

Penn State Law

Penn State Law eLibrary

SJD Dissertations

11-21-2019

Targeting Civilians

Daniel Ivo Odon

Follow this and additional works at: <https://elibrary.law.psu.edu/sjd>



Part of the [Criminal Law Commons](#), [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

The Pennsylvania State University

Penn State Law

Targeting Civilians

A Dissertation in Law

By

Daniel Ivo Odon

Submitted

for the Degree of *Superior Juris Doctor* (S.J.D.)

Adviser

Prof. Larry C. Backer

Table of Contents

Abbreviations.....	5
CHAPTER 1	7
INTRODUCTION	7
CHAPTER 2	15
THE CONTEMPORARY INTERNATIONAL LAW AND THE SENSE OF COMMUNITY	15
2.1. Introduction.....	15
2.2. The Paradigm Shift of the International Law and International Community	20
2.3. Rules in International Law	28
2.4. The Generalization of Values in International Law	33
2.5. International Complex Legal System.....	37
CHAPTER 3	47
THE LAW OF HUMAN RIGHTS	47
3.1. Historical Considerations	47
3.2. The Rising of Human Rights Morality	55
3.2.1. <i>The sacredness of human life</i>	56
3.2.2. <i>Ethos of love</i>	60
3.2.3. <i>Universal respect</i>	65
3.3. Human Dignity.....	72
3.4. Human Rights (wannabe) Universalism	85
3.4.1 <i>Positivist Credential</i>	87
3.4.2 <i>Self-evidence</i>	89
3.4.3. <i>Universalizability</i>	91
3.5. Apparent Conflicts	97

3.6. Incommensurability	101
3.7. Enclosing Considerations.....	105
CHAPTER 4	108
THE LAW OF ARMED CONFLICTS	108
4.1. Historical background.....	108
4.2. International Humanitarian Law contemporary traits	113
4.3. Geneva Conventions, rules and development	117
4.4 The Common Article 3 and the rule of civilians' immunity.....	123
4.5. Principles of Necessity and Humanity	127
4.6. The contemporary wars and their hostis humani generis.....	133
4.7. Enclosing considerations	136
CHAPTER 5	141
THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW	141
5.1. Initial thoughts	141
5.2. Human Dignity relationship.....	150
5.3. Derogation on Human Rights in times of emergency.....	155
5.4. Today's assessment by Courts' precedents.....	162
5.5. The Burden of Morality	180
5.6. Doctrine of Double Effect and Utilitarianism.....	197
CHAPTER 6	216
CONCLUSION.....	216
Bibliography	234
Books	234
Internet Resources.....	242

Films Materials	243
International Materials, International law cases, International Court of Justice	243
International Materials, International law cases, International Criminal Tribunal for Rwanda.....	244
International Materials, International law cases, International Criminal Tribunal for the Former Yugoslavia	244
International Materials, International law cases, Court of Justice of the European Union	244
International Materials, International law cases, European Court of Human Rights.....	244
International Materials, International law cases, Inter-American Commission on Human Rights.....	246
International Materials, International law cases, Inter-American Court of Human Rights	246
United Nations Materials	248
European Union Materials	249
Inter-American Commission on Human Rights Materials.....	249
Foreign Jurisdiction: Germany.....	250

Abbreviations

ACHR	American Convention on Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC I, II, III, IV	Geneva Convention I, II, III, IV
HRL	Human Rights Law
IAC	International Armed Conflict
IACCommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJS	International Court of Justice Statute
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IHL	International Humanitarian Law
IMT	Nuremberg Judgement
LOAC	Law of Armed Conflict
LOW	Law of War
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict

NTP	Normal Temperature and Pressure
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
POW	Prisoner of War
STP	Standard Temperature and Pressure
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US or USA	United States of America
WHO	World Health Organization

CHAPTER 1

INTRODUCTION

This work has been conceived regarding the effects that law provoke in society and also on the observance of what society expects from law in answering some questions. It is interesting because we firstly depart from a conception of law which connects itself with many other fields of knowledge, such as sociology, biology and so on so forth. There are so many questions arising from problems society faces in front of civilization advancement natural process and in each one the analysis becomes twofold: what law provides as an answer and what society expect from law as an answer.

The science of law has a lot of undeniable social traits, regardless whether contractarian theory sympathizer or not. At same time, as morality is a social compass, we also understand law as a science attached to moral background, especially in respect to human agency. Therefore, moral reasoning is a cornerstone of this work and we believe that there are several layers on human knowledge before reason as a human guide toward true knowledge and good decisions. During this process, warns Hugo Mercier, first comes inference, then intuitions, then intuitions about representations, then intuition about reasons and at last, reason¹. The rationality here developed then goes through this very humane process of using reason to justify ideas and opinions.

¹ HUGO MERCIER AND DAN SPERBER, THE ENIGMA OF REASON 05-06 (2017).

Only through communicative action we may ascend to new levels of civilization social enhancement and law expand as moral instrument, while authorizing the democratic debate on values and providing accurate answers to real social problems². The diversity of our opinions arises not from the fact that some of us are more reasonable than others, but solely that we have different ways of directing our thoughts, and do not take into account the same things. It is not enough to have good soul; you must be able to use it righteously. The greatest minds are capable of the greatest vices as well as the greatest virtues³.

Reason can be worked to explain or justify decisions already taken and belief already held. This is a retrospective use of reason. On the other hand, sometimes reason is used as arguments in favor of new decisions or new beliefs. This is a prospective use of reason. Yet, when reason is used prospectively, it may be to answer a question which the answer is unknown or to convince others of an opinion one already has. The former is inquisitive reasoning, while the latter is argumentative reasoning, or communicative reasoning. In the production of reasons to convince others, the same reasons have both retrospective and prospective relevance⁴. Furthermore, this work trails on prospective reason at argumentative kind, since the arguments are made in favor of new decisions and beliefs and the aim of this argumentative exercise is to convince readers of author's opinion about the matter, based in both retrospective and prospective element.

² 1 JURGEN HABERMAS, DIREITO E DEMOCRACIA: ENTRE FACTICIDADE E VALIDADE 190-194 (Rio de Janeiro: Tempo Brasileiro, 2nd ed. 2012)

³ René Descartes, *Discurso do Método*, in OBRAS ESCOLHIDAS 39, 41 (SÃO PAULO: DIFEL, 2ND EDITION, 1973).

⁴ HUGO MERCIER AND DAN SPERBER, THE ENIGMA OF REASON 128-130 (2017).

On connecting the dots, we use both theoretical and pragmatic rationales. There are a lot of theories from doctrines just as much as theories from judicial precedents upon real cases. The main objective of this dissertation is to establish a deductive moral reasoning on situations of armed conflicts regulated by international law where targeting civilians becomes one of the most disturbing concerns of our morality of law and the use of it. Thus, the deduction method retrieved here comes from observation on what international courts are experimenting day by day in real cases where some observational and experimental truths are realized with axiomatic weight⁵.

As a researcher, our posture is to inflict a critical spirit on some prevailing understanding on morality of law to discursively promote an alternative with intellectual honesty and humility towards what we hope to be a good use of reasoning. For that, Welber Barral explains that constructing a theory requires an analytical statement from technical knowledge to metascientific knowledge. The former is informative and useful to our routine, while the latter innovates concepts towards new ideas, very applied in dissertations⁶. Therefore, this work agglutinates some personal convictions on management of morality in human rights law and its relationship with other areas also covered by law. One thing that is very sensitive in hermeneutics lessons is the weight caused by the interpreter history and background in the application and insights of the law⁷.

⁵ CARLOS MARÍA CÁRCOVA, LAS TEORÍAS JURÍDICAS POST POSITIVISTAS 33-34 (2ND EDITION, BUENOS AIRES: ABELEDO PERROT, 2009).

⁶ WELBER OLIVEIRA BARRAL, METODOLOGIA DA PESQUISA JURÍDICA 29-34 (3RD EDITION, BELO HORIZONTE: DEL REY, 2007).

⁷ 1 HANS-GEORG GADAMER, VERDADE E MÉTODO 70-74 (PETRÓPOLIS: VOZES, 1997).

Therefore, it is undeniable my personal origin in a South American country where the discussions over the law is quite more theoretical than pragmatic. The way law is taught in Brazilian universities is very different from U.S. model of learning. First, Brazil has a civil law genealogy and a great influence of Catholic Church institution in state and social politics. As heritage, we work very hard in hermeneutics science to give our civil law traditions and legal rigidity (*dura lex sed lex*) some mobility towards the best account of justice possible. Second, moral values and dignity are, besides empiric hypocrisy revelations every day in our society, very important elements in law development and understanding in Brazil. Personally, I am agnostic, but I took a lot of moral lessons from my military catholic father and my geneticist protestant mother. Although being in military school my whole youth and taking theology classes in parallel with law classes, my social status of agnostic remained while I have been nurturing philosophies of goodness and altruism virtues with deep roots in Christianity, even towards animals to whom I am an enthusiastic defender of subjects of rights in the same way I am a vegetarian in order to save animal lives.

All these background influences in the way I think and, certainly, in the way I write. Diversity of background and thinking is something that American universities are used to embrace which is one of the characteristics that made me look for something abroad. The American inputs help my personal and professional growth, the same way I expect my inputs and this work will be part of Penn State library materials which may touch any curious soul interested in something different from the usual American standard.

With that being said, the construction of the thesis departs from an overall vision of international law and the new design in international society from the second half of last century

onwards. The promulgation of human rights core values, a whole international system centered in human dignity instead of state interests, and the method employed to govern all these elements toward a brand-new threshold of international law and international community, all of these new traits are exposed in this work. Some characteristics will make intimate connection with the purpose of this dissertation, which is legal and morally evaluation on targeting civilians in armed conflicts situations where emergency is a reality.

Besides of the proliferation of new international actor and the decentralization and universalization of international society, the legal codification process and appearance of international courts, mainly human rights courts, have shown a great shift on international values and legal framework. A very interesting phenomenon we are able to point out is the leading role played by judicial decision-making process in defining international law legal contours. Associated with the vertical hierarchy structure of international legal system and the several primary sources of law to manage, Vienna Convention and ICJ Statute tries to bring harmony and integrity to international legal order when setting interpretation and application of law guidelines.

Notwithstanding, international courts guided by the good intentions of promoting humanity core values and implementing into the law the dynamic and ductile elements of legal provisions semantic densification, creates an alternative body of legal source that, in practice, becomes primary source of international law. In addition, we have the opportunity to explain all avenue human rights law crossed, from origin values to moral reasoning configuration, which generates a very strong conception of law, both statutory and morally. The same proliferation of

values and plurality has given to human rights some moral quandaries which international courts have been settling case by case.

By the same token, the law of war gains the moral component of humanity and Geneva Conventions are drafted to humanize the horrors of war and a good amount of international legislation also regulates civilians' immunity and care, recommending the nominal replacement of law of war to international humanitarian law. Some international obligations upon civilians are bound in international law demanding heed to principles of distinction, necessity, proportionality and, most of all, humanity. Nevertheless, civilians continue to experiment the hellishness of hostilities all over the globe and international courts launch a new comprehension regarding mutual application of international humanitarian law and human rights law, setting eventual collision between each specific provision to be solved by *lex specialis* criteria of the former upon the latter.

In the beginning of this century then, a new form of combat emerges astonishing all international community because of its characteristics, or the lack of it. New terrorism does not comply to any humanitarian or human rights law, and it is added by acts of shocking cowardice, evilness and cruelty, disregarding any value or distinction among their victims. International law, in response, progressively shapes its jurisprudence to try to overcome the evil, step by step, and restore peace and community welfare. During such process, some precedents mutates form incident to incident and some concerning considerations appears to guide this dissertation.

Mainly focused in the relationship interplayed by international humanitarian law and human rights law, we establish some foregrounds from where we unfold our thought over the matter. So, in an attempt to organize chronologically the ideas, we foresee three waves of

international law comprehension. The first would be the official merge between international humanitarian law and human rights law that, until that moment, were considered two opposite branches of law. Despite of being set international humanitarian law as *lex specialis* over human rights law, the compatibility between them was formally recognized. Secondly, human dignity morality was pushed to the center of the interwoven relationship, interfering in acts judgement performed during armed conflict situations. Finally the third wave, we have the human dignity morality and some important human rights law provisions and considerations withdrawn from the relationship, what happens initially in Europe, where the effects of the fight against global terror are being closely sensed.

Regarding this third stage, we develop a critical analysis which disagrees with the rationale employed albeit agreeing with the overall conclusion. Basically, we scientifically and argumentatively uphold a theory that promotes the same outcome and final understanding, however, under different justifications. Believing that we are able to convince our arguments, the idea is to develop a creative theory of action which changes the morality overview on targeting civilians as side effect in armed conflicts situations. Taking account of all relevant international humanitarian law provisions, human rights morality and the combination of both with the recent understanding on their mutual interplay where not even the claim of formal derogation on human rights has to be fulfilled, we boldly present an alternative solution which complies with legal morality and rationality toward the action of targeting civilians.

We chose to keep the scope of the analysis narrow, although the rationale we develop can be applied in different situations where factual analogies might be made. Nevertheless, the

situation under the lens is the action of targeting civilians during armed conflicts whose factual scenario matches with consensual notion of supreme emergency or state of exception.

The materials used to elaborate this dissertation come from different parts of the world. I work with Brazilian theorists, especially international law scholars, Argentinian and European theories and law cases, a bunch of German scholars with their hermeneutics and sociology theories, a lot of American scholars and theorists as well, and Inter-American human rights jurisprudence and international documents, and United Nations documents and International Court of Justice cases likewise.

Let's do it!

CHAPTER 2

THE CONTEMPORARY INTERNATIONAL LAW AND THE SENSE OF COMMUNITY

2.1. Introduction; 2.2. The Paradigm Shift of the International Law and International Community; 2.3. Rules in International Law; 2.4. The Generalization of Values in International Law; 2.5. International Complex Legal Systems.

2.1. Introduction

The origin of international law is closely related to the birth of the European States as political, national and sovereign unities in the sixteenth and seventeenth centuries. The international law grew into modernity boundaries as an aftermath of the new European system of Nation-States and it has reflected the natural development of the common human necessities of all cultures. Then the old idea of a State surpasses the European frontiers and the European system itself allows the appearance and coexistence of others States under the same international rules, if “civilized” – basically the Christian States. Subsequently, a system arises based in concepts of territorial sovereignty and equality of prerogatives among them⁸. However, the international law did not regulate the issues that involved the vital interests of the States which were overlapped by the private interests of the dominant States. It means that, legally, all

⁸ A. W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE – BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 91-93 (2004).

members of the international community were on an equal footing but in practice, a group of Great Powers have led the international scenario⁹.

Thus the old international law possessed two salient features about international rules and principles: (i) they were the product of Western civilization based on a *laissez-faire, laissez passer* philosophy that all States were equal and free to pursue their own interests, irrespective of any economic or social imbalance; and (ii) they were mainly framed by the Great Powers, reason why they serve their own interests. After the First World War had many decisive impacts because of its magnitude involved all major members of the international community. It became tough for States to keep aloof from what was happening around the world. So in 1917 a new ideology and political philosophy arose with the following fresh principles: (i) self-determination of peoples advocated by the USSR; (ii) the substantive equality of States instead of the old legal equality; (iii) socialist internationalism, for the first time proclaimed by a member State of the world community as a policy to disrupt the capitalism and it was rapidly implemented in Mexico and Germany, by the Constitutions of 1917 and 1919 respectively; and (iv) the partial rebuff of international law because it was hitherto contaminated with capitalist tendencies, so only the provisions that match with the socialist interests would be endorsed¹⁰.

In 1919, the victors of the First World War decided to set up an international institution designed to prevent the recurrence of worldwide armed conflict, the League of Nations. The reigning atmosphere proclaimed that the human race would grow together into a single great community which system of international guarantees would prevent future wars and foster

⁹ GUILLERMO R. MONCAYO ET AL, DERECHO INTERNACIONAL PÚBLICO 35-39 (BUENOS AIRES: ZAVALIA, 1990)

¹⁰ ANTONIO CASSESE, INTERNATIONAL LAW 30-36 (2ND EDITION, 2005)

democracy and small nations self-determination rights¹¹. So that was an attempt to lay the foundations for an enduring peace by replacing the old diplomacy and crafting its boundaries around the notion of power balance through a system of collective security in which all nations would be part. Nevertheless, the sovereign equality was shared only between member States. Thus, the League of Nations was a universal organization with statutory and organic basis which primary mission was to preserve peace and security as well as to promote international cooperation. In parallel, there were the Permanent Court of International Justice – PCIJ, created in 1921, and arbitral tribunals.

As known, the League of Nations did not prosper. There were a lot of differences between member States, lack of cooperation, its use as a political instrument by Britain and France and also some institutional deficiencies. Even in the period between the two world wars, States gradually endeavored to retrieve their traditional unfettered right to use military force in international relations. The League of Nations, in this aspect, served to slow down the process and diminish the instances of recourse to force. However, the inefficiency of the League contributed to make international arbitration a full bloom that suddenly was also preventing the eruption of new wars. But arbitration was inherently unable to restrain state power in politics. Besides these failures, some grounds were set into international arena: the society of states gradually became more universal; the principle of international legitimacy on self-determination was set in motion; and legal constraints have appeared to mold state's freedom to engage war, especially those based on humanitarian principles¹².

¹¹ HANS JOAS, WAR AND MODERNITY 72-73 (2003).

¹² DAVID ARMSTRONG ET AL, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 58-59 (2007).

This work departs from contemporary international law concepts since modernization theory, as once stated by Hans Joas, embeds the idea that modernity is peaceful¹³. Not abandoning Hobbesian view of a state that emerges from human evolution to consciously adopt the necessity of a higher power capable to defend society, nevertheless. In centralizing the power into state's hands, the individuals celebrate an agreement where they forfeit their anarchic liberty in order to prevent chaos. The state then rises as leviathan, opulent biblical monster that commands the environment and protects its subjects at same time. Notwithstanding, John Locke has mitigated this state-centric vision as he considers that man's original freedom is not forfeited and, on this regard, serves as limitation to state powers, although sovereignty remains the absolute and undeniable state power. Nevertheless, the sole existence of a prominent figure such as leviathan, whose subjects collectively submit to his will, allows positively unrestrained competition in economic markets or in the political arena which highlights individuality during the pursuit of personal goals and turns possible a system centered in individual interests¹⁴. Also, cooperation to escape war is easier between democracies; it is easier if states are subject to some degree of international authority.

However, modern international law has gradually moved away from state-sovereignty-centered outlook in order to strengthen transnational forces. So, the legal international *system* or *order* has been enriched with normative elements which emphasizes international social interaction where a plurality of relatively independent bodies share to each other political, economic and cultural bonds. In their mutual interactions, these bodies ought to comply with norms which are deemed to be binding on the basis of legal consciousness rooted in religious,

¹³ HANS JOAS, WAR AND MODERNITY 45 (2003)

¹⁴ HANS JOAS, THE CREATIVITY OF ACTION 09-10 (2005)

cultural and other common shared values. International law therefore has become an elastic term set on a cosmopolitan formulation of international society which aggregates individuals and non-state groups besides sovereign states¹⁵. The basis of the emerging new international law has abandoned the absolute independence of states to enforce the idea of the international community which carries multiple international subjects that maintain interests and common rights with and before states, forming an organic whole¹⁶. An international order which is to have any authority other than pure self-interest is also going to need the moral resources.

War has its teachable moment with great meaning for the collective. War works as teacher because it tears collective ideas away from the feelings in which they are harbored and then breaks down barriers to learning process¹⁷. Last century has been marked by two world wars who shaped deeply the new features of modern international law. After the war horrors, the international community has come to an inexorable conclusion: the international law, the international community itself and especially the law needed to change. It became evident the existing tension between the opposite poles of law and force. Although we still have those scholars who advocate the realistic need of a leviathan to regulate international relations and bring peace to international community¹⁸, there is a growing movement of idealists who convey that international norms and rules must fulfill the righteous criteria of justice which has cardinal roots in natural law¹⁹.

¹⁵ DAVID ARMSTRONG ET AL, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 36-53 (2007).

¹⁶ STEPHEN C. NEFF, JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW 309 (2014).

¹⁷ HANS JOAS, WAR AND MODERNITY 182 (2003)

¹⁸ MICHAEL WALZER, JUST AND UNJUST WARS 112 (4TH EDITION, 2006).

¹⁹ DEMÉRITO MAGNOLI, O MUNDO CONTEMPORÂNEO: RELAÇÕES INTERNACIONAIS 1945-2000 27 (SÃO PAULO: MODERNA, 1997).

On this regard, the international legal system foundation has shifted your core from state-centric to individual-centered, mostly toward human rights. International law has been so dramatically enhanced that new rules and principles have been stated and performed upon; a new international framework has been established with a view to place an ever-increasing number of legal restraints on state sovereignty. Peace has become again the major objective of the world community at large. In an instable and unsecure world, *humanity's law* has been constituted by the normative combination of the law of war, international human rights and international criminal justice which has reset the international relationships discourse²⁰. In this vein, International Court of Justice ruling the case of Nicaragua v. United States of America asserted that the human effort to promote peace is the very cornerstone of international community which is so eager for peace and progress that its “non-observance could lead to disastrous consequences causing untold misery to humanity”²¹.

2.2. The Paradigm Shift of the International Law and International Community

Before the Second World War the demands of individuals that were not recognized as international subjects were initially accepted in two ways: related to the uprising policy of banning the institution of slavery and in groups of individuals when the complaints about religious, ethnic and linguistic issues were lodged with international bodies. These normative innovations were indicative of the new tendency to pay greater heed to the interests of human

²⁰ RUTI G. TEITEL, HUMANITY'S LAW 04 (2011).

²¹ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. §§143-146 (June 27).

beings who until then had had no say whatsoever in the international community²². The establishment of mutual beneficial relations between states has become a primary goal in the new international law regime. After all, it is the establishment of a legal relationship between states that fully creates the preconditions required to enable every human being to live in accordance with the imperatives of reason and peace, even domestically²³.

However, new standards and human values were required following the end of the Second World War. It was unshakable the belief that governments themselves were not capable of safeguarding human rights which, from that day forward, should demand international guarantees²⁴. Consequently, some States lost their prerogative of self-interpretation of the international law and it was collectively reconfigured to encourage only cooperative measures. Therefore, international community makeover changes radically. The paradigm shift from classic international law to contemporary is chiefly divided in five waves designed to prevent future generations to experience the horrors of wars and to establish new directives to reach a common good between nations and peoples²⁵.

First, the rising of a fiercely codification process of international legal order and the appearance of new institutions, regional systematization and organization of multiple branches of international law (Law of the Sea, Law of International Organizations, International Humanitarian Law, International Human Rights Law and so on and so forth). Therefore, there

²² ANTONIO CASSESE, INTERNATIONAL LAW 38-39 (2ND EDITION, 2005)

²³ HANS JOAS, WAR AND MODERNITY 35 (2003)

²⁴ LUIS MARÍA DESIMONI, LOS DERECHOS HUMANOS Y LA GUERRA CONTRA EL TERROR 35 (BUENOS AIRES: EDITORIAL ÁBACO DE RODOLFO DEPALMA, 2009).

²⁵ ANTÔNIO AUGUSTO CAÑADO TRINDADE, DIREITO DAS ORGANIZAÇÕES INTERNACIONAIS 527-528 (BELO HORIZONTE: DEL REY, 5TH EDITION, 2012).

has been a continuing expansion and development of areas which were not used to international scrutiny, such as transit, outer space, civil aviation, intellectual property, the Antarctic and terrorism. Throughout this expansion in the content of international law, a far deeper process of world politics legislation also has taken place²⁶.

Second, the legal order receives an institutional form genuinely universal. The liberal-democratic theory was increasing and gradually granting legal entitlements to individuals on the international arena throughout the human rights doctrine. Individuals have been enabled to call states into account before international bodies whenever they feel their rights are being disregarded or overlooked. It has not only resulted in the drafting of several protective international treaties (mainly the Universal Declaration of Human Rights of 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the American Convention on Human Rights of 1969 and the African Charter on Human and Peoples' Rights of 1981) but also creating regional Courts of Human Rights (besides the International Court of Justice, it was instituted the European Court of Human Rights, in Strasbourg/France, the American Court of Human Rights, in San Jose/Costa Rica, and the African Court on Human and Peoples' Rights, in Arusha/Tanzania)²⁷.

From this point on, we may unfold the third wave which gives to international law a great deal of legal content and jurisdictional solution to settle international disputes. As envisioned by Article 95 of United Nations Charter, there has been a gradual creation of judicial bodies with international jurisdictions to solve controversies between parties and to directly safeguard human

²⁶ DAVID ARMSTRONG ET AL, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 61-62 (2007)

²⁷ VALÉRIO DE OLIVEIRA MAZZUOLI, CURSO DE DIREITO INTERNACIONAL PÚBLICO 880-938 (SÃO PAULO: RT, 5TH EDITION, 2011).

rights from all citizens of the world²⁸. When the Permanent Court of International Justice Statute was elaborated in 1920, the dimension of international law was notably inter-state based which led the judicial functionalism of that period to focus only on states disputes, option that no longer stands since now an individual person is entitled of capacity to act (*legitimation ad causam*) and to be (*locus standi in judicio*) before international courts²⁹. Hence, international courts have acquired great importance on appeasing international conflict through their jurisprudence which have earned a major role on international law dynamics as we shall see forwardly.

Forth, a communitarian law that comes from the openness and universality of international arena which makes it henceforth decentralized and horizontal on its subjects. The openness grants the appearance to new international actors, which differs from international subjects since the former, albeit playing a significant role in international arena, does not have full agency in international law life, as the latter, such as transnational corporations, for example. All international subjects are international actors, but reciprocity is untrue. Decentralization grants a unique system of operability in international law but without monopoly of a central power. Based on self-tutelage it also consolidates juridical equality among its members, like previewed in Articles 1 and 2 of United Nations Charter, international community enshrines the principle of non-discrimination and reciprocity among all subjects³⁰.

²⁸ Rodolfo E. Piza Escalante, *El Valor Del Derecho y La Jurisprudencia Internacionales de Derechos Humanos en el Derecho y la Justicia Internos – El Ejemplo de Costa Rica*, in LIBER AMICORUM, HÉCTOR FIX-ZAMUNDIO, VOL. I 169, 175 (SAN JOSÉ, COSTA RICA: CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1998).

²⁹ The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, Concurring Opinion of Judge A.A. Cançado Trindade, §30 (October 1, 1999).

³⁰ SIDNEY GUERRA, CURSO DE DIREITO INTERNACIONAL PÚBLICO 48-49 (SÃO PAULO: SARAIVA, 7TH EDITION, 2013).

Then, states remain international law primary actor, although new players come into action bearing the same stature of states in international dialogue. New countries have been recognized after the erosion of colonial empires tradition; there was acceptance of new subjects like international organizations, private and public, national liberation movements and individuals *per se* or in groups, transfiguring international society into a universal and opened community. The selection criteria of international law subjects as civilized nations was shattered and United Nations, in 1945, promptly allowed the adherence of fifty-one new states-parties³¹. These actual subjects actively participate in foreign relations, also demonstrating the new decentralized nature of international law. The decentralized power similarly leads to a position of horizontal equality of its subjects, without overlapping each other, compelling the states to support a policy of non-discrimination and reciprocity³².

Finally, the growing significance of global civil society, legalization and interventionism bring into international scenario of cosmopolitan principles whose origins is to be found in the ideas of a great community of mankind and natural law. Cosmopolitanism enjoins moral obligations and rights as possessed equally by all individuals regardless their bond – or no bond at all – to any specific political community. There are cosmopolitan signs spread in international treaties and customary rules of international law, especially those relating to human rights and the environment, which have coined valuable expressions like ‘equal and inalienable rights’ and ‘common heritage of mankind’ respectively³³. It is now acknowledged that there are some rights inherited by human personality which makes it inviolable by any positive norm and international

³¹ MALCOLM N. SHAW, INTERNATIONAL LAW 45 (6TH EDITION, 2008)

³² A. W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE – BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 157 (2004).

³³ DAVID ARMSTRONG ET AL, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 64-65 (2007)

law shall be the guardian of it, regulating the relationship among cultures to turn it more sophisticated and improved as a universal community³⁴. Thus, cosmopolitanism doctrines have stressed the importance of the community defined by common history, tradition and culture, planting the seeds of people's right of self-determination. Under the influence of collectivist doctrines, individual rights came to be viewed as relative to a community, and essentially belonging to its members³⁵.

After two world wars, cosmopolitan law becomes the great hope for international community. It offers legitimate governance worldwide and is based in an "ethical-and-human-rights-law discourse" built on Kant morality groundwork. This new discourse makes opposition to the traditional state-centric interests. International law turns into the appropriate channel to achieve peace, international security and to promote democracy and human rights all over the planet. Cosmopolitan landscape effectively captures the spirit that animates the proliferation of law to turn it essentially a timeless moral truth on pursuit of justice realizations³⁶. Simultaneously, the self-interest governance and social tribalism, which gained strength in Nazi policies through social Darwinist ideas philosophically encouraged by Nietzsche, are overcome. Compassion is no longer weakness, but moral solidarity; human dignity morality is no longer loathsome, rather the new core of international law and community. Respect and sympathy become the heart of our system³⁷.

³⁴ VICENTE RÁO, *O DIREITO E A VIDA DOS DIREITOS* 56-57 (SÃO PAULO: RT, 5TH EDITION, 1999).

³⁵ Maya Hertig Randall, *The History of International Human Rights Law*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW* 03, 10 (2013).

³⁶ RUTI G. TEITEL, *HUMANITY'S LAW* 167 (2011).

³⁷ JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY* 327-337 (2nd ed., 2012)

As an outcome of international wide legislation and the appearance Vienna Convention on treaties in 1969, international law codification henceforth follows general rules. Sources of law has been divided in primary and secondary, being treaties, international customs and general principles of law primaries sources and jurisprudence and doctrine secondaries. In addition, it has been settled that instruments neither stemmed from treaty nor customs might acquire imperative status whether bearing human value, *as jus cogens* which is appreciated by some as formal acceptance of natural law precepts in international arena, since it marks the groundwork for the community as it occupies the higher level in international juridical logic and objective framework³⁸. The concept of imperative norms pulled out from *jus cogens* requires straightforward formulation and does not stay immune of the idea of limitation since it is axial to law's understanding that everything that is legally enforced is, at same time, susceptible to certain limits. However, *jus cogens* is currently considered as statutory law over the combined application of articles 53 and 64 of Vienna Convention where *jus cogens* has received the recognition in international law either as treaty or custom³⁹.

From this moment on, international law establishes its fundamental principles regarding moral and political agendas, both mitigating states sovereignty. Whilst sovereignty remains a core principle of international law, it now faces limitations set by consensus in international community, which are: prohibition of aggression and unilateral use of force; self-determination

³⁸ HILDEBRANDO ACCIOLY ET AL, MANUAL DIREITO INTERNACIONAL PÚBLICO 137-138 (SÃO PAULO: SARAIVA, 20TH EDITION, 2012).

³⁹ Rodolfo E. Piza Escalante, *El Valor Del Derecho y La Jurisprudencia Internacionales de Derechos Humanos en el Derecho y la Justicia Internos – El Ejemplo de Costa Rica*, in LIBER AMICORUM, HÉCTOR FIX-ZAMUNDIO, VOL. I 169, 177-179 (SAN JOSÉ, COSTA RICA: CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1998).

of peoples; and the full respect to human rights⁴⁰. Thus, the state that overlooks humanity value incurs in grave and systematic violations of human rights which make the state accountable before international community. No sovereignty permits the commitment of such violations toward mankind, not even against one sole individual⁴¹. Hence, it seems evident today that the essential point in international law is the full protection of human rights⁴².

The major problem of our era is not to find reasonable argument to sustain human rights but to effectively endorse and protect them. As portrayed by David Rieff, by the beginning of the twenty-first century, we had come to accept the new conventional wisdom that there are no humanitarian solutions to humanitarian problems⁴³. With that being said, our problem is not of philosophical nature, but juridical and political. Behind the smokescreen of human rights, international law had hereafter the concern to grapple the safest way to ensure human rights and compel their continuously violations not mattering the right nature or foundation. Besides, the Universal Declaration of Human Rights of 1948 has already set the cornerstone of human rights foundation which irrefutable value has been reached by international consensus – *consensus omnium gentium or humani generis*⁴⁴.

⁴⁰ HILDEBRANDO ACCIOLY ET AL, MANUAL DIREITO INTERNACIONAL PÚBLICO 953-954 (SÃO PAULO: SARAIVA, 20TH EDITION, 2012).

⁴¹ Juridical Conditions and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) No. 18, §100 (September 17, 2003).

⁴² SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 176 (2010).

⁴³ David Rieff, *Humanitarianism in Crisis*, in FOREIGN AFFAIRS MAGAZINE VOL. 81 N. 6, 111 (2002).

⁴⁴ NORBERTO BOBBIO, A ERA DOS DIREITOS 25-27 (RIO DE JANEIRO: ELSEVIER, 2004).

2.3. Rules in International Law

The international law codification process means the predominance of statutory law in international society. Thus, two major kind of law is produced, those related to organization and addressed to international organs and their proceedings; and those related to social behavior and values, where we have a fact and its consequence hypothetically foreseen all mingled by law to achieve the aim of promoting justice. International norms are characterized therefore by an enunciative propositional structure of certain organization or conducts that ought to be followed objectively and mandatorily, since they are formally and materially accepted by international community's members (*praeceptum juris*), building the international legal system or order⁴⁵.

The sources of law can be either formal or material. The former is the positive norms built up by society through a formal law-making process while the latter is the phenomonic events of the world, studied by philosophy, sociology and so many other fields of social knowledge. In positive legal system, just as the contemporary international legal order, the primary sources of law are statutes, customs and general principles of law (Article 38 of International Court of Justice Statute). There are though some scholars that heavily criticize positive international legal order for being contradictory since it does not have an international legislative branch, international courts with mandatory jurisdiction and sanctions centrally organized which provokes a lot of disbelief to law practitioners. Under this outlook, international

⁴⁵ SIDNEY GUERRA, CURSO DE DIREITO INTERNACIONAL PÚBLICO 63-64 (SÃO PAULO: SARAIVA, 7TH EDITION, 2013).

rules would be only social structures made by primary obligations that would not afford it to be called as law⁴⁶.

Notwithstanding, we acknowledge international law as a valid general branch of law. Although possessing a diminutive juridical structure, the positive norms of international law do not lack of effectiveness and coercibility, which is enough to be called as law. The domestic structure of law and how it is conceived does not erode the validity of a different framework on international arena for not reproducing it *ipsis litteris*. International law is defined by a complex system of juridical norms, built by consensus or custom, and principles which sets rights and duties in international society to all its actors and then coordinates coherently international relationships among them. As the International Military Tribunal at Nuremberg put it, “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”⁴⁷. So, there is a web of justice which affords security and effectiveness with certainty to all activities from all international figures, based on cooperation and fulfilment of multiples collective and individual interests⁴⁸.

In this new horizon of international law, the active agency and dynamism of international organizations have been a great deal to reshape international law legal order to give it a multilateral progress, regional integration and international cooperation. There have been a lot of contribution on regulating new areas of human activity and the institutional setup of a gradual

⁴⁶ HEBERT L. A. HART, O CONCEITO DE DIREITO 230 (LISBOA: FUNDAÇÃO CALOUSTE GULBENKIAN, 5TH EDITION, 2007).

⁴⁷ Cited as [I.M.T., 1 (1946), p. 223] by JOANISVAL BRITO GONÇALVES, TRIBUNAL DE NUREMBERG 1945-1946 27 (RIO DE JANEIRO: RENOVAR, 2004).

⁴⁸ HILDEBRANDO ACCIOLY ET AL, MANUAL DIREITO INTERNACIONAL PÚBLICO 950-951 (SÃO PAULO: SARAIVA, 20TH EDITION, 2012).

valorization on international statutory law regarding humanity concerns, issues that states were never primarily interested to regulate satisfactorily. This role of international organizations furthermore has enriched the process of contemporary international law universalization⁴⁹.

By this token, international legal system, as conceived in Article 38 of International Court of Justice Statute, is programmed into a vertical body of law, recognizing inside of the entire system a hierarchy among legal sources. Thus, *jus cogens* norms are recognized as “hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms”. So, it can be said that *jus cogens*, as a source of international law within a vertical legal system, basically overrides any other rule which does not have the same status. Consequently, in the “event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails”⁵⁰.

In accordance to Articles 53 and 64 of Vienna Convention of 1969, *jus cogens* are peremptory norms set in the highest position of our vertical international legal system. On this regard, human rights law is significantly appreciated as *jus cogens* norms. International Court of Justice has held that self-determination right⁵¹, war crimes and crimes against humanity⁵² are *jus cogens*; same did European Court towards freedoms, life and human integrity rights⁵³ and Inter-

⁴⁹ ANTÔNIO AUGUSTO CANÇADO TRINDADE, DIREITO DAS ORGANIZAÇÕES INTERNACIONAIS 534-537 (BELO HORIZONTE: DEL REY, 5TH EDITION, 2012).

⁵⁰ *Al-Adsani v. United Kingdom [GC]*, no. 35763/97 Eur. Ct. H.R., joint dissenting opinion filed by Mr Rozakis and Mr Caflisch joined by Mr Wildhaber, Mr Costa, Mr Cabral Barreto and Mrs Vajić (2001).

⁵¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. §136 (July 9).

⁵² Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. §56 (February 14).

⁵³ *Demir and Baykara v. Turkey [GC]*, no. 34503/97 Eur. Ct. H.R., §73 (2008); and *Al-Adsani v. United Kingdom [GC]*, no. 35763/97 Eur. Ct. H.R. (2001).

American Court⁵⁴ and Commission⁵⁵ towards all human rights. Hence, it is widely accepted that human rights protection is a general principle of law categorized as *jus cogens* splattering all over international and domestic legal jurisdictions and taking first level position in hierarchy scale of international norms⁵⁶.

