) et (j).

140 Articles 50 (rights to medical care and education in occupied territories) and 51 (interdiction of forced labor) could have been expressed clearly as they are quasi-universally recognised.

141 Respecting amongst other the dispositions of the *Declaration of the Rights of the Child*, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959)and of the *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, as well as those of articles 77(2) of *Protocol I* and 4(3)(c) of *Protocol II*. It is somewhat regrettable, however, not to see the full protections of article 77(2) of *Protocol I* whereby it would force to choose children by priority of age when enrolled in the armed forced between the age of 15 and 18.

142 Retaking the dispositions common to articles 12(3) of *Conventions I* and *II*, as well as those of articles 10(2) of *Protocol I* and 7(2) of *Protocol II*.

143 Re-stating *verbatim* the notions of articles 15 of *Convention I*, 18 of *Convention II*, 17 and 33 of *Protocol I* as well as 8 of *Protocol II*.

respected and have this respect ensure in the course of doing their humanitarian duties[144]. This provision is laudable as such, but then comes the difficulty of having it obeyed as doctors treating a wounded insurgent in some countries are perceived as conspirators (which they sometimes are) and often treated as accessories to murder or other insurgent actions or terrorism charges. It is precisely that which it attempts to correct, but it enforcement by the agents of the state makes it very hard to obey.

In the spirit of the enlargement of protections, article 15 then offers an open door to humanitarian organisations when, under the law of armed conflicts, solely the existence of an armed conflict gave them liberty to offer their services and only due reasons prohibit their activities.[145] This article could have serious repercussions[146], as this merging of humanitarian provisions into a mixed 'minimal humanitarian standard' brings also a blurring of mandates between organisations primarily involved with human rights such as Amnesty International and humanitarian organisations, such as the Red Cross. This is not necessarily a welcomed addition to the whole project of a minimal humanitarian standard. In effect, it plunges ahead in a widening of mandates of a flurry of organisations which already have enough problems with coping with their own specialty and give them incentive to broaden their horizons to ever more complex situations.

In effect, this ignoring once more the political reality that states are not interested in ever more interventions into their internal affairs at all times and further that such interventions by all kinds of interventions from the very efficient and serious such as the Red Cross movement to the 'mom & pop' volunteer organisation that will criticise willy-nilly without proper knowledge of the facts in a country. This leads only to more antipathy from government and lessen the chance of a broad accord on a minimal humanitarian standard.

Once more, this is the heaviest criticism that can be made of the whole project of a humanitarian minimal standard applicable at all times: it has to rest on a broad agreement of *minimal* norms in order to reach the acceptance of states. Trying to enlarge this to unnecessary fields does not give better chances of such a project being accepted nor can an agreement be made upon what truly constituted the *minimal* standard to be applied.

Again, this danger lurks in article 16, whereby the notion of the protection of the rights of groups, minorities and peoples, to include their dignity and identity is included. Inspired by the *travaux préparatoires* of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*. The protection of minorities and the notion of groups can be explicitly found in it, clearly intending to link this inclusion with the declaration. Again, this aim at creating an interdependence of international instruments in order to have it further embedded within the *lex corpus* of international law, this is even more the case as the *Declaration on the*

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144 *Turku Declaration*, *supra* note 123 at article 14(1) *in fine*: "*They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.*", stating the exact terms of articles 15(2) of *Protocol I* and 9(2) of *Protocol II*.

145 Articles 142 of *Convention IV*, 70 of *Protocol I* and 18 of *Protocol II*.

146 When we think for example of the enlargement of the mandate of *Amnesty International* to include the case of children-soldier, one perceives overlapping of mandates of private or non-governmental organisations dealing with either human rights or humanitarian aid. The debate has reached the Red Cross in the middle of the 1990, and thankfully the ICRC has resisted being drawn into the human rights debate. Since resources in humanitarian aid are fairly stretched to start with, a mandate enlargement would provoke certain deficiencies in aid and further threaten the essential notion of impartiality that permits it to operate.

Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities has a throve of references to other instruments itself precisely in the aim of using the referring approach to establish its force of law[147].

But, once more, the addition of such an article is a guarantee of creating further more reason for reticence by states with large minorities or with many peoples or nations composing them. Such as article would be a reference as an argument in justifying such issues as the recognition of Spanish as an official language in at least some parts of Western and Southern United States, or that of the Russian very large minority of Ukraine, or indeed the Kurd minority of Iraq. Applying the principles contained in a United Nations' General Assembly declaration, which is non-opposable to states, in order to create and then extend its applicable force of law is a sure way to further turn away states from recognising its principles.

The arguments of the drafter of the *Turku Declaration* is that such arguments are rendered inoperable by its article 17, which edicts clearly that nothing contained in the declaration modifies the legal status of any entity, thereby once more retaking the notions of articles 3(2) common to the *Geneva Conventions* of 1949 *in fine* and of article 3 of *Protocol II*.

But again, the problem is not so much this argument, although clearly it is a major part of the issue, but rather it is that the drafter have taken notions which are establish as norms of international law and attempted not only to impose an effective opposability through force of law, but even go beyond by extending that reach and its scope of application. Doing so is the only sure way to prevent any consensus from emerging. And again, this is the downfall of jurists everywhere: they see life in terms of legal terms, but forget that they application of law depends on governments and that government are driven by interests. In short, they forget that law is a product of politics as defined as "*who gets what, when and how.*". Any course in political science will teach as much, but jurist forget this and try to impose a juridical view of 'what should be', forgetting often 'what is'.