In this hierarchy, international courts decisions occupy a down rate position, at the bottom of the verticality since it is considered as auxiliary source of law. Nevertheless, by techniques of interpretation and application of the law, we can assure that international jurisprudence is endowed of plenitude and full operability as legal source, which has granted to Article 38 a lot of critics and challenges. International community thereof interprets and applies Article 38 in broader terms. Even though, as auxiliary source, courts' decisions cannot be based only on previous courts' decisions, rather the rationale ought to embed treaties, customs and/or

⁵⁴ *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No.328, §124 (November 30, 2016); *Caso Velásquez Paiz y Otros v. Guatemala*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 307, §173 (Noviembre 15, 2015); *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 282, §264 (August 28, 2014); *Case of Espinoza Gonzáles v. Peru*, Preliminary objections, merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 289, §141 (November 20, 2014); *Case of Norín Catrimán et al. (Leaders, Members and Activists of the Mapuche Indigenous People) v. Chile*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 279, §197 (May 29, 2014); *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) No. 18, §101 (September 17, 2003); *Case of the Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 148, §47 (July 1, 2006); *Case of Caesar v. Trinidad and Tobago*, Merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 123, §100 (March 11, 2005); *Case of Barrios Altos v. Peru*, Merits, Inter-Am. Ct. H.R. (ser.C) No. 83, §10 (March 14, 2001); and *Case of the "Mapiripán Massacre" v. Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No. 22, §178 (September 15, 2005) among so many others.

⁵⁵ *Coard et al v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report N° 109/99, OEA/Ser.L/V/II.106, Doc. 6 rev, §39 (1999); and *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §331 (2018) among others

⁵⁶ German J. Bidart Campos, *Jerarquía y Prelación de Normas em un Sistema Internacional de Derechos Humanos*, in LIBER AMICORUM, HÉCTOR FIX-ZAMUNDIO, VOL. I 447, 449-451 (SAN JOSÉ, COSTA RICA: CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1998).

general principles of law⁵⁷. Far from being treated as a auxiliary source of international law, the decisions and opinions of the Court are treated as authoritative pronouncements upon the current state of international law. Even advisory opinions have a role of great importance⁵⁸.

For instance, if ICJ makes a judicial statement about some concrete case and turns it into international custom, this judicial opinion becomes binding in term of elevating that decision to primary source of law instead of auxiliary. Therefore, in theory this decision is not mandatory besides the parties involved, according to Article 59 of ICJS, but in practice it becomes primary law, binding and *erga omnes*⁵⁹, what can be seen in *Mamatkulov and Askarov v. Turkey* case, where measures set by the European Court became binding through interpretation process under Article 31 of Vienna Convention that points to human rights system of protection in compliance to principle of effectiveness⁶⁰. Thereafter, international jurisprudences are more than merely a secondary provenance for international law. ICJ has also stressed that judicial decisions are not incapacitated to law-making process, neither it is improper to function under this threshold, since it gives law provisions their accurate content. The court “states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend”⁶¹.

⁵⁷ Manuel Becerra Ramírez, *Las Decisiones Judiciales como Fuente del Derecho Internacional de Los Derechos Humanos*, in LIBER AMICORUM, HÉCTOR FIX-ZAMUNDIO, VOL. I 431, 432-433 (SAN JOSÉ, COSTA RICA: CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1998).

⁵⁸ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 203 (2004).

⁵⁹ THOMAS BUERGENTHAL, MANUAL DE DERECHO INTERNACIONAL PÚBLICO 33 (MÉXICO: FONDO DE CULTURA ECONÓMICA, 1994).

⁶⁰ *Mamatkulov and Askarov v. Turkey [GC]*, nos. 46827/99 and 46951/99 Eur. Ct. H.R., §§122-123 (2005).

⁶¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. §18 (July 8).

2.4. The Generalization of Values in International Law

Universalist values are produced by wars. However, they do not owe their triumph to military force and victories, but to the fact that they are capable of generalization. Although paradoxical, war succumbs universalist values but, overturning the basket, war curbs values and stimulate their impetus to flourish. Therefore, a generalization of values must embrace everyone, never legitimizing their use in some instances and disavowing in others, since hypocrisy is not the road to moral education⁶². Like history denounces, the universalization process on human rights, what shall be grasped in more details at next chapter, new values were injected into international political system⁶³. These common values are definitive elements of international law and interpretations of treaties performed by States, international courts and competent organs shall constitute a relevant consideration in solution of cases or definition of any terms meaning or notions⁶⁴.

Modern humanistic values can be traced back to the visionaries of the Enlightenment who sought a more just relationship between the state and its citizens. Notably after American Bill of Rights and independence process and French Revolution, human rights language was, in their beginning, a municipal matter, an internal affair between the government and its citizens. International regulation regarding human values through international codification on human rights would have been perceived as interference in the domains of the state. It remained, with

⁶² HANS JOAS, WAR AND MODERNITY 185 (2003)

⁶³ Manuel Becerra Ramírez, *Las Decisiones Judiciales como Fuente del Derecho Internacional de Los Derechos Humanos*, in LIBER AMICORUM, HÉCTOR FIX-ZAMUNDIO, VOL. I 431, 434 (SAN JOSÉ, COSTA RICA: CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1998).

⁶⁴ *Demir and Baykara v. Turkey [GC]*, no. 34503/97 Eur. Ct. H.R., §85 (2008).

the exception of minority protection following the First World War, a subject of national law until after the Second World War. With the conclusion of the Second World War human rights became part of international law, starting with the adoption of the Universal Declaration of Human Rights in 1948⁶⁵.

After the end of twentieth century, history has pointed us towards an investigation into the conditions of peace with a sober analysis of specifically modern tendencies to war. For that, there is a need to justify the normative premises underlying the modern theory and its regenerative effect of violence. Thereafter, we have launched a clear consciousness that democracy is the yardstick of social progress – although the twentieth-first century has shown an astonishing recession on democracy regimes⁶⁶ – and the social and legal reinforcement of crucial values and their foundation and development through civilization process⁶⁷. It is the research on the role of war in social changes that promotes impacts and configurations in international law which allows modernization processes, moreover through international courts jurisprudence who pragmatically sets the genesis of new values and the tension between them and existing institutions⁶⁸.

The Nuremberg trials set in motion an important wave that has channeled the further judgments in every international Court and promoted a big wave of values generalization. Basic premises were established, and a new order and human values arose. The interpretation and

⁶⁵ Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in ISRAELI LAW REVIEW. VOL. 40, NO.2, 310, 313 (2007).

⁶⁶ FRANCIS FUKUYAMA, *AS ORIGENS DA ORDEM POLÍTICA: DOS TEMPOS PRÉ-HUMANOS ATÉ A REVOLUÇÃO FRANCESA 19* (RIO DE JANEIRO: ROCCO, 2013)

⁶⁷ ANA PAULA DE BARCELLOS, *A EFICÁCIA JURÍDICA DOS PRINCÍPIOS CONSTITUCIONAIS: O PRINCÍPIO DA DIGNIDADE DA PESSOA HUMANA 236* (RIO DE JANEIRO: RENOVAR, 2002)

⁶⁸ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS 86* (2013).

application of the human rights therefore became the main task of the international courts and these issues were no longer centralized in States' hands. Moreover, every new subject of international law gained the faculty to participate and debate about these rights. These conditions emerged from the new framework of the world community, now universal and open to everyone. All these confluent events hugely contributed to the improvement of international law which, day by day, became an instrument of reality changer full of details. Henceforth every international actor has inherited the duty to promote the legal progress criticizing the rules and meditating on their guidelines for their gradual reconfiguration through the appointments of proper and opportune reforms⁶⁹. That is the path towards law stability without being static, and dynamic without being frenetic. That is the reason why Norberto Bobbio calls the twentieth century as the Age of Rights. In this century, particularly, an entire new structure of law has erected, and as he has predicted, the improvement of law would make us experience its greatest challenge in the following century when all the functionality of that structure hardly built would be tried⁷⁰.

Despite the revolutionary development of human rights in the United Nations era, no attempts have been made to bring to justice such gross perpetrators of crimes against humanity or genocide as Pol Pot, Idi Amin or Saddam Hussein, perhaps because the atrocities in Cambodia, Uganda and Iraq (against the Kurds) did not occur in the context of international wars. Internal strife and even civil wars are still largely outside the parameters of war crimes and the grave breaches provisions of the Geneva conventions⁷¹. As asserted by Johnathan Glover, the

⁶⁹ MALCOLM N. SHAW, INTERNATIONAL LAW 129-130 (6TH EDITION, 2008)

⁷⁰ NORBERTO BOBBIO, A ERA DOS DIREITOS 45-81 (RIO DE JANEIRO: ELSEVIER, 2004).

⁷¹ Theodore Meron, *The Case for War Crimes Trials in Yugoslavia*, in FOREIGN AFFAIRS MAGAZINE, SUMMER 1993 <[HTTPS://WWW.FOREIGNAFFAIRS.COM/ARTICLES/YUGOSLAVIA/1993-06-01/CASE-WAR-CRIMES-TRIALS-YUGOSLAVIA](https://www.foreignaffairs.com/articles/yugoslavia/1993-06-01/case-war-crimes-trials-yugoslavia)>.

numbers of people murdered by Stalin's tyranny far surpass those killed in the Nazi camps. The numbers of Mao's victims are yet greater. Pol Pot killed a far higher proportion of the population than Hitler did and yet, even after thinking about Stalin, Mao and Pol Pot, to turn towards Hitler still seems to be to look into the deepest darkness of all⁷².

Even though, it is post Holocaust that a collective process enacts a community declaration drafted by a diverse group of authors and successful case of "value generalization", containing plural moral elements of individual and social nature. The world was unaware of the full extent of the Holocaust during the war, but efforts toward a human rights declaration were made before the war was over. Again, the Universal Declaration of Human Rights is a composite synthesis, the result of a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining role – the result of a successful and authentic process of value generalization. What was agreed was merely a declaration that was entirely or largely legally nonbinding, at first. Later on, it became binding by successive treaties, such as the two Covenants of 1966, and regarded binding too as customary law⁷³. All human rights law framework, then, respected the cultural specificities between Western and Eastern cultures and civilizations, taking note of both differences of origins and values. Hence, international community builds daily its terms towards universally shared cultural assumptions of a universal validity based on generalization of values⁷⁴.

⁷² JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY* 317 (2nd ed., 2012)

⁷³ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* 182-188 (2013).

⁷⁴ Xiaorong Li, "*Asian Values*" and the *Universality of Human Rights*, in *THE PHILOSOPHY OF HUMAN RIGHTS* 397, 407 (2001).

After horrors and unnecessary suffering provoked by men and overlooked by law and nations, a generalization of values becomes a need to dislodge human cruelty and to promote mankind communitarian peace. So testimony like Fergal Keane's becomes obsolete: "it is this immensity of evil that prompts me to speak of the 'soul of man'... I felt there was enough decency and love around to nourish the gift of hope. There will be many who say that I was foolish, naïve to ever have had such faith in man. Maybe they are right. In any event after Rwanda I lost that optimism"⁷⁵. Objective not accomplished, yet, but at least we have a plurality of international actors and a legal system that afford some good fighting. Respect for human dignity is one of the great barriers against atrocity and cruelty which winning requires social cooperation and impulses.

Cooperation is the reason why we still exist and, at same time, one of our greatest challenge in building an international community based on universal and generalized values. As all animals, we have individualistic impulses, however what makes we excel in animal kingdom is the ability to compose strong social impulses. Therefore, the survival and advancement of international community relies greatly in our social values, not disregarding individuals nevertheless⁷⁶.

2.5. International Complex Legal System

⁷⁵ FERGAL KEANE, *SEASON OF BLOOD: A RWANDAN JOURNEY* 185 (1996).

⁷⁶ JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 102 (2013).

Contemporary international law framework is complex because it possesses a plurality of legal sources set in vertical hierarchy. In such kind of legal systems, it is normal when we face conflicts between legal sources which, at first glance, might seem contradictory to each other but, as a system, there is a method to pacify the supposed conflict, otherwise it would not be able to be called as a system. No serious system tolerates incompatible norms, reason why a mechanism of incompatibility elimination must be drawn. First and foremost, we need to apprehend that a vertical hierarchy system is endowed of three cooperating characteristics: (i) unity, meaning that the norm that is at the higher edge until the other at the bottom, both of them and all other in between, shall be connected and aligned, like an imaginary umbilical cord; (ii) coherence, meaning that all these norms from the top to the bottom must be harmonious in their purpose to guide action upon the with uniformity, so from multiplicity of norms we shall see orderly coexistence to the whole body of law just as much as between each other, working reciprocally without collision, molding a systematic and consistent bloc of law; and (iii) wholeness, meaning that all norms combined should cover all areas of human agency and interests in such way that there is no gap⁷⁷.

To a better comprehension, the villain of unity would be the lack of hierarchy, concerning a horizontal system of norms where each norm trumps the other, creating legal confusion; of coherence would be contradiction, technically called as *antinomie*, a norm prohibiting something another allows and vice versa; and of wholeness would be legal gaps, situations which law does not provide an answer, leaving the subject disregarded and certain situation uncovered. Although these crucial triad, we still lack of a perfect deductive system. An interesting fact on international

⁷⁷ NORBERTO BOBBIO, *TEORIA DO ORDENAMENTO JURÍDICO* 71-80 (10TH EDITION, BRASÍLIA: EDITORA UNB, 1999).

legal system is that we have among valid norms some that are formal and written and others that are customary and, mostly, unwritten. This is very interesting because it requires from us a certain sense of “spirit of the system”, which leads to dynamic mechanisms of interpretations and the exercise of teleology to reach the *ratio essendi* (“raison d’être”) of the law⁷⁸.

Foregoing, to apply international law entirely, the interpretation and application deductive process of rationality is imminent and essential. This is the only avenue to full comprehension of a complex legal system, especially when we need to extract from it the inner morality and rationality, something beyond literality. It is this global vision that allows us to link past, present and future in law, guiding all interpretation and application of law as a system, not as isolated bodies of law. A sense of entirety must be extracted from the legal system, showing order from unity, coherence and wholeness features⁷⁹. Furthermore, international law framework is a complex one, because it is made of multiples sources, positivists and customary. Among primary and secondary sources on law, we got international decisions which are considered a secondary source of law as inserted in article 38 of ICJ Statute. They are auxiliary means on international rule of law-making process. For that reason, article 59 makes it crystal clear that international court decisions apply only to the parties involved in such way that precedents shall not create legal rules. Despite this, Guillermo Moncayo and Thomas Buergenthal grasp a relevant warning when entails that international court decisions are a direct consequence of international law applicability, which means that it is court decisions that give international law its content and reach. Therefore, international court decisions should not be deemed as an alien

⁷⁸ NORBERTO BOBBIO, *TEORIA DO ORDENAMENTO JURÍDICO* 76 (10TH EDITION, BRASÍLIA: EDITORA UNB, 1999).

⁷⁹ 1 HANS-GEORG GADAMER, *VERDADE E MÉTODO* 444-487 (PETRÓPOLIS: VOZES, 1997).

source of law irrespective of treaties. Rather, it represents law interpretation in order to make it applicable to our day by day cases and their inner vicissitudes. This is the key to allow the progressive development of international law⁸⁰.

Likewise, Nils Melzer considers caselaw and doctrine as tools to permit treaties, custom and general principles of law to be applied in practice. Largely treaties, which possess statutory nature, contain indeterminacy in their expressions and concepts that needs interpretation that falls primarily to international courts and tribunals⁸¹. Therefore, three features have been relevant to harmonize and expand international legal system and its idea of *rule of law*, the prominence of general principles of law, the modern unity of law toward justice accomplishment and international jurisdiction as a mean to fulfil and pursue justice alongside domestic jurisdiction⁸². In essence, the primacy of justice becomes a foundational priority that bears a great deal of moral sense which outweighs political interests. Justice become not one value among other, but the highest of all social virtues, the one that must to be met during law's interpretation and application on individual rights⁸³.

To determine the meaning of the terms and phrases used in the human rights bodies of law, Articles 31 to 33 of the Vienna Convention guide the rules of interpretation. Therefore, international courts are required to ascertain the “ordinary meaning to be given to the words in

⁸⁰ GUILLERMO R. MONCAYO ET AL, DERECHO INTERNACIONAL PÚBLICO 153-154 (BUENOS AIRES: ZAVALIA, 1990); AND THOMAS BUERGENTHAL, MANUAL DE DERECHO INTERNACIONAL PÚBLICO 33 (MÉXICO: FONDO DE CULTURA ECONÓMICA, 1994).

⁸¹ NILS MELZER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 25 (2016).

⁸² Antônio Augusto Cançado Trindade, *A Contribuição dos Tribunais Internacionais à Evolução do Direito Internacional Contemporâneo*, in O DIREITO INTERNACIONAL E O PRIMADO DA JUSTIÇA 03, 12-14 (RIO DE JANEIRO: RENOVAR, 2014).

⁸³ MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 02 (2ND EDITION, 1998).

their context and in the light of the object and purpose of the provision from which they are drawn”, taking also into consideration significant “supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable”. Since human rights law is first and foremost a “system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions”⁸⁴.

This advanced legislative technique reproduced in Vienna Convention on interpreting and applying international statutes (treaties), the legal, formal and written primary and most notable source of international law gives life to their words. Unity feature amounts the idea that the law is not anyone of its elements isolated but all of them combined and, to attain the *raison d'être*, we need to take into consideration simultaneously fact, rule and value, each one correlating to each other in a dialectic manner. As once said by a German international law professor, Josef Kunz, “the law is a normative integration of facts in accordance with values”⁸⁵. International law no longer is conceived as a fact floating in the abstraction, lost in space and time, because now it is steeped in humanity, communicating with its agglutination of feelings and hopes. It is part of an existential process of both individual and community. On this end, individualism gives place to social and humanistic conception of law and, as a result of this valuative ethic, the provisions of

⁸⁴ *Demir and Baykara v. Turkey [GC]*, no. 34503/97 Eur. Ct. H.R., §§65-66 (2008); *Saadi v. the United Kingdom [GC]*, no. 13229/03 Eur. Ct. H.R., § 62 (2008); and *Stec and Others v. The United Kingdom*, nos. 65731/01 and 65900/01 Eur. Ct. H.R., §§47-48 (2006).

⁸⁵ JOSEF LAURENZ KUNZ, *LA FILOSOFÍA DEL DERECHO LATINOAMERICANA EM EL SIGLO XX* 30 (BUENOS AIRES: LOUSADA S.A., 1951)

statutes, even without textual modifications, automatically come to mean something different, something in accordance with the paramount principle of justice and humanity⁸⁶.

So, the provisions of law intentionally encapsulate general concepts that need interpretation in every step of human evolution and advancement of civilization. These general concepts are represented in multise semantic words, called “general clauses”, which vagueness permits the interconnection of other fields of human knowledge, like sociology, economy, religion, politics etc., allowing them to function as truly elements of connection in the legal system through judicial interpretation and application of the law. Inevitably then, all kind of concepts and axiological vectors from these fields come to account for the solution of social and personal issues principally those related to the human dignity. Thus, legal provisions gain mobility through moral variables and then becomes an elastic tool to operate international justice and to affirm community values⁸⁷. This methodology consents the entry of values to equip the legal system with ductile rules that can provide its openness hence avoiding the tension between normative rigid precepts and evolving values. Every regulatory rule becomes a vivid rule while connecting facts, norms and values of the whole legal system, which contributes on giving living meaning to legal provisions just as much as filling legal gaps. Both ways we satisfactorily fulfil the entirety of legal order⁸⁸.

International Court of Justice also encompassed a statement enforcing the lack of gaps in international legal system through interpretation and application of international law, for the sake

⁸⁶ MIGUEL REALE, *TEORIA TRIDIMENSIONAL DO DIREITO* 124-126 (5TH EDITION, SÃO PAULO: SARAIVA, 1994).

⁸⁷ ALBERTO GOSSON JORGE JUNIOR, *CLÁUSULAS GERAIS NO NOVO CÓDIGO CIVIL* 10-22 (SÃO PAULO: SARAIVA, 2004).

⁸⁸ NORBERTO BOBBIO, *DA ESTRUTURA À FUNÇÃO – NOVOS ESTUDOS DE TEORIA DO DIREITO* 102-128 (BARUERI: MANOLE, 2007).

of unity, coherence and wholeness, “whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part”⁸⁹. Therefore, these general clauses of law bring effectiveness and allows the judgement of social values directly associated to treaties words, putting aside gaps and antinomies, and launching to first level doctrines and judicial decisions⁹⁰. Additionally, European Court of Human Rights complements that such interpretation of the wide framework of international law must be interpreted in the light of the rules set out in the Vienna Convention while taking into account the special nature of the Convention on Human Rights as an instrument of human rights protection which such interpretation must be so far as possible consistently with the other principles of international law of which it forms a part⁹¹.

Thus, in order to comply with Vienna Convention provisions on interpretation and application of international law, international courts must interpret in “good-faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty’s object and purpose”⁹² “in accordance with the principle of effectiveness” that endorses human rights system of protection⁹³. Yet, to maintain coherence in eventual conflicts between provisions, the principle of *lex specialis* is an accepted principle of interpretation in international law. It stems from a roman principle of interpretation, according to which in situations especially

⁸⁹ Interpretation of the Agreement of 25 March 1951 Between The WHO and Egypt, Advisory Opinion, 1980 I.C.J. §10 (December 20).

⁹⁰ NORBERTO BOBBIO, TEORIA DO ORDENAMENTO JURÍDICO 115-160 (10TH EDITION, BRASÍLIA: EDITORA UNB, 1999).

⁹¹ *Mamatkulov and Askarov v. Turkey [GC]*, nos. 46827/99 and 46951/99 Eur. Ct. H.R., §111 (2005); and *Al-Adsani v. the United Kingdom [GC]*, no. 35763/97 Eur. Ct. H.R., §60 (2001).

⁹² LaGrand Case (Germany v. United States of America), 2001 I.C.J. §99 (June 27).

⁹³ *Mamatkulov and Askarov v. Turkey [GC]*, nos. 46827/99 and 46951/99 Eur. Ct. H.R., §§122-125 (2005).

regulated by a rule, this rule would displace the more general rule (*lex specialis derogat leges generalis*)⁹⁴.

There is an inseparability of international legal instruments and international adjudication by courts appreciation. International jurisprudence thereafter promotes and defines international law rationale and essence in order to develop its terms. Judicial decisions are inherent and crucial to international legal system workflow. It is a widely accepted truth that international law cannot be isolated from cases since it is fostered on a case-by-case basis. Formally, international judicial decisions are regarded as subsidiary means for interpreting international law. Apart from it, international courts and organs resort to previous judicial decision and arbitral awards frequently, which reveal the importance of jurisprudence for international law. Since international courts hold the duty to settle disputes between international subjects and to deliver advisory opinions to organs, they do not develop international law in the abstract, as primary sources of international law (Article 38 of ICJS), however “the very determination of specific disputes, and the provision of specific advise, does develop international law”. Judicial function is not simply the application of existing rules to facts, rather it elaborates content of a norm, “the expansion upon uncertain materials, all contribute enormously to the development of international law”⁹⁵.

One important premise we can retrieve form contemporary international law is the prevalence of the rule of law to appease conflicts; to investigate relevant international facts (fact-finding proceedings); to form and strengthen judicial provisions; and to safeguard cultural

⁹⁴ Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in ISRAELI LAW REVIEW. VOL. 40, No.2, 310, 338 (2007).

⁹⁵ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 202 (2004).

plurality and diversity⁹⁶. The modern international law, pushed by the rising of a new human rights law regime mostly, has been reshaped in quantity and quality alike which turns international legal system into an authentic, prolific and autonomous legal order with less sovereign state power concentration and more diluted participation of different international actors, emphasizing the sense of community⁹⁷. In this vein, all regional human right courts (European, Inter American and African) have been developing through the years a vast jurisprudence, mostly in substantive rights sphere, regarding the protection on human rights which has foisted a “humanization process of international law”⁹⁸.

Alongside the positive norms of international legal order, an international morality has arisen. It is no longer conceivable a construction of international law without morality. It is fully understood nowadays that the enhancement of international law only is possible whether we transcend the positivism to aim and depart from kernel values of social justice and solidarity⁹⁹. Its concreteness is daily taken from general principles of law or general clauses found in international provisions, mainly human rights law provisions. A lot of contemporary international law groundwork comes from natural law, applied in combination of positive law, as

⁹⁶ ANTÔNIO AUGUSTO CANÇADO TRINDADE, *DIREITO DAS ORGANIZAÇÕES INTERNACIONAIS* 654 (BELO HORIZONTE: DEL REY, 5TH EDITION, 2012).

⁹⁷ Rodolfo E. Piza Escalante, *El Valor Del Derecho y La Jurisprudencia Internacionales de Derechos Humanos en el Derecho y la Justicia Internos – El Ejemplo de Costa Rica*, in *LIBER AMICORUM*, HÉCTOR FIX-ZAMUNDIO, VOL. I 169, 170-171 (SAN JOSÉ, COSTA RICA: CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1998).

⁹⁸ Antônio Augusto Cançado Trindade, *A Contribuição dos Tribunais Internacionais à Evolução do Direito Internacional Contemporâneo*, in *O DIREITO INTERNACIONAL E O PRIMADO DA JUSTIÇA* 03, 35-40 (RIO DE JANEIRO: RENOVAR, 2014).

⁹⁹ SIDNEY GUERRA, *CURSO DE DIREITO INTERNACIONAL PÚBLICO* 70 (SÃO PAULO: SARAIVA, 7TH EDITION, 2013).

once grasped by Grotius and Pufendorf. After all, it is natural law conception of justice that gives dynamics and ductility to international positive law¹⁰⁰.

The strand of international positive norms that comprehend human rights bodies of law regulate and value action upon persons, individually or collectively. Its objective because is based on international society common welfare; it is rational because it is fruit of a process of plural dialogue built on practical consensual reason; and it is transcendent because its scope is to achieve the common good of international community which overrides any state position of self-interest¹⁰¹. Therefore, international courts' interpretation might go well beyond what is mostly envisaged and reach some creative actions through innovative decisions which reflect the evolving conditions of the international community, since all the possible situations cannot have been foreknown by the international law drafters of the time. Then it is also true that international courts have indeed shaped some rudimentary legal notions into more refined and precise definitions which gave legal order some maturity. These *opinio juris* process and international practices play significant role in crafting and ensuring unity, coherence and wholeness to contemporary international law¹⁰².

¹⁰⁰ STEPHEN C. NEFF, *JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW* 61-66 (2014).

¹⁰¹ CELSO ALBUQUERQUE DE MELLO, *CURSO DE DIREITO INTERNACIONAL PÚBLICO* 136 (RIO DE JANEIRO: RENOVAR, 15TH EDITION, 2004).

¹⁰² Merve Ozkan Borsa, *The Contribution of International Court of Justice to the Development of International Humanitarian Rules and Principles*, in *PUBLIC AND PRIVATE INTERNATIONAL LAW BULLETIN* VOL. 36 N. 2, 83, 95-97 (2016).

CHAPTER 3

THE LAW OF HUMAN RIGHTS

3.1 Historical considerations; 3.2 The Rising of Human Rights Morality; 3.2.1. The sacredness of human life; 3.2.2. Ethos of love; 3.2.3. Universal respect; 3.3. Human dignity; 3.4. Human Rights (wannabe) Universalism; 3.4.1. Positivist credentials; 3.4.2. Self-evidence; 3.4.3. Universalizability; 3.5. Apparent conflicts; 3.6. Incommensurability; 3.7. Enclosing Considerations.

3.1. Historical Considerations

When we talk about human rights, we are talking about current politics and ethics that reach both international community and states histories, socio-economic structures, legal systems, religions and cultures. Its legal dimension, therefore, usually mingles internal and international law towards a common goal, which currently counts with intergovernmental bodies as well in order to transform internal and international order. This “human rights movement” grapples for universal validity throughout the body of law, which has both horizontal and vertical strands that are equally important to concepts and moral development. The former purveys the widening process of constitutionalism among states through comparative law, while the latter

means the binding effect of international treaties on human rights held by international institutions¹⁰³.

Under such auspices, however, we must draw a line in human history which reveals to us different approaches, precisely on the Second World War onwards. A bridge is usually built between 1945 period to American and French Revolutions in the eighteenth century. Despite several documents that are related to human rights historiography somehow, we ought to focus our approach in the eighteenth century, when declarations of human rights were proclaimed in America and France, and then move forward.

Although it is common to find some declarations of rights recollection toward the English Declaration of Rights of 1689, most human rights advocates does not harbor on it. This declaration might be deemed the first declaration of rights. Nevertheless it remains attached to the medieval tradition and lacks the core elements proclaimed in the following ones. It is indeed influenced by the rationalism accordingly to the revolution it ensues, but still, it is related to the Middle Age precepts and the English parliamentary monarchy¹⁰⁴. This bill of rights, for instance, recognizes only royal dignity attainable just for the nobility – what was later broadened to all humanity, as we shall see.

The same must be said about older instruments, such as the Magna Carta of 1215 (usually cited as one of the first human rights precedents), the Petition of Rights of 1628 (where English Parliament offers to King Charles I the constitution of distinct rights) and the Habeas Corpus Act

¹⁰³ HENRY J. STEINER ET AL, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 58-59 (3rd ed., 2007).

¹⁰⁴ RICARDO D. RABINOVICH-BERKMAN, DERECHOS HUMANOS: UNA INTRODUCCIÓN A SU NATURALEZA Y A SU HISTORIA 150 (Buenos Aires: Quorum, 2007).

of 1679¹⁰⁵. Albeit they compose human rights historic ballast, they do not fit the purpose employed in this work as long as actual human rights resemble the rationalism and pluralism purveyed during the Enlightenment epoch. Therefore, we begin the current approach on eighteenth century's declaration onwards.

In this sense, the American Declaration of Independence of 1776 and the French Revolution Declaration of the Rights of Man and Citizen of 1789 were the first documents to bear the idea of unalienable rights, regarding to life, liberty and happiness. Moreover, the French Declaration also brought the promise of universal human rights, as ascertained on its Article I: “men are born and remain free and equal in rights”¹⁰⁶. Back in the day, the current designation was “rights of man” in France and “natural rights” notably in the US; no reference to “human rights” was circulated on those days¹⁰⁷. Both instruments have laid out general principles of justice that were retrieved from natural law ideas, like the law should be the same for everyone, nobody should have his liberty constrained arbitrarily and so forth.

However, the eighteenth-century breakthrough of universal rights encompassed a political and social exclusion of women, children, slaves, religious minorities among others. The connotation of “rights of men” – so called self-evident – did not carry equality on rights, which also has put in doubt their naturalness. So those declarations emancipatory meaning were not fully-fledged but instead, a very restricted ones. Nonetheless, they inaugurated the first generation of rights, strengthening the notion of liberty and individual rights which has contained

¹⁰⁵ CARLOS S. FAYT, *DERECHOS HUMANOS Y EL PODER MEDIÁTICO, POLÍTICO Y ECONÓMICO: SU MUNDIALIZACIÓN EN EL SIGLO XXI* 56-70 (Buenos Aires: La Ley, 2001).

¹⁰⁶ LYNN HUNT, *INVENTING HUMAN RIGHTS* 15-17 (2007).

¹⁰⁷ SAMUEL MOYN, *HUMAN RIGHTS AND THE USE OF HISTORY* 05-06 (2014).

the enlightened human autonomy and the discernment to distinguish good from evil, as free agents¹⁰⁸.

Notwithstanding, recent historians have repeatedly reported that the human rights we have today do not resemble the right of man or natural rights conceived in the eighteenth century. Even the abolitionist movement claimed by Jenny Martinez as foundational to human rights¹⁰⁹ have been challenged by others who, in that sense, purvey the idea of rights as barely used by abolitionists those days, which convictions lied on Christianity, humanitarianism or other ideologies. Rights were never a cornerstone for those freedoms pursued¹¹⁰.

The same happened to second generations rights built on the following century, where the so far political rights were not enough to embrace the society's need to develop the welfare of its worse off members. The socialism retrieved from nineteenth century emphasized solidarity and the need for positive rights pursued by state intervention in order to fight economic inequality and to protect certain members of society considered vulnerable, especially by the cruel system of industries labor exploitation. Nevertheless, the breakthrough of the international human rights as we know today occurred in the twentieth century, as a revival of natural law and a redesign of human rights as moral¹¹¹.

Between the eighteenth century's declarations and the mid-twentieth century, human rights remained a domestic concern only. It was after the Second World War that it became an

¹⁰⁸ LYNN HUNT, *INVENTING HUMAN RIGHTS* 19-27 (2007).

¹⁰⁹ JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 15, 134-135 AND CHAPTER 8 (2012).

¹¹⁰ SAMUEL MOYN, *HUMAN RIGHTS AND THE USE OF HISTORY* 58-59 (2014).

¹¹¹ Maya Hertig Randall, *The History of International Human Rights Law*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW* 03, 09-10 (2013).

international concern actually. Suddenly, the birth of new values and commitments appeared to take place before international community's eyes, regarding to be one of the greatest transformations started from modernization process¹¹². The idea of universality came forward once more, but this time it took initially the form of universal in the sense that any state of the world could join – as a result of the openness character of the new international society's framework. Along with the United Nations creation, the human rights movement arose. Not just a systematic ordering of fundamental postulates, ideologies and norms, but also as institutions – national and international; governmental and nongovernmental, also as a character of the new international society's framework¹¹³.

Therefore, in 1947 the UN General Assembly gathered representatives of all states that were members in order to draft a universal declaration of human rights which would serve as moral exhortation to state politics, but not a legally binding instrument. The promotion of human rights was a main purpose for the UN, which is clear in its Charter Preamble, where human rights are linked with human dignity as self-evident value that neither needs justification nor guidance. Then, in the end of 1948, the UDHR was adopted as a “common standard of achievement of all peoples and all nations”¹¹⁴.

Right after the Second World War, human rights were minimal, individual and fundamentally moral. So, in order to pass in the UNGA, the Declaration of 1948 had to be

¹¹² HANS JOAS, *WAR AND MODERNITY* 78 (2003).

¹¹³ HENRY J. STEINER ET AL, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 133-134 (3rd ed., 2007).

¹¹⁴ Maya Hertig Randall, *The History of International Human Rights Law*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW* 03, 16 (2013).

essentially not binding, what counted with 48 states voting in favor and eight abstaining¹¹⁵. The true fact is that states were not prepared “to derogate from the established character of the international system by establishing law and legal obligation that would penetrate Statehood in the radical way”¹¹⁶.

Although deemed a mere moral instrument, the UDHR emerged linking itself to the Enlightenment and the French Declaration of 1789. Using the same language, the UDHR brought the references to ‘inherent dignity’, ‘equal and inalienable rights’, freedom and reason. However, all that happened without mentioning natural law or any other philosophy, what has kept the moral foundation of human rights undetermined. Nevertheless, remains undeniable the cultural influence upon philosophies that shaped the American and French Revolutions, chiefly on their development of democracy based on the rights of men. Philosophically, several concepts have shaped the features of modern age and our thinking on human rights, but their mainstay still is the idea of reason achieved in the Enlightenment era¹¹⁷.

Moreover, as adjourned by Samuel Moyn, the idea of human dignity after human rights became current mostly after 1945. The previous declarations of rights of man did not take account of dignity in order to establish their standards. The notion of human dignity was only conceived and encoded in the United Nations Charter, the Universal Declaration of Human Rights of 1948 and German Grundsgezet – the constitutional Basic Law of 1949. Until that time, dignity was not human rights kernel, not even inviolable. It was at last mid-century where human dignity and democracy were translated as human rights. On that period of time, the notions of

¹¹⁵ SAMUEL MOYN, HUMAN RIGHTS AND THE USE OF HISTORY 82 (2014).

¹¹⁶ HENRY J. STEINER ET AL, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 139 (3rd ed., 2007).

¹¹⁷ PATRICK HAYDEN, THE PHILOSOPHY OF HUMAN RIGHTS 03 (2001).

human dignity and its non-negotiable character emerged largely from Catholic doctrine. Despite the Catholic origin of human dignity framed in international human rights bodies, the expression has gotten new interpretations through time as long as secularism policies advanced in western cultures, turning human dignity inviolable and a vivid mainstream to guide further human rights dispute and conflicts¹¹⁸.

In spite of the non-binding character of UDHR, nowadays we have a very tenacious blend of international bodies that makes human rights enforceable as hard law – even knowing that many people consider the declaration enforceable since day one as part of customary international law. Straight after UDHR adoption in 1948, UNGA decided to split its provisions between two core treaties, one on civil and political rights and other on economic, social and cultural rights. Albeit it was conceived in 1952, only in 1966 the project was approved, uprising the two major Covenants on human rights: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, only ten years later, in 1976, the number of ratifications was met and both instruments of positive law entered into force, shifting human rights soft law structure to a hard law imposition¹¹⁹.

On this regard, the division of UDHR into two Covenants was for both ideological and legal reasons, although both still share equal structure and refer to the inherent dignity of the person as a foundation of the proclaimed rights. The ideologies underneath both Covenants reflected the separation between East and West of the Cold War. Their legal significance came

¹¹⁸ SAMUEL MOYN, HUMAN RIGHTS AND THE USE OF HISTORY 20-33 (2014).

¹¹⁹ HENRY J. STEINER ET AL, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 136 (3rd ed., 2007).

through the codification of Article 2 of the UDHR they represented, which turned the dispositions thereof legally binding. Besides, the Covenants hold the universality and equality of their provision, also adding the so-called third generation of rights, people's right to self-determination. They all together form the International Bill of Rights, what have been enlarged by other human rights instruments that raise a treaty-based enforcement mechanism of the contemporary international human rights regime¹²⁰.

Therefore, enforcing Article 103 of the UN Charter, international jurisprudence has prevailed states' commitment on human rights over any conflicting national obligation or any other international agreement. Human rights become the ultimate promise that trumps any other obligation, no matter what. As held by Inter American Court of Human Rights, in *Sawhoyamaxa Indigenous Community v. Paraguay*, human rights are currently peremptory norms of international law which cannot be circumvented by any state, not even by a parallel treaty¹²¹.

Summing up, the law of human rights is deeply rooted on moral philosophy. Even after Second World War, modern international law of human rights has been indissolubly linked with moral concerns¹²². All conflicts addressed by human rights are also moral conflicts and throughout time and development of the modern international community, which counts with plural subjects and sources of law dynamism, the human dignity has served itself as guidance to human rights appeasement. Both old and new human rights framework have had the same

¹²⁰ Fernando R. Tesón, *International Human Rights and Cultural Relativism*, in THE PHILOSOPHY OF HUMAN RIGHTS 379, 382-383 (2001).

¹²¹ Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146, §§137-140 (March 29, 2006).

¹²² Maya Hertig Randall, *The History of International Human Rights Law*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 03, 09-10 (2013).

overall aim, the building process of a world more peaceful and humane that would lead to the fading away of war and all forms of human cruelty and barbarism¹²³.

3.2. The Rising of Human Rights Morality

As stated in Article 1 of DUDH, “all human beings are born free and equal in dignity and rights”. Since the birth of human rights in American Declaration of 1776 and French Declaration of the Rights of Man and Citizen of 1789 (where the correlated statement was “men are born and remain free and equal in rights”), in order to fill the gaps of human rights fulfilment of almost 150 years, there has been the addition of *equality in dignity and rights*. This subtle change encompasses a substantial reform upon what we conceive as human rights and, most of all, what we conceive as human beings.

A context of value is merged to human rights comprehension, human values acquired through mankind history which composes the *juridical inventory of humanity*¹²⁴. Although the process of modernization might seem to us appealing to values decline or erosion, in fact it has proven the opposite. Too many atrocities and cruelty were perpetrated during human rights building process. In general, human rights transgressions are being reduced while *human dignity* is being emphatically advocated, what might be accounted to several reasons¹²⁵. However, one of

¹²³ JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 06-07 (2nd ed., 2012)

¹²⁴ FLÁVIA PIOVESAN, DIREITOS HUMANOS E O DIREITO CONSTITUCIONAL INTERNACIONAL 28-30 (São Paulo: Saraiva, 2007).

¹²⁵ For instance, the international proliferation of NGOs and their recognition as international subjects; the establishment of international courts on human rights; the enactment of new international treaties among

the most precious is that the notion of human dignity embraced by human rights encompasses human values related to religious and cultural traditions. These values compare themselves to the also general duty of helping people who is suffering, no matter where. This statement therefore emphasizes (i) the sacredness of human life, (ii) an ethos of love and (iii) universal respect¹²⁶.

3.2.1. *The sacredness of human life*

Georg Jellinek was the first one to conceive the idea that the human rights in the French Revolution were not built over Enlightenment solely. The concepts of natural law could never have led to the codification of human rights by itself. There was also an equivalent force which traces them back to Christian roots. Human rights – or the ‘rights of man’ and ‘natural rights’, as they were called back in the day – as binding metanorms turned into positive law, could never be stemmed from any philosophy based only on reason, not even natural law or Kant’s theory, for instance. Instead, the *dignity* of all human beings also had truly deep roots in Christian tradition¹²⁷.

According to this view, the idea of legally establishing inalienable, inherent and sacred rights of men is not of political but religion foundation. For Jellinek, this is the source of all other individuals’ rights, those within and against the state. The rise of abolitionism, when the fight

international cooperation of states; the replication of human rights on domestic level, in national constitutions and so on so forth.

¹²⁶ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* 09 (Alex Skinner trans. 2013).

¹²⁷ GEORG JELLINEK, *THE DECLARATION OF THE RIGHTS OF THE MAN AND CITIZENS* 53-55 (FRANKFURT, GERMANY: OUTLOOK, 2018)

against slave trade was simultaneously going on, for example, was built upon the laws of God and the rights of men to whom every human being is entitled to the fruit of his own labor and also his liberty¹²⁸. Although it was not the only source for the abolitionist movement, since the slave owner also based their property rights over slave on God's law, the Christianity had its undeniable argumentation contribution¹²⁹.

So, the core liberty rights of the first dimension of human rights actually have also Christian roots, even the American declarations previous to French's have it. What was needed then was a language cognitively in secular terms, understandable to all sides, where the promise of a wide allegiance could be fulfilled, since the 'rights of man' was vigorously declared as self-evident. Although there has been a lack of self-evident truths, it does not mean a loss of all common vocabulary where we may attain a consensus on values¹³⁰.

Therefore, analyzing human rights background history might give us the confidence to assure that there is in them features of both Enlightenment rationalism and Christian canons. These two components balance the understanding of human rights and this duality makes part of a large process that has been called *the sacralization of reason*¹³¹. The rationalism of the Enlightenment conveys the autonomy and the cultivation of reason which grant to human beings the cardinal instrument of independence, where Kant's theory plays a major role – since

¹²⁸ JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 17-20 (2012).

¹²⁹ JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 156 (2013).

¹³⁰ HANS JOAS, THE GENESIS OF VALUES 09 (Gregory Moore trans. 2000).

¹³¹ HANS JOAS, THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS 27-32 (Alex Skinner trans. 2013).

Kantianism has been regarded the most compelling theory on human rights and the modern philosophy of justice within¹³².

The eighteenth-century philosophy of human rights asserted a refrained notion of human dignity, since its political and social applicability put aside relevant groups of people, such as women, children, slaves and religious minorities. All of that under a self-evidence moral power which set on march welcome social changes. After that, only the UN Charter, the Universal Declaration of Human Rights of 1948 and the German Grundsgezet bring back the notion of human dignity (“inherent dignity” that leads to “equal and inalienable rights”), but this time quite differently from the past. Now, human dignity embeds respect for other people as a form of recognition of their moral standing, and this duty of respect, so broadly uphold nowadays, is what Kantian ethics and moral rights are based on, which inobservance ensues a denial of humanity itself¹³³.

So, both rationalism and religious tradition encompass the sacralization of reason that delivers a significant cultural twist in which human person becomes a sacred object. Human rights and universal human dignity become the “religion of humanity”¹³⁴. The sacredness of the person overreached the boundaries of religion to take place in reason kernel during Enlightenment period, mostly through Kant’s theory which detaches the dignity from our likeness with God and replaces it in individual’s moral autonomy¹³⁵. In doing so, the comprehension of the holiness of the person, which is grasped by most (if not all) religions in the

¹³² MICHAEL SANDEL, *JUSTIÇA: O QUE É FAZER A COISA CERTA* 135 (Rio de Janeiro: Civilização Brasileira, 2012).

¹³³ JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY* 28-49 (2nd ed., 2012)

¹³⁴ Émile Durkheim, *Individualism and the Intellectuals*, in *DURKHEIM ON RELIGION* 59, 64 (1994).

¹³⁵ BERNARDO GONÇALVES FERNANDES, *CURSO DE DIREITO CONSTITUCIONAL* 216 (Rio de Janeiro: Lumen Juris, 3rd ed., 2011)

world, descends to human beings as *dignity*, which is bound to all of us due to the humanity we all commonly share. Thus, as rational beings, only our humanity can carry moral law within, which gives us autonomy and dignity¹³⁶. Therefore, the notion of dignity that comes from our humanness and reason merges with the inalienability of human inner value prevailing in any religion precept.

So human rights and human dignity rise as an expression and a process of the sacralization of the person which constitutes, as Durkheim has stated, the religion of humanity where “man is at the same time, both believer and God”¹³⁷. The godliness and inward faith of the individual are now set up to hold a social cohesion of modern societies. But this endless and ongoing process of sacralization of the person, despite the Christian roots, also means overlapping old tradition in the sense that it has to continue as broader and more pluralistic as possible, in order to replace Christianity which is merely acknowledged to have paved the way for this new stage¹³⁸.

From Christianity we borrowed the idea that we are made in the image of God or we are the children of God. The former gives us a divine essence, the soul, while the latter brings the idea that our life (with soul) is a gift which demands some restraints about our disposal over ourselves. The former also encompasses the metaphysical sacred core of every human being, while the latter entails the sense of indisposability of our lives. The sacralization of the person embedded in human rights and dignity has become a challenge to religions (in general) once it beholds secular value which is reinterpreted over and over during the process. Consequently, the

¹³⁶ MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 22-26 (2012)

¹³⁷ ANTHONY GIDDENS, *DURKHEIM ON POLITICS AND THE STATE* 81 (1986)

¹³⁸ Émile Durkheim, *Individualism and the Intellectuals*, in *DURKHEIM ON RELIGION* 59, 68 (1994).

articulation of this process reinterprets the values to a language attainable to believers and nonbelievers alike. The conception of the soul is translated into that of the 'self' endowed with reason; and the giftedness of life turns into a rational argumentation where we are not a fact of mere existence and our life is deemed a gift opposite to randomness and by gratitude and logic, we cannot dispose of it as we desire¹³⁹.

Then, through the novel process of sacralization of the person we understand the concepts of inalienability, inviolability and indisposability of rights and human dignity without embracing or worshipping any religion dogma of the sanctity of human life. Likewise, we comprehend the notion of life as a gift and the moral weight it contains, whether or not aiming the source of the giftedness to God¹⁴⁰. The rational recognition of our finitude turns out to be the precondition for the genesis of human life; the self's awareness of our own finitude becomes the main point to validate the giftedness of life¹⁴¹. Hence these ideals constitute the formation of human rights and dignity through time and mankind history.

3.2.2. *Ethos of love*

The notion of love has always been the innermost canon of Christianity. The conception of *goodness* descends from the divine love. All human rational principles, rules and the justice ballasts came afterwards. Love is anchored in the heart of social behavior that guides human

¹³⁹ HANS JOAS, THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS 143-162 (Alex Skinner trans. 2013).

¹⁴⁰ MICHAEL SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 95 (2007)

¹⁴¹ HANS JOAS, THE GENESIS OF VALUES 80 (Gregory Moore trans. 2000).

agency and set its values. Nevertheless, both religion and emotion have taken place on morality of law construction process, namely the morality of human rights law. The moral code contained in all religions has been added to human empathy over the history of mankind values which framed and keeps framing the understanding of human rights and dignity¹⁴².

Historians trace the uprising of emotions in the mid of eighteenth century back to novels (mainly Samuel Richardson's and Jean-Jacques Rousseau's) and newly notions of bodily integrity. Therefore, the comprehension over "bodily integrity" and "empathetic selfhood" served as mainstream to human rights history and their building process¹⁴³. For example, Rousseau's book *Julie ou La Nouvelle Héloïse*, from 1761, provoked a viral reaction worldwide against bodily punishment and marriage freedom, reaction quite similar to the one caused by Harriet Beecher Stowe's *Uncle Tom's Cabin* against the cruelty of slavery in United States in the following century. All kind of violence – such as torture or those directed toward women, children, slaves and animals – began to gradually wane in Western culture, mostly. The rise of compassion for human suffering brought to light the need of political rights revolutions¹⁴⁴. The Law of the Seas, for instance, was pioneer branch of international law in ruling against piracy, who has served so many years as *hostis humani generis* in human rights history and the combat over crimes against humanity, encoding many punishments to its perpetrators and vastly intensifying its pursuit¹⁴⁵.

¹⁴² HANS JOAS, THE GENESIS OF VALUES 26-47 (Gregory Moore trans. 2000).

¹⁴³ LYNN HUNT, INVENTING HUMAN RIGHTS 30 (2007).

¹⁴⁴ SAMUEL MOYN, HUMAN RIGHTS AND THE USE OF HISTORY 04-05 (2014).

¹⁴⁵ EKREM KORKUT, TURKEY AND THE INTERNATIONAL LAW OF THE SEA 166-172 (2017).

Likewise, renewal of collective ideas, especially after a great social trauma such as war, can only be achieved when the theory of learning is anchored in emotions. The need to uproot these collective ideas and replace them with new ones also anchored in emotions consists in a process of change that cannot be carried out simply through the non-violent compulsion of superior arguments. Hence war maintains an important teaching effect over the collectives affected and allows the overcoming of barriers which might block the uprising of learning new collective ideas which cognitive contents harbor in affective emotions. Thus, a multiplicity of collective experiences in war is featured by the common existential experience of many individuals who share empathy on the basis of association and cohesiveness that get stronger in the trauma of war¹⁴⁶.

The empathy (that moves toward a rational process where we put ourselves into other's place) has arisen the mutual identity among men, which has served as a touchstone to the foundation of human rights. Lynn Hunt attributes to novels the awakening of inward feelings – the sense of equality and empathy through emotional attachment in the narrative – which pushed the claim for individual autonomy. Although empathy was not a new human feeling, it got a new way to express itself through fiction, which created the “ideal presence” cognition where the reader puts himself into the story as a subject of imaginative identification and this trancelike state nurtures morality. People become more interested to perform “acts of generosity and benevolence” and reprehensible to evildoings and immoral acts at same time. These new experiences have shaped new social and political concepts¹⁴⁷.

¹⁴⁶ HANS JOAS, WAR AND MODERNITY 182-184 (2003)

¹⁴⁷ LYNN HUNT, INVENTING HUMAN RIGHTS 32-39, 56-65 (2007)

Therefore, the comprehension over human rights outplays the relation between the aggressor and the victim – at domestic level and international as well – in order to put inside of the relation the rest of the humanity. The rights violations concern all mankind. This notion of humanity points to the “understanding and kindness towards other people”¹⁴⁸. The source of empathy and its compassion had deep roots in Christianity and came out through a rediscovering momentum of human dignity. The Enlightenment age was a mixture of feeling and reason in order to foster the value of humanity¹⁴⁹.

From Christianity, the interplay between the principles of love and justice took place. All in all, love works as a moral dimension that matches with reason to apply and to organize the social milieu. As love empowers us to act morally it also enjoins endless reinterpretation of justice, since love and justice pose together a “relationship of indissoluble tension”¹⁵⁰. This duality is what we conceive as morality of law; this duality governs the world, Nature and mankind, science and consciousness, logic and moral, economy, politics and history; and it is the semantic of all human rights¹⁵¹.

The tonic, nonetheless, is the balance between both elements. Emotions engaged in empathy and love cannot operate moral judgments all by themselves, neither can reason. The former solely would rule a system toward impersonal criteria validity which leads to moral

¹⁴⁸ JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 135 (2012).

¹⁴⁹ SAMUEL MOYN, *HUMAN RIGHTS AND THE USE OF HISTORY* 05-09 (2014).

¹⁵⁰ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* 169 (Alex Skinner trans. 2013).

¹⁵¹ JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY* 401-402 (2012).

disagreements and manipulative social relations¹⁵². The latter in turn cannot sustain moral axioms based on self-evident truths because there is no such thing; no substantive moral conclusion is capable to appease entirely moral disagreement in the real world¹⁵³. No longer resists in contemporary philosophy of law the idea in which a genuine moral action can only be motivated towards what is morally right to be regarded moral.

Joas and Durkheim criticize Kant when he states that only duty based on reason constitutes a necessary factor in the definition of moral rules. According to Kant, rational duty cannot be compromised with inclinations, what means that goodwill and good-doing would not have moral value if inspired by emotions¹⁵⁴. Actually, human agency is unable to perform solely from a sense of duty. We must also add the common goodness; the human desirability and empathy which make part of morality just as much. Goodwill and good-doing, in fact, possess as much moral value as there is *love* in them. Under this auspice, there must be coexistence between rational duty and the goodness. The good interplays with duty to set up human obligations¹⁵⁵.

On this regard, Bernard Williams grasps that there is no need to deem an action or perspective moral only when guided by reason. There is no exclusion relationship between morality and reason¹⁵⁶. Behind the smokescreen of our moral duties, our emotional life provides us access to ideal values. As glimpsed by Joas, our feeling-state of pain unites all mankind, since we all share the sensitivity to pain, not only physical but also in humiliation. The struggle for human protection and welfare is the common ground for shaping public life and the meaning of

¹⁵² ALASDAIR MACINTYRE, AFTER VIRTUE CHAPTER 3 (3RD ed. 2007)

¹⁵³ JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 183-184 (2013).

¹⁵⁴ IMMANUEL KANT, FUNDAMENTAÇÃO DA METAFÍSICA DOS COSTUMES 23 (São Paulo: Martin Claret, 2006)

¹⁵⁵ HANS JOAS, THE GENESIS OF VALUES 65-87 (Gregory Moore trans. 2000).

¹⁵⁶ BERNARD WILLIAMS, MORAL: UMA INTRODUÇÃO À ÉTICA 107 (São Paulo: Martins Fontes, 2005).

solidarity that we achieve through our shared empathy. This is actually the value-quality which does not surface from abstraction, but real life. In this regard, the prevention of cruelty is the essence of an ethos of love which exceeds the spell of imperative morality of duty and formalism to break through to a new non-formal conception of values based on a *phenomenology of value-experience*¹⁵⁷.

3.2.3. *Universal respect*

The principles of justice and love form a complex interweaving formula of morality. From the Christianity notion of love and the principle of reciprocity it implies, we command our life as a gift. As life is viewed as a free gift from a giver, the reciprocity encompasses the idea of its inalienability, inviolability and indisposability and the duty to respect it comes along, even against our own will. Moreover, this central idea has turned itself politically and morally shared by all peoples, whether religious belief, or none, they hold. It really has been part of human rights tradition regardless of any religious belief. The notion of life as a gift has also reached the precepts of reason, being belief and reason complementary to each other on this way¹⁵⁸.

In fact, the value we praise to life nowadays and back in Enlightenment era would never thrive based solely in human reason. The idea of life as mere existence and the randomness it suggests would never survive without the belief of an immortal soul. That is the motivation why Lynn Hunt states that humans by themselves “cannot overcome their inner propensity to apathy

¹⁵⁷ HANS JOAS, *THE GENESIS OF VALUES* 92-93, 158-159, 166 (Gregory Moore trans. 2000).

¹⁵⁸ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* 168-170 (Alex Skinner trans. 2013).

or evil”. The idea of life as a gift gives life its metaphysical *raison d’être*¹⁵⁹. In this vein, the concept of life as a gift may arise from either religious or secular sources. According to Michael Sandel, it is needless to hold a religious belief to reverence the giftedness of life. Its inalienability and inviolability contain a moral weight whether or not embracing any sense of religious sanctity¹⁶⁰.

In secular terms, the giftedness of life sheds to light human dignity, the inner value of each human being acknowledged by our common reason. Therefore, the sacredness of modern human rights lies on those societies which hold the principles of inalienable rights and the dignity of the individual – and not dignity as social status, what was upheld by Catholic Church and religious societies of that time. Actually, human dignity comes from the democratization process of the high social status once reserved exclusively for the well-born. It entails a leveling up process where gradually more and more people have been treated equally in deserving social respect. Human rights have held that “everyone becomes a king where claims that basic human dignity is non-negotiable”¹⁶¹. Thus, dignity turns out to be the mainstay of the human rights morality. The estimate of human dignity which a rational being must give comes through the universal duty of *respect*.

During Enlightenment epoch, as the notion of dignity progressively loses its linkage with religion and merges itself closer to reason, the very understanding of human autonomy connected with dignity is grasped for the first time in Kant’s Groundwork. In general lines, autonomy is the

¹⁵⁹ LYNN HUNT, INVENTING HUMAN RIGHTS 211 (2007).

¹⁶⁰ MICHAEL SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 92-95 (2007)

¹⁶¹ SAMUEL MOYN, HUMAN RIGHTS AND THE USE OF HISTORY 19-20 (2014).

idea that the moral law which governs us all also gives us the agency to be an end in ourselves, since the moral law is self-given to us. Dignity in turn is our priceless inner value, incomparable in nature. As dignity is something that we all share and possess pursuant our humanity, the moral law that drives us to autonomously treat each other as an end equally enjoins the duties of respect and self-respect¹⁶².

Our rational capacity is what makes all human especial. According to Kant, rationality dictates our autonomy which means our endowment to be free and to act regarding the moral law we give ourselves. Heteronomy would be the opposite action to bend before desires we have not chosen to ourselves. It is the autonomy, by this mean, what gives human's life its especial dignity, regarding persons not just as means, but also as an end in themselves. Thus, our rationality grants us the autonomy which makes us worthy of dignity and respect. It is the way we face human dignity that defines our current conceptions on universal human rights and our entitlement of respect, since we are all rational beings completely capable of thinking and autonomously acting and choosing freely¹⁶³. More than acknowledging our own specialness, we ought to recognize in each and every individual the same dignity. The Article 1 of UDHR, in this sense, treats us all indiscriminately, no matter how reasonably and sensitively we differ from each other. We are all endowed with reason and conscience and we should interact among ourselves in a spirit of brotherhood¹⁶⁴.

¹⁶² IMMANUEL KANT, FUNDAMENTAÇÃO DA METAFÍSICA DOS COSTUMES 65 (São Paulo: Martin Claret, 2006)

¹⁶³ MICHAEL SANDEL, JUSTIÇA: O QUE É FAZER A COISA CERTA 136-139 (Rio de Janeiro: Civilização Brasileira, 2012).

¹⁶⁴ ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 14 (2013).

On this regard, Michael Rosen brings the deal of respect as a new strand of dignity, distinguishing the “respect-as-observance” from “respect-as-respectfulness”. The former implies the duty to respect human dignity albeit not necessarily justifying or matching with it on genuine doings. That means that our respect rather comes from an automatic setting made by social rules than by appraisal itself. The duty to respect in the latter derives from treating someone with dignity, truly showing him/her respect as moral action which, by this means, usually occur irrespective of positive law commanding you to do so¹⁶⁵. This version of respect touches the morality of aspiration asserted by Lon Fuller, to whom the morality of law is composed by both morality of duty and morality of aspiration. Whilst the first keeps respect as minimum social duties required to a civilized society to function, the second goes beyond and reaches the utmost point of human moral behavior that, regardless mandatory minimum rules, acknowledges the respectfulness by the common sense of humanity and equality we all universally share¹⁶⁶.

Under Kantian terms, human rights are universal in the sense that we are free to act autonomously in accordance to a moral law that is self-given, whence the duty to respect each other flows. In case of acting heteronomously – moved by inclinations – the universality and equality of human dignity is overlooked besides turning itself into an instrumental value. Utilitarianism in turn supports that all human beings are worthy of respect because in the long run we attain the greatest happiness to the greatest number. In doing so, even a modern kind of utilitarianism computes human rights as an element of calculation that portrays the maximization of utility (overall happiness) in society. Hence the respect of human dignity remains instrumental

¹⁶⁵ MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 57-58 (2012).

¹⁶⁶ LON FULLER, MORALITY OF LAW 04-06 (1969).

since it is not based on the respect of human life, but on the ultimate goal of making things better to the greatest number of people¹⁶⁷.

Nonetheless, as asserted before, the duty to respect another's dignity must merge with inclinations without that compromising the meaningfulness of human rights law. Goodwill and good-doing do have relevant moral value even when inspired purely by emotions. It does not matter if motivated by inclination or by duty (although Kantian theory acknowledges only those acts performed by duty). Both motive and consequence of human agency are equally important to human rights morality¹⁶⁸. Moreover, it is not all actions and practices based on self-interest that will be out of morality because it is focused on egoistic content.

For example, someone who gives money to charity in order to enhance his social reputations is moved by egoistic purpose – and considering those beneficiaries as a mean, not as an end –, however there are people taking advantage of that donation and they are truly better off. Although those beneficiaries were not treated as an end – but as a mean – even though we can easily support that there is a difference between this donor and another man who chooses to spend the same amount of money purchasing a jet ski for his own amusement disregarding completely those who are in need. According to Kant, both men are equally and morally wrong. Nevertheless, we all do not dispute that the action of the donor is far better than the *bon vivant's* action (albeit the donor did not have respect-as-respectfulness for those he was assisting, he complied with respect-as-observance in order to maximize the morality and benefit of charity for

¹⁶⁷ CARLOS S. FAYT, DERECHOS HUMANOS Y EL PODER MEDIÁTICO, POLÍTICO Y ECONÓMICO: SU MUNDIALIZACIÓN EN EL SIGLO XXI 109 (Buenos Aires: La Ley, 2001).

¹⁶⁸ MICHAEL SANDEL, JUSTIÇA: O QUE É FAZER A COISA CERTA 143-144 (Rio de Janeiro: Civilização Brasileira, 2012).

human welfare). So, the donor is not entirely approved by morality but he possesses something in between that is somehow partial to the notion of morality¹⁶⁹.

Hence, we cannot conclude that moral actions only come from moral reason. Neither only interests to morality the behaviors that are performed upon moral aim or principles. Although to Kant the person who behaves honestly for his own sake is morally reprehensible – because is action based on inclinations –, an undisputable moral aftermath surfaces from this agency maximization. There are actions that, based on the outcome they intent to implement or modify, are morally relevant as an observance – not because of their motivation or individualistic outlook, but because of the benefit they provide to others¹⁷⁰. Thus, the interplay between strict duty to respect and respect stemmed from good-doings represents exactly the interwoven between respect-as-observance and respect-as-respectfulness or, we should also say, the morality of duty and the morality of aspiration. Both of them, together, make the overall morality of human rights endorsable.

As Fuller grasps, there are some corners of morality that not even the law can reach. There is and there always will be a gap between morality of duty and morality of aspirations and all human agency towards aspiration – even based on goodwill and good-doings – integrates the morality of law¹⁷¹. Therefore, there are some empirics elements around human rights that not even international law can reach and this grey zone comes very clearly to surface in wartime. As

¹⁶⁹ BERNARD WILLIAMS, *MORAL: UMA INTRODUÇÃO À ÉTICA* 108-109 (São Paulo: Martins Fontes, 2005).

¹⁷⁰ BERNARD WILLIAMS, *MORAL: UMA INTRODUÇÃO À ÉTICA* 111-113 (São Paulo: Martins Fontes, 2005).

¹⁷¹ LON FULLER, *MORALITY OF LAW* CHAPTER 1 (1969).

Michael Walzer once said, “war is hell”. In a war, human cruelty usually arises as our civilization outfit slowly fades away¹⁷².

Yet, human agency sometimes reveals aspiration and respect-as-respectfulness even when law does not pursue it. For instance, Robert Graves’ biography on his experience in the Second World War tells us a case where he was watching a frontline post when he saw a German soldier some yards away from him taking a shower behind German line. Grave had him on target but he chose not to shoot, rendering the rifle to his sergeant, who shot him. Both were under the same law and that death was lawful according to law. So, the difference between then remains in another level, a level that law does not reach. Graves said he refused to shoot because when that man was taking a shower, he did not see a soldier, but a simple man, like any one of us¹⁷³. This is aspiration, respect-as-respectfulness, empathy, love and sacralization of life, all combined and together. This is what launched human rights in the first place and same elements remain precious nowadays. It is contained in the morality of law, whether it comes from inclinations or not; whether it encompasses utilitarian calculation or not.

Besides, the interplay between human rights, Kantian human dignity and utilitarian calculation will be further explored in the following chapters. However, we shed to light that human agency complies with the moral philosophy of utilitarianism and this reveals us a noble contribution towards disciplining the human inclinations to frame the acts into rationality through clearly defined interests. The duty to respect human dignity as inviolable, inalienable

¹⁷² MICHAEL WALZER, *JUST AND UNJUST WAR* 142 (2006).

¹⁷³ ROBERT GRAVES, *GOOD-BYE TO ALL THAT* 132 (2014).

and indisposable right is not absolute, which makes inclinations and utilitarian calculations equally relevant¹⁷⁴.

3.3. Human Dignity

When we talk about morality, we mean what is valuable to us as social beings. As suggested by sociobiology, our common reason shapes societies as an aggregation of its collective approvals and disapprovals and moves toward evolution in an expanding circle, which denotes our constant enhancement on good deeds and virtues¹⁷⁵. Besides social evolutionism, we also have commitment to values that comes from experiences of violence and injustice (what is properly called as *traumas*) which have transformed our relationship to ourselves, the world and our values understanding. These experiences can be recollected from mankind history over human rights building process, especially by the central role played by human dignity in the recent international human rights bodies and modern Constitutions – to whom it has served as an “epistemic foundation”¹⁷⁶.

Notwithstanding, the history of human rights has demanded three interlocking qualities. Human rights have to be natural (as an inheritance in human beings), equal to everyone and universal. As mankind moral exhortation, all men in the world must possess them equally while sharing each other the common status of human beings. However, the naturalness is more

¹⁷⁴ HANS JOAS, THE CREATIVITY OF ACTION 23 (Jeremy Gaines and Paul Keast trans. 1996).

¹⁷⁵ PETER SINGER, THE EXPANDING CIRCLE 94 (2011)

¹⁷⁶ HANS JOAS, THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS 69-77 (Alex Skinner trans. 2013).

commonly shared than equality and universality, as rights of men vis-à-vis each other¹⁷⁷. Since the Enlightenment, the equality and universality of human rights have been the unaccomplished elements of the equation. They have been easier to endorse than to enforce, since we have a permanent tension between practices and values.

The very notion of dignity has significantly changed through human history. As a kernel value to humanity, its conception has evolved and still evolving especially after the Universal Declaration of 1948 and the international framework it launches. Thus, the modern understanding of human dignity applies equally to all men, instead of a few (overcoming the notion of dignity craved in the English Bill of Rights of 1689 and getting closer to the naturalness, universalism and equality proclaimed in the declarations of eighteenth century). The comprehension departs from the idea that everyone is “subjected to the same obligations and entitled to the same benefits under the law”¹⁷⁸ and its validity stems from international treaties and postwar constitutions and applied and enforced by both domestic and international courts.

Dignity can be regarded either as right or as value, or even both. The UN Charter of 1945, at the preamble, establishes dignity as value when reaffirming its “faith in fundamental rights, in the dignity and worth of the human person”. As value, it guides the interpretation and application of positive fundamental rights, but does not constitute a right *per se*. Rather it helps international courts to set their jurisprudence based on human dignity interpretation and embeds it into rights assured by human rights treaties. Additionally, the UDHR of 1948 brings the statement that “all human beings are born free and equal in dignity and rights” which sets a new

¹⁷⁷ LYNN HUNT, *INVENTING HUMAN RIGHTS* 20-21 (2007).

¹⁷⁸ ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* 12 (2013).

moral paradigm that requires the equal and respectful treatment among men simply by virtue of being human. Underneath these documents rests the hope that the acknowledgment of human dignity may cease the abuses and cruelties.

As well observed by Erin Daly, no matter the best interpretation we get from human dignity, it comes with enormous cultural influence all around the world and it does not transform dignity into a right at first glance¹⁷⁹. On UDHR's behalf, the following International Covenants of Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) preambles recognize the dignity as inheritance of all humanity and assert the "equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person". From that moment on, dignity is not a mere value, but the centerpiece from where all fundamental rights are rooted, the *cardinal value*¹⁸⁰, such as the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, for instance, which preamble emphasizes in particular that discrimination against women "violates the principles of equality of rights and respect for human dignity". It becomes a *supervalue* placed in between law and morality so the former can only be founded on the latter as a legitimate rationale¹⁸¹.

Because of its multiple irradiating effects, human dignity has been developed by international courts – and some domestic courts alike – as the epicenter of all human rights and it has also been interpreted and applied as literally not treating man as a mean but an end in itself.

¹⁷⁹ ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 15 (2013).

¹⁸⁰ ANA PAULA DE BARCELLOS, A EFICÁCIA JURÍDICA DOS PRINCÍPIOS CONSTITUCIONAIS: O PRINCÍPIO DA DIGNIDADE DA PESSOA HUMANA CHAPTER 1 (Rio de Janeiro: Renovar, 2002).

¹⁸¹ BERNARDO GONÇALVES FERNANDES, CURSO DE DIREITO CONSTITUCIONAL 219 (Rio de Janeiro: Lumen Juris, 3rd ed., 2011)

As a cardinal value (or supervalue), it has been set to appease human rights collisions, like liberty versus life. Thus, human dignity has been held inviolable, inalienable and indisposable to other and ourselves¹⁸². Despite the intent of implementing UDHR human rights kernel throughout human dignity enforcement, international bodies subsequently to UDHR have galvanized a “ubiquity of dignity in current legal discourse” which masks a “great deal of disagreement and sheers confusion”¹⁸³ – the moral quandaries.

Exactly to sustain human dignity, states and international community have the power to enforce the duty to respect ourselves and others. Following the Article 1 of UDHR, the Federal Republic of Germany reconstructed its constitutional framework pursuant to the new international law standards, particularly those concerned to human rights. In 1949 Germany enacted the constitutional basic law, the Grundgesetz. More than anyone, Germany had the moral obligation to fulfill human rights positivation process and galvanize the inviolable nature of human dignity, as affirmed on Grundgesetz’s first article: “human dignity is inviolable. To respect it and protect it has been the duty of all state power. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world”.

In one way or another, since the UDHR all domestic constitutions have been redrafted in such way that nowadays we might assure that almost all national constitutions utterly entail human dignity – some as value, some as right and some as both. In this vein, the Grundgesetz was pioneer in featuring human dignity. Henceforth German constitutional philosophy and

¹⁸² DANIEL SARMENTO, *LIVRES E IGUAIS: ESTUDOS DE DIREITO CONSTITUCIONAL* 60-61 (Rio de Janeiro: Lumen Juris, 2006).

¹⁸³ MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 67 (2012).

theory have inspired and guided every constitutional law and jurisprudence of civil law systems, mostly. As highlighted by Samuel Moyn, UDHR and Grundgesetz put dignity into politics and turned it into a watchword in philosophy and political theory. Before that, he reminds, dignity was not even considered an inviolable value¹⁸⁴.

On this regard, many scholars grasp that both UDHR – and related international instruments – and Grundgesetz have played the concept of dignity and modern international human rights largely over Immanuel Kant’s theory¹⁸⁵ (although the drafting process that occurred in the mid of last century gathered several moral philosophies, western and eastern), especially his categorical imperative of humanity as an end, never merely as a mean – also called the formula of humanity – and the bound connection between dignity and autonomy of human nature. In this sense, there are several international human rights courts’ precedents which report this phenomenon openly.

The Preamble to the Charter of the United Nations (1945) stresses the determination of the peoples of the United Nations “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”. The concept of dignity, as mentioned, is also embedded in the Universal Declaration of Human Rights Preamble, which explicitly recognizes the inherent dignity and equal and inalienable rights of humanity, the same does the preamble of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). The Preambles of

¹⁸⁴ SAMUEL MOYN, HUMAN RIGHTS AND THE USE OF HISTORY 21 (2014).

¹⁸⁵ MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 19 (2012); JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY, 23-24 (2012); MICHAEL SANDEL, JUSTIÇA: O QUE É FAZER A COISA CERTA, 135-137 (Rio de Janeiro: Civilização Brasileira, 2012); SAMUEL MOYN, HUMAN RIGHTS AND THE USE OF HISTORY 23 (2014); AND JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 108-116 (2013).

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 make reference to principles proclaimed in the Charter of the United Nations, recognizes that the rights there enlisted derive from the inherent dignity of the human person, and, respectively, Article 10 asserts that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and Article 13 recognizes the right to education to the full development of the human personality and the sense of its dignity. The Preamble of the Charter of Fundamental Rights of the European Union (2000) affirms that being “conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity”, and Article 1 of which states that human dignity is inviolable and must be respected and protected.

Although all human dignity references are part of preamble, Article 31 of Vienna Convention (1969) sets the general rules of interpreting a treaty which would occur in “good-faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. For that, the preamble is unambiguously included into the purpose of interpretation of a treaty – Article 31, §2. All regional human rights conventions also bring human dignity to their interior. The African Charter on Human and Peoples’ Rights (1981), in Article 5; the American Convention on Human Rights (1969), in Articles 5, 6 and 11; and the European Convention on Human Rights, in Protocol 13 and Article 4 of Protocol 4. Yet, considering the vast and rich treaties containing the international human rights body of law, the great majority expressly contemplates human dignity as value and right. The list below is not exhaustive, but serves to make the point of human dignity deemed as value and right in international human rights law:

(i) the Preamble and Articles 23, 28, 37, 39 and 40 of the Convention on the Rights of the Child (1989) congregate the spirit of peace, dignity, tolerance, freedom, equality and solidarity;

(ii) the preamble and Articles 3, 8, 16, 24 and 25 of the Convention on the Rights of Persons with Disabilities (2006) condemn the discrimination against any person on the basis of disability as a violation of the inherent dignity and worth of the human person;

(iii) the Convention on the Elimination of All Forms of Discrimination against Women (1979) emphasizes that discrimination against women “violates the principles of equality of rights and respect for human dignity”;

(iv) The Preamble of the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty (1989) says that “abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights”;

(v) Article 18 of the Oviedo Convention for the Protection of Human Rights and Dignity of the Human Being (1997), with regard to the Application of Biology and Medicine establishes that States Parties “shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine”;

(vi) the International Declaration on Human Genetic Data (2003) sets its purposes as to ensure the respect for human dignity and protection of human rights and fundamental freedoms in the collection, processing, use and storage of human genetic data, human proteomic data and

of the biological samples from which they are derived, in keeping with the requirements of equality and justice;

(vii) the United Nations Declaration on Human Cloning (2005) forbids all forms of human cloning in as much as they are incompatible with human dignity and the protection of human life, and the application of genetic engineering techniques that may be contrary to human dignity and the Universal Declaration on Bioethics and Human Rights (2005) proclaims the need for scientific research to occur within the framework of ethical principles and to respect human dignity, human rights and fundamental freedoms; the fundamental equality of all human beings in dignity and rights is to be respected so that they are treated justly and equitably; and no individual or group should be discriminated against or stigmatised, in violation of human dignity, human rights and fundamental freedoms;

(viii) the preamble and Articles 6 and 16 of the Council of Europe Convention on Action against Trafficking in Human Beings (2005) to whom human trafficking constitutes a violation of human rights and an offence to the dignity and the integrity of the human being.

The Inter American Human Rights Court, for this matter, has been denoted to human dignity the broadest conception possible which the protection of private life encompasses a series of factors associated with the dignity of the individual, including the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships; also aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other

human beings and with the outside world¹⁸⁶. Moreover, it has endowed human rights and dignity of *erga omnes* opposability as an expression of a collective interest of the international community as a whole¹⁸⁷.

In *Pretty v. United Kingdom*, the European Court of Human Rights overruled Diane Pretty personal and private family decision to put an end on her life because of untreatable and incapacitating disease with suffering condition. Accusing the United Kingdom state of inflicting her ill-treatment and torture in face of the denial of her “right to die”, she took her case to European Court to cease her suffering. Nevertheless, the court held the indisposability and inviolability of her human dignity, which does not give her the right to treat herself as a mean in order to “deny the principle of sanctity of life” protected under human rights bodies. The right of life does not encompass a negative form, not even when the victim consents. There is no “self-determination in the sense of conferring on an individual the entitlement to choose death rather than life”. To the court, indisposing and assuring the inviolability of her life emphasizes her human dignity rather than the alleged “lack of respect” for diminishing her human dignity on letting her degrade and suffer according to her disease’s own pace¹⁸⁸.

So European Human Rights Court has established through rationale of the cases brought upon the court that the very essence of the Human Rights Convention is respect for human

¹⁸⁶ *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 257, §143 (November 28, 2012); and *Rosendo Cantú et al. v. Mexico*, Preliminary objection, merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 216, §119 (August 31, 2010).

¹⁸⁷ *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No.328, §124 (November 30, 2016); *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 282, §267, 463 (August 28, 2014); and *Contreras et al. v. El Salvador*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 232, §112 (August 31, 2011).

¹⁸⁸ *Pretty v. United Kingdom [Fourth Section]*, no. 2346/02, Eur. Ct. H.R., §§ 37-39, 52 and 65 (2002).

dignity and human freedom. In other words, liberty and life human rights are intimately linked to human dignity as this intimate link has been repeatedly stated respectively in numerous international documents and suffices to refer to General Comment No. 12 and General Comment No. 15 adopted by the United Nations Committee on Economic, Social and Cultural Rights at its twentieth and twenty-ninth sessions¹⁸⁹. Therefore, Europe also requires broad human rights protection in the name of human dignity¹⁹⁰.