This is again apparent in article 18(1), which states that nothing the *Turku Declaration* contains affects can limits the reach of other international instruments and further stipulates at article 18(2) that: "No restriction upon or derogation from any of the fundamental rights of human beings recognized or existing in any country by virtue of law, treaties, regulations, custom, or principles of humanity shall be admitted on the pretext that the present standards do not recognize such rights or that they recognize them to a lesser extent."[148].

The result is that while the objective of the *Turku Declaration* is very laudable, it departs from its concept of being inclusive and of merging existing rights by attempting to encompass domains

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147 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993) at preamble: "Desiring to promote the realization of the principles contained in the Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations."

148 *Turku Declaration*, *supra*, note 123 at article 18.

outside its true scope of a *minimal* humanitarian standard and further tries to create principles of international human rights law that do not even exist as of yet and attempt to go beyond in their reach, by applying at all times, all the while being confusing on very important notions such as that of the use of gases, the question of mercenaries, the blurring of mandates and the recognition of linguistic and religious minorities as protected.

The *Turku Declaration* was revised in 1994 in Oslo and its change were adopted as the *Declaration of Minimum Humanitarian Standards* by the *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, which is part of the Human Rights Commission of the Social and Economic Council of the United Nation's Organisation[149].

Declaration of Minimum Humanitarian Standards

As it now stands, the modifications brought to the *Turku Declaration* differ little from the initial proposal, which is why the Turku Declaration was first analysed herein even though only the *Declaration of Minimum Humanitarian Standard* has a recognition by the UN. Overall, the structure and content has hardly change, but with some notable corrections.

These result in a large part from Pr. Meron's revision of his initial declaration as modified in Turku and sporting a number of propositions, including a re-drafting of article 18, a new article 19 including individual responsibility and a new article 20 concerning the obligation to respect the rights protected wherein without any derogation[150].

This was the proposal that led to the modification put into the *Declaration of Minimum Humanitarian Standards* into which the first correction that was brought was the use of the word shall instead of may at article 8(3). This was an obvious correction and has been correctly addressed. Other changes result not of a juridical interpretation, but rather of an evolutionary adaptation due to the multiple conflicts of the 1990s. As the *Background Paper* mentions: "Because of the most recent conflicts, the words 'ethnic, religious and national conflicts' have been added in all pertinent paragraphs."[Which after examination means articles 1(1), 15 and 17]"[151].

The structural changes that take place are those whereby article 7 is given a second paragraph that protects the rights of persons to stay in place. Flowing from refugee law, this signal the intention of having an instrument that protects while projecting the interdependence of many fields of international law. However, once more it is an dangerous addition with regards to the acceptance of the declaration as this could prohibit state expropriation, with or without compensation as the internal legal regime permits, and again would bring to the fore the issue of indigenous populations.

Article 15 is then rewritten to encompass not only the rights of international organisation to

[149] *Declaration of Minimum Humanitarian Standards*, reprinted in *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).
[150] T. Meron, "Combating Lawlessness in the gray zone", (1995) 89 *A.J.I.L.* 215
[151] *Ibid.* at p. 8.

provide help, but also of persons to have this aid reach them. Once more, the comment made above remains intact and this addition does not help to a future adoption as positive norms of international by states by giving ever more access to escapatory means to individuals, which can be as much insurgents, combatants as civilians.

Finally, the last change is that adding a paragraph to article 18 of the *Turku Declaration* transposing clearly the concept of non-derogation from Pr. Meron's article 20 into a second paragraph of article 18. Nonetheless, these changes bring little to change the initial direction and offering of the *Turku Declaration* and of its final accepted version of the *Declaration on Minimum Humanitarian Standard.*

Conclusions

Firstly, one must take into account the fact that a legal void exists between the application of the law of armed conflicts and that of international human rights law in situation of exceptions where limitations or suspensions, termed derogations, of human rights are permitted under treaty law.

Further, the non-derogable human rights covered even in situation of exceptions are rather limited. The core rights are composed of the rights contained in applicable treaties of international human rights law as applicable by regional system of protection and universal norms and by the application of the basic notions of international humanitarian law and/or their applicable *Geneva Conventions* or *Protocols*. The legal void is not a gap; it remains an abyss that needs to be bridged.

This leaves the efforts of finding a minimum humanitarian standard applicable at all times a very difficult project that must ally the extension of protections beyond the basic protections and yet not try to over-reach and create entirely new norms of international law that have not been agreed upon on by states previously.

The project of bridging this legal void is laudable and must be pursued, but it must be so in a narrower scope in order to guarantee the minimal norms in order to be realistic and practical as without state support, such a project will never rise beyond paper wishes and noble speeches. And this project must be done in the aim that either treaty recognition is the aim or the recognition by the International Court of Justice in a piecemeal manner of each and every right contains within the declaration. This second approach would hardly be practical and may take decades, if not centuries: and there are no guarantees that the present system of international law will survive in its present form for such a long period.

Finally, we need to remember that this protection of human rights at all times attempt to bring together the notions of international human rights law and the protections of human rights provided for in the law of armed conflicts. To do so mixes two very different system and either brings about a third one or will re-structure the current universal human rights system. Whatever the outcome, only an instrument that meets the common understanding of the fundamental norms of international human rights accepted by all will be politically viable, legally tenable and seriously enforceable.