In *Manuel Wackenheim v. France*, the International Court of Justice upheld France's decision in terminating Mr. Wackenheim job in order to prevail his human dignity. Mr. Wackenheim was hired by a French entertainment company who had dwarf tossing as an event and he was the one, among other dwarves, who had been tossed. Under human dignity auspices, the activity was banned by local mayor which emerged Mr. Wackenheim claim to overrule the ban, once he had not had his dignity dwindled whatsoever but, conversely, he was glad for having a nice job which he also shared a lot of fun. To him, the violation of his dignity was implied on not letting him continue working as he wishes, entailing violation to his freedom, employment rights and respect of private life. Moreover, he emphasized, "there is no work for dwarves in France and his job does not constitute an affront to human dignity since dignity consists in having a job"¹⁹¹.

In *Wackenheim* case, France held the ban on dwarf tossing basing its arguments on the legitimacy of human dignity upon the alleged discrimination against dwarves. So it was deemed by France as a question of upholding the public order, furthermore, "human dignity is part of

¹⁸⁹ *Lambert and Others v. France [GC]*, no. 46043/14, Eur. Ct. H.R., §§ 142-143 (2015).

¹⁹⁰ *Vo v. France [GC]*, no. 53924/00, Eur. Ct. H. R., §§ 75, 82, 84-85 (2004).

¹⁹¹ *Manuel Wackenheim v. France*, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002)

public order”, “despite the consent of the individual concerned”. In response, Mr. Wackenheim inveighed that “employment is an element of human dignity and depriving an individual of his employment is tantamount to diminish his dignity”¹⁹². Both sides were arguing the same human dignity and both sides were recollecting human rights on their behalves – such as Mrs. Pretty and her self-right to die without suffering. This and several quandaries regarding human rights and human dignity have been settled by international courts over Kantian formula of humanity as an end.

Therefore, the reason why modern human dignity and its moral bounds are related to Kant is because the language widespread nowadays, mostly by scholars and international/domestic jurisprudence¹⁹³, emphasizes the Kantian categorical imperative and notion of dignity as inherent value. Dignity has shown itself through different strands, like status, behavior and inherent value. Only the third was developed by Kant and is encompassed by modern international human rights, also unfolding and carrying within the universal duty of self and mutual respect. Through human autonomy, each human being bears his humanity that overreach the exercise of personal choices (inclinations); humanity, on this sense, sets boundaries to what human beings may do.

Such value, by the way, transcends the human person and his own will. In *Parrilo v. Italy*, European Court of Human Rights recognized the dignity of an unborn human life, for example. In respect to dignity, as value and rights, the potential of being a born life is enough. In

¹⁹² *Manuel Wackenheim v. France*, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002)

¹⁹³ For instance, in 2006, German Constitutional Court held unconstitutional the statute enacted by the Parliament regarding Homeland Security, which asserted that aircrafts taken by terrorist could be lawfully shot down in order to save the lives of those who would be on the ground. The Court rationale was in the sense that such provision erodes the human dignity of those who are inside the plane, even considering their death as certain outcome. Check on case 1BvR 357/05, of German Constitutional Court.

such terms, “human embryos must be treated in all circumstances with the respect due to human dignity”, not even genetics science shall prevail “over the respect for human dignity”, since “scientific progress must not be built upon disrespect for ontological human nature” and the “scientific goal of saving human lives does not justify means that are intrinsically destructive of that life”¹⁹⁴. The same depth of dignity beyond the person was held by Inter-American Court as well, where human dignity was found on human remains possession, especially by the dead deity beliefs and liturgy¹⁹⁵. Likewise, as stated in *Wackenheim* case, France ban on dwarf tossing had “reasonable grounds”. Not every differentiation of treatment between people constitutes discrimination, what would occur when not based on objective and reasonable grounds. Human Rights Committee thus endorsed France’s policy regarding it “necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant”¹⁹⁶ – article 26, ICCPR.

In modern international arena, Kantian theory is very appealing, emphasizes Martha Nussbaum. It is so because it brings into international politics and general relationships ethical content which forces all nations to comply with several moral mandatory statements. This approach outweighs the economic power in the sense that upholds universal equality and enhances the value of human life and dignity, which trumps any other interest (like in the case of the *Sawhoyamaya Indigenous Community v. Paraguay*). Even though, she highlights that it has

¹⁹⁴ *Parrilo v. Italy [GC]*, no. 46470/11 Eur. Ct. H.R., §47 (2015).

¹⁹⁵ *Velásquez Paiz y Otros v. Guatemala*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 307, §173, 220 (Noviembre 15, 2015); *Caso Bámaca Velásquez Vs. Guatemala*, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 91, §81 (Febrero 22, 2002); and *Caso Blake Vs. Guatemala*, Fondo, Inter-Am. Ct. H.R. (ser. C) No. 36, §115 (Enero 24, 1998).

¹⁹⁶ *Manuel Wackenheim v. France*, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002)

not been enough to establish international social cooperation which grants all human beings' equal respectfulness¹⁹⁷.

The reasons supported above are commanded by the categorical imperative of the formulation of humanity as an end, where there is an invisible (but not untraceable) power to enforce the duty of being respectful to ourselves and others. Human dignity, therefore, serve as mediator for moral quandaries, since each man, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will¹⁹⁸. However, as warned by Michael Rosen, to treat human beings as an end is an open question which remains unanswered by the formula of humanity, particularly because Kant does not forbid treating human as a mean totally but as *means only*, which arises a variety of semantic differences where our practices hold a grey zone of uncertainties about what is and what is not morally permissible on human rights¹⁹⁹.

Human dignity has become the foundational norm that guides all fundamental rights just as much as settle eventual conflict between them, even knowing that human rights morality did not derive entirely from Kantianism. Suddenly, every other values and rights become instrumentals²⁰⁰. For those constitutions and international treaties who treated human dignity as value, it becomes also an undeniable right mainly through constitutional and international human rights courts jurisprudence. To them, using the value of dignity to overcome individual's

¹⁹⁷ MARTHA C. NUSSBAUM, FRONTEIRAS DA JUSTIÇA: DEFICIÊNCIA, NACIONALIDADE, PERTENCIMENTO À ESPÉCIE, 334-337 (São Paulo: Martins Fontes, 2013)

¹⁹⁸ IMMANUEL KANT, FUNDAMENTAÇÃO DA METAFÍSICA DOS COSTUMES 68 (São Paulo: Martin Claret, 2006)

¹⁹⁹ MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 83-86 (2012).

²⁰⁰ CARLOS S. FAYT, DERECHOS HUMANOS Y EL PODER MEDIÁTICO, POLÍTICO Y ECONÓMICO: SU MUNDIALIZACIÓN EN EL SIGLO XXI 109 (Buenos Aires: La Ley, 2001).

personal choices and behavior makes sense because what is protected underneath is the “respect for the dignity of the human person” In this vein, UDHR and the Grundgesetz foist “Kantian conception of dignity as an essential value as the central principle guiding state action”²⁰¹.

In a piecemeal, human dignity has revealed itself at once a universal value and a contextualized right. It is then both a principle to lead law interpretation and a right judicially enforceable, legally and politically²⁰². However, far from being a universal and self-evident concept, the right to dignity has created an everlasting tension that neither positive law nor judicial interpretations have been able to appease. As remarked by Erin Daly, any effort to find a single, unifying theory of dignity will ultimately be thwarted by “the vast range of unconnected instances of its use”²⁰³, which requires human rights to be regarded in context of a “dynamic and evolving process of international norm-setting” that takes into consideration plurality and various historical, cultural and religious backgrounds²⁰⁴.

3.4. Human Rights (wannabe) Universalism

As we have mentioned earlier, the American Declaration of Independence and the French Revolution Declaration of the Rights of Man and Citizen borrowed the essence of natural law

²⁰¹ MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 125-126 (2012).

²⁰² ANA PAULA BARCELLOS, A EFICÁCIA JURÍDICA DOS PRINCÍPIOS CONSTITUCIONAIS: O PRINCÍPIO DA DIGNIDADE DA PESSOA HUMANA CHAPTER 2 (Rio de Janeiro: Renovar, 2002); NELSON ROSENVALD, DIGNIDADE HUMANA E BOA-FÉ NO CÓDIGO CIVIL 07-62 (São Paulo: Saraiva, 2005); AND LUIS MARÍA DESIMONI, LOS DERECHOS HUMANOS Y LA GUERRA CONTRA EL TERROR 41 (Buenos Aires: Editorial Ábaco de Rodolfo Depalma, 2009).

²⁰³ ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 20 (2013).

²⁰⁴ Maya Hertig Randall, *The History of International Human Rights Law*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 03, 20 (2013).

theories. The philosophy that departs from Hugo Grotius and moves further on establishes rights that are essential to human nature, irrespective of God. Human rights, which unite rationality with the idea that each person has rights simply by being human, have galvanized modern era by setting the rights of life, liberty, happiness and property as natural to any human being, even prior any political society. These precepts went deep into Enlightenment and the social transformations provoked in eighteenth century pursuant to the idea of universal natural rights which are, by this mean, inalienable. They cannot be taken away or conferred by society, since they are “self-evident” and a moral quality. All brought up again since the revival of human rights in the second half of last century²⁰⁵.

However, since the beginning of UN human rights movement, the delimitation over what would mean universality has been a great problem. The diversity of philosophies on the UDHR drafting process was enough to symbolize the unravel nature of simple question just as where basic human values are concerned. All the philosophers gathered had to trace a “*common conviction*” because the outlooks upon human rights varied as Western and Eastern culture and philosophy do²⁰⁶. Hence Hans Joas supports a duty of *value generalization* in order to maintain the constitutive patterns of the system’s identity²⁰⁷.

International human rights law has been broadly grappled and inveighed for being unfit for universalism in a pluralistic world. Some believe their universalism comes from the ability to autonomy and reason that all men share and yoke all of us through humanity. Jenny Martinez

²⁰⁵ PATRICK HAYDEN, THE PHILOSOPHY OF HUMAN RIGHTS 04-05 (2001).

²⁰⁶ MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 221-222 (2002).

²⁰⁷ HANS JOAS, THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS 179-182 (Alex Skinner trans. 2013).

points to the no-dissent ratification of Universal Declaration of Human Rights in 1948 (the “positivist credentials”) and its moral exhortation force about right and wrong²⁰⁸. In addition, Lynn Hunt brings the claim that the moral rules framed in human rights are universal because they are “self-evident”²⁰⁹. Actually, neither of them is accurate.

3.4.1 Positivist Credential

The international law has been traditional on establishing the universality by configuring to its standards the related juridical positivism. Since the international community has always been detained by states – even nowadays, with the openness of international arena, states remain the prime subjects – and their will can only be granted and visualized on international positive instruments. On this regard, the positivism tradition of international law traces back to states sovereignty that supposedly implies the containment of human being complete emancipation from state power²¹⁰.

As cited before, the UDHR came to international law as a soft law instrument. Only later it became hard law by the enforcement of parallel treaties, such as the two Covenants of 1970s. Nowadays, several international bodies constitute the human rights bloc all over the world, each one with its own scope. Regardless of their positivism movement, transgressions over human rights become even more usual these days, meaning that universal respect is not such a universal

²⁰⁸ JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 161 (2012).

²⁰⁹ LYNN HUNT, *INVENTING HUMAN RIGHTS* 19 (2007).

²¹⁰ ANTÔNIO AUGUSTO CAÑADO TRINDADE, *A HUMANIZAÇÃO DO DIREITO INTERNACIONAL* 13 (Belo Horizonte: Del Rey, 2006).

value like once portrayed. Hence, all international subjects and courts struggle every day to set a minimum of morality out of human rights, regarding the generalization of values and the sustenance of world plurality.

Once again, we face the abysm between positivism announcement and human behavior and state policy. Beyond the letters of the positivism movement and out of its reach, however, we find and nurture goodwill and good-doing. On this regard, no matter if it comes from moral duty, religious principle of love or pure prudence (reason), they are all very welcome. What has really mattered so far and will always matter to morality of law is the international actions' content; the judgment, practices and principles involved, whatever their motivation, they all might be moral. Along the process of distinguishing facts from values, we face the objective value of human welfare (objective in the sense that is not acceptable the idea of welfare upon anything that is deemed good individually). Rather, the value of human welfare as international moral posture ought to be grappled in a larger level where "welfare" might be interpreted in general terms. Therefore, values, practices and institutions must be approved in general terms in order to fulfill a global understanding of human welfare²¹¹.

Therefore, the generalization of human rights and – the vagueness it implies – has given international courts enlarged powers to set the jurisprudence of the court freely. During this process of value statement, consensus over the core value is hard to achieve in international society where pluralism is also a mainstay value²¹². The current sense of humanness, as secular and anti-religious term, embeds the human welfare in happiness connotation. Even that moral

²¹¹ BERNARD WILLIAMS, *MORAL: UMA INTRODUÇÃO À ÉTICA* 117-124 (São Paulo: Martins Fontes, 2005).

²¹² ALBERTO DE AMARAL JÚNIOR, *CURSO DE DIREITO INTERNACIONAL PÚBLICO* 113-128 (São Paulo: Atlas, 2nd ed. 2011)

philosophies disregard happiness as fundamental notion, there is in it a nature of welfare which contains multiples meanings not disregarded by anyone in general terms²¹³.

3.4.2 Self-evidence

To proclaim the human rights as self-evident, it has been required three intertwined and inseparable qualities. First, human rights must be natural, in the sense that they are inherent in all human beings; second, they must be equal, what means to be the same for everyone; and third, they must be universal, applicable everywhere. In sum, the human rights ought to attain equally all mankind in the whole world just because of the shared status of “human being”. Among these qualities, the naturalness has been easier to embrace than equality and universality. Besides these qualities, to turn them meaningful we also have to add the political content. Since they are human rights in society – domestically or internationally –, states must engage as well²¹⁴.

Samuel Moyn agrees with Hunt about the need of politic engagement. For him, human rights had been minimal from 1945 onwards. They had moral foundation but no political enforcement, since the United Nations role on that period insisted on its nonbinding character in order to make the Universal Declaration pass in the General Assembly. Only in the 1970s that human rights movement gained strength and achieved foreground beyond government

²¹³ BERNARD WILLIAMS, *MORAL: UMA INTRODUÇÃO À ÉTICA* 133-134 (São Paulo: Martins Fontes, 2005).

²¹⁴ LYNN HUNT, *INVENTING HUMAN RIGHTS* 20-21 (2007).

institutions, greatly by the hands of NGOs. Only then the human rights are galvanized as a moral alternative to the blindness of politics²¹⁵.

Notwithstanding, Hunt still believes the universality of human rights lies on our universal “effort to dislodge cruelty”, which has been part of mankind history since ever. This common effort chiefly erupts from our empathy, which has become a “more powerful force for good than ever before”; this makes human rights our bulwark against evil. Accordingly, human rights are better defended by the sentiments, convictions and agency of peoples who seek answer for their outrage and it goes beyond law – which sometimes serves as instrument of oppression. This is enough to turn them self-evident and carry the potential for universality²¹⁶.

Likewise, the Inter-American Court of Human Rights holds an outlook very akin to Hunt’s. In *Advisory Opinion OC-18/2003*, it is endorsed that human rights emanate from “human conscience” rather than the will of states. They come as a consensus from all the subjects of international law – *opinio juris communis* – where the conscience occupies a higher stage than will. It is true that human rights are ostensibly and flagrantly violated every day and everywhere, acknowledges the court. However, against these transgressions, which affront the juridical conscience of mankind, international courts contribute to the ongoing process of international law humanization, where universality and unity of mankind rest²¹⁷.

In this vein, the international human rights movement has gradually overlapped the uneasy arguments of cultural relativism to enforce its validity instead. To overcome the alleged

²¹⁵ SAMUEL MOYN, HUMAN RIGHTS AND THE USE OF HISTORY 82-83 (2014).

²¹⁶ LYNN HUNT, INVENTING HUMAN RIGHTS 212-214 (2007).

²¹⁷ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) No. 18, Concurring opinion of Judge A. A. Cançado Trindade, §§21-30 (September 17, 2003).

cultural specificity and difference of origins and values, international community has been focusing on few universally shared cultural assumptions which are easily invoked to foster and implement a universal validity based on generalization of values²¹⁸. To form these minimal shared values, we must perceive Habermas discursive dialogue process that lies on public and democratic reasoning which, in turn, allow us to constantly revise, interpret and apply human rights morality²¹⁹.

Regarding all of this, moral and political philosophy of twentieth century onwards has overcome the prevailing idea of early modern philosophy and natural law theory. Contemporary human rights justifications have to be more sophisticated to move beyond the moral reasoning from that age and the idea of self-evidence, especially in face of the moral, political and religious pluralism existent in the world²²⁰. A global demand on human rights generalization has been more and more suitable these days.

3.4.3. Universalizability

Unlikely self-evident and potentially universal, human rights have many faces and multiples uses. Whilst Hunt asserts that rights cannot be defined once and for all because their emotional element keeps itself in permanent change, since our sense of right and wrong varies

²¹⁸ Xiaorong Li, “Asian Values” and the Universality of Human Rights, in THE PHILOSOPHY OF HUMAN RIGHTS 397, 406-407 (2001).

²¹⁹ 1 JURGEN HABERMAS, DIREITO E DEMOCRACIA: ENTRE FACTICIDADE E VALIDADE 190-210 (Rio de Janeiro: Tempo Brasileiro, 2nd ed. 2012)

²²⁰ PATRICK HAYDEN, THE PHILOSOPHY OF HUMAN RIGHTS 07 (2001).

through time²²¹, Moyn thinks otherwise. According to him, it is a fiction that human rights convey an inviolable consensus everyone share. In fact, their interpretations and applications are inevitably partisan and, just like anything that calls itself universal, human rights are violated every time they are interpreted and encoded into a specific program²²².

The ICJ Justice Cançado Trindade, by his turn, believes that moral excellence is acquired by practices through time and experiences, giving shape to human behavior in a piecemeal. This process is part of what he calls “common right of mankind” (tantamount to Flavia Piovesan’s “juridical inventory of mankind”) which represents the evolution of the *jus gentium*. To him, rather than the positive law, the common rights of mankind – as a *jus gentium* evolution – disregard legislative authority because they are apprehended by human natural reason collected over human consciousness through history which also apply their universal validity²²³. International human rights courts seek to rescue human rights’ universalism and place it above states’ will and politics by recognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection²²⁴.

This historical evolution and universal ethical compilation common to every man, which create the “universal juridical conscience”, have one single aim, the realization of the common welfare, addressed obviously to international society and law. In a world marked by peoples and

²²¹ LYNN HUNT, *INVENTING HUMAN RIGHTS* 29 (2007).

²²² SAMUEL MOYN, *HUMAN RIGHTS AND THE USE OF HISTORY* 84 (2014).

²²³ ANTÔNIO AUGUSTO CANÇADO TRINDADE, *A HUMANIZAÇÃO DO DIREITO INTERNACIONAL* 08-10 (Belo Horizonte: Del Rey, 2006).

²²⁴ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, Inter-Am. Ct. H. R. (ser. A) No. 2, §31 (September 24, 1982).

cultures' diversity and plurality of ideas and cosmopolitan visions, the *jus gentium* becomes a *societas gentium* where its unicity is held by the universal juridical conscience. On this regard, it is placed above positive law that, in this respect, has revealed itself unable to protect humanity²²⁵.

In addition, Helio Gallardo enlightens that since the rise of the second dimension of human rights, in nineteenth and beginning of twentieth centuries, the alleged universalism has been proven false. The expression of human rights, instead, takes into account the social-historic place of groups, nations and individuals, which means humaneness is always retrieved in a particular way, not universally, like abstractly envisaged by the drafter and supporters of the first dimension, back in eighteenth century. For him, the difficulties to establish social, economic and cultural rights uniformly in the whole world serve as evidence of the fallibility of universalistic enterprise, which also encompass an inner tension in human rights integrity – where he portrays the permanent conflict between capitalism and workforce which impairs the general right of life²²⁶.

Although Gallardo is right on his observation, this relativism anti-universalization and human rights inefficiency has been already responded by some criteria. Beyond positivism, in the first place, the universalizability is launched in morality²²⁷, even when progressing its terms and scope from tribal to humanity concerns. No longer remains the morality perfectionism of law which entails an unconditional and universal validity to human dignity. Like Joas' and Habermas'

²²⁵ The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H. R. (ser. A) No. 16, §§03-04 (October 1, 1999).

²²⁶ HELIO GALLARDO, *TEORIA CRÍTICA: MATRIZ E POSSIBILIDADES DE DIREITOS HUMANOS* 50 (São Paulo: Unesp, 2013).

²²⁷ BERNARD WILLIAMS, *MORAL: UMA INTRODUÇÃO À ÉTICA* 37 (São Paulo: Martins Fontes, 2005).

criticism on Kant's theory, no philosophical development can be dealt with a morality irrespective of history. Conversely, a moral legal universalism must take into account historical and cultural sources which may merge a universality argument toward the genesis of values²²⁸. A universalistic morality cannot be based only on pure practical reason; it might also count on religious beliefs, emotions and cultural traumas.

The fact is that true universality does not apply to mankind. In the real world, there is no such thing as universal identical form of autonomous and enlightened reason. The larger a society is – namely international society –, the harder is for it to achieve homogeneity of practices, mainly because of the historical and cultural inputs. Kant's rationalism, therefore, is the secularized echo of religious absolutism²²⁹. Mankind does not need (nor even is pragmatically conceivable) to be morally perfect. We need to pursue and always be morally better, just as envisioned by Singer's expanding circle²³⁰. Our moral values and progress are and always will be afoot.

We do have too many relativist arguments attempting to erode human rights' universalizability. Basically, the cultural differences and shift of empowerment between individual x social rights. Nevertheless, as asserted by Fernando Tesón, “the place of birth and cultural environment of an individual are not related to his moral worth or to his entitlement to human rights”²³¹. Likewise, Xiaorong Li manifests that the origin of an idea in one culture does

²²⁸ HANS JOAS, *THE GENESIS OF VALUES* 174-175 (Gregory Moore trans. 2000)

²²⁹ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* 128-129 (Alex Skinner trans. 2013).

²³⁰ PETER SINGER, *THE EXPANDING CIRCLE* 118-123 (2011)

²³¹ Fernando R. Tesón, *International Human Rights and Cultural Relativism*, in *THE PHILOSOPHY OF HUMAN RIGHTS* 379, 386 (2001).

not necessarily mean its unfitness to another culture²³². Bernard Williams, in his turn, calls this misunderstanding as “relativist error” in which no injustice can find comfort on subjective morality neither can it provoke a complete absence of protest. This kind of relativism and subjectivism is more than incoherent, it is false²³³.

Neither prospers the outlook difference from Western and Eastern cultures on human rights. The idea that Eastern philosophy outweighs community over individual in opposition of Western individuality is also a fallacy. The so-called Western rights (first dimension of human rights), the political and civil rights, are actually indivisible to Eastern rights (second dimension rights), the social, economic and cultural rights. Albeit they are represented in two Covenants, both together makes part of the whole body of international human rights. Each one of them is indispensable for the effective exercise of the other. Nowadays, political and civil liberty and the rule of law improve social and economic opportunities, especially because the history has denounced that what begins as an endorsement of the value of community and social harmony ends in a support of authoritarian regimes where anything that opposes to the “community interest” is erased²³⁴.

As warned by Samuel Moyn, if human rights do not offer “more realistic and politicized utopia, something else will take its place”. The multipolarization that has prevailed in international arena is no longer supported by a morality above politics²³⁵. In the same sense,

²³² Xiaorong Li, “*Asian Values*” and the Universality of Human Rights, in THE PHILOSOPHY OF HUMAN RIGHTS 397, 401 (2001).

²³³ BERNARD WILLIAMS, MORAL: UMA INTRODUÇÃO À ÉTICA 42-43 (São Paulo: Martins Fontes, 2005).

²³⁴ Xiaorong Li, “*Asian Values*” and the Universality of Human Rights, in THE PHILOSOPHY OF HUMAN RIGHTS 397, 403-405 (2001).

²³⁵ SAMUEL MOYN, HUMAN RIGHTS AND THE USE OF HISTORY 146-147 (2014).

Jürgen Habermas asserts that human rights values are inevitably particular and cannot be subjected to universalization validity through normative process²³⁶. Both Habermas and Moyn believe we might attain universalism, but it must not come as binding by international law. The universalism on human rights by normative validity claim is unsuitable in a plural and cosmopolitan environment such as international community. As Hans Joas states, “the only hope of universalization lies in the spheres of law and normative morality”; the communication about values ought to depart from our own commitment; our immanent sense of morals which enables us to differ good from evil²³⁷.

As grasped by Jonathan Glover, respect and sympathy are the heart of our humanity and the cornerstone of all human values, regardless of its codification in positive law. This immanent morality is the main source to the process of universalization and values generalization²³⁸. As an illustration, he cites some events where morality prevailed over law, such as Sargent Anton Schmidt, who was in charge of a German army patrol in Poland and gave forged papers and the use of military trucks to the Jewish underground until he was arrested and executed²³⁹. We may also add the German and anti-Nazi students who were executed for distributing subversive pamphlets in Munich, all led by a young girl named Sophie Scholl which has today schools and streets named after her²⁴⁰; and the Le Chambon village which hidden several jews in Dutch

²³⁶ 1 JURGEN HABERMAS, DIREITO E DEMOCRACIA: ENTRE FACTICIDADE E VALIDADE CHAPTER III (Rio de Janeiro: Tempo Brasileiro, 2nd ed. 2012)

²³⁷ HANS JOAS, THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS 176 (Alex Skinner trans. 2013).

²³⁸ JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 337 (2nd ed., 2012).

²³⁹ JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 382-383 (2nd ed., 2012).

²⁴⁰ SOPHIE SCHOLL – THE FINAL DAYS (Zeitgeist Films 2005).

homes occupied by Nazi's forces²⁴¹. These acts of “civil courage” served universally in several different places and among different people and this is the morality that might reach universalization, unrelated to any binding normative process.

Although reality does not support universalistic claims, human rights utopia must endure. What is needed, in fact, is not a blind belief on universal values toward a moral perfection of mankind. Rather, we need a new language process that fits human rights morality in a real geopolitical and plural world, where humanity moves forward to moral improvement, taking into consideration the generalization of values and setting process of common and shared beliefs (a common currency). We do not need to be moral perfect, but morally better, albeit the moral perfection must endure in order to keep us going forward. Pursuant to the gradual objective of this work, we are going to reintroduce this subject on Chapter 6, when we are going to direct the matter to the aftermath envisioned.

3.5. Apparent Conflicts

Each legal system that is constituted by multiple sources of law is deemed a complex system. Therefore, each complex system must possess unity, completeness and coherence to keep itself rigid and sustainable. So, from the highest norm to the lowest, they all must be logically linked and content-based among themselves; all situations brought out on day by day routine must have an answer by law; and all legal instruments, no matter how diverse they are, must hold together coherence in order to not embrace law contradictions. During this process of

²⁴¹ WEAPONS OF THE SPIRITS (Chambon Foundation and Pierre Sauvage Productions 1990).

eschewing contradictions, multiples scenarios of conflicts between legal instruments occur, among higher and lower statutes (in hierarchy systems), older and newer norms, general and especial norms, domestic and international laws and so on so forth. Thus, all these situations must have solutions within the system, reason why they are called apparent conflicts – otherwise, if it is real, the only solution would be to eliminate one of the conflicting norms²⁴².

Same dynamic flow happens in modern international law, especially after article 38 of ICJ Statute and its plural sources of international law. Moreover, we still have conflicts inside the same international treaty or international bodies it belongs to, such as human rights²⁴³. Likewise, the inclusion of new participants in international politics through the new international community framework has contributed to a rich and endless building process over human rights. International courts, organizations and treaties have been shaping solutions and interpretations which guide human rights applicability on international and domestic politics in order to solve apparent conflicts that appear every single day. All international subjects together follow the development of the caselaw that has been made upon human rights courts and treaties, leading towards a particular interpretation and application which carry legitimacy to form a consistent *jus commune* among nations.

Marcelo Neves mentions a transconstitutionalism which does not mean an international constitutionalism, there is no transnationality here. The concept encompasses in reality an unfolding process to appease and solve juridical problems which go through and are common to all legal systems. Therefore, a transconstitutionalist problem involves states, international,

²⁴² NORBERTO BOBBIO, TEORIA DO ORDENAMENTO JURÍDICO CHAPTER 1 (Brasília: UnB, 10th ed. 1999).

²⁴³ NORBERTO BOBBIO, A ERA DOS DIREITOS 58-60 (Rio de Janeiro: Elsevier 2004)

transnational courts just as much as local legal institutions, all committed in a role to solve and suppress the problem. What this comprehension entails nowadays is the problems related to fundamental and human rights, what goes way beyond any modern Constitution²⁴⁴.

To Marcelo Neves, thus, the challenge we currently face is not to set an inward solution; it is not a constitutional problem solely. Rather, the cornerstone is to precise the problems that emerge in all democratic legal systems and draw a solution which can settle all of them equally, intermingling the response through system so it can be called universal. For that, international community needs to adopt cooperation among its members to dwindle their conflicts and propose mutual appeasement²⁴⁵.

All in all, during the process of settling apparent conflicts over human rights, the constitutional and international kernels depart from the same place: human dignity. This is so simply because dignity is the universal boundary set where every time it is crossed, the state and international community are called upon to intervene. Then, the governing rule has been a formula to affirm human dignity, taking into consideration that its deprivation does not ensue dignity disappearance – since it cannot be detached from our humanity – but the denial of rights employment. However, this general rule applied to human rights interpretation and applicability does not appease modern conflicts which have entrenched moral quandaries.

With that being said, the usual rule would argue that one kind of value should override the claims of those values that are inferior. Nevertheless, on human rights all claims are the same kind because all of them derive from human dignity. There is no hierarchy among them and that

²⁴⁴ MARCELO NEVES, *TRANSCONSTITUCIONALISMO* 21-22 (São Paulo: Martins Fontes, 2009).

²⁴⁵ MARCELO NEVES, *TRANSCONSTITUCIONALISMO* 121 (São Paulo: Martins Fontes, 2009).

pushes us to a dead end. How can we appease the weighing of competing dignity-claims of life and safety, liberty and privacy, for instance? Rosen, on this account, brings a very keen observation when asserting that in such cases, human dignity is not been balanced, since it is the core of both conflicting rights. So, dignity is the foundation of rights and the rights are the ones who can be weighed, not the dignity. That means that inviolability of rights and inviolability of dignity are not the same thing²⁴⁶.

Therefore, the idea of transconstitutionalism embeds the idea of universalizability of human rights. Where you have same problems and same moral values, the solution should be the same. However, the reality disagrees. As stated by Bernard Williams, there is not just one way from human nature and morality; there is no universal and unique moral ideal²⁴⁷. This notion becomes very clear when we cross exam the rationale conveyed in Princess of Monaco case. When challenging the paparazzi's conduct of taking pictures of her on her moments of family privacy, the German Constitutional Tribunal held that as public figure she is not entitled to a full guarantee of privacy as an ordinary citizen²⁴⁸. Nevertheless, when the case reached the European Court of Human Rights, dealing with the same facts and moral values, the morality and law solution was entirely reverse. To the Court, there is no freedom of press or expression that erodes the Princess' human right of family privacy²⁴⁹. Same facts, same human rights law, same moral values and two completely different outcomes.

²⁴⁶ MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 108-109 (2012).

²⁴⁷ BERNARD WILLIAMS, MORAL: UMA INTRODUÇÃO À ÉTICA 101 (São Paulo: Martins Fontes, 2005).

²⁴⁸ Bundesverfassungsgericht [German Constitutional Court] December 15, 1999, CASE OF VON HANNOVER V. GERMANY, BverfGE 101, 1 BvR 653/96, 1999 (Ger.)

²⁴⁹ *Von Hannover v. Germany [Third Section]*, no. 59320/00, Eur. Ct.H.R. (2004).

3.6. *Incommensurability*

When we deal with social values and their penetration into law's decision-making process, we shed into light social goals which are based on reason towards individual and collective welfare. Morality and welfare, on this token, are not two independent institutes; one does not exclude the other; and there is no collision between them. Therefore, there is no specific prior tendency towards their demands.

If we have two co-existing values, liberty and equality, for instance, we shall cogitate that liberty prevails over equality or the other way around or even they are both equivalent with equal potency. It is within this inaccuracy zone where the relativist judgement develops itself about the strength of two co-existing values. However, in social science field we dare to go further on. More than working on relativist interplay between two values, we grasp the idea of the *incommensurability* of these two values, moreover two values which are rooted so fiercely into human rights history.

Thus, incommensurability departs from two premises: (i) that no value override another; and (ii) at same time, they are both unequal. So, X and Y are incommensurable whether none of them are better than the other nor equal in value. Incommensurability hence is defined in the sense that only what bears inner value (or possess negative value) is incapable of being measured in your value in face of another element which likewise bears inner value²⁵⁰. Claiming the outweigh of one value upon another raises a multitude of issues and, at bottom, it conflates the category of the *incommensurable* with the category of the *incomparable*. There is no common

²⁵⁰ JOSEPH RAZ, THE MORALITY OF FREEDOM 322 (1986).

scale on which X and Y can be put together, such that Y can be seen as proportionate in value to X, but they can share comparability without proportionality²⁵¹.

When we work the idea that X is not better than Y and Y is not better than X and they are also unequal in value depth we entail a second stage of rationale where this statement does not present itself as false or true because their value are unmeasurable. Moral quandaries are part of human sociology. When we grasp apparent conflicts inside of human rights list, we are truly facing a moral quandary of sociological background. As there is no hierarchy nor equality relationship among them, the judgement to bring solution to this conflict must dive into social value dimensions to set which is going to be the prevailing right. As long as we organize ourselves like a pluralist society, there is no prevailing understanding of rights. The prevailing right is going to be revealed after robust argumentative debate developed from our communicative action skills which push us away from statics pre-comprehension of values²⁵².

This formula is fostered on jurisprudence rationale where normativity and rationality mingle towards a reconstructive theory of society based on communicative reasoning²⁵³. Also, it does not constitute an axiom because morality does not contain self-evident truth and also because substantial moral conclusions are incapable to appease moral disagreement in the real world. That means that a certain action might be wrong under certain circumstances and right under others²⁵⁴. For example, we can easily say that is wrong to kill a person, but there is no

²⁵¹ LARRY S. TEMKIN, *RETHINKING THE GOOD: MORAL IDEALS AND THE NATURE OF PRACTICAL REASONING* 53 (2015).

²⁵² EDUARDO RIBEIRO MOREIRA, *CRITÉRIOS DE JUSTIÇA* 25 (SÃO PAULO: SARAIVA, 2014).

²⁵³ JURGEN HABERMAS, *DIREITO E DEMOCRACIA: ENTRE FACTICIDADE E VALIDADE, VOLUME I* 21 (RIO DE JANEIRO: TEMPO BRASILEIRO, 2ND EDITION, 2012).

²⁵⁴ JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 184 (2013).

mischief in killing a homicide which is trying to kill other people whether it is the only way to spare victims' lives. In this vein, the savior killer who decides to kill to prevent other deaths does not choose to act wrongly while in fact he is under certain circumstances which turns out to be correct to do what usually is deemed a wrongdoing. That explains that in each conflicting situation there is at least one option where no error can be found, and this comprehension does not encompass the erosion of any social value encapsulated into norms content whatsoever. The reason that guides the choice made in conflicting situations, whatever it is, shall be linked to some social value because all human action is embedded in values which drive rational human agency. The social value underneath action will surface regardless the agent ability of choosing under certain circumstances.

Even though, international law has given hierarchy status over some cardinal values in order to secure the sacredness of the person and the new set of human values which foster human rights enforcement. Appearing as international undisputable acknowledged values, international community frame these values as *jus cogens* containing *erga omnes* nature because of the importance of the values it protects. Under the auspices of article 53 of Vienna Convention on the Law of Treaties (1969), *jus cogens* appertains to the area of international enforcement related to the hierarchy of rules in the international normative order, enjoying a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated

from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force²⁵⁵.

Moral actions are not dogmas or mathematical axioms. Human agency can be wrong in some circumstances and right in others. Like, it is wrong to kill for pleasure, but it is right killing a murderer while he attempts to kill someone else. In such case, there is no choosing between two wrongs. The latter action is right, but the action entailed is normally wrong. What is interesting in a plural society just as international community is that we have a lot of values coming and going, and a lot of moral quandaries. So, two lessons promptly emerge: moral pluralism asks for reasons for action and incommensurability makes conceptual room for wrongdoing as justification for action which becomes right according to circumstances. They are moral dilemmas because “they are cases in which the act which is morally required of one is wrongful”²⁵⁶.

Basically, we have two driving forces that are incommensurable to each other and both regulates international law morality and statutes. In consequence, some moral dilemmas might arise. Deontology and individual welfare advocates take opposite side with teleology and social welfare advocates. Nonetheless, it is essential to the very notion of community the survival of incommensurable social values. The choosing process of which will prevail in an apparent

²⁵⁵ *Prosecutor v. Anto Furundzija [Trial Chamber]*, Case No. IT-95-17/1-T, 1998 I.C.T.Y. §153 (December 10); and *Case of Al-Adsani v. United Kingdom*, no. 35763/97, §60, ECHR (GC), 2001.

²⁵⁶ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 361-365 (1986).

conflict shall be solved by moral reasoning grappled through democratic discourse, creativity of action and communicative performance of rational morality and positive law²⁵⁷.

3.7. Enclosing Considerations

Human rights have been deemed as a body of hard law which enshrines morality through the force of law. Human rights composition takes into account multiples human values that – regardless the religious and cultural traditions and idiosyncrasies – have been upheld globally by several international and national institutions and subjects. The main scope of this brand of international law, however, remains on human rights inefficiency to appease real conflicts and to solve moral dilemmas.

Human rights under a Kantian perspective proclaim a moral perfection ruled by the categorical imperative of humanity as an end. However, there is no room for absolutism in such applicability in international arena, as mentioned by Michael Rosen. To treat human beings as an end has been an open question which remains unanswered by the formula of humanity where the prohibition seems to embrace exclusively the idea of treating human as *means only*, which arises a variety of semantic differences where our practices hold a grey zone of uncertainties²⁵⁸. Therefore, a moral perfection would only be possible if we achieve universal moral standards – what has been unsuccessfully tried since the Enlightenment.

²⁵⁷ HANS JOAS, THE CREATIVITY OF ACTION 160-161 (2005); and 1 JURGEN HABERMAS, DIREITO E DEMOCRACIA: ENTRE FACTICIDADE E VALIDADE 139-140 (Rio de Janeiro: Tempo Brasileiro, 2nd ed. 2012)

²⁵⁸ MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 83-86 (2012).

The multiplicity of human rights dimensions – Neves' transconstitutionalism – provokes a moral quandary that is becoming natural in our globalized and complex international law. For that, Neves defends a transverse rationality which allows a constructive dialogue among legal systems in order to sustain the pluralism and respect for diversity without commensuring and outweigh values that are, for the sake of pluralism and diversity, incommensurable, the same idea also captured by Hans Joas and Jürgen Habermas. Notwithstanding, to Neves, the world's plurality ought to be fulfilled by identity and otherness. Each state then should give a self-solution to your problem in order to build its identity which is gradually intertwined with other states from the core notion of otherness. Only through permanent exchanges the international community can provide a constructive dialogue among nations and enhance its human rights decisions and articulations²⁵⁹.

Joas and Habermas, in their turn, propose a constructive and democratic dialogue over social values as well. To them, the universalizability of human values to set human behavior will come from a process of value generalization where the society will openly and democratically discuss ideas towards social enhancement and moral improvement. To reach that, however, it is needed first to set the social values to subsequently put them into social practices to only then permit them becoming a social institution²⁶⁰. Moreover, during this process of values generalization, we might find a common currency, as espoused by Bernard Williams and Joshua Greene, a core of minimal shared beliefs where mankind might rest universal understanding, interpretation and application of law and the morality it entails. Conversely to any Kantian

²⁵⁹ MARCELO NEVES, *TRANSCONSTITUCIONALISMO* 264 (São Paulo: Martins Fontes, 2009).

²⁶⁰ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* 140 (Alex Skinner trans. 2013); AND 1 JURGEN HABERMAS, *DIREITO E DEMOCRACIA: ENTRE FACTICIDADE E VALIDADE* 158-159 (Rio de Janeiro: Tempo Brasileiro, 2nd ed. 2012).

premises, this new approach needed does not mean a denial of human rights, but a new densification of them on moral common-sense grounds²⁶¹.

At least, the search for this universal common value must not diverge from the universal principle carried by human rights rationale – that follows them since their origin process-making – which is the universal effort to dislodge cruelty. This has been unquestionably a common goal to mankind, to empower the good against evil, and also the aim of all morality of law²⁶². Especially in international arena, where plurality and cosmopolitanism prevail, there must be a thriving process of communicative action over values and their universalizability enforcement based on their generalization and adoption of common grounds.

²⁶¹ BERNARD WILLIAMS, *MORAL: UMA INTRODUÇÃO À ÉTICA* 117-134 (São Paulo: Martins Fontes, 2005); AND JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 306-345 (2013).

²⁶² LYNN HUNT, *INVENTING HUMAN RIGHTS* 212-214 (2007).

CHAPTER 4

THE LAW OF ARMED CONFLICTS

4.1. Historical Background; 4.2. International Humanitarian Law contemporary traits; 4.3. Geneva Conventions, rules and development; 4.4. The Common Article 3 and the rule of civilians' immunity; 4.5. Principles of Necessity and Humanity; 4.6. The contemporary wars and their hostis humani generis; and 4.7. Enclosing Considerations.

4.1. Historical background

The understanding of just war has arisen very early in international law history. As the crowning achievement of the *jus gentium* in the Middle Ages, just war doctrine would be a body of law which stipulates when armed force can justifiably be resorted in order to put a stop to some kind of evildoing. The main concern then was the permissibility of resorting to force, not the methods by which the hostilities were conducted. On this regard, it has been noted that just war doctrine had no specific rules about the conduct of war but one, a general prohibition against purely gratuitous violence which means that it is in the building core of just war doctrine the

cornerstone idea that, irrespective of the rules over conducting methods of combat, nihilist evil and hollow violent acts should not be tolerated²⁶³.

Even for liberals, whose discourse aims the limitation of state power followed by individual agency enhancement, wars have always been immoral just as much as harmful. Wars cause too much damage in the economics sphere and domestic and foreign free trade policy. The depopulation of entire tracts of land, the destruction of capital, the increasing burden of taxes, the growth of government debt, the shrinking of international trade, general impoverishment and so on so forth have been traced as devastating impacts of wars in economics²⁶⁴.

The rise of Fascism and National Socialism and their relation to the spirit of war brought the hope that the war would have a revitalizing effect in society. More than a continuation of old-fashioned militarism, this idea was conceived as hindsight modernity. War itself was deemed as modern revolution. Therefore, violence and terror against enemies were not only practiced but they were also encouraged even in cases of no instrumental purpose²⁶⁵. Because of that the Pact of Paris of 1928 (or Kellogg-Briand Treaty) is the most prominent treaty on the subject of armed conflicts for launching the vivid prohibition of war as an instrument of national policy²⁶⁶.

As some scholars emphasize, the reality is that international law currently changes its foundations after incredible and barbaric totalitarian regimes which invariably pursue, destroy and humiliate ethnic groups or peoples through war. In time of war the law is silent. The war interrupts the peace, not just the absence of fighting but the peace-with-rights that represents

²⁶³ STEPHEN C. NEFF, JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW 67-83 (2014).

²⁶⁴ HANS JOAS, WAR AND MODERNITY 34 (2003).

²⁶⁵ HANS JOAS, WAR AND MODERNITY 49-51 (2003).

²⁶⁶ STEPHEN C. NEFF, JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW 361 (2014).

liberty and safety. The outcome always turns out to be a union of nations and peoples committed to set new moral guidance based on ideas of democracy, liberty, equality and justice just as much as the fostering necessity to preserve peace before new risks of destructions from the enhancement of technology and modern war methods. Nowadays, there is a strong conviction and shared consensus among nations that human dignity and fundamental liberties and rights must endure and be indivisibly and universally attained by all²⁶⁷.

With the precipitation of the downfall of colonial empires, the framework of the upcoming international community was designed to make armed clashes exceptional events besides their constant control and dissolution by means of international institutionalized cooperation. The Charter of the United Nations then banned the use of threat of force and simultaneously granted to the Security Council of the United Nations the power to take sanctions and proper measures involving the use of force against any State breaking that ban. For the first time an international instrument expressly prohibit not just war but any threat of or resort to the use of military force. From that time forward, the fundamental principles of the international relations were: (i) the substantive equality of States; (ii) non-intervention in the internal or external affairs of other States; (iii) prohibition of the threat or use of force; (iv) peaceful settlement of disputes; (v) respect for human rights; and (vi) self-determination of peoples. Creating the new order became a peace aim and the international protection of human rights

²⁶⁷ Rodolfo E. Piza Escalante, *El Valor Del Derecho y La Jurisprudencia Internacionales de Derechos Humanos en el Derecho y la Justicia Internos – El Ejemplo de Costa Rica*, in LIBER AMICORUM, HÉCTOR FIX-ZAMUNDIO, VOL. I, 169, 174 (SAN JOSÉ, COSTA RICA: CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1998).

came to be presented as such an aim, principally by those who placed primary importance on individualism, political freedom, and the furtherance of democracy²⁶⁸.

After the end of twentieth century, history has pointed us towards an investigation into the conditions of peace with a sober analysis of specifically modern tendencies to war. For that, there is a need to justify the normative premises underlying the modern theory and its regenerative effect of violence. Thereafter, we have launched a clear consciousness that democracy is the yardstick of social progress – although the twentieth-first century has shown an astonishing recession on democracy regimes²⁶⁹ – and the social and legal reinforcement of crucial values and their foundation and development through civilization process²⁷⁰. It is the research on the role of war in social changes that promotes impacts and configurations in international law which allows modernization processes, moreover through international courts jurisprudence who pragmatically sets the genesis of new values and the tension between them and existing institutions²⁷¹.

Out of the law of war, comes a type of international law strengthened by the regent principle of humanity to govern the use of principles of necessity and proportionality in armed conflict situations. Therefore, a solid preoccupation on victims of the conflict, civilian or military, arises in order to regulate means and methods of engagement in war. These new traits become intense from the half of twentieth century onwards. Its codifications are developed in

²⁶⁸ ANTONIO CASSESE, INTERNATIONAL LAW 46-59 (2ND EDITION, 2005)

²⁶⁹ FRANCIS FUKUYAMA, AS ORIGENS DA ORDEM POLÍTICA: DOS TEMPOS PRÉ-HUMANOS ATÉ A REVOLUÇÃO FRANCESA 19 (RIO DE JANEIRO: ROCCO, 2013)

²⁷⁰ ANA PAULA DE BARCELLOS, A EFICÁCIA JURÍDICA DOS PRINCÍPIOS CONSTITUCIONAIS: O PRINCÍPIO DA DIGNIDADE DA PESSOA HUMANA 236 (RIO DE JANEIRO: RENOVAR, 2002)

²⁷¹ HANS JOAS, THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS 86 (2013).

Hague, Geneva and New York, basically. So, this international humanitarian law is configured by primary international law sources towards the respect to human dignity and the flourishing of mankind. It is compatible to contemporary international legal order and maintains unity, coherence and wholeness towards the system even in wartime. Hague statutes regulate *jus in bello* and its methods combat and use of force. For this work, Geneva and New York are more relevant, since the former deals with the victims of armed conflicts and the latter with human rights within armed conflicts²⁷².

Then, International Humanitarian Law (IHL) is a specialized branch of international law that is applied in armed conflicts. That expression may be understood in a very broad sense as covering any rule of international law, applying both in times of peace and war, which has a humanitarian purpose. This would include branches of international law such as Human Rights Law, Refugee Law, International Criminal Law and so on. There are different expressions used to designate that body of law. The "Law of War" or "Laws of War" (*jus in bello*) is the oldest expression which is still used today. However, the "Law of War" is not the most suitable expression, nevertheless, we understand it as synonymous to international humanitarian law for the purpose of this work. After the Second World War, when the material and objective notion of armed conflict replaced the formal and subjective notion of war, another expression has been used: The Law of Armed Conflict (LOAC). Despite this, international humanitarian law is used to cover the whole body of rules regulating all aspects of armed conflicts, including those rules that regulate the conduct of hostilities²⁷³.

²⁷² JOANISVAL BRITO GONÇALVES, TRIBUNAL DE NUREMBERG 1945-1946 207-208 (RIO DE JANEIRO: RENOVAR, 2004)

²⁷³ NILS MELZER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 56 (2016).

4.2. International Humanitarian Law contemporary traits

Therefore, the main sources and subjects of IHL are the classical sources and subjects of international law. The extent to which those rules apply depends upon whether the armed conflict in question may be qualified as an international armed conflict or non-international armed conflict. This means that treaties and customary law are the most important sources while states, as well as international organizations, are the most important subjects. The inclusion of armed groups in the study of IHL is becoming ever more important because today classical international armed conflicts, between two or more states, are relatively rare in comparison to what we call internal or non-international armed conflicts, which are contested by a state and an armed group or between armed groups.

IHL is the result of a delicate tension between two major preoccupations: military necessity on one hand, which means that belligerents must have enough freedom to fight the war; and, on the other hand, humanitarian considerations which seek to minimize unnecessary suffering. Furthermore, IHL is the result of an equilibrium between two fundamental principles: the principle of military necessity and the principle of humanity. IHL seeks to achieve this equilibrium by regulating two aspects of warfare. The first aspect concerns the protection of individuals under the control of the enemy. It is often referred to as the Geneva Law which regulates a wide range of issues that arise in armed conflict such as the treatment of prisoners of war; medical aid for wounded soldiers and the detention of civilians. A significant part of the Geneva Law also deals with a particular issue, the occupation of the territory of a state by

another state. This is the law of occupation. The law of occupation sets the duties and rights of the occupying power in relation to the occupied population. It is particularly relevant in relation to the occupied Palestinian territories. The second part of IHL, concerns the actual conduct of hostilities. To regulate the conduct of hostilities is to set the rules regarding who or what can be lawfully targeted and which arms or methods of warfare can be used (the Hague Law).

We should always keep in mind that international humanitarian law was conceived as the legal regime which limited the behavior of parties in warlike situations. In the respective treaty laws, war-like situations are referred to as armed conflicts. Thus, IHL limits the behavior of parties to armed conflicts. IHL only applies to situations which have reached a special threshold of armed violence. Either between states, between states and certain non-state actors, or even between non-state actors. Therefore, IHL does not apply to internal disturbances or tensions falling below that threshold such as riots, isolated and sporadic acts of violence, or acts of terror. In these latter situations, human rights law and domestic law would apply. International humanitarian law recognizes two types of armed conflict. International armed conflicts or IACs which occur between two or more states and non-international armed conflicts, also known as NIACs or civil wars, which usually occur within a state. As you might already know, both international and non-international armed conflicts are governed by a different set of rules as a result of political history²⁷⁴.

Traditionally, states expressed their intention to start a war through a formal declaration. Today however, international armed conflict is presumed to exist as soon as a state uses armed force against another state, regardless of the reasons for the confrontation, the intensity of the

²⁷⁴ NILS MELZER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION CHAPTER II (2016).

violence or the existence of a formal declaration of war. The rules of IHL governing situations of international armed conflicts have been codified primarily in the 1907 Hague Regulations, the four 1949 Geneva Conventions, and the 1977 Additional Protocol I supplemented by Customary International Law. Armed conflicts derive their international character from the fact that they occur between states. Common Article 2 of the Geneva Conventions provides that, "The present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties. Even if the state of war is not recognized by one of them". An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there²⁷⁵.

The insights and practices of human rights movement and the placing of humanitarianism within the context of International Humanitarian Law creates an important connection to Human Rights Law and their interwoven moral revalidation, since the language of rights proves itself alluring in warlike zones. The confluence of interests between IHL and HRL has restored human dignity at large and allowed charity from other, especially NGOs. The moral code underneath

²⁷⁵ *The Prosecutor v. Dusko Tadic [Appeal Chamber]*, Decision of the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 1995 I.C.T.Y. §70 (October 2).

such bond is impregnable²⁷⁶. A process of humanization driven by human rights norms and principles of humanity took place. Although both branches have their specific traits and scopes, it is undeniable that they also share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity which makes their provisions be a mutual reinforcement to each other instead of any contradiction²⁷⁷. Despite their divergencies, these two branches seem to be commonly conflated, they share the same essence. “Under the influence of human rights, the law of war has been changing and acquiring a more humane face: the inroads made on the dominant role of reciprocity; the fostering of accountability; the formation, formulation and interpretation of rules”²⁷⁸.

Universal human rights law, on the other hand, protects all persons against “arbitrary” deprivation of life, thus suggesting that the same standards apply to everyone, irrespective of their status under IHL. In such cases, the respective provisions are generally reconciled through the *lex specialis* principle, which states that the law more specifically crafted to address the situation at hand (*lex specialis*) overrides a competing, more general law (*lex generalis*). Accordingly, the ICJ has held that, while the human rights prohibition on arbitrary deprivation of life also applies in hostilities, the test of what constitutes arbitrary deprivation of life in the context of hostilities is determined by IHL, which is the *lex specialis* specifically designed to regulate such situations. Similarly, the question of whether the internment of a civilian or a

²⁷⁶ David Rieff, *Humanitarianism in Crisis*, in FOREIGN AFFAIRS MAGAZINE VOL. 81 N. 6, 113-114 (2002).

²⁷⁷ *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report N° 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. at 271, §158 (1997); *Prosecutor v. Anto Furundzija [Trial Chamber]*, Case No. IT-95-17/1-T, 1998 I.C.T.Y. §183 (December 10); and Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §108 (2002).

²⁷⁸ Merve Ozkan Borsa, *The Contribution of International Court of Justice to the Development of International Humanitarian Rules and Principles*, in PUBLIC AND PRIVATE INTERNATIONAL LAW BULLETIN VOL. 36 N. 2, 83, 87 (2016).

prisoner of war by a State party to an international armed conflict amounts to arbitrary detention prohibited under human rights law must be determined based on the Third and Fourth Geneva Conventions, which constitute the *lex specialis* specifically designed to regulate internment in such situations²⁷⁹.

4.3. Geneva Conventions, rules and development

Wars have destructive consequences that go on long after they have come to an end. Over post war period, there is not only mourning for human lives suppressed by violence, but also social relations teared apart, cities and countryside turned into pieces. Even survivors bear eternal scars of destruction and violence. It is true that social life is never entirely free from violence or the threat of violence, but in war the degree of this threat and the fear tagged along surpass for the most part of imagination of it entertained by people who grow up in peacetime²⁸⁰.

The Geneva Conventions were conceived after the publication in 1862 by Henri Dunant of *A memory of Solferino*, in which he wrote of the horrors he had witnessed at that battle. To alleviate them, he proposed the creation of neutral relief groups to provide humanitarian aid in time of war. So, the Red Cross was born and so the First Geneva Convention on protecting wounded and sick soldiers on land in time of wars was passed in 1864. The Second Convention, enacted in 1907, extended those protections to those who needed it on the sea. The Third Convention, guaranteeing decent treatment for prisoners of war was concluded in 1929. In 1949,

²⁷⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. §25 (July 8).

²⁸⁰ HANS JOAS, WAR AND MODERNITY 111 (2003)

all three Conventions were updated, and a fourth Convention was created. The basic intention was to protect innocent civilians by deterring violations of the laws of war. To that end, the Convention also offered protection to combatants who followed the laws of war²⁸¹. So, First and Second Geneva Conventions deal with the sick and wounded of armed forces on the field and on shipwrecks at the sea, the Third takes care of prisoners of war and the Fourth of civilians.

Thus, the Fourth Geneva Convention of 1949 was drafted to protect civilian populations in wartime. Nowadays, it is Geneva Conventions who lead the role in international humanitarian law. The Common Article 2 of Geneva Conventions sets that their provisions shall be implemented in peacetime and applied to all cases of declared war or of any other armed conflict which may arise between two or more states, even if the armed conflict is not recognized by one of them. It is also applied to all cases of partial or total occupation of the territory of a state, even if the said occupation meets with no armed resistance. Furthermore, an armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. International humanitarian law applies from the beginning of such armed conflicts and goes on beyond the termination of hostilities until a general conclusion of peace is reached. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States²⁸².

International humanitarian law distinguishes between two types of armed conflict, international armed conflicts, which occur between two or more States, and non-international

²⁸¹ WILLIAM SHAWCROSS, *JUSTICE AND THE ENEMY: NUREMBERG, 9/11, AND THE TRIAL OF KHALID SHEIKH MOHAMMED* 54 (2011).

²⁸² *The Prosecutor v. Dusko Tadic [Appeal Chamber]*, Decision of the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 1995 I.C.T.Y. §70 (October 2).

armed conflicts, which take place between States and non-governmental armed groups, or between such groups only. This categorization follows political history instead of being constructed by military necessity or humanitarian need, albeit their rationales are essentially the same for both types of conflict. The incorporation of the concept of non-international armed conflict (NIAC) in Common Article 3 of Geneva Conventions instituted a landmark in the development and codification of this branch of international law. From that moment forward, organized armed groups, such as terrorists' groups, are considered "parties" to an armed conflict with their own obligations under international law. Although the historical retrospective of international armed conflict is more extensive, non-international armed conflicts are the main concern on contemporary international law²⁸³.

Non-international armed conflicts are non-international in character because they occur between on the one hand the government forces of a sovereign state, and on the other hand, what are known as organized armed groups. Yet, in certain cases, a non-international armed conflict can also exist between two or more organized armed groups without the involvement of the state. The reason is that treaties applicable to non-international armed conflicts are much more limited than those applicable to international armed conflicts. The behavior of the parties in a non-international armed conflict is limited mainly by the rules laid down in Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II. The inclusion of this provision in the Geneva Conventions after World War II was a major achievement. This provision contains a series of rights and duties, which ensure a minimum level of protection to civilians and other persons who are not or who are no longer taking an active part in hostilities. The International

²⁸³ NILS MELZER, *INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION* 53 (2016).

Court of Justice has even held that Common Article 3 embodies elementary considerations of humanity. Thereby, implying that respect for Common Article 3 is supposed to make situations of war more humane.

Meanwhile, Protocol I of 1977 and Protocol III of 2005 deal with victim's protection on international armed conflicts and the Adoption of an Additional Distinctive Emblem, respectively. Even the law of war is currently centered in humanity. This shift of center values between old and new regimes intends to build a bridge between power (generally assumed in the hands of States) and transpolitical moralism. Thus, the legal humanity discourse provides as alternative an entire body of law, full of principles and values, towards global governance²⁸⁴.

As well kwon, the international community has banned the separatism between the law of armed conflicts and HRL, which for a long time – 1940s and 1950s – were predominantly considered mutually exclusive. Their kernel reasoning was the non-binding force of UDHR of 1948 and the different material scope between branches – HRL applied in peacetime and IHL in times of armed conflict. However, after the adoption of the Fourth Geneva Convention on civilians' protection during hostilities, a humanitarian element has been added to the equation and this principle of humanity has been enough to change the approach for a humanitarian law instead of simply law of armed conflict. Likewise, the two Covenants of 1966 have put human rights obligations as positive international law, eroding the so far non-binding ideology. These humanitarian features have gradually established the common ground for HRL on the protection of the human person, shifting the IHL military-oriented and state-centered outlook to a person-oriented law.

²⁸⁴ RUTI G. TEITEL, HUMANITY'S LAW 35 (2011).

In this vein, one of the great advances of last century in international law is the Fourth Geneva Convention that came into play to create a legal regime to protect civilians in wartimes improving Fourth Hague Convention of 1907 on this regard. The treaty sees civilians as either those who are in the hands of an adverse part of the conflict or nationals of a belligerent state who are in the territory of the adversary and also expand its spectrum to protected persons in Article 4, who are those that, “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not national”. The principle of distinction between combatants and civilians became extremely important in international humanitarian law, which strength comes from a comprehensive framework of the Fourth Geneva Convention, Common Article 3, the Additional Protocols and customs, all combined to ensure the protection of civilians in armed conflicts and occupations. Adopting a binary concept, Article 50 of Additional Protocol I considers civilian everyone who is not legally defined as combatant. If any doubt arises, the person’s status is deemed civilian in order to afford as much protection as possible. Also, civilian population does not lose its civilian character in case of a combatant within its midst hiding or just intertwined²⁸⁵.

The assumption that derives from this comprehension is that civilians include all those who are innocent in the sense that they do not present current threats or who are not part of a recognized fighting group. F. M. Kamm adds that even if civilians take up arms and become threats to combatants do not thereby acquire combatant status if they are not being part of a

²⁸⁵ LAURIE R. BLANK AND GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICTS: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 277-283 (2013)

recognized fighting group²⁸⁶. In this respect, the Inter-American Commission on Human Rights has specified that Common Article 3, customary law principles applicable to all armed conflicts require the contending parties to refrain from directly attacking the civilian population and individual civilians and to distinguish in their targeting between civilians and combatants and other lawful military objectives. In order to spare civilians from the effects of hostilities, other customary law principles require the attacking party to take precautions to avoid or minimize loss of civilian life or damage to civilian property incidental or collateral to attacks on military targets²⁸⁷.

The provision that forbids military attack on civilians is Article 51 of Additional Protocol I. Only whether they take part in hostilities that a military against them is admissible. Under this provision, the principle of proportionality prohibits “attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” However, precedents from International Criminal Tribunal for the Former Yugoslavia make a side note, encompassing that targeting civilians is an offense when not justified by military necessity. Therefore, attacks on civilians are forbidden when launched deliberately in the course of an armed conflict without military necessity as justification²⁸⁸. The principle of necessity justifies only those measures of military violence, not specifically

²⁸⁶ FRANCES MYRNA KAMM, *THE MORAL TARGET: AIMING AT RIGHT CONDUCT IN WAR AND OTHER CONFLICTS* 83 (2012).

²⁸⁷ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §101 (2002); and *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report N° 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. at 271, §177 (1997).

²⁸⁸ *Prosecutor v. Blaskic [Trial Chamber]*, Case No. IT-95-14-T, 2000 I.C.T.Y. §§180, 510 and 544 (March 03); and *Prosecutor v. Galic [Trial Chamber]*, Case No. IT-98-29-T, 2003 I.C.T.Y. §§42-44 (December 05).

forbidden by international law, which are relevant and proportionate to securing the rapid submission of the enemy with the least possible expenditure of human and economic resources²⁸⁹. Military necessity means “doing what is necessary to achieve a war aim” and it acknowledges the potential for unavoidable civilian death and injury²⁹⁰.

4.4 The Common Article 3 and the rule of civilians’ immunity

Despite the lack of a legal definition, it is widely accepted that non-international armed conflicts governed by Common Article 3 are those waged between state armed forces and non-state armed groups or between such groups themselves²⁹¹. Two criteria are considered indispensable for classifying a situation of violence as a Common Article 3 armed conflict, thus distinguishing it from internal disturbances or tensions that remain below the threshold. First, the existence of parties to the conflict, with a minimum requisite of organization but, at least, a command structure and disciplinary rules and mechanisms within the armed group; the existence of headquarters; the ability to procure, transport, and distribute arms; the group’s ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to negotiate and conclude agreements such as ceasefire or peace accords; and so forth. Second, the intensity of violence involved, which is measured by the number, duration and

²⁸⁹ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §110 (2002).

²⁹⁰ LAURIE R. BLANK AND GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICTS: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 312 (2013)

²⁹¹ Jelena Pejic, *The Protective Scope of Common Article 3: more than meets the eye*, in INTERNATIONAL REVIEW OF THE RED CROSS VOL. 93 N. 881, 189, 191 (2011).

intensity of individual confrontations, the type of weapons and other military equipment used, the number and caliber of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones²⁹².

Common Article 3 simply identifies a number of key duties and prohibitions providing a minimum of protection to all persons who are not, or who are no longer, taking an active part in the hostilities. In return, the provision must be applied minimally by each party to any armed conflict not of an international character. To this end, some acts are “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”.

Common Article 3 permeates all four Geneva Conventions and defines certain rules to be applied in the armed conflicts of a non-international character. It is unquestionable that, in the event of international armed conflicts, these rules form a minimum yardstick to be added to other rules which are also to apply to international conflicts. Also, this article encompasses rules which reflect “elementary considerations of humanity”²⁹³. Therefore, it has been settled by international courts that common Article 3 is binding as international customary law regardless of the

²⁹² *Prosecutor v. Ramush Haradinaj et al [Trial Chamber]*, Case No. IT-04-84-T, 2008 I.C.T.Y. §§49-60 (April 3).

²⁹³ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. §218 (June 27).

character of the armed conflict, either non-international or international, and it is not restricted to the territory of a single state, confirming its extraterritoriality effect²⁹⁴.

International humanitarian law has drawn a great importance on protecting civilian populations who are caught up in conflict zones and most part of the time suffer the horrors of war without being part of the combat. This protection ensues both positive and negative obligations. One account of negative obligation is the example of Second World War on British army bombing policy at the beginning of hostilities. Initially, it was not directed at civilians, the targets were military, but the bombing was inaccurate and civilians who lived or worked near military installations were often hit. Nontetheless, the inevitable civilian casualties were accepted as a reasonable price to pay for helping to defeat Hitler, even making the choice between abandoning bombing altogether or intentionally continuing to bomb civilians. The bombing of Germany has killed 593,000 non-combatants, because Churchill was an advocate of bombing strategy in war²⁹⁵. Whilst we still have double effect doctrine, this scenario is completely out of question pursuant Common Article 3 and Geneva Conventions provisions on civilians' protection, States now have the negative obligation to refrain from hitting civilians in military operations.

The evils that fall upon civilians are unimaginable and the sole speech of peace being the main aim of contemporary international law does not seduce or convince the endurance of suffering, since ignoring the hell experienced by civilians is also forbidden in Common Article 3 and binds States to do something to refrain the suffering. In fact, the word 'peace' provokes a lot

²⁹⁴ *The Prosecutor v. Jean-Paul Akayesu [Chamber I]*, Case No. ICTR-96-4-T, 1998 I.C.T.R. §608 (September 2); and *The Prosecutor v. Dusko Tadic [Appeal Chamber]*, Decision of the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 1995 I.C.T.Y. §155 (October 2).

²⁹⁵ JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 70-77* (2nd ed., 2012)

of disdain and uneasiness among people who pass through wars and its hellishness. It happens because peace was so many times employed to justify foreign policies which were not defensive at all. Therefore, the word has become devaluated in such way that people have not payed attention to any discourse about peace interruption or threats of it²⁹⁶.

For that reason, when the United Nation Security Council's back in 1990s made the statement that violations of international humanitarian law constitute a threat to international peace and security and that the establishment of the war crime tribunal for Yugoslavia would contribute to the restoration and the maintenance of peace is of ground-breaking importance it did not appease social community. Afterall, as stated by a Bosnian woman who had been raped: “at the end, I get a bit tired of constantly having to prove. We had to prove genocide, we had to prove that our women are being raped, that our children have been killed. Every time I take a statement from these women, and you journalists want to interview them, I imagine those people disinterested, sitting in a nice house with a hamburger and beer, switching channels on TV. I really don't know what else has to happen here, what further suffering the Muslims have to undergo ... to make the so-called civilized world react”²⁹⁷. Not doing anything is also inadmissible in Common Article 3.

Overcoming the sufferings that happen in real combat zones, the moral exhortation to relentlessly repudiate these vile actions becomes cardinal principles in the fabric of humanitarian law and human rights law²⁹⁸. For that, principle of distinction plays an important role. It is based on the recognition that “the only legitimate object which States should endeavour to accomplish

²⁹⁶ HANS JOAS, WAR AND MODERNITY 125 (2003)

²⁹⁷ JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 05 (2nd ed., 2012)

²⁹⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. §83 (July 8).

during war is to weaken the military forces of the enemy”, whereas “the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.” Therefore, the parties to an armed conflict must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”. Accordingly, parties to the conflict must distinguish between military objectives and civilians and launch attacks only against the former. Likewise, it must distinguished between persons who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life, and persons who do not present such a threat, and use force only against the former²⁹⁹.

So basically, in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless they take a direct part in hostilities³⁰⁰.

4.5. Principles of Necessity and Humanity

²⁹⁹ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §§99, 111 (2002).

³⁰⁰ Jelena Pejic, *The Protective Scope of Common Article 3: more than meets the eye*, in INTERNATIONAL REVIEW OF THE RED CROSS VOL. 93 N. 881, 189, 222-223 (2011).

The fundamental principles of international humanitarian law are universal directives to nations and binding to states as they stem from Geneva Conventions basic standards, and the Additional Protocols. These principles determine, limit and channel the conducts of international actors in armed conflicts. By this token, a proper interpretation of them is required in order to complement one another within the scope of refraining act that might endanger the life and integrity of civilian population and their property³⁰¹.

International humanitarian law is based on a balance between considerations of military necessity and of humanity. On the one hand, it recognizes that, in order to overcome an adversary in wartime, it may be militarily necessary to cause death, injury and destruction, and to impose more severe security measures than would be permissible in peacetime. On the other hand, IHL also makes clear that military necessity does not give the belligerents carte blanche to wage unrestricted war. Rather, considerations of humanity impose certain limits on the means and methods of warfare and require that those who have fallen into enemy hands be treated humanely at all times. The balance between military necessity and humanity finds more specific expression in the core principles of humanitarian law. The principle of humanity complements and inherently limits the principle of necessity by forbidding those measures of violence which are not necessary, relevant and proportionate to the achievement of a definite military advantage³⁰².

The first principle is military necessity does not detach its actions from the law scrutiny. Military conducts consequently should be controlled, and your necessary spectrum is to achieve,

³⁰¹ *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §§342-345 (2018)

³⁰² Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §110 (2002).

as quickly as possible, the complete or partial submission of the enemy. The military action that does not provide this achievement purpose is deemed unlawful, especially when it involves wanton killing and destruction. Necessity has been a bulwark for the law of war way before the world wars of last century, it has now to be applied in harmony with humanity concerns. Hence, the principle of military necessity exists in a delicate balance with the second core principle of international humanitarian law, the principle of humanity³⁰³.

It is necessity that generally allows the employment of violence and shrewdness in the edge of their indispensable use to achieve the end of the war or a great advantage. The interesting thing about the principle of necessity is that it was argumentatively applied at Nuremberg trials as a defense maneuver. Not just German defendants argued it to justify their hideous practicing and acts, also the United States decision on bombing Hiroshima was justified on necessity to save uncountable human lives and to eschew Japan invasion would cause another significant number of military casualties. As Nuremberg trials refused the necessity justification, new base on international law of war was set, permitting the imperative approach of the principle of humanity. Nevertheless, necessity still a core principle in law of armed conflicts, even the statute of the recent International Criminal Court brings it as exculpatory feature of international criminal justice (Article 31)³⁰⁴. Yet, United Nations conveyed on its Annual Report on Afghanistan in 2010 that when a “raid by military forces is conducted against a legitimate military objective, such as combatants, it is largely governed by the same standards of international humanitarian law that govern other attacks, including rules and principles

³⁰³ LAURIE R. BLANK AND GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICTS: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 37 (2013)

³⁰⁴ JOANISVAL BRITO GONÇALVES, TRIBUNAL DE NUREMBERG 1945-1946 210-212 (RIO DE JANEIRO: RENOVAR, 2004)

pertaining to the verification of the target as a military target, proportionality, precautions in attack and military necessity”³⁰⁵.

The Common Article 3 of The Fourth Geneva Convention conveys the principle of humanity, which enshrines the minimum applicable in all armed conflicts. The Geneva Conventions, when dealing with civilians, slowly opened the door to building bridges, because of the inevitable link between “civilians” and “human beings”. “elementary considerations of humanity” are “illustrative of a general principle of international law” and “should be fully used when interpreting and applying loose international rules” of treaty law³⁰⁶. Nevertheless, the principle remission has occurred far back, in the preamble to the Hague Convention IV of 1907, and replied later in Article 1 of Additional Protocol I to the Geneva Conventions as well.

Humanity implies a moral force. Under international law terms, humanity is interpreted in terms of people’s security and well-being. Therefore, a universally applicable and objective definition of humanity is proposed that helps to clarify the complex relationships between humanity, inhumanity, the capacity for armed violence, the restraint of armed violence, and international law. The word humanity possesses a vague dimension of meaning, nonetheless we all attain it as a sentiment of active goodness which with no doubt places itself in an *ethos* of love deeply connected with the sacredness of human life and universal respect to all fellow human being³⁰⁷. Not only it embeds the elimination or mitigation of unnecessary suffering to any

³⁰⁵ UNITED NATIONS, AFGHANISTAN ANNUAL REPORT ON PROTECTION OF CIVILIANS IN ARMED CONFLICTS, 2010, 29 (MARCH, 2011).

³⁰⁶ *The Prosecutor v. Kupreskic et al. [Trial Chamber]*, Case No. IT-95-16-T, 2000 I.C.T.Y. §524 (January 14).

³⁰⁷ Robin Coupland, *Humanity: what is it and how does it influence international law?*, in IRRC DECEMBER 2001 VOL. 83 N. 844, 971-972 (2001).

human being, it also affirms the immunity of civilian populations and serves as essential counterbalance to the principle of military necessity³⁰⁸.

Regarding these two intertwined principles, humanity does not govern necessity in reality, as theory would endorse. The decision-making process in international politics not always follow the rhythm set in theory. Reality and pragmatism overcome theoretical humanity daily. Even though, some scholars argue that international pragmatism should be mitigated by idealism, especially in wartime when necessity must step back in face of general principle of law *salus populi suprema lex esto*, the welfare of the people should be the supreme law³⁰⁹. Therefore, in between necessity and humanity, we shall convey a third principle who serves to moderate necessity based on humanity, the principle of proportionality. The concept of proportionality is inherent in the complementary customary law principles of necessity and humanity which underlie the law governing the conduct of all armed conflicts³¹⁰.

Proportionality is too a very relevant principle to international humanitarian law. To fight justly (*jus in bello*) two points are considered: civilian immunity and proportionality, as a mean to reduce or eliminate excessive harm it must commit to save as many civilian lives as possible. Proportionality is weighed between the mischief done (immediate harm and permanent injury to the interests of mankind) and the contribution that this mischief makes to the end of the armed conflict. That is a hard criterion to apply. That is a calculation of costs and benefits in terms that

³⁰⁸ LAURIE R. BLANK AND GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICTS: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 41 (2013)

³⁰⁹ HILDEBRANDO ACCIOLY ET AL, MANUAL DIREITO INTERNACIONAL PÚBLICO 448 (SÃO PAULO: SARAIVA, 20TH EDITION, 2012).

³¹⁰ Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §110 (2002).

interests of civilians might have lesser value than the gain or victory that is being sought and pursued, since it is imperative to soldiers to try to win the wars they are fighting with all assets at disposal even the actually related to winning³¹¹. Afterall, the legal provision on targeting civilians does not extend to an entire prohibition on all civilian casualties, interestingly law has always tolerated some civilian deaths as consequence of military maneuvers³¹².

Principle of proportionality has its modern formulation inscribed in Additional Protocol I to Geneva Conventions. Envisaging protecting civilians in general, it forbids any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. Subsequently, some provisions of the Protocol set warnings on precautions that must be followed by military activities in attacks pursuant their restriction to what is indispensable to achieve the military gain sought. It can be said that the principle of necessity looks toward the lawful military objectives of the armed conflict, while proportionality looks toward humanitarian protections of noncombatants, which means that the balance of the two is a central concern of international law³¹³.

Contemporary international humanitarian law then applies vigorously the combination of these three principles, especially toward military response to terrorism in international arena today. Inter-American Commission Report on Terrorism underpins that international humanitarian law “imposes a general limitation on military operations by requiring that parties to

³¹¹ MICHAEL WALZER, *JUST AND UNJUST WARS* 129 (2006)

³¹² LAURIE R. BLANK AND GREGORY P. NOONE, *INTERNATIONAL LAW AND ARMED CONFLICTS: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR* 51 (2013)

³¹³ *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §§360-364 (2018)

an armed conflict respect the principles of necessity, distinction, proportionality and humanity. These principles seek to limit the sufferings of the victims of armed conflicts, including the unnecessary loss of lives”³¹⁴. The rule of proportionality applies in peacetime and during situations of armed conflict too. It has a different meaning and different implications in each context though.

4.6. The contemporary wars and their hostis humani generis

In 2002, the Council of Europe has issued some guidelines over terrorism, the contemporary warlike fight. For that, all “States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life”. “All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law”. “In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable”³¹⁵. At same time, United Nations Security Council issues Resolution 1373, in 2001, that calls upon all States to comply with all obligations under international law pursuant taking “the necessary steps to prevent the commission of terrorist acts”³¹⁶.

³¹⁴ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §§99, 110 (2002).

³¹⁵ THE COUNCIL OF EUROPE, HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM 09-13 (2005).

³¹⁶ S.C. Res. 1373 (2001), U.N. Doc. S/RES/1373, 2(b) (September 28, 2001).

Once Paul Butler asserted that there is a big difference between terrorism and traditional war. The former is illegal while the latter is legal; the perpetrators and the intended victims of the former are often civilians, whereas in the latter the perpetrators and victims are both soldiers³¹⁷. Also, the legal and practical difficulties arising as a result of changes in the contemporary security environment have caused confusion and uncertainty not only about the distinction between armed conflict and law enforcement, but also about the traditional categorization of persons as civilians and combatants and the temporal and geographic delimitation of the “battlefield.” The most urgent humanitarian need, however, is not to adopt new rules but rather to ensure actual compliance with the existing legal framework³¹⁸.

Although recurring to terrorism might be efficient under unattached consequentialist analysis, the fundamental critique harbors on a diverse ground, which is paramount to humanity’s law: morality. Terrorism may be rational, but it is also evil. The immorality of terrorism lays at the sense of risk that it causes the public at large; the powerlessness people have from being put at risk; and the instrumentality of attacking innocent people in pursuit of an alleged political goal. Nevertheless, it is important to establish the separation between immorality and the killing of innocent people because they are not always mutually inconsistent. There are cases in which taking innocent lives in pursuit of an urgent objective is warranted. Moral standing, on this regard, is about legitimacy and not about right. In the context of international law, politics and morality matter³¹⁹.

³¹⁷ Paul Butler, *Terrorism and Utilitarianism: lessons from, and for, criminal law*, in SUPREME COURT REVIEW VOL. 93 N. 1, 04 (2003).

³¹⁸ NILS MELZER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 46 (2016).

³¹⁹ Paul Butler, *Terrorism and Utilitarianism: lessons from, and for, criminal law*, in SUPREME COURT REVIEW VOL. 93 N. 1, 07-13 (2003).

Whilst killing combatants still a huge point of controversy between human rights and humanitarian law, the main focus remains at a more advanced perspective of noncombatants killing which, in two occasions, is tolerable in the law of war. Generally, when the military necessity demands a double effect conduct, that aims military and nonmilitary targets, for its legitimation, we have to extract utilitarian arguments. To perform an act with evil consequences (noncombatants casualties), the good effect ought to be sufficiently good to compensate the allowance of the evil effect. However, in the modern comprehension of humanitarian law, the double effect theory is defensible only when the good end is achieved, and the evil consequence is reduced as far as possible. Although the utilitarian grounds of the theory, it must have some kind of commitment to save as many civilian lives as possible, since principle of proportionality demands moral maneuver to repute it appropriate.

Also, there is a second situation that the killing of innocent people occurs fairly. It is when we have a self-determination of a group or people ongoing. As stated in the Protocol of 1977 of the War Convention and United Nations Resolutions 1514 and 2908, the armed struggle is justified against (i) alien occupation, (ii) colonial domination and (iii) racist regimes. Thus, these causes are just causes for fight and they must observe the same rules of proportionality and civilian immunity of an armed conflict. However, if there is no more space for deliberation and nonviolence policy and the oppression is such that it justifies turning to violence as a last resort, then the moral issue sets that the weak has the right to fight dirty to have a chance on winning over the strong. If we oblige the weak to fight clean, the strong will always win. The only tactic

that converts weakness into strength is terrorism, hitting the enemy at its most vulnerable point, its civilian population³²⁰.

This second scenario presents the lesser evil argument. In order to overcome the greater evil of injustice and oppression, the weak must be entitled to resort to the lesser evil of terrorist violence, otherwise the weak will be condemned to an eternity of subjugation. Nonetheless, that justifiable innocent targeting is restricted to the right of self-determination of a people or group under alien occupation, colonial domination or racist regime. The lesser evil argument does not apply to nihilist terrorism. Conversely, they aim attacking the enemy, but they intentionally choose to attack noncombatants rather than combatants to cause a higher impact and humiliation, to destroy the morale of a nation. There is no commitment to spare civilian lives, their method is the random murder of innocent people.

4.7. Enclosing considerations

The systematic use of remote-controlled drones for counterterrorist operations in countries such as Afghanistan, Pakistan and Yemen raise questions as to the applicability of IHL to these operations and, consequently, as to the rules governing the use of lethal force against the persons targeted. Where IHL is applicable, the systematic use of drones raises concerns with regard to the reliability of the targeting information used, the exposure of the civilian population to incidental harm, and the inability of the attacker to care for the wounded, or to capture rather

³²⁰ G.A. Res. 1514 (XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960); and G.A. Res. 2908 (XXVII), *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/RES/2908 (XXVII) (Nov. 02, 1972).

than kill. Another relatively recent development is the expansion of military operations into cyberspace, the so-called “fifth domain of warfare” next to land, sea, air and space. While it is generally uncontested that IHL would also apply to cyber operations conducted in relation to an existing armed conflict, it is unclear whether cyber operations, in and of themselves, could give rise to an armed conflict and, thus, trigger the applicability of IHL. Also, once cyber operations are governed by IHL, questions arise as to what exactly amounts to “attacks” – defined in IHL as “acts of violence” – in cyberspace, and how the proportionality of “collateral damage” to civilian infrastructure should be assessed, particularly in view of the fact that military and civilian computer networks are generally interconnected. This ongoing process, however, should not lead to the misperception of a legal void in this “fifth domain,” but must build on the premise that existing international law fully applies in cyberspace. In situations of armed conflict, that includes all relevant rules and principles of IHL³²¹.

Consequently, international humanitarian law and human rights law arose at international arena in different times of the history, under different circumstances and with different aims. Even the recent edition of UDHR and Geneva Conventions were clearly not mutually inspired. Although sharing common ground – principle of humanity and all it entails – there were an understanding that they would have overlapping areas of application and so human rights would not be applied in situations of armed conflicts, but in times of peace, since peace was what United Nations has struggled to achieve³²².

³²¹ NILS MELZER, *INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION* 42-43 (2016).

³²² Robert Kolb, *Human Rights Law and International Humanitarian Law Between 1945 and the aftermath of the Teheran Conference of 1968*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW* 35, 39-40 (2013).

Yet, there is a resounding reminiscence of war in the debates on the Universal Declaration. Since then, international community has acknowledged that human rights are relevant in armed conflict, as ascertained in United Nations General Assembly of December 3, 1953, where Resolution 804 invoked human rights in the context of Korean armed conflict³²³:

Having considered the item “Question of atrocities committed by the North Korean and Chinese Communist forces against United Nations prisoners of war in Korea” [...], *Recalling* the basic legal requirements for humane treatment of prisoners of war and civilians in connection with the conduct of hostilities are established by general international law and find authoritative reaffirmation in the Geneva Convention of 1929 and 1949 relative to the treatment of prisoner of war and in Geneva Convention of 1949 relative the protection of civilians in times of war, *Recalling* that these Conventions also embody precise and detailed provision for giving effect to the basic legal requirements referred to above, and that these provisions, to the extent that they have not become binding as treaty law, have been accorded most general support by international community, *Desiring* to secure general and full observance of the requirements of international law and of universal standards of human decency, (1) *Express its grave concern* at reports and information that North Korea and Chinese Communist forces have, in a large number of instances, employed inhuman practices against the heroic soldiers of forces under the United Nations Command in Korea and against the civilian population of Korea; (2) *Condemns* the commission by any governments or authorities of murder, mutilation, torture, and other atrocious acts against captured military personnel or civilian populations, as a violation of rules of international law and basic standards of conduct and morality and as affronting human rights and the dignity and worth of the human person.

Same happened few years when Soviet army invaded Hungary, when the United Nations General Assembly, in December 12, 1958, issues Resolution 1312 invoking human rights boundaries into armed conflict in course, “Again calls upon the Union of Soviet Socialist Republics and the present authorities in Hungary to desist from repressive measures against the Hungarian people and to respect the liberty and political independence of Hungary and the Hungarian people’s enjoyment of fundamental rights and freedoms”³²⁴.

³²³ G.A. Res. 804 (VIII), *Question of atrocities committed by the North Korean and Chinese Communist forces against United Nations prisoners of war in Korea*, U.N. Doc. A/RES/804/VIII (Dec. 3, 1953).

³²⁴ G.A. Res. 1312 (XIII), *The Situation in Hungary*, U.N. Doc. A38/49 (Dec. 12, 1958).

Not less, in December 19, of 1968, the United Nations General Assembly designates that year as International Year for Human Rights by Resolution 2441 and, by Resolution 2442, confirms and endorses the Final Act of the International Conference on Human Rights held at Teheran some months earlier. Thereafter, edits Resolutions 2443 and 2444 that embodies the respect for and implementation of human rights in occupied territories and in armed conflicts, respectively. So, these United Nations Resolutions expressly bear in mind the provisions of the Geneva Convention of 1949 relative to the protection of civilian people in time of war, however convey for the respect and implementation of human rights in conflict zone as concerns pulled out from “the violation of human rights in Arab territories occupied by Israel, (...) the disregard of fundamental freedoms and human rights in occupied territories, (...) acts of destroying homes of the Arab civilian population inhabiting areas occupied by Israel”. For that, United Nations calls upon Israeli government “(...) to respect and implement the Universal Declaration of Human Rights and the Geneva Conventions of 12 August 1949 in occupied territories, (d) affirmed the inalienable rights of all inhabitants who have left their homes as a result of the outbreak of hostilities in the Middle East to return home, resume their normal life, recover their property and homes, and rejoin their families according to the provisions of the Universal Declaration of Human Rights”³²⁵.

At same token, Resolution 2444 recognizes the necessity of applying basic humanitarian principles in all armed conflicts, such as the prohibition “to launch attacks against the civilian population” and the distinction between people “taking part in the hostilities and member of the civilian population to the effect that the latter be spared as much as possible”. On the urge of the

³²⁵ G.A. Res. 2443 (XXIII), *Respect for and implementation of human rights in occupied territories*, U.N. Doc. A/RES/2443/XXIII (Dec. 19, 1968).

“need for additional humanitarian international conventions or other appropriate legal instrument to ensure the better protection of civilians, prisoners and combatants in all armed conflicts”, the Final Act of International Conference on Human Rights in Teheran is hold as legal instrument for human rights respect in armed conflicts³²⁶. In sum, even during the periods of armed conflicts, principle of humanity must prevail, either by international humanitarian law or human rights law.

³²⁶ G.A. Res. 2444 (XXIII), *Respect for human rights in armed conflicts*, U.N. Doc. A/RES/2444/XXIII (Dec. 19, 1968).

CHAPTER 5

THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

5.1. Initial Thoughts; 5.2. Human Dignity Relationship; 5.3. Derogation on Human Rights in Times of Emergency; 5.4. Today's Assessment by Courts' Precedents; 5.5. The Burden of Morality; and 5.6. Doctrine of Double Effect and Utilitarianism.

5.1. Initial thoughts

In international legal order there are innumerable bodies of law which belong to Human Rights Law and, simultaneously, International Humanitarian Law also has some statutory instruments under its wings. Like approached at second chapter of this book, all bodies of law pertain to the general and complex international legal system whose traits of unity, wholeness and coherence are imperative. Nonetheless, each branch of international law covers specific aims. While HRL always deals with the inherent rights of the person to be protected against abusive and arbitrary actions, the IHL regulates the conduct of parties to an armed conflict.

Since Human Rights Law applies at all times, it is based on principle of universality and therefore possess, at first glimpse, a *lex generalis* character. On the other hand, International Humanitarian Law have a narrower scope of application, reaching only factual cases under

armed conflict spectrum, thus acquiring to itself a sense of *lex specialis*. Although inherently distinct one to another and their rules are not necessarily consistent with each other, it is taken for granted today that international humanitarian law and international human rights law maintain between their respective bodies both subtle and multiple relationship, with one branch of the law complementing, strengthening or filling the other's gaps. From a theoretical standpoint, both branches of the law have some shared or common legal ground on which they can interact³²⁷.

After all both share the major principle of humanity. Human rights and humanitarian law share a common ideal, protection of the dignity and integrity of the person, and many of their guarantees are identical, such as the protection of the right to life, freedom from torture and ill-treatment, the protection of family rights, economic, and/or social rights³²⁸. While human rights law has been recently developed and contains a lot of national, cultural and religious antecedents, humanitarian law has served as “an important historical foundation for the development of human rights law, resting on the notions of protection of human dignity inherent” in the law of armed conflicts³²⁹. The United Nations Charter preamble then is addressed to all international bodies of law, humanitarian law and human rights law included. It says that one of the four key purposes of the United Nations is “to reaffirm faith in fundamental human rights, in the dignity

³²⁷ Robert Kolb, *Human Rights Law and International Humanitarian Law Between 1945 and the aftermath of the Teheran Conference of 1968*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 35, 35 (2013).

³²⁸ Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in ISRAELI LAW REVIEW. VOL. 40, NO.2, 310, 312 (2007).

³²⁹ LAURIE R. BLANK AND GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICTS: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 27 (2013)

and worth of the human person, in the equal rights of men and women and of nations large and small”.

Thus, the question arises whether there is conflict and tension or synergy between these regimes, as we seek to analyze the possible ways in which the interplay between human rights law and humanitarian law can work in practice. There is some dispute over the matter, but even though legal authorities of international law massively support that human right law is applicable alongside international humanitarian law in combat situations on the position of harmonious convergent bodies of law. Two main concepts inform their interaction: complementarity between their norms in most cases and prevailing of the more specific norm when there is contradiction between the two. The question is in which situations either body of law is the more specific.

Accordingly, the ICJ has held that, while the human rights prohibition on arbitrary deprivation of life also applies in hostilities, the test of what constitutes arbitrary deprivation of life in the context of hostilities is determined by IHL, which is the *lex specialis* specifically designed to regulate such situations. Similarly, the question of whether the internment of a civilian or a prisoner of war by a State party to an international armed conflict amounts to arbitrary detention prohibited under human rights law must be determined based on the Third and Fourth Geneva Conventions, which constitute the *lex specialis* specifically designed to regulate internment in such situations³³⁰. *Lex specialis* sets the priority norm, and that would be the case of respect to life regarding the targeting of combatants. IHL as special regimes overlaps HRL, according to Advisory Opinion on the *Legality of th Threat or Use of Nuclear Weapons*.

³³⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. §25 (July 8).

However, years later, the ICJ ruled a different understanding in Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, rejecting the cartesian application of human rights law governing in peace time and humanitarian law governing in wartime and, because of that, as *lex specialis*, humanitarian rules override human rights law. Under a different outlook, the Court now holds that human rights are cherished and duly protected in armed conflicts situation by the standards of human rights law, only the actions of the perpetrators shall be contrasted before the feasible justifications inserted in humanitarian law. Therefore, the *lex specialis* serves to evaluate whether human rights violations are arbitrary or not, particularly taking into considerations the military necessity and proportionality of actions. In this sense, “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict”³³¹. And in *Case Concerning Armed Activities on the Territory of the Congo*, international human rights prevailed, especially before Congo’s civilian population, in order to condemn Uganda to be in absence with its international legal obligations³³².

In summary, the Court sets three possible situations coming out of the interplay between these two branches of law: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; and others may be matters of both these branches of international law³³³. Chiefly, the separatism between both branches takes account for the difficulties for a shift from a military-oriented law to a protected person-oriented

³³¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. §§105-106 (July 9).

³³² Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. §§217-220 (December 19).

³³³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. §106 (July 9).

law. Therefore, the analysis is made rule by rule and context by context, not broadly as whole body of law prevailing over the other. So, there is no longer doubts of IHL and HRL co-application. However, which remains unsettling, challenging and ongoing is the grey zone between both bodies of law to set how this co-applicability works in day by day judicial experience.

Regarding United Nations Resolution 2444 of 19 December 1968, human rights are officially inserted in armed conflicts legal order. The Final Act of International Conference on Human Rights in Teheran upheld in that document proclaims that the “primary aim of United Nations in the sphere of human rights is the achievement by each individual of the maximum freedom and dignity”. Furthermore, urges “all peoples and governments to dedicate themselves to the principles enshrined in the Universal Declaration of Human Rights and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare”³³⁴. Regarding specifically human rights in armed conflicts, the Final Act brings at provision XXIII: “*Considering* that peace is the underlying condition for the full observance of human rights and war is their negation, *Believing* that the purpose of the United Nations Organization is to prevent all conflicts and to institute an effective system of peaceful settlement of disputes, *Observing* that nevertheless armed conflicts continue to plague humanity, *Considering*, also, that the widespread violence and brutality of our times, including massacres, summary executions, tortures, inhumane treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare,

³³⁴ UNITED NATIONS, FINAL ACT OF THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, TEHERAN, 22 APRIL TO 13 MAY 1968, A/CONF.32/41, SALES NO. E68.XIV.2, 04-05 (1968).

including napalm bombing, erode human rights and engender counter-brutality, *Convinced* that even during the periods of armed conflicts, humanitarian principles must prevail”³³⁵.

The United Nations Teheran Conference of 1968 on human rights in armed conflicts, Resolution 2444, and the two Covenants of 1966 – on civil and political rights (Covenant II) and on social, economic and cultural rights (Covenant I) – turn human rights law in a fully-fledged positive law. The question of the application of this branch of law in the times of armed conflict now appears on the very level of positive law. All these factors, among others, pulled consistently towards a convergence and some form of cooperation between both branches of the law³³⁶.

Afterwards, the United Nations General Assembly, in December 09, 1970, enacts Resolution 2675 which, recalling and expressly creating its connection to Resolution 2444, sets international basic principles for the protection of civilian populations in armed conflicts “to ensure the better protection of human rights in armed conflicts of all types”. So eight principles have been issued and here they are: (1) Fundamental Human Rights fully applied in situations of armed conflict; (2) distinction between people actively taking part in the hostilities and civilian populations; (3) precaution and maximum effort in military operations to spare civilian populations from ravages of war and eschew injury, loss or damage to them; (4) Civilian population should not be object of military operations; (5) Places and installations inhabited by civilians should not be object of military operations; (6) Places or areas designated for the

³³⁵ UNITED NATIONS, FINAL ACT OF THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, TEHERAN, 22 APRIL TO 13 MAY 1968, A/CONF.32/41, SALES NO. E68.XIV.2, 18 (1968).

³³⁶ Robert Kolb, *Human Rights Law and International Humanitarian Law Between 1945 and the aftermath of the Teheran Conference of 1968*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 35, 45 (2013).

protection of civilians or refugees should not be object of military operations; (7) civilians, collectively or individually, should not be object of reprisals, forcible transfer or other assaults on their integrity; and (8) The provision of international relief to civilians “is in conformity with the humanitarian principles of the Charter of United Nations, the Universal Declarations of Human Rights and other international instruments in the field of human rights”³³⁷.

It is clear that all principles announced are those already embedded in International Humanitarian Law theory but the first and the last. The first that calls the full application of human rights in armed conflicts is underpinned by previous instruments and resolutions. However, the last one unambiguously encompasses the shared principle of humanity and all provisions and concepts tailored in the Charter of United Nations and Universal Declarations of Human Rights. International Humanitarian Law and Human Rights Law are hitherto living a biological symbiosis or, we also shall call, mandatory mutualism.

Taking some guidelines from Biology, mandatory mutualism (or symbiosis) occurs when two different species associate one to another creating an interspecific relationship in such way that both species intervene on each other metabolism and start to depend one another for the sake of the benefits of this association. Some difference between mutualism and symbiosis is drawn though, being mutualism considered the relationship where both species benefit from the association, while symbiosis has a broader meaning, also entailing commensalism, where only one of the species benefit from the association³³⁸. With that in mind, from now on, we shall refer

³³⁷ G.A. Res. 2675 (XXV), *Basic principles for the protection of civilian populations in armed conflicts*, U.N. Doc. A/RES/2675/XXV (Dec. 09, 1970).

³³⁸ LIBRETEXTS LIBRARY, [https://bio.libretexts.org/Bookshelves/Human_Biology/Book%3A_Human_Biology_\(Wakim_and_Grewal\)/24%3A_Ecology/24.04%3A_Community_Relationships](https://bio.libretexts.org/Bookshelves/Human_Biology/Book%3A_Human_Biology_(Wakim_and_Grewal)/24%3A_Ecology/24.04%3A_Community_Relationships) (last visited September 2, 2019)

to International Humanitarian Law and Human Rights Law fusion and co-applicability as mandatory mutualism because it is for the benefit of both branches and, above all, the benefit of principle of humanity and the pursue of peace by mankind.

In 1977, United Nations sets a diplomatic conference where two Additional Protocols join international humanitarian bodies of law. These Protocols deal mostly with human rights guarantees and proceedings during armed conflict situations. Even though, until today we still have a grey zone over the details of their mutual interaction. The adoption of the Fourth Geneva Convention and two Additional Protocols have progressively ventilated a new conception of law, creating a common ground on the protection of the human being based on fundamental principle of humanity. Any gap left utterly open by international humanitarian law is hitherto filled by human rights law, giving a perfect harmony among bodies of law within international legal system.

In this vein, complementarity that comes out of the mutualism between the two branches of international law reflects a method of interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties which allows, in interpreting a norm, to take into account “relevant rule of international law applicable in the relations between the parties.” As aforementioned, this provision entails the idea of international law understood as a coherent system which observes unity and shows wholeness among its legal sources. It sees international law as a regime in which different sets of rules cohabit in harmony, providing mutual benefits

one another. Thus, human rights can be interpreted in the light of international humanitarian law and vice versa³³⁹.

Article 72 of Additional Protocol I to Geneva Conventions already stresses that humanitarian law provisions are supplementary to any other applicable rule of international law relating to the protection of fundamental human rights during armed conflicts, international or non-international. Yet, Inter-American Commission on Human Rights elucidates that it is because of their mandatory mutualism and the fact that “both normative frameworks are based on common core principles and values”, international human rights law and humanitarian law “can provide reciprocal influence and reinforcement”. So, the conclusion is that “international human rights law can be interpreted in the light of international humanitarian law and the latter, in turn, can be interpreted in the light of international human rights law, if required”³⁴⁰. Moreover, the mandatory mutualism is applied entirely in cases of belligerent occupation as well. As alien occupation is also a matter of humanitarian law, according to the Hague Regulations and Fourth Geneva Convention, the enjoyment of human rights law stands, especially to protect civilian populations. Not just ICJ³⁴¹ has reached this conundrum, but European Court³⁴² and Inter-American Court³⁴³ likewise.

³³⁹ Cordula Droegge, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in ISRAELI LAW REVIEW. VOL. 40, NO.2, 310, 337 (2007).

³⁴⁰ *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §328 (2018); same conclusion at *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, Case IP-02, Inter-Am. Comm’n H.R., Report N° 112/10, OEA/Ser.L/V/II.140, doc. 10, §121 (2010).

³⁴¹ Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. §§172-173 (December 19); and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. §178-179 (July 9).

³⁴² *Al-Skeini and Others v. The United Kingdom [GC]*, no. 55721/07 Eur. Ct. H.R., §§90-91, 142 (2011) and *Ilascu and Others v. Moldova and Russia [GC]*, no. 48787/99 Eur. Ct. H.R. §370 (2004).

5.2. *Human Dignity relationship*

As we worked previously, international legal system is a complex one which contains multiple sources of law and also open clauses in order to provide law its dynamics and ductility for settling hard cases and embrace new traits of law regarding the civilization process and science (in general) rapid development. So, regarding human rights law, we have human dignity being applied in international courts either as a right or a value, mostly on hard cases where we might find some apparent conflict of legal provisions of international bodies of law. This moral contribution from human rights law touched law of war giving it a more humane contour, what is often called as humanization process based chiefly on principle of humanity.

Thus, it is largely conceived that law of war, or law of armed conflict, shall be appropriately named as international humanitarian law, since it shares with human rights law the same values and moral, i.e., the same essence. Hence, a mandatory bound between that is endorsed in order to purport mutualism to both branches of law, benefits for both sides. Furthermore, “the essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law”³⁴⁴. It is then

³⁴³ *Case of the “Mapiripán Massacre” v. Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No. 22, §238 (September 15, 2005); and *Norín Catrimán et al (Leaders, members and Activists of the Mapuche Indigenous People) v. Chile*, Merits, Reparations and Costs. Inter-Am. Ct. H. R. (ser.C) No. 279, §197 (May 29, 2014).

³⁴⁴ *Prosecutor v. Anto Furundzija [Trial Chamber]*, Case No. IT-95-17/1-T, 1998 I.C.T.Y. §183 (December 10).

undeniable the strength that human dignity exercises in this mandatory mutualism, both as right and value.

The major key we are trying to uphold here is that, either right or value, international law and jurisprudence on human rights have applied human dignity largely as human rights law centerpiece. That means human dignity is grappled as a supervalue; the core from where all provisions on human rights emanates and develops their constitution and comprehension. This irradiation process might be seen on several international bodies of law – expressly – or contextualized on jurisprudence semantics and rationale, as being part of the provision referenced to.

Portraying an international wide scenario, we shall shed light to some relevant bodies of law whereas human dignity is expressly conceived, if not in the preamble, in the provisions set. Even when established in the preamble which possesses a moral codification esteem, the supervalue of human dignity yokes the applicability of all human rights provisions, chiefly by jurisprudence rationale. The positive credentials of human dignity in international law, just like the majority of modern national constitutions, has purported a great ideological latitude that may propitiate different degrees and shapes of realization, but it is undeniable human dignity have reached general acknowledgement in international community. Although we have experienced some punctual setbacks during the way, it cannot serve to dwindle or compromise the main goal that is to increasingly enforce the respect on human dignity and to densify its content in an irreversible manner³⁴⁵.

³⁴⁵ Peter Harbele, *A Dignidade Humana como Fundamento da Comunidade Estatal*, in *DIMENSÕES DA DIGNIDADE* 89, 150-152 (PORTO ALEGRE: LIVRARIA DO ADVOGADO, 2005).

The aforementioned United Nations Resolution 2444 of 19 December 1968, which puts human rights law in the center of armed conflicts legal order, foists The Final Act of International Conference on Human Rights in Teheran as human rights icon. At provision XXV, giving publicity for the Universal Declaration of Human Rights, it expressly recognizes that “in order to make effective use of human rights, everyone must understand the nature of these rights and his responsibility to exercise and defend them in fulfillment of the dignity of man”³⁴⁶. On previous chapters, we worked into the nature of human rights and their responsibility to mankind and for that we might assert we understand perfectly.

Besides the several international statutes indicated on previous chapter on human rights law, we shall recall some core references for the sake of congruency in our discourse. United Nations, encompassing the Charter of the United Nations and Universal Declaration of Human Rights issues Resolution 1904 that proclaims the Declaration on the Elimination of All Forms of Racial Discrimination fully convinced that racial segregation and discrimination hamper the “respect for the dignity of the human person”, which is thereof considered as an “offense to human dignity”³⁴⁷. And more, the realization of economic, social and cultural rights lies at the core efforts to realize all human rights since an existence worth of human dignity is only possible if both categories of rights are fully enjoyed³⁴⁸.

³⁴⁶ UNITED NATIONS, FINAL ACT OF THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, TEHERAN, 22 APRIL TO 13 MAY 1968, A/CONF.32/41, SALES NO. E68.XIV.2, 19 (1968).

³⁴⁷ G.A. Res. 1904 (XVIII), *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, U.N. Doc. A/RES/18/1904 (Nov. 20, 1963).

³⁴⁸ E.S.C. Report on the Thirty-Sixth Session, Official Records, 1980, Supplement No. 3, U.N. Doc. E/1980/13, E/CN.4/1408, §116 (February 4 – March 14, 1980).

All regional conventions on human rights also entail human dignity and, no matter whether expressed in preamble solely or not, the characterization of value and right fall within the orientation set in Article 31 of Vienna Convention of 1969, to whom interpreting a treaty occurs in “good-faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” and inside of the treaty is the preamble which also serves into the purpose of interpretation. The application of Article 31 is duty bound to work towards mandatory mutualism between international human rights law and international humanitarian law, according to Inter-American Commission on Human Rights³⁴⁹.

It is also interesting that in spite of European Convention on Human Rights does not explicitly ascertain human dignity, neither as value nor right, the later Protocol 13 and Article 4 of Protocol 4 bring their comprehension, like a principle, when banning death penalty, for instance. Nevertheless, European Court of Human Rights has already recognized human dignity as value too, doing the interpretation exercise that allows full applicability of international legal order with unity, coherence and wholeness. Human dignity “has been taken into account when interpreting the Conventions and substantive judicial decision-making has been produced³⁵⁰. In *Bouydi v Belgium* and *Khlaifia and Other v. Italy*, the recognition of human dignity was galvanized as a value of civilization closely bound to respect. Any act that humiliates, debases an individual, shows a lack of respect for or diminishes his or her human dignity shall be forbidden.

³⁴⁹ *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §328 (2018); same conclusion at *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, Case IP-02, Inter-Am. Comm’n H.R., Report N° 112/10, OEA/Ser.L/V/II.140, doc. 10, §121 (2010).

³⁵⁰ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, in INTERNATIONAL LAW AND JUSTICE WORKING PAPERS 2008/8, 57 (2008).

Thus, the “respect for human dignity forms part of the very essence of the Convention”³⁵¹. *Parrilo v. Italy* went far beyond, it recognized the dignity of an unborn human life, embracing the notion of ontological disrespect of human nature in a way that means of working scientifically through genetics to reach the end of saving human lives is not acceptable³⁵².

Inter American Court has held a wide outlook over straight tie between human dignity and personal integrity. Citing Articles 5 and 11 of Inter American Human Rights Convention, the court hold that embedded in the provision that sets personal integrity as a fundamental right we shall find human dignity since “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person” and “everyone has the right to have his honor respected and his dignity recognized”³⁵³. Besides that, human dignity is turned into an *erga omnes* international obligation towards American States, which means that rights to life, personal integrity, honor and dignity not only need to be respected – negative obligation – but also require from all States the adoption of all appropriate measures to enforce and guarantee them to every individual – positive obligation³⁵⁴.

³⁵¹ *Bouyid v. Belgium [GC]*, no. 23380/09 Eur. Ct. H.R., §§81-89 (2015); and *Khlaifia and Other v. Italy [GC]*, no. 16483/12 Eur. Ct. H.R., §158 (2016).

³⁵² *Parrilo v. Italy [GC]*, no. 46470/11 Eur. Ct. H.R., §47 (2015).

³⁵³ *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No.328, §124 (November 30, 2016); *Caso Velásquez Paiz y Otros v. Guatemala*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 307, §173 (Noviembre 15, 2015); and *Case of Barrios Altos v. Peru*, Merits, Inter-Am. Ct. H.R. (ser.C) No. 83, §52 (March 14, 2001).

³⁵⁴ *Velásquez Paiz y Otros v. Guatemala*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 307, §106 (Noviembre 15, 2015); *Caso Gonzales Lluy y otros Vs. Ecuador*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 298, §168 (Septiembre 1, 2015); *Caso Defensor de Derechos Humanos y otros Vs. Guatemala*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 283, §138 (Agosto 28, 2014); and *Velásquez Rodríguez Vs. Honduras*, Fondo, Inter-Am. Ct. H. R. (ser. C) No.4, §163, 165-166 (Julie 29, 1988).

5.3. Derogation on Human Rights in times of emergency

Although the mandatory mutualism between international humanitarian law and human rights, it is well spread through human rights conventions that some human rights can be derogated during emergency times upon a State-Party request. This becomes relevant to this work because armed conflict usually falls within the concept of this state of exception that invites to the use of exceptional law in order to eschew a state of anomie, since a moral legal order, just as contemporary international law, does not comprise with moral abstention or neutrality, not even in the edge of a breakdown³⁵⁵.

Like Carl Schmitt once grasped, the state of exception is called when the political unity of the state is under threat, putting its own existence at risk of extinction. Therefore, the system requires a decision-making, and only the sovereign in power is entitled to do so, because he is the Chief of State. The sovereignty does not mean monopoly of coercion or domination, but the burden of decision which emerges as the genuine tool to reestablish the safety and public order. The sovereign then can suspend the Law as a political maneuver for self-preservation of the State and its subjects. Every order, consequently, rests on a decision – reason why this doctrine is often called as political decisionism – leaving the state into anomie. Only after the elimination of threat and the end of abnormality that the legal order shall be restored and all rules reinforced³⁵⁶. To him, the Chief of State is the guardian of the Constitution and the law and even nowadays Schmitt remains a controversial scholar in international law and social theory, afterall his

³⁵⁵ VLADIMIR JANKÉLÉVITCH, *O PARADOXO DA MORAL* 05 (SÃO PAULO: MARTINS FONTES, 2008).

³⁵⁶ CARL SCHMITT, *TEOLOGIA POLÍTICA*, 11-16 (BELO HORIZONTE: DEL REY, 2006); AND CARLOS A. FERNÁNDEZ PARDO, *CARL SCHMITT EN LA TEORÍA POLÍTICA INTERNACIONAL* 25-28 (BUENOS AIRES: BIBLOS, 2007).

contributions to international legal theory have been denounced as ideological and propagandistic Nazi bric-a-brac³⁵⁷. Since Nuremberg trials, this theory of international law is unconceivable.

International law no longer comprises with a total regime of absence of rights, especially human rights. State of exception situations is always something different from anarchy and chaos and, under legal perspective, there still exists an order. Modern understanding on state of exception is far from being a legal loophole. Conversely, it is an international law provision which keeps inside the legal system its own exception clauses³⁵⁸. For this account, this exceptional situation allows solely a partial fulfillment of human rights and hence is viewed like an especial application of the law out of general provisions and applicability whose interpretations shall be as restricted as possible³⁵⁹.

So, the international human rights conventions call this exception of law as derogation clauses. Article 15 of European Convention on Human Rights enables all but the absolute rights in the Convention to be suspended in “time of war or other public emergency threatening the life of the nation” provided this is “strictly required by the exigencies of the situation”. Nevertheless, interferences on human rights must be “proportionate to the legitimate aim pursued and that this will vary from case to case, the background circumstances, the right in question and the type of interference concerned”³⁶⁰. Article 27 of American Convention on Human Rights in turn enables all but the absolute rights in the Convention to be suspended in “time of war, public danger, or

³⁵⁷ CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* 27 (2006).

³⁵⁸ GIORGIO AGAMBEN, *ESTADO DE EXCEÇÃO* 39-54 (SÃO PAULO: BOITEMPO, 2004).

³⁵⁹ CARLOS MAXIMILIANO, *HERMENÊUTICA E APLICAÇÃO DO DIREITO* 183 (RIO DE JANEIRO: FORENSE, 2006).

³⁶⁰ STEVEN GREER, *THE EXCEPTIONS TO ARTICLES 8 TO 11 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 15 (1997).

other emergency that threatens the independence or security of a State Party, (...) to the extent and for the period of time strictly required by the exigencies of the situation”. Following Article 30 also envisions and strengthens the submission to necessity and proportionality for adopting such exceptional measures³⁶¹.

Accordingly, most human rights can be derogated from in time of public emergency, which includes situations of armed conflict. Nevertheless, it is a common misconception to dismiss the application of human rights in armed conflict situations, because derogability is understood as entirely suspending the right, even not being what international law says³⁶². It is lawful to detain suspects and keep them imprisoned to unfold the risks they represent. Nevertheless, some fundamental juridical guarantees must be left for them, such as the right to a counselor and judicial review over their detention, since their rights restriction are limited and temporary, not giving permission to a “black hole” in the law³⁶³.

Likewise, American Commission on Human Rights have held that the Convention’s derogation clause gives room to continental deliberations about the emergency time which does not signify the explicit suspension or restriction on human rights. These deliberations, by the way, shall observe the requisites of proportionality, necessity and distinction before a very grave situation of armed conflict in which state’s order and safety is really threatened³⁶⁴. Whilst any state-party may have this legal reserve to derogate human rights, the international court has

³⁶¹ COMISSION INTER AMERICANA DE DERECHOS HUMANOS, INFORME SOBRE TERRORISMO Y DERECHOS HUMANOS, PAR. 360 (2002).

³⁶² Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in ISRAELI LAW REVIEW. VOL. 40, NO.2, 310, 318 (2007).

³⁶³ MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 29-30 (2004).

³⁶⁴ COMISSION INTER AMERICANA DE DERECHOS HUMANOS, INFORME SOBRE TERRORISMO Y DERECHOS HUMANOS, PARS. 50-51 (2002).

secured that this option is greatly forbidden and deemed incompatible with the scope and aim of human rights convention, therefore not authorized whatsoever³⁶⁵.

Both European and American Conventions – Articles 15 and 27, respectively – and also Article 4 of International Covenant on Civil and Political Rights (ICCPR) set derogation clauses limit of exercising to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with states’ other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin. Nevertheless, we now know that even before an armed conflict situation, there are some rights that are not susceptible to derogation since such derogation would imply an incompatibility with the very existence of human rights protective bodies of law. Such inderogable rights belongs to *jus cogens* block, as international peremptory norm³⁶⁶. There are some scholars that struggle with the idea of all human rights being considered *jus cogens*, but regarding those chosen as inderogables by international law, these indisputably are³⁶⁷.

European Court has recognized these inderogable rights as *jus cogens* in some cases brought before the court, at least. It is *jus cogens*, as it says, because of the importance of the values they protect³⁶⁸. Meanwhile, Inter-American Court gives a much wider sense on *jus cogens*

³⁶⁵ Restricciones a la Pena de Muerte (artículos 4.2 y 4.4 Convención Americana sobre Derechos Humanos), Opinión Consultiva OC-3/83, Inter-Am. Ct. H. R. (ser. Fallos y opiniones) No. 3, §61 (September 08, 1983).

³⁶⁶ TANIA GABRIELA RODRÍGUEZ HUERTA, TRATADO SOBRE DERECHOS HUMANOS: EL SISTEMA DE RESERVAS 58 (PORRUÁ, MÉXICO: ITAM, 2005).

³⁶⁷ Rodolfo E. Piza Escalante, *El Valor Del Derecho y La Jurisprudencia Internacionales de Derechos Humanos en el Derecho y la Justicia Internos – El Ejemplo de Costa Rica*, in LIBER AMICORUM, HÉCTOR FIX-ZAMUNDIO, VOL. I 169, 185 (SAN JOSÉ, COSTA RICA: CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1998).

³⁶⁸ *Al-Adsani v. The United Kingdom [GC]*, no. 35763/97 Eur. Ct. H.R., §§60-62 (2001).

norms, contemplating human rights in general³⁶⁹. Besides being *jus cogens*, these inderogable rights are treated differently from European and American law, where the latter contains a wider spectrum of human rights protection in comparison with the former. European Convention selects only four rights as inderogable: life, prohibition of torture, prohibition of slavery or servitude and no punishment without law. American Convention in turn selects these rights: to juridical personality; to life; to humane treatment; freedom from slavery; freedom from ex post facto laws; freedom of conscience and religion; of the family; to a name; of the child; to nationality; to participate in government; and of the judicial guarantees essential for the protection of such rights.

Afterwards, Article 2 of Protocol n° 6 to the European Convention made an adjustment on right to life in order to permit any State to “make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war” but some time later, this permission on death penalty was withdrawn on Protocol n° 13, Articles 1 and 2, where death penalty is abolished completely and no derogation is accepted on this regard. Moreover, European Court of Human Rights has even widened the idea of life protections holding that states not only shall refrain from the intentional and unlawful taking of life, but also must take appropriate steps to safeguard the lives of those within its jurisdiction³⁷⁰. Meanwhile, European Court has put great emphasis to compel torture, enshrining the prohibition of torture as one of the most fundamental values of democratic societies. “Even in the most difficult circumstances, such

³⁶⁹ Juridical Conditions and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) No. 18, §101 (September 17, 2003); *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No. 282, §264 (August 28, 2014); and *Norín Catrimán et al (Leaders, members and Activists of the Mapuche Indigenous People) v. Chile*, Merits, Reparations and Costs. Inter-Am. Ct. H. R. (ser.C) No. 279, §197 (May 29, 2014).

³⁷⁰ *L.C.B. v. the United Kingdom [GC]*, no. 23413/94 Eur. Ct. H.R., §36 (1998).

as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment” tolerating no “exceptions and no derogation from it is permissible under Article 15”, even in the event of a public emergency threatening the life of the nation, The inderogability then is in absolute terms³⁷¹, no matter the evil perpetrated by the enemy in an armed conflict³⁷². Even the deportation of the individual to a country where the belief that he would be subjected to torture or any inhuman or degrading treatment remains vivid, is not permissible under the convention’s provisions. In such cases, European Convention of Human Rights implies an obligation not to deport the individual³⁷³.

On the top of the four inderogable rights, the ICCPR, Article 4, added three more, which remain less than American provisions: the rights to juridical personality and to not be imprisoned merely on the ground of inability to fulfil a contractual obligation, freedom of thought, conscience and religion. The European Court in turn has acknowledged the broader scope of inderogability in observance of international law unity, wholeness and coherence, giving instructions to states to observe the additional criteria of temporality brought by ICCPR, combining with necessity and proportionality³⁷⁴. Moreover, such derogation can only be conceived whether previously and formally submitted by the State-Party before the regional court to grant it (Article 4, ICCPR; Article 15, ECHR and Article 27, ACHR). Additionally, European Court of Justice, in *Kadi v. Council of the European Union and Commission of the European Communities*, moves the mutualism of international humanitarian law and human

³⁷¹ *Chahal v. the United Kingdom*, no. 22414/93 Eur. Ct. H.R., §79 (1996).

³⁷² *Labita v. Italy*, no. 26772/95 Eur. Ct. H.R., §119 (2000).

³⁷³ *Saadi v. Italy*, no. 37201/06 Eur. Ct. H.R., §125 (2008) and *Salah Sheekh v. the Netherlands*, no. 1948/04 Eur. Ct. H.R., §135 (2007).

³⁷⁴ *A. and Others v. The United Kingdom [GC]*, no. 3455/05 Eur. Ct. H.R., §178 (2009).

rights law away from prevailing state-centricity and toward anthropocentrism, declaring the guidance by human rights law as fundamental principles of the Union and solely condition of the lawfulness of Community acts³⁷⁵.

At the other side, Inter American Court of Human Rights has understood that Article 27 of the Convention enjoins limits to states power on suspending rights and liberties. On this view, some suspensions are not tolerated no matter what circumstances, not even judicial guarantees to pursue them under human rights protection. Judicial guarantee and proceeding to ensure human rights are indispensable in armed conflicts or emergency situations³⁷⁶. The control over legality of perpetrated acts in armed conflicts by an impartial and autonomous judicial organ is a key trait to establish the state of exception as legal³⁷⁷. Consequently, Habeas Corpus is the major guarantee to enforce human rights protection on liberty and personal integrity, besides the guarantee of due process of law³⁷⁸. In sum, Inter American Court takes very seriously the picture of human rights violations. No state can justify human rights violations as a consequence while declaring going through a state of exception³⁷⁹.

Notwithstanding the regional conventions on human rights, the content of common Article 3 of Geneva Convention constitutes a minimum legal guidance that is applicable to any type of armed conflict. Thus, with respect to armed conflict, it is not possible to draw a

³⁷⁵ Case C-402/05 P and C-415/05 P, *Kadi v. Council of the European Union and Commission of the European Communities* [GC], 2008 E.C.R. §§284, 344.

³⁷⁶ El hábeas corpus bajo suspensión de garantías (artículos 27.2, 25 y 8 Convención Americana sobre Derechos Humanos), Opinión Consultiva OC-8/87, Inter-Am. Ct. H. R., §§23, 28 (January 30, 1987).

³⁷⁷ Garantías Judiciales en Estados de Emergencia (arts. 27.2, 25 y 8 Convención Americana sobre Derecho Humanos), Opinión Consultiva OC-9/87, Inter-Am. Ct. H. R., §21 (October 06, 1987).

³⁷⁸ *Loayza-Tamayo v. Peru*, Merits, Inter-Am. Ct. H. R. (ser. C) No. 33, §§46-52 (September 17, 1997).

³⁷⁹ Juridical Conditions and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) No. 18, §§89-101 (September 17, 2003).

conclusion from the absence of derogation clauses that the respective treaty does not apply. Today, human rights law is an integral part of international law for the common welfare of humanity and represent common values that no State may revoke, even in times of war. The mandatory mutualism ensues the objective of protecting and safeguarding individuals in all circumstances.

In sum, despite the common ground they actually share, IHL and HRL core nature and law-processing are quite diverse and such diversity brings an endless debate about the preciseness of their mutual complementarity and enforcement. We deal in daily basis with this grey zone, where remains a permanent struggle to settle under which circumstances the HRL should prevail and overlap the military-based rationale of the IHL and vice-versa. Notwithstanding, since the end of 1960s, especially after the two Covenants, it has been established worldwide that the HRL is mandatory, being only excepted a restricted and temporary suspension-clause claim from a State in emergency times which shall follow procedural and substantive safeguards regarding the declaration and implementation of such state of exception – as stated in Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the ECHR and Article 27 of American Convention on Human Rights.

5.4. Today's assessment by Courts' precedents

Regarding the public emergency and situations of state of exception of contemporary international law, we have a lot of new kinds of armed conflicts. We have seen armed conflicts, international and non-international, in Ukraine, Russia, Turkey and onwards. Nonetheless, one

intriguing model of armed conflict has shaped deeply the way we conceive the mandatory mutualism, particularly in respect of human dignity and personal rights, is the war on terror. We are not focusing on terrorism in this work. Rather, we focus on breaches and understanding mutation it has provoked during the years, what can be seen in international jurisprudence of the part of international community who is intimately engaged in this type war which is carried out by belligerent groups, not States; unidentified, because they are all mixed in the middle of civilians; with no political agenda but inflict terror and nihilism; they do not recognize or follow international and civilized moral standards of combat, principally those related to principles of distinction and humanity; and their acts are artfully and artistically cruel, eroding any moral identity.

It is imperative, by this token, that some jurisprudence of recognition of this particular and exceptional situation must be forwarded. Karl Laurenz grasps that this method of law pragmatism is called “jurisprudence of interests”. Not on a demeaning sense of outset, but as an instrument of refurbishing concepts according to specific situations. It is the logic submission of facts to juridical concepts where the “interests” points to priority values and these values must be linked to some idea of justice³⁸⁰. Therefore, European Court of Human Rights has generally recognized the application of the European Convention in situations of international armed conflict, following the footsteps left by International Court of Justice in *The Construction of a Wall* and *Congo v Uganda* cases. However, we can sense a setback in recent jurisprudence of the court. In *Hassan v. The United Kingdom*, the court envisages the precedent rules set by ICJ pointing out the continued application of human rights law within armed, but makes a side note

³⁸⁰ KARL LARENZ, *METODOLOGIA DA CIÊNCIA DO DIREITO* 163-164 (3RD EDITION, LISBOA, PORTUGAL: FUNDAÇÃO CALOUSTE GULBENKIAN, 1997).

encompassing that it does not work in a formal or absolute way and the exception that war causes cannot be overlooked when determining what standards should be used to judge behavior in those exceptional circumstances. The formal or absolute predominance of human rights law consequently would be “too idealistic, bearing in mind the speciality and persistence of armed conflict”. Humanitarian law is related to today’s reality while human rights law is related to tomorrow’s promise, for that the court needs to ensure “the survival of a State”³⁸¹.

The twist point on all of this is that the UK requested the Court to not apply its obligations under Article 5 of the European Convention on Human Rights – right to liberty – while no formal derogation request was filled under Article 15 or Article 4, ICCPR – derogation in time of emergency. Yet, even not requesting the suspension clause, in *Hassan*, the Court has conveyed the constant practice of interpreting human rights law in the light of the rules set out in the 1969 Vienna Convention on the Law of Treaties that, according to its terms, when interpreting a treaty, such as the European Convention on Human Rights, it is necessary to take into account any relevant rules of international law applicable in international affairs.

In this respect, the Court has noted that it is not the practice of a State to derogate from their Article 5 obligations in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. Moreover, the human rights law has to be interpreted in harmony with the rules of international law as a whole, of which it forms part, applied equally to the rules of international humanitarian law, such as those set out in the four Geneva Conventions of 1949. The Court considered that, even in situations of international armed conflict, the human rights safeguards continue to apply, albeit interpreted against the

³⁸¹ *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §38 (2014).

background of the provisions of humanitarian law. But, by reason of the co-existence of the safeguards provided by humanitarian law and by human rights law in time of armed conflict, the grounds of permitted deprivation of liberty set out under human rights regime should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.

In this vein, the Court upheld that the exercise of the derogation clause in emergency times is not mandatory under international armed conflict, which falls into Geneva Conventions broad powers, amazingly overruling its previous case *A. and others v. the United Kingdom*³⁸². Therefore, Hassan's capture and detention had been consistent with the powers available to the UK under the Third and Fourth Geneva Conventions, not unlawful, since the court has upheld a previous analogous case happened a couple of years before, in *Al-Jedda*, where imprisonment or preventive detention without intention to bring criminal charges is deemed lawful within a reasonable period of time³⁸³.

The catch in *Al-Jedda* was the argument by UK Government that since the state was part of United Nations Security Council task force in the war on terror, by Resolution 1546 of June 8, 2004, the rules of engagement in war were already issued by UNSC, which makes innocuous any petition before European Court asking for derogation clause applicability. Nevertheless, the court has dismissed the argument noting that ICJ has already held in Advisory Opinion of *Legal Consequences for States of the Continued Presence of South Africa in Namibia* that "the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that,

³⁸² *A. and others v. The United Kingdom [GC]*, no. 3455/05 Eur. Ct. H. R. (2009)

³⁸³ *Al-Jedda v. The United Kingdom [GC]*, no. 27021/08 Eur. Ct. H.R., §100 (2011).

therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State”³⁸⁴. Also, in *Case Concerning Armed Activities on the Territory of the Congo*, ICJ has vividly established that occupying forces shall fall within Article 43 of the Hague Regulations of 1907, which demands respect and full observance of international human rights law to protect civilian populations of occupied territory³⁸⁵ – which was the case of the United Kingdom in *Al-Jedda*. Hence, in *Al-Jedda*, the protection international law on civilians was maintained³⁸⁶.

Additionally, it is important to shed into light that in the aftermath of 9/11 terrorist attacks, the United Kingdom Government had notified the Secretary General of the Council of Europe for a derogation clause pursuant Article 15 of the ECHR, in order to engage on the war against terror. On this regard, the Council of Europe Parliamentary Assembly enacted the Resolution 1271 (2002), which paragraphs 9 and 12, respectively, resolve that “in their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights”, so all Member States should “refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the rights and liberties guaranteed under its Article 5 (right to liberty and security)”. Dealing with that, the Court, in *A. and Others* had also considered the British exercise of derogation clause disproportionate and discriminatory under human rights commitments³⁸⁷, which matched with the general grasp provided in *Bouyid v. Belgium* and *Khlaifia and Other v.*

³⁸⁴ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. §114 (June 21).

³⁸⁵ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. §§178-180 (December 19).

³⁸⁶ *Al-Jedda v. The United Kingdom [GC]*, no. 27021/08 Eur. Ct. H.R., §107 (2011).

³⁸⁷ *A. and others v. The United Kingdom [GC]*, no. 3455/05 Eur. Ct. H. R., §§ 144, 172-190 (2009).

Italy, where has been emphasized that respect for human dignity forms part of the very essence of the Convention, alongside human freedom. Yet, the general purpose the Convention's provisions were to protect "a person's dignity and physical integrity" and to prevent "serious interferences with human dignity"³⁸⁸. In *Khlaifia*, the Court added that "even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organized crime, irrespective of the conduct of the person concerned", human dignity core prevails³⁸⁹.

By the same token, United Nations Security Council issues Resolution 1373, in 2001, that calls upon all States to comply with all obligations under international law, including human right law and humanitarian law, meaning recognition over the fact that upholding human rights and protecting the public from terrorist acts are not antithetical, but complementary, responsibilities of States³⁹⁰. Nevertheless, Resolution 1373 also *decides* that all States shall take "the necessary steps to prevent the commission of terrorist acts"³⁹¹.

Regarding the experience in *Al-Jedda*, the United Kingdom Government did not build its case upon derogation clause in *Hassan*: "in the present case, the United Kingdom did not purport to derogate under Article 15 from any of its obligations under Article 5"³⁹². Setting as a leading case, the court emphasizes that this "is the first case in which a respondent State has requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the

³⁸⁸ *Bouyid v. Belgium [GC]*, no. 23380/09 Eur. Ct. H.R., §§89-90 (2015).

³⁸⁹ *Khlaifia and Other v. Italy [GC]*, no. 16483/12 Eur. Ct. H.R., §158 (2016).

³⁹⁰ Robert K. Goldman, *Extraterritorial Application of the Human Rights to Life and Personal Liberty, includinh Habeas Corpus, during a Situation of Armed Conflict*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 104, 104-105 (2013).

³⁹¹ S.C. Res. 1373 (2001), U.N. Doc. S/RES/1373, 2(b) (September 28, 2001).

³⁹² *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §98 (2014).

light of powers of detention available to it under international humanitarian law”³⁹³. So, the argument has mutated from *Al-Jedda*, which has served no obstacle at all before the Court. Rather, it was observed the necessity to interpret and apply the HRL in a manner which is coherent with the framework under international law, by the scope of Article 31 of Vienna Convention of 1969.

Suffices from *Hassan* case the proceeding of the court to examine the mandatory mutualism in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, Article 31. So, the court holds that judicial interpretation shall keep harmony with other rules of international law of which it forms part. Emphasizing the mutualism, it grasps that the “four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification” and also were designed to protect captured “civilians who pose a security threat”. Thus, the interpretation pushed forward is that in armed conflict situations, the right to life (Article 2 of European Convention) follows the rule of international humanitarian law – not human rights law – which play “an indispensable and universally-accepted role in mitigating the savagery and inhumanity” and, for the same reason, the right to liberty (Article 5) falls within the same context³⁹⁴.

An interesting finding in *Hassan* is that the court has been acknowledging the mandatory mutualism between international humanitarian law and human rights law for a long time, even following the footsteps of prior ICJ *Nuclear Weapons* and *The Construction of a Wall* advisory opinions. *Hassan*’s rationale makes reference to *Varnava and Others v. Turkey* case, where

³⁹³ *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §99 (2014).

³⁹⁴ *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §102 (2014).

people who were under government's custody went missing during an armed conflict period and claims over rights to life and liberty were submitted before the court. There, the mutualism was acknowledged and set that the right to life follows the rule of international humanitarian law, which play "an indispensable and universally-accepted role in mitigating the savagery and inhumanity". However, the court found a violation to the right of life under European Convention, Article 2, the lack of obligation from the government "to account for the whereabouts and fate of the missing men". Regarding the right to liberty, Article 5, under European Convention a violation was found³⁹⁵. Thus, the mutual benefit from both branches were duly co-applied on that occasion.

On the other hand, in *Hassan* the court overrules *Varnava and Others* and other precedents. It extinguishes the mandatory mutualism to recognize a mandatory commensalism instead, where only international humanitarian law benefits from the union of two branches. Recalling the footstep left by *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, there are three possibilities that come out from the interplay between international humanitarian law and human rights law: "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law"³⁹⁶. The mutualism is represented by the third option, understanding which has prevailed until *Hassan* case.

³⁹⁵ *Varnava and Others v. Turkey [GC]*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 Eur. Ct. H.R., §§185-186, 208 (2009).

³⁹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. §106 (July 9).

Arguing that the court's interpretation propitiates a consistency to the framework under international law, it accepts the United Kingdom inobservance to the obligations of formalizing derogation under Article 15 of European Convention and Article 4 of ICCPR and holds that this proceeding is forfeited before international humanitarian law provisions. The court now understands that the obligation of formal derogation is applied in peacetime only. In situations of armed conflicts, consequently, human rights safeguards continue to apply, although it will be always interpreted "against the background of the provisions of international humanitarian law". So, from now on, in time of armed conflict, the grounds of permitted deprivation of liberty should be accommodated, as far as possible, with the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. International humanitarian law becomes the governing rule for possessing "broad powers", while human rights law adheres as subsidiary source. "This means that the detention must comply with the rules of international humanitarian law" and Article 5 comes to play only to protect individual from arbitrariness which is absent pursuant the periodical review of the imprisonment allowed by Articles 43 and 78 of the Fourth Geneva Convention³⁹⁷.

Mandatory commensalism takes over mutualism in European international law. Prior precedents who had enshrined the prevalence of human rights were overlooked. Once the court stressed that human rights embedded in European Convention and bodies of law constitute first and foremost a "system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal

³⁹⁷ *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §§103-106 (2014).

consistency and harmony between its various provisions”³⁹⁸. That was not the regent understanding held in *Hassan*, apparently.

In summary, “the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law”³⁹⁹. Its hindsight overcomes former understandings ruling that the civilian imprisonment in wartime shall fall within the scheme of deprivation of liberty upon the exercise of the derogation clause (Article 15, ECHR, and Article 4, ICCPR). Conversely, human rights law ought to be interpreted as permitting the exercise of such humanitarian law broad powers. The Court even diminishes the human rights content and value behind Article 5 when it entails that the right to liberty, at first glance, seems the most relevant provision, however “there does not need to be any correlation between security internment and suspicion of having committed an offence or risk of the commission of a criminal offence”. Therefore, the court considers that it would not be appropriate to hold that this form of detention on civilians detained as prisoners of war falls within the scope of Article 5 right to liberty⁴⁰⁰.

Underneath these arguments, the ECtHR has established a threshold of proceedings and application of the two bodies of law. In doing so, the Court launches a remarkable perspective about enjoining human rights unbinding obligations over armed conflicts, namely those concerned with civilians. The Vienna Convention directives recall, in a certain way, the old separatism once mitigated in international arena and open a whole new path of international

³⁹⁸ *Demir and Baykara v. Turkey [GC]*, no. 34503/97 Eur. Ct. H.R., §§65-66 (2008); and *Stec and Others v. The United Kingdom*, nos. 65731/01 and 65900/01 Eur. Ct. H.R., §§47-48 (2006).

³⁹⁹ *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §107 (2014).

⁴⁰⁰ *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §97 (2014).

lawyering and decision-making. Although the rationale embeds an easygoing detention approach against the civilians' right to liberty, its grounds might go further in order to reach other values conflicts and dilemmas within the grey zone between IHL and HRL.

According to primary scope of this work, targeting civilians is what puzzles us for the continuity of the thesis rationale. If we consider Article 2 of European Convention, which stresses the right to life, we hereinafter link it to the Fourth Geneva Convention and Additional Protocol I, particularly Common Article 3. As aforementioned, the recent interpretation of the Court is that in armed conflict situations, the right to life follows the rule of international humanitarian law – not human rights law – which play “an indispensable and universally-accepted role in mitigating the savagery and inhumanity”⁴⁰¹, overruling some other precedents⁴⁰².

It worths noting that, nationally, the idea of human rights, particularly the right to life, being balanced with action perpetrated under “absolute necessity”. In *McCann and Others v. The United Kingdom*, the Court addresses that human right to life ranks as one of the most fundamental provisions in the Convention, enshrines one of the basic values of the democratic societies and sets out the circumstances when the deprivation of life may be justified. Then, the court emphasis: “indeed one which, in peacetime, admits of no derogation under Article 15”. The Convention describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life and must be no more than "absolutely necessary" for the achievement of the defense of any person from unlawful violence, to effect a lawful

⁴⁰¹ *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §102 (2014).

⁴⁰² For example, *Varnava and Others v. Turkey [GC]*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 Eur. Ct. H.R., §§185-186, 208 (2009).

arrest, to prevent an escape for someone lawfully detained or in action lawfully taken for the purpose of quelling a riot or insurrection. The term "absolutely necessary", then, indicates that the principle of necessity must be more compelling than the usual necessity employed in normal application from a state action as "necessary in a democratic society"⁴⁰³.

In 2011, in *Al-Skeini and Others v. The United Kingdom*, the court took into account civilian deaths by British soldiers during Iraq invasion by Coalition of armed forces led by United States and approve by United Nations Security Council Resolution 1441, issued in November 8, 2002. Civilians died during belligerent occupation of Iraq, where international humanitarian law and human rights law are applicable under Articles 42 to 56 of the Hague Regulations, Articles 27 to 34 and 47 to 78 of the Fourth Geneva Convention and Additional Protocol I. At this point, where military necessity is at stake in the rules of engagement, the court acknowledges that the civilian deaths happened during a period when crime and violence were endemic and bring to the table the arguments of "absolute necessity" crafted for domestic crisis, in *McCann and Others*⁴⁰⁴.

Likewise, in *Al-Skeini and Others* it is stressed that Article 2, the right to life, ranks as one of the most fundamental provisions in the Convention, enshrines one of the basic values of the democratic societies and sets out the circumstances when the deprivation of life may be justified. Consequently, the court matches the prior understanding and adapt it to international law frame, encompassing that no derogation from it is permitted under Article 15, "except in respect of deaths resulting from lawful acts of war". On this regard, Article 2 covers both

⁴⁰³ *McCann and Others v. The United Kingdom [GC]*, no. 18984/91 Eur. Ct. H.R., §147-149 (1995).

⁴⁰⁴ *Al-Skeini and Others v. The United Kingdom [GC]*, no. 55721/07 Eur. Ct. H.R., §161 (2011)

intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life and any use of force must be no more than “absolutely necessary” for the achievement of one or more purposes set out, just like previously held in *McCann*⁴⁰⁵.

It is paramount to highlight that in *Al-Skeini and Others* the court still had the comprehension of mandatory mutualism, which means that it was recognized the full applicability of Article 2, right to life, in armed conflict situations. This understanding, as abovesaid, was overruled three year later, in *Hassan*. The excuse to Article 2 from human rights law was admitted as principle of necessity, from international humanitarian law, the supreme military necessity. This mutual relationship between human rights and humanitarian law held in *Al-Skeini and Others* no longer endure though. Although the court established the mandatory mutualism which would waive charges on unlawful deprivation of life because supreme military necessity in armed conflict, the case had no conclusion on the matter for lacking procedural measures. Uncertain whether civilian killings were an outcome of arbitrariness or supreme necessity, the court did not judge the fact-found, and affirmed the violation of the procedural duty to review and investigate the lawfulness of the use of lethal force by the state under Article 2 of the Convention⁴⁰⁶.

In contrast, the Inter-American Commission and Court have strictly kept the general conception of mandatory mutualism and equal cooperation and benefits between humanitarian law and human rights law regarding the American Declaration on the Rights and Duties of Man

⁴⁰⁵ *Al-Skeini and Others v. The United Kingdom [GC]*, no. 55721/07 Eur. Ct. H.R., §162 (2011)

⁴⁰⁶ *Al-Skeini and Others v. The United Kingdom [GC]*, no. 55721/07 Eur. Ct. H.R., §§163-177 (2011)

and the American Convention on Human Rights. It has been almost a dogma the understanding that modern human rights law, particularly the American Convention, is not performed by multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the benefit of states. The object and purpose of human rights law are the protection of the basic rights of human beings and states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations to mankind. These views about the distinct character of humanitarian law and the consequences to be drawn therefore apply with even greater force to the American Convention whose preamble vehemently reaffirm the consolidation of a “system of personal liberty and social justice based on respect for the essential rights of man”; and recognize these rights as essentials and “based upon attributes of the human personality, and that they therefore justify international protection”⁴⁰⁷.

Taking a step forward, Inter-American Court, regardless of its reach only over applicable human rights bodies of law, has also applied humanitarian law by interpreting the American Convention on Human Rights in the light of the Geneva Conventions because of their mandatory mutualism⁴⁰⁸. Likewise, Inter-American Commission has used the prerogative of expressly assigning itself the competence to apply humanitarian law: “the Commission’s competence to apply humanitarian law rules is supported by the text of the American Convention, by its own case law, as well as the jurisprudence of the Inter-American Court of Human Rights”⁴⁰⁹.

⁴⁰⁷ The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H. R. (ser. A) No. 2, §§29-31 (September 24, 1982).

⁴⁰⁸ *Bámaca-Velásquez v. Guatemala*, Merits, Inter-Am. Ct. H. R. (ser. C) No. 91, §§207-210 (November 25, 2000).

⁴⁰⁹ *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report N° 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. at 271, § 162 (1997).

It is held in *Abella v. Argentina* and *Coard et al v. United States*, and also in some posterior analysis, that human rights bodies of law and Geneva Conventions share a common nucleus of inderogable rights and a “common purpose of protecting human life and dignity”. There is an “integral linkage between the law of human rights and humanitarian law”. Moreover, human rights law applies both in peacetime, and during situations of armed conflict, while international humanitarian law generally does not apply in peacetime. Although one of the purposes of human rights law is to prevent warfare, none of its provisions was designed to regulate such situations and, at same time, humanitarian law purpose is to place restraints on the conduct of warfare in order to diminish the effects of hostilities⁴¹⁰. Hence, common Article 3 of the Geneva Conventions and Article 1 of the American Declaration of the Rights and Duties of Man share humanity core that makes indispensable to resort to humanitarian law in situation of armed conflicts, but with an interpretation to make possible the application of the American Declaration “with due consideration for the specific characteristics of this situation”. Even pursuant Article 27 of American Declaration and Article 4 of ICCPR, it is impossible “to suspend the validity of the Convention in its entirety”⁴¹¹.

In occasion of mandatory mutualism, the Commission believes that the so-called "most-favorable-to-the-individual-clause", Article 29(b) of American Convention shall give full legal effect to co-apply humanitarian law properly. Thus, there is no scenario where human rights become restricted under Commission’s landscape. Where there are differences between legal

⁴¹⁰ *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report N° 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. at 271, §§ 158-159 (1997); *Coard et al v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report N° 109/99, OEA/Ser.L/V/II.106, Doc. 6 rev, §39 (1999); and Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §108 (2002).

⁴¹¹ *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §§323-324 (2018).

standards governing the same or comparable rights in human rights law and humanitarian law, the Commission is duty bound to give legal effort to the provision with the higher standard applicable to the right or freedom in question. It is this interplay that authorizes the Commission to vigorously apply humanitarian law where and when relevant⁴¹². According to Article 27 of the American Convention and Article 4 of ICCPR, the Commission is also duty bound to analyze the state's obligations under human rights law in light of the standards of international humanitarian law that apply as *lex specialis* for the purpose of interpretation under Article 31 of Vienna Convention guidance, being “advisable to address both systems simultaneously striking a balance between the interpretation and application of the *lex specialis* and international human rights law so that humanitarian considerations and military needs are respected”. Thus, the establishment of humanitarian law as *lex specialis* by ICJ precedents, does not mean that human rights are inapplicable. Just the opposite, it means that applying human rights law under its mandate may and sometimes must turn to international humanitarian law “for the purpose of interpretation as the more specific normative framework that governs situations in armed conflict”⁴¹³.

When reviewing the legality of derogation measures taken by a state, the Commission should not resolve this question solely by reference to the text of Article 27 of the American Convention or Article 4 of ICCPR. Rather, it must also determine whether the rights affected by these measures are similarly guaranteed under applicable humanitarian law. If it finds that the rights in question are not subject to suspension under humanitarian law, the conclusion shall be

⁴¹² *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report N° 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. at 271, §§ 164-168 (1997).

⁴¹³ *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, Case IP-02, Inter-Am. Comm'n H.R., Report N° 112/10, OEA/Ser.L/V/II.140, doc. 10, §122 (2010); and *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §§325-329 (2018).

that the derogation measures are in violation of the state's obligations under both the human rights law and the humanitarian law treaties concerned. "It is also worth noting that the Inter-American Court of Human Rights has viewed with approval the Commission's practice of applying sources of international law, other than the American Convention"⁴¹⁴. Furthermore, the Commission can manage the rules of international humanitarian law as a concrete legal framework in order to give more specific application to the contents of human rights law when defining state's obligations. In addition, when dealing with this mandatory mutualism, the interpretation and application of international law must take into account the general framework of the legal system, preserving its unity, coherence and wholeness⁴¹⁵.

Regarding the right to life applied to civilians in armed conflicts, as retro approached, the Inter-American Commission makes no concession over its absolute and inderogable value. Quite different from the evolutive argumentation developed by European Court of Human Rights in *MacCann and Others*, *Al-Skeini and Others* and, finally, *Hassan*, to undermine and displace human rights protection on life, the Inter-American international legal order, besides of recognizing the mandatory mutualism of human rights law and humanitarian law, conveys that the arbitrary deprivation of life is completely forbidden even in situation of armed conflict. Nevertheless, the analysis of the case performed by the Commission or the court shall comply with principles of proportionality and necessity in the use of force, taking into attempts to limit

⁴¹⁴ *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report N° 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. at 271, §§ 170-171 (1997).

⁴¹⁵ *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, Case IP-02, Inter-Am. Comm'n H.R., Report N° 112/10, OEA/Ser.L/V/II.140, doc. 10, §124 (2010); and *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §§330-331 (2018).

the suffering of civilians and unnecessary loss of life⁴¹⁶. It is imperative that whether in times of peace, emergency situations or armed conflict, the right to life governs the use of lethal force by states and their agents by prohibiting the arbitrary deprivation of life and summary executions. The contours of the right to life may change in the context of an armed conflict, but the prohibition on arbitrary deprivation of life remains absolute, since this right cannot be suspended under any circumstances, including armed conflicts and legitimate states of emergency⁴¹⁷.

The mutualism is preserved in Inter-American legal system because all cases and reports merge international humanitarian law and human rights law into one guidance book. Prior cases brought to Inter-America Commission on Human Rights has appreciated the interplay between the two branches of international law in detentions and liberty restrictions, like the central right grappled in *Hassan*. In *Coard et al v. United States*, therefore, is launched the primary idea of mutual benefit of mutualism that human rights law has not been designed to apply in absolute terms. Conversely, some permissible and non-permissible limitations must be monitored in accordance to humanitarian law⁴¹⁸. Considering the right to life, the Commission, on its Report on Terrorism and Human Rights, takes note that, even the right being an absolute right, the use of lethal force when strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order is permissible where

⁴¹⁶ *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §§338-339 (2018).

⁴¹⁷ Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §§86, 106 (2002).

⁴¹⁸ *Coard et al v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report N° 109/99, OEA/Ser.L/V/II.106, Doc. 6 rev, §§38-50 (1999).

strictly necessary and proportionate⁴¹⁹. The Court has explained that, in such circumstances, states have the right to use force, “even if this implies depriving people of their lives”⁴²⁰.

All in all, it would be too simple to say that while humanitarian has an underlying realistic philosophy based on military necessity, human rights law is idealistic and inappropriate for situations of hardship. The application of human rights to situations of armed conflict is compatible with the drafting and wording of human rights treaties and of the two Additional Protocols to the Geneva Conventions⁴²¹. Besides, this mandatory mutualism combined with international jurisprudence on human rights interpretation and application are an outcome of international law evolution in general terms which tame states’ obligations toward human rights law and international humanitarian law⁴²².

5.5. The Burden of Morality

It seems evident today that the essential point in international law is the full protection of human rights, either individual or collective. After the Second World War the international human rights became extremely significant, turning itself into the modern utopia. Morality became the aspiration of mankind worldwide, leaving a heavy burden based in two visions. First,

⁴¹⁹ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §§87, 112 (2002).

⁴²⁰ *Neira-Alegría et al. v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 20, §74 (January 19, 1995).

⁴²¹ Cordula Droegge, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in ISRAELI LAW REVIEW. VOL. 40, NO.2, 310, 324 (2007).

⁴²² COMISSION INTER AMERICANA DE DERECHOS HUMANOS, INFORME SOBRE TERRORISMO Y DERECHOS HUMANOS, PAR. 46 (2002).

it carries pure moral content within with great antipolitics potential; and second, in order to survive, human rights had to build a political agenda with programmatic scope to inject morality into foreign policy, which is initially contradictory with the antipolitics position taken by the utopia. The profound moral quandaries faced by human rights today point us to the very meaning of the ideal and movement appearance as utopia, which is its moral survival in a moment of history where all other political utopias died. Therefore, human rights were compelled to define the good life and offer a plan to keep them pulsing in international community in accordance with their suprapolitical birth⁴²³.

Besides the understanding grasped in *Hassan* and so many other cases that gives support to emergency times and the following derogation of human rights law, it is certain that international law has changed to embrace a broader perception of armed conflicts and emergency situation. Targeting on morality compliance, some scholar and international precedents ascertain that international humanitarian law, as *lex specialis*, prevails in conduct of hostilities under international law spectrum, because humanitarian is the more refined body of law. On the other hand, domestic law enforcement has human rights law as its more refined version. “Thus, the closer a situation is to the battlefield, the more humanitarian law will prevail over human rights law, whereas for law enforcement, human rights law prevails”⁴²⁴. This notion is exactly what we attempt to overcome on this work.

Firstly, we need to clarify why such notion is current in doctrine and some jurisprudence. Both contemporary domestic and international law share the values of human dignity to endorse

⁴²³ SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 213-214 (2010).

⁴²⁴ Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in *ISRAELI LAW REVIEW*. VOL. 40, No.2, 310, 344 (2007).

and reinforce human rights. However, as we have seen chapters earlier, the smaller social structure we have, the better is to uphold a unison grasp of human dignity, because the values congregated in such social body are less plural and more homogenic in society. Conversely, the larger social body we have, the wider has to be the grasp of human dignity through a process identified as generalization of values. As more plural society becomes, more generalized and broader shall be its values. In this vein, human rights are easier to be enforced domestically than internationally, while humanitarian law is today a branch of law crafted in principle of humanity duly designed to operate internationally, containing broader notions of law in accordance to its wider range of cover. Humanitarian law, albeit principle of humanity, possesses other rules that do not converge to human dignity, what generally do not happen within human rights law, which has human dignity as its axial value.

Therefore, it is commonly assumed that in some cases, international humanitarian law and human rights law are incompatible because of their inner divergence toward aims, the former has a social value predominance while the latter centralize individual value kernel. Something we have learned throughout mankind history is that violence has a tendency to perpetuate itself, like an autonomous process, and historically its power condemns all the participants to impotence. Hence, every serious effort to change quasi-institutionalized violent conditions cannot limit itself to such factors as insight and means-ends rationality, or personal morality and values like the one supported by human dignity and its Kantian roots⁴²⁵.

Paying the due heed to the conditions and the phases of violence in armed conflicts, we want to uphold the opposite idea related to targeting civilians. There is some argumentative

⁴²⁵ HANS JOAS, WAR AND MODERNITY 193-194 (2003).

space where the mutualism may stand with some adaptation on morality background to sustain the mutual reinforcement; “to address both systems simultaneously striking a balance between the interpretation and application of the *lex specialis* and international human rights law so that humanitarian considerations and military needs are respected”⁴²⁶. Juridical perspectives eventually face moral dilemmas. That happens because international law does not provide a precise account on moral behavior enforced by law, as natural sciences usually do. What shall be demonstrated is a balance in moral argument to push the action forward, in order to justify reasonably the perpetration of such conducts. Thus, the incongruence of morality and law shall be lifted, since the morality behind of any act may differ among individuals or communities⁴²⁷.

When we deal with social values into decision-making process, we shed into light social goals which are based on reason towards individual and collective welfare. Morality and welfare merge to a common ground. The conventional philosophy of social science has asserted that the task of the social scientist is the production of law-like generalizations, this is the contemporary duty of social scientists who have to foresee the outcomes of alternative policies that derive from a knowledge of law-like generalizations. MacIntyre inserts a very interesting comparison in the debate, he considers that chemistry law equations relating pressure, temperature and volume of gases have a very well-defined set of counterfactual conditionals, as natural science, in the way that law-like generalizations do not entail. Natural science has universal quantifiers which do not serve in law-like generalizations of social science. Although we have universal values, they mutate from case to case, regarding probabilities and social phenomena. Pure contingency is a

⁴²⁶ *Jose Isabel Salas Galindo and Others v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138, §326 (2018).

⁴²⁷ HEIDI M. HURD, *O COMBATE MORAL 21* (SÃO PAULO: MARTINS FONTES, 2003).

social modifier; even trivial contingencies can powerfully influence the outcome of great events⁴²⁸.

This is interesting because one of the most amazing things about gases that we have learned from our high school days is that, in spite of wide differences in chemical properties, all the gases obey the gas laws which deal with how gases behave with respect to temperature and pressure. The famous NTP, or STP, for Normal Temperature and Pressure, or Standard Temperature and Pressure, which creates normal conditions to gas laws to form patterns. Since temperature and air pressure varies from place to place a standard reference is necessary for comparing the measurement and documentation of chemical and physical processes. Thus, the International Union of Pure and Applied Chemistry (IUPAC) has established the pattern as “air at 60°F (520°R, 15.6°C) and 14.696 psia (1 atm, 1.01325 bara)”⁴²⁹, which means that always when conditions of temperature and pressure is at 60°F and 1 atm, the gases will behave repeatedly the same way. If conditions of temperature and pressure change, gases behave differently pursuant new conditions appropriateness⁴³⁰. Again, NTP is the regular bases of gases reaction, but, eventually, exceptional conditions arise which provoke natural adjustments of reaction while perduring such irregular conditions. Surpassed that, normal reactions take command.

MacIntyre assessment in chemistry rationale is interesting because natural science works with logic and patterns, looking for different results where stabilization and normality can be

⁴²⁸ ALASDAIR MACINTYRE, AFTER VIRTUE 88-100 (3RD EDITION, 2007).

⁴²⁹ THE ENGINEERING TOOLBOX, https://www.engineeringtoolbox.com/stp-standard-ntp-normal-air-d_772.html (last visited September 21, 2019)

⁴³⁰ THE PENNSYLVANIA STATE UNIVERSITY, <http://chemistry.bd.psu.edu/jircitano/gases.html> (last visited September 21, 2019)

found, no matter original conditions shift. In social science, just as international law, the same logic applied in natural science is not enough, since we have social elements that overload the equations in such way that we have multiple answers to the same scenario and standard conditions. As grappled by Michael Rosen, to treat human beings as an end is an open question which remains unanswered by the formula of humanity, particularly because Kant does not prohibit treating human as a mean totally but as *means only*, which arises a variety of semantic differences where our practices hold a grey zone of uncertainties about what is and what is not morally permissible on human rights⁴³¹. Besides that, some fruitful knowledge may be assessed in this comparison, since we can infer that applying in human rights law in peacetime, when you have political stability and social normality. Under certain standard conditions, the answer to ensure and protect human rights shall be repeatedly the same, to fully respect and endorse human dignity. Furthermore, in occasions we breach political instability and social abnormality, the answer may not be the same if the main goal becomes the reestablishment of *status quo*, stability and normality.

This very notion is achieved by scholars and international jurisprudence, and that is why their response is the overall predominance of international humanitarian law, as *lex specialis*, over human rights law. They see that human rights law is NTP, is the answer for our social pattern of 60°F and 1 atm, while humanitarian law is the answer for the unbalanced conditions, the social contingencies, until restored normality. Obviously it was acquired through course of time that international humanitarian law and human rights law do not exclude each other, rather they share a common nucleus – principle of humanity – which cannot be set apart, reason why

⁴³¹ MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 83-86 (2012).

the mutualism theory was developed in ICJ precedents and reproduced in regional human rights courts.

Even with mandatory mutualism recognized, in certain cases such as targeting civilians in wartime, the understanding of the court is to displace human rights law to open the avenue to international humanitarian law, whose rules are more appropriated to certain unbalanced conditions since it carries the existential paradox of inserting moral and legal restriction within a scenario where a lot of aggressions and violence is assumedly committed. When human rights law harbors in humanitarian law domains, there is who believes that this junction leads to unavoidable respect on human dignity as minimum and essential core to rule humanity, although others who lean on longstanding lessons of Emer de Vattel defend that morality is sacrificed in face of the priority goal of keeping stable State's political system, so justice is henceforth found in necessity⁴³². Human dignity therefore not always serves a great deal to international law and international community and, as it is seen as a unremovable core of human rights law and morality, the answer to fulfill certain conditions and justify actions aimed to public order reestablishment or maintenance is usually the commensalism; the human rights withdrawal for the solely benefit of international humanitarian law. Afterall, men do whatever it takes to save themselves and their community, so morality is generally detached from law during wartimes⁴³³.

Notwithstanding courts' decisions, for the sake of Habermas' communicative action theory and Joas' creativity action theory of law, we present a different formula to this equation, a formula where human rights law does not need to be put aloof, standing still the mandatory

⁴³² RUTI G. TEITEL, HUMANITY'S LAW 47-74 (2011).

⁴³³ MICHAEL WALZER, JUST AND UNJUST WARS 03-21 (4TH EDITION, 2006).

mutualism to its full application towards mutual benefits for both branches of law. Nevertheless, as a rule, it regards some military acts towards civilians as rational actions that are retained inbounds of legality and certainly are also morally acceptable. The unbalanced conditions of instability and abnormality described in Article 4 of ICCPR, Article 15 of ECHR and Article 27 of ACHR changes human rights law NTP response on human dignity morality to resort on utilitarianism as metamorality for the sake of normality and stability recovery. As demanded by United Nations, these new conditions of abnormality must be of exceptional and temporary nature and their unbalanced features are well defined by United Nations as “public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency” pursuant the main goal of regain normality, noting as well that “not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation”⁴³⁴.

We talked earlier that international legal framework embraces a plurality of values which goes through a process of generalization of values. So, all beliefs, all opinions and thoughts can harbor peacefully in international community. Consequently, in order to apply a metamorality concept over human dignity, a shared value must take place as common currency to all. Plurality of thoughts and opinions and values acknowledge justice as a common currency very well represented by achieving the greatest good for the greatest number. This utilitarian conception of justice as social value is indisputably a common currency in our plural international society which fits to solve moral quandaries and controversies, keeping concurrently all members of society united under a common goal. Therefore, metamorality functions as a second moral

⁴³⁴ C.C.P.R. General Comment No. 29, *State of Emergency (Article 4 of International Covenant on Civil and Political Rights)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, §§2-3 (August 31, 2001).

compass, coming into action when the first moral compass – human dignity – fails to deliver controversies solutions. The second moral compass, since its pragmatic nature, is more suitable to deliver satisfactory answers⁴³⁵.

As aforementioned, today it is global terrorism who plays the role of *hostis humani generis*. We are not talking about the terrorism largely accepted by United Nations resolutions, those alien occupation, colonial domination or racist regimes⁴³⁶. Rather, *hostis humani generis* is the nihilist terrorism which purpose is to destroy the morale of a nation or a group of people adopting random method of murdering innocent people and undercutting any sign of solidarity. The revolutionary terrorism, like IRA, had a minimum of honor in their actions. As Walzer narrates, IRA bombing maneuvers avoided unnecessary suffering from children, for example. “Even in destruction there is a right way and a wrong way, and there are limits”. Children, policeman, pedestrians, these people are like civilians in wartime and they are innocent politically as civilians are innocent militarily. It is precisely these people that contemporary terrorists aim to kill. There is a moral difference between aiming at particular people because of things they have done or are doing and aiming at whole groups of people, indiscriminately, because of who they are⁴³⁷.

There are moments of extremity and crisis when state’s right and human rights have to be violated for the greatest good of all. For these extreme moments, the war conventions solely do not provide an answer; these extremities lie beyond the reach of conventional provision. The

⁴³⁵ JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 290-292(2013).

⁴³⁶ G.A. Res. 1514 (XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960); and G.A. Res. 2908 (XXVII), *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/RES/2908 (XXVII) (Nov. 02, 1972).

⁴³⁷ MICHAEL WALZER, *JUST AND UNJUST WAR* 199-200 (2006).

greatest the justice of the cause, the more rules I can violate for the sake of the cause – though some rules are always inviolable (like torture⁴³⁸). The same argument can be put in terms of outcomes, so the greater the injustice likely to result from my defeat, the more rules I can violate in order to avoid defeat⁴³⁹. For that, we have to look upon the principle of necessity. One criterion of lawful necessity is to submit the enemy with least possible expenditure of time, life and money. At this point of view, the military necessity determines whether the civilians involved are attacked or not, according to the theory of double effect. At the actual humanitarian law, we need to match the military necessity with the protection of life (respecting the war principle that noncombatants can't be attacked at any time) and moral maneuvers in a way to consider the war justly fought (there is a moral distinction between people who can and people who cannot be killed in a war), and this is the big modern challenge, the constant tension between winning and fighting well.

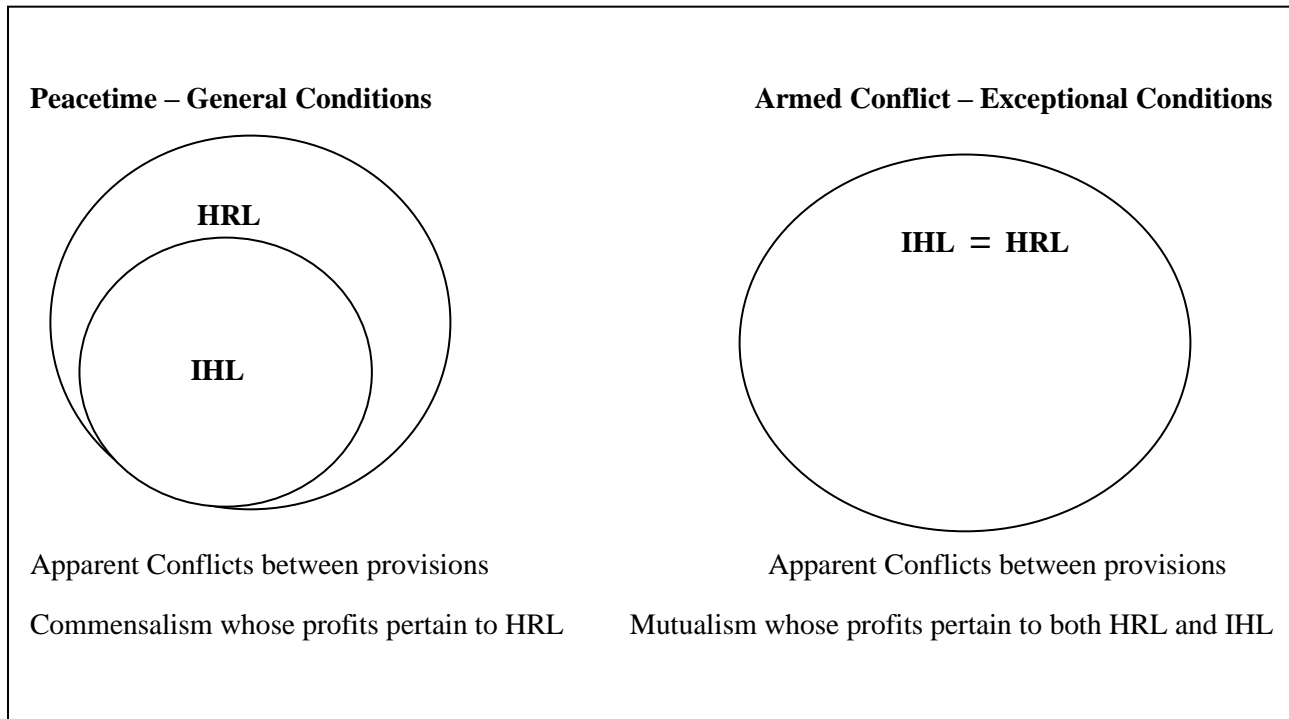
On this regard, the restoration of normality and NTP answer would be the inverse comprehension, which is peacetime, political stability and social normality where public emergency and threats to the life of the nation are absent and, under such conditions, the pattern reaction of international law shall be the same that normality has always afforded. Then, normality supports the duty to respect human dignity which, by international human rights law, is conceived as respect-as-observance. According to what we have grasped some chapter ago, the legal duty of respect-as-observance human dignity presupposes the existence of human rights, and the respect comes formally and binding by the law in such manner that we respect a person

⁴³⁸ *Prosecutor v. Anto Furundzija [Trial Chamber]*, Case No. IT-95-17/1-T, 1998 I.C.T.Y. §153 (December 10); *Demir and Baykara v. Turkey [GC]*, no. 34503/97 Eur. Ct. H.R., §73 (2008); and *Neira-Alegría et al. v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 20, §§74-75 (January 19, 1995).

⁴³⁹ MICHAEL WALZER, *JUST AND UNJUST WAR* 221-229 (2006).

just as we respect the speed limit by driving below a certain speed. That is exactly the legal force generated by the post-war human rights bodies of law and Common Article 3 of the Geneva Conventions⁴⁴⁰. Thus, the moral reasoning to judgement dislocates from duties, as fixed in Kantian deontology of categorical morality, to ends, consequences of actions, teleologically secured in consequentialist morality.

So, graphically, it would be something like the representation below, meaning that in peacetime, where we face NTP conditions of normality and stability, the universe of international humanitarian law in contemporary international law is completely submerge and dependent on human rights law, while in armed conflict situations, where we face abnormality and instability provoked by public emergency and state of exception, international humanitarian law and human rights law universes are concentric.



⁴⁴⁰ MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 57-60 (2012).

As we can see, any apparent conflict between provision from international humanitarian law and human rights law during peacetime, the human dignity morality must prevail, since it is the value and right highly appreciated in democratic societies and international community alike. It is the axial value; the supervalue of whole legal system. Therefore, commensalism on human rights behalf signifies the civilized commitment to respect, endorse and guarantee individual rights. Conversely, in wartime, both branches of law equalize, and human dignity morality no longer surpasses the apparent conflicts and moral quandaries, which requires a metamorality as values common to both branches and capable to provide both the benefits of mutual application. Peter Singer's expanding circle of morality encompasses utilitarianism as common currency of all nation of a cosmopolitan environment such as international community⁴⁴¹. Following the aristotelic teleological reasoning, only by living in a polis and partaking in politics do we fully realize our nature as human beings that are by nature meant to live in a political community which exists by nature and it is prior to the individual. Human beings are not self-sufficient without a political community⁴⁴². What is being defended here is international community which international legal system is designed to protect, just as much as the lives and liberties of the members of this community. Thus, like a Latin catchphrase cited by Walzer, *fiat justitia ruat coelom*, do justice even if the heavens fall, and he adds, do justice unless the heavens are really about to fall, recalling the extreme necessity upon an intense crisis, a supreme emergency⁴⁴³.

⁴⁴¹ PETER SINGER, THE EXPANDING CIRCLE 118-123 (2011); AND PETER SINGER ET RENATA SINGER, THE MORAL OF THE STORY: AN ANTHOLOGY OF ETHICS THROUGH LITERATURE 401 (2005).

⁴⁴² PETER SINGER, ÉTICA PRÁTICA 21 (3RD EDITION. SÃO PAULO: MARTINS FONTES, 2002); ALASDAIR MACINTYRE, AFTER VIRTUE 148 (3RD EDITION, 2007); AND MICHAEL SANDEL, JUSTIÇA: O QUE É FAZER A COISA CERTA 54-55 (Rio de Janeiro: Civilização Brasileira, 2012).

⁴⁴³ MICHAEL WALZER, JUST AND UNJUST WAR 230-231 (2006).

The identification of supreme emergency, by the way, can be made international courts or international governmental organization, such as United Nations. As we have seen, international legal system allows the usage of legal general clauses which might be filled by interpretation and application of international law (Article 31 Vienna Convention). Moreover, this law-making process through decision-making rationale has to take into account the unity, coherence and wholeness of the entire legal system, forwarded by a systematic and teleological interpretation. The mandatory mutualism between international humanitarian law and human rights law, by this token, complies with international law standards when applying utilitarian metamorality to combat imminent danger of high impact where targeting civilians might appear necessary and proportional as a side effect to overcome the supreme emergency.

We can boldly certify that Rawls reflective equilibrium defends that commitment of priority of rights shall prevail over the good. It is imperatively true in peacetime, where we can theorize an unveiled society building its values to uphold political stability, equality and social moral improvement⁴⁴⁴. All in all then, contemporary international law, principally the law of armed conflicts that ensues the mandatory mutualism between human rights law and humanitarian law, carries the burden of morality. International solutions in armed conflicts cases no longer admits the absence of moral considerations. Since last century, the law itself has been shaped in three dimensions indissociable to each other: fact, norm and value⁴⁴⁵. There is no modern body of law of humanity that is void in moral values, so the burden of morality and moral justification is a constant reality. Therefore, the rationale we are developing of using utilitarianism as metamorality to overcome moral quandaries on human rights law reach on

⁴⁴⁴ JOHN RAWLS, *UMA TEORIA DA JUSTIÇA* 70-88 (3RD EDITION. SÃO PAULO: MARTINS FONTES, 2008).

⁴⁴⁵ MIGUEL REALE, *TEORIA TRIDIMENSIONAL DO DIREITO* 124-126 (5TH EDITION, SÃO PAULO: SARAIVA, 1994).

targeting civilians in armed conflict situations complies with the contemporary burden of morality and have too some social rules of applicability, value of community and social harmony ends⁴⁴⁶.

Utilitarianism is a theory of both personal morality and social justice⁴⁴⁷. Applying utilitarianism as metamorality does not mean human dignity morality is forfeited. Utilitarianism comports personal morality within its walls, however social justice shall prevail on exceptional situations of armed conflict, particularly those moral dilemmas on targeting civilians. As abnormality and instability remove normal conditions of law interpretation and application, social justice trumps personal morality, such as it would in overruling *Parrilo v. Italy* hold on human dignity morality as an impediment of using human embryos for the sake of genetic developments on cures and saving human lives⁴⁴⁸. It is just a pragmatic morality where principles are put forward tentatively in the expectation that they will be shaped and modified by our responses to practical problems which adjustments, by the way, also comports Rawls reflective equilibrium rationale, since utilitarianism as metamorality underpins our judgement of community seeking for a greater good cooperatively⁴⁴⁹.

As stated by Joshua Green, utilitarianism is a great idea with a bad name in politics and moral philosophy, albeit is always a great answer to promote community's social values of liberty and security, since it delivers the best outcome to the greatest number of society

⁴⁴⁶ Xiaorong Li, "Asian Values" and the Universality of Human Rights, in THE PHILOSOPHY OF HUMAN RIGHTS 397, 403-405 (2001).

⁴⁴⁷ RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 51-52 (1996).

⁴⁴⁸ *Parrilo v. Italy [GC]*, no. 46470/11 Eur. Ct. H.R. (2015).

⁴⁴⁹ JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 06 (2nd ed., 2012); AND JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 328 (2013).

members. So, when we have a clash of values, or what we have called since the beginning of this work, an apparent conflict of law provisions, utilitarianism fulfil the duty of pointing a way out based in rationality and morality, which human values and interests are preserved. As we have an international community based on generalized and universal values, utilitarian metamorality serves too as *common currency* among nations, since everyone can easily attain the comprehension of promoting a greater good for the survival and continuity of society, weighing in the other hand some losses unintended as collateral damage before a significant victory or advantage⁴⁵⁰. Working as common currency, utilitarian metamorality must surpass two moral truths we have been working on, the morality in God and the morality in Reason. As we have seen extensively in Chapter 3, human rights conceptions rely immensely on both types, one through Christian values and the other through Kant's breakthrough.

Barack Obama once lectured that the biblical episode where Abraham takes his only son to the top of a mountain to sacrifice him in the name of the God to prove his faith is a good story to show the audience that the understanding of treating a person as a meaning to certain end is divinely wrong, since God had to personally interfere as a teachable moment for us to grasp the importance of human dignity. Nevertheless, if anyone of us saw Abraham nowadays taking his son out of the church to sacrifice him in the name of the God in the middle of the street, all of us would call the police or personally intervene, even whether Abraham had authentically listened the same orientations to sacrifice the kid as Bible says. It also serves us a good deal, since it is safer for us to act accordingly to what we see and hear, i. e., accordingly to our perceptions of the

⁴⁵⁰ JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 106-107, 175 (2013).

current facts, as a common inherited right of all of us or even as basic rational reasons⁴⁵¹. The point is that morality in God has its reasons and rationality, all valid, but it does not serve as common currency for international community. Thus, if we are against abortion for reasons based in God and we believe we are right, we have to defend the idea based in different grounds toward others who do not believe in the same God we do or in no God at all. Morality out of Judeo-Christianity precepts are not able to work as common currency in a plural society.

Morality on reason, in Western culture mostly, rests on Immanuel Kant's shoulders. Recalling his moral groundwork and practical pure reason. Kant departs from an immanent sense of morality rooted in our humanity, which is a feature universal and self-evident. All of us share these traits regardless of our personal inclinations. From humanity, which inhabits in all human beings, emerges the element of morality which leads to two characteristics that only human reason provides, dignity and autonomy. Thus, the first human value is the dignity of the human person. Only on a second moment that other values definitions are made, and this process is developed by human autonomy. Under this point of view, the human being has dignity because the moral law lives within; it is embodied on him – reason why he praises for a universal and self-evident morality. Also, reason enjoin us to obey two imperatives, the universal law and humanity as an end. The former proposes we “act only on that maxim whereby you can at the same time will that it should become a universal law”. The latter insists all human “has in itself an absolute value... an end in itself...I say that man, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will”⁴⁵². As we have

⁴⁵¹ Barack Obama, *Obama's 2006 Speech on Faith and Politics* (June 28, 2006), <https://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html> (last visited in Oct. 2, 2019)

⁴⁵² IMMANUEL KANT, FUNDAMENTAÇÃO DA METAFÍSICA DOS COSTUMES 62-70 (SÃO PAULO: MARTIN CLARET, 2006).

discussed in Chapter 3, a lot of practical and real-life problems come into action towards Kant's morality of human dignity that transcends the human person becoming a universal imperative. It is more theoretical than pragmatic, while utilitarianism is just the opposite. Besides not being unanimously shared as the best conception to justice, as a true universal value, morality on reason is also unfit for universal common currency.

To moral science, however, justice is goodness and the fulfilment of good deeds by men. Justice as value requires an endless reinterpretation so its meaning might realize new ideals and their unfulfilled potential pursuant new social achievements⁴⁵³. Neither human dignity nor utilitarianism are moral dogmas, there is no such thing as moral philosophy. Yet, when we talk about shared values obtained by a generalization process, utilitarian morality serves quite well as common currency. The pursuit of a greater good fits on restraining of freedom, life and property. Utility, in this vein, is the agglutination of good life experiences which is a notion accessible to all mankind regarding utilitarianism as common currency and metamorality. For that, utilitarianism serves as metamorality to achieve the greatest good as an end so we, as international community, always compromise to evolve and to be morally better. No need on being morally perfect⁴⁵⁴.

Inasmuch, human dignity morality is prevailing and fully-fledged endorsed as first moral compass to lead human rights law and international law in peacetime, where social *NTP* is current as normal and politically stable. Once configured the state of exception, utilitarianism works as metamorality inward human rights law and, even though, human dignity plays a

⁴⁵³ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* 135 (2013).

⁴⁵⁴ JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 280-284 (2013).

secondary role when contrasting actions toward civilians with necessity, proportionality and the mandatory configuration of targeting as side effect, which makes those theoretical monstrous examples intangible in these lines of pragmatic approach. Complementarily, Michael Walzer says it is wrong to believe that the fight to enforce and endorse universal values and principles shall be fought always the same way. It is wrong because universal values have multiples concrete applications⁴⁵⁵.

5.6. Doctrine of Double Effect and Utilitarianism

The factual scenario of targeting civilians mentioned above, to be morally acceptable in this work, has to contain its epistemological limits within doctrine of double effect. It is morally permissible to perform an act having both a good effect and an evil effect, as long as the intended good effect outweighs the evil effect, which is simply foreseen rather than intended. In essence, double effect is a way of reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity. Even before modern formulation of proportionality in Additional Protocol I, the laws of war incorporated these notions⁴⁵⁶, and its applicability looms to actions against nonstate actors as well⁴⁵⁷.

It is paramount that the evil consequence is not intended as an end in itself, however it is permissible to pursue a greater good as a final end by neutral or good means even if a lesser evil

⁴⁵⁵ MICHAEL WALZER, *JUST AND UNJUST WARS* 117 (4TH EDITION, 2006).

⁴⁵⁶ LAURIE R. BLANK AND GREGORY P. NOONE, *INTERNATIONAL LAW AND ARMED CONFLICTS: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR* 52 (2013)

⁴⁵⁷ RUTI G. TEITEL, *HUMANITY'S LAW* 122 (2011).

is certain, anticipated side effect when there is no other way to achieve the greatest good. So, it is important to highlight a subtle detail in this formula, which is intending and aiming. The doctrine of double effect morally acceptable is that one where the intending is good, and the aiming contains certain evil consequence. The one that covers an evil intending and aiming is not the focus of this work, since this one is incompatible with all moral advancement conquered in international law and would advocate the annulation of human dignity morality, the heart of human rights law. As galvanized above, utilitarianism works as metamorality and human dignity morality still there, in backstage though. Although the subjective content in intending, practice and pragmatism advises its identification by evidences collected case by case. The power of the State to act and target civilians is not unlimited, nor may the State resort to any means to attain its ends⁴⁵⁸. Then, it is important to analyze the intentional character of human action, the specific corporeal dimensions and the original social nature of the human capacity for action⁴⁵⁹.

Doctrine of double effect is relevant because it morally distinguishes from terror bombing civilian in armed conflicts and bombing military targets predicting with certainty some civilian casualties as collateral damage, for example. The former is unacceptable, since its intention is evil, while the latter might be acceptable. So, this doctrine is deeply related to morality in wartime. Two things must be taken into consideration, the action is itself a means to the greatest good which has an evil effect and the greatest good must outbalance the evil effect. Principle of proportionality also adds one more aspect, that this evil foreseen ought to be the lesser evil possible. Thus, “it may be permissible to produce a lesser evil as a side effect only if we are

⁴⁵⁸ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §§89, 107 (2002); and *Neira-Alegría et al. v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 20, §75 (January 19, 1995).

⁴⁵⁹ HANS JOAS, WAR AND MODERNITY 191 (2003).

pursuing a greatest good as a final end”⁴⁶⁰. For instance, if we bomb a munition factory, civilians are going to die as a side effect, but it does not signify we aim at their deaths. Then, to be permissible, the greatest good aimed must outbalance this evil effect albeit we can infer that munition is necessary to kill people in war and the reduced ability to reach munition equals a greater number of people being alive, even though, the civilian deaths also should be the lesser evil shown. Furthermore, resorting to the lesser evil is not an immorality⁴⁶¹.

Likewise, Jonathan Glover stresses that armed conflicts allow some actions which have the foreseen but unintended consequence as a side effect. To tolerate innocent people being targeted, the good must be sufficient to outweigh the harm. So long as the numbers are not disproportionately large, some foreseen but unintended civilian targeted can be morally acceptable. Doctrine of double effect then causes acts which have both good and bad effects. The morality of the acts is tied to whether the bad effect is merely foreseen or actually intended. A merely foreseen bad effect may be permissible, so long as the badness is not out of proportion to the good being pursued. Afterall, intention is important in moral thinking, even teleological consequentialist moral reasoning. To many of us, there is an important moral difference between unintentionally killing civilians in a raid on the ball-bearing factory and deliberately bombing a housing state⁴⁶².

Justice in this scenario comes from fighting justly, which is twofold by the utilitarian outlook we can retrieve from international humanitarian law and human rights law. Basically, in

⁴⁶⁰ FRANCES MYRNA KAMM, *THE MORAL TARGET: AIMING AT RIGHT CONDUCT IN WAR AND OTHER CONFLICTS* 28-33 (2012).

⁴⁶¹ VLADIMIR JANKÉLÉVITCH, *O PARADOXO DA MORAL* 30 (SÃO PAULO: MARTINS FONTES, 2008).

⁴⁶² JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY* 84 (2nd ed., 2012)

the conduct of armed conflicts is not permitted to do any mischief which does not tend materially to the end of the hostility or a significant gain is strategy towards its end, as maximization of utility. What is prohibited is the excessive harm and evil intentions. For that, we shall determine the utility out of military necessity and analyze proportionality upon the mischief done on targeting civilians, weighing it not only under the immediate harm to individuals but also any injury to the permanent interests of mankind against the contribution that mischief makes to the end of hostilities or great gain on this direction. The limits of utility and proportionality are very important. Utilitarianism applied to armed conflicts invites soldiers to calculate costs and benefits only up to a point and at that point it establishes a series of precise rules to moral barricades that can be captured only at great moral cost. The utilitarian arguments here are that victory or great advantage will end the conflict or reduce the probability of future combats or even eschew immediate and horrifying consequences. It all sets the interests of individuals and of mankind at a lesser value than the victory or advantage that is being sought, which follows utilitarian morality of the greatest good for the greatest number⁴⁶³.

Afterall, the rationality of armed conflicts, and the nature of its necessity, is to compel the submission of the enemy with the least possible expenditure of time, life and money. Military necessity can determine whether the civilians involved are attacked or not. Generally, they must not be attacked if their activities can be stopped or their products seized or destroyed, in some other way and without significant risk. They can never be the objects or the targets of military activity. Nevertheless, because of the civilians proximity to a conflict zone, doctrine of double effect requires not the battle to be stopped, rather that some degree of care be taken not to harm

⁴⁶³ HENRY SIDGWICK, THE METHODS OF ETHICS 75-79 (2012)

civilians, which commonly implies that we recognize their rights as best as we can within the context of armed conflicts. This doctrine is closely related to our ordinary ways of thinking about moral life; it is a way of reconciling the absolute prohibition against attacking non-combatants with the legitimate conduct of military activity⁴⁶⁴ and it is far way more complex than the simple statement of solving international issues “on the basis of arithmetical considerations”. This banalization would be contrary to the idea of human nature and the purpose of the international humanitarian law and human rights law mutualism⁴⁶⁵.

Combatants, on the other hand, can be hit deliberately or as side effect. Targeting individual enemy combatants in war is accepted as both legal and moral⁴⁶⁶. International humanitarian law does not prohibit the targeting or killing of enemy combatants who have not laid down their arms or been placed *hors de combat*, and accordingly that the death of a combatant under these circumstances does not constitute a violation of the right to life⁴⁶⁷. Nevertheless, noncombatants can only be attacked as side effect, or collateral damage. The mandatory mutualism between international humanitarian law and human rights law, regarding military necessity on targeting, can be synthetized as below:

Target	Combatant		Civilian
Harm	deliberate	Side effect	Side effect

⁴⁶⁴ MICHAEL WALZER, JUST AND UNJUST WARS 144-152 (4TH EDITION, 2006).

⁴⁶⁵ *Khlaifia and Other v. Italy [GC]*, no. 16483/12 Eur. Ct. H.R., partially dissenting opinion of Judge Serghides, §52 (2016).

⁴⁶⁶ WILLIAM SHAWCROSS, JUSTICE AND THE ENEMY: NUREMBERG, 9/11, AND THE TRIAL OF KHALID SHEIKH MOHAMMED 193 (2011).

⁴⁶⁷ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §100 (2002).

Notwithstanding, international humanitarian law has been interpreted to permit deliberate harming of civilians in a supreme emergency, which is a necessity to overcome an imminent catastrophe and to win it, humanity principle ought to be put aside, at least partially. It is so because bombing in World War II, besides the elevated number of civilians' deaths, was always under the greater good of defeating Hitler and Nazism, what would be worst worldwide than those casualties. In 1939, when atomic energy began to seem a serious possibility, United Kingdom and United States were concerned about the German atomic program and the danger of a Nazi bomb. In Germany, large quantities of heavy water from Norway was being used for experiments on the possibility of a chain reaction which pertained to the Norsk Hydro plant at Rjukan. Suddenly, the Nazi decided to dismantle the plant and to transport the heavy water to Germany. Glover tells us that it was vital to stop the heavy water reaching Germany, but there was no time for a full-scale raid on the plant in Rjukan, there were no troops nearby to undergo a successful attack to destroy the plant. The water would go by train, crossing a lake by rail-ferry. The train would be hard to blow up and would be crowded with civilians. The ferry carried fewer people but blowing it up would still kill civilians. However, the results were important enough to justify these losses, so the concerns aimed to make the effects of hitting civilians as minimum as possible. Then, the plant's transport engineer supported the plan and he put the water to go on the relatively uncrowded Sunday ferry. Afterwards the ferry was blown up, killing 26 of the 53 people on board, but also sending all the heavy water to the bottom of the lake. It was the elimination of German heavy water production in Norway and the Germans could not resume the heavy water project since that episode, which contributed hugely to the German failure on achieving a self-sustaining atomic reactor before the end of the war. Post facto studies and scientific analysis say that in 3 to 4 more years Germany would have completed its atomic bomb

project and this dreadful hindsight would have put Nazis ahead of Manhattan Project and excelled the atomic program⁴⁶⁸.

The case of the ferry carrying the heavy water from Norway illustrates abstract calculus that is made for decision-makers, and these are the kind of indicators that legitimately lead the decision-making process in international law⁴⁶⁹. If the heavy water had reached Germany, a Nazi atomic bomb would not have been certain, but would have been more likely and letting Hitler have an atomic bomb would risk huge numbers of deaths and perhaps a Nazi victory, which is something we can picture nowadays, since there is a fictional TV show highly appreciated by the public that works towards this alternative scenario⁴⁷⁰. With so much at stake, the evaluation of fact there seemed worth paying a substantial price to keep the chance of atomic bomb by Nazi as low as possible. In this occasion, the doctrine of double effect has been welcome. If the deaths of the ferry passengers were not intended and the sinking permitted, the ultimate end fails. Civilian deaths, here, are side effect. It is not morally perfect, but it is morally acceptable.

On this regard, Michael Walzer also agrees that rights of innocent people can be overridden for the sake of the political community. He stresses that “individuals cannot kill other individuals to save themselves, but to save a nation we can violate the rights of a determinate but smaller number of people”⁴⁷¹, and so does Alasdair MacIntyre to whom loyalty bound and cosmopolitanism should govern decision toward supreme emergency. The survival and freedom of

⁴⁶⁸ JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 89-92 (2nd ed., 2012)

⁴⁶⁹ SCOTT SIGMUND GARTNER, STRATEGIC ASSESSMENT IN WAR 33-36 (1997).

⁴⁷⁰ THE MAN IN THE HIGH CASTLE (Amazon Studios 2015-).

⁴⁷¹ MICHAEL WALZER, JUST AND UNJUST WARS 232-254 (4TH EDITION, 2006).

political communities are the highest values of international society⁴⁷². Thus, the prohibition set in international humanitarian law and human rights law is not absolute but have threshold and so may be permissibly overridden even if it involves infringing the rights of civilians. For that, Kamm complements, the supreme emergency must entail a “dilemmatic situation” by which the deliberate killing of civilians is a wrong and not killing them is also wrong, and the lesser evil should prevail. Standard *jus in bello*, however, rules out (most) deliberate targeting of civilians albeit eventually some military operations may expect civilian casualties as collateral damage⁴⁷³.

Fiction allows us to have a great account to what this theory represents in our real daily life. In *Ender’s Game* movie, the world is going through a war with an enemy alien race called Formics. Beyond fiction, great understanding can be captured from this movie. Ender Wiggin, the main character, is playing battles in a futuristic facility in something that looks like videogame on screen. All his military training is performed in this videogame battles and are informed that they are simulation trainings. In the end of the movie (spoiler alert here), Ender engage to the final battle of his simulated training, such battle that no military student was ever capable of winning. Somehow, Ender finds a solution that completely ends the war, annihilates the enemy and provide the victory to his army, and accordingly he performs. He wins, and everyone astonished upon the victory congratulates him emphatically, when he realizes the war was real. Mourning on the impact of his decision that wiped out the whole Formic race – besides being rational and teleologically aimed to an acceptable end, the victory – he listens from his General as consolation and justification “son, you are going to be remembered as a hero because

⁴⁷² ALASDAIR MACINTYRE, *AFTER VIRTUE* 152 (3RD EDITION, 2007).

⁴⁷³ FRANCES MYRNA KAMM, *THE MORAL TARGET: AIMING AT RIGHT CONDUCT IN WAR AND OTHER CONFLICTS* 85, 93 (2012).

you put an end to the war”, and then he replies “no, I am going to be remembered as a murderer”. Finishing the discussion, the General answers “we won, that is all that matters”, Ender concludes “the way we win is what really matters”⁴⁷⁴.

Of course, it is a fictional situation and to extreme to our purpose of endorsing utilitarian metamorality on targeting civilians. First, the example serves because Ender target a military object which was the entire enemy planet, so he intended the annihilation of the whole Formic soldiers and Formic civilians were side effects, however there was no prior cost-benefit calculus, nor an attempt to minimize civilian casualties. Second, there is a clear disproportionality in the maneuver, since he wiped out the whole race moved by a moral vacuum, which is an absurd for the development of utilitarian metamorality. Otherwise the solution for world war would be to blow up the whole Germany and Japan. This is not conceivable, but what worths noting is the rationality employed on his decision-making process. He was pure teleology, since his only goal was to end the war. Pure rationality is saved by its own open-endedness, but it is not acceptable here detached from moral boundaries. Therefore, this fiction helps me to defend utilitarianism as metamorality and the imposition of mutualism for both benefit of international humanitarian law and human rights law because it proves the presence of human rights morality on dignity underneath. It proves that utilitarian metamorality trumps human dignity morality in order to teleologically achieve an end, but it does not remove human dignity morality entirely of the equation because, as Ender said, the way we win also matters. It is not just doing, but how we do what we have to do also counts.

⁴⁷⁴ ENDER’S GAME (Summit Entertainment, 2013).

Ender's concern was not directed to the victory he propitiated, rather to the respect of Formic's dignity that he renounced and was not even a considered element of his equation of cost-benefit analysis. No proportionality was made on this regard, what he elucidates that would be done whether he knew it was a real fight. There is plausibility in his view because if an action is morally the best one available to us, then we are not morally worse for carrying it out. This is an appeal of symmetry. It is not just about winning; some moral grounds must remain to keep actions perpetrated morally admissible⁴⁷⁵. Some people challenge this opinion, but they would accept that it is still relevant that the alleged action was morally the best – or least bad – of all possibilities assessed. Therefore, utilitarian metamorality applied in international humanitarian law and human rights law mutualism is not just rationality and mere mathematic calculus of cost-benefit. Deontology moral plays his supporting role through principles of proportionality and necessity.

Returning to World War II bombing examples, the Allied atomic project had started in response to German development in the area. After fulminating German project to continue, Manhattan project gained a new aim, Japan. The target was Japan and the purpose was the need to end the war quickly, otherwise the endurance of the war would have had terrible human costs, afterall Japanese occupation in Asian countries was bloody and cruel and a military cost-benefit analysis of an invasion of Japan by Allied army would also mean enormous casualties on both sides and would make longer the period of armed conflicts, which also increases the cost of more American and Japanese lives. Hence, on August 6, 1945, the atomic bomb called 'Little Boy' was dropped from an American bomber called the Enola Gay on Hiroshima and caused 140,000

⁴⁷⁵ DAVID RODIN ET HENRY SHUE, *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 12-15 (2008).

deaths and, five years later, the total amounted 200,000. On August 9, 1945, the atomic bomb called 'Fat Man' was dropped from an American bomber on Nagasaki, which killed 70,000 people and, five years later, the total amounted 140,000.

So, considering Ender's conundrum, could the war against Japan have been stopped by other means? And, if there were no alternative ways of stopping the war, would the dropping of bombs remain justifiable? Maybe there was no certain way of ending the war without the use of the bomb. Nonetheless, in the light of what happened to the people of Hiroshima and Nagasaki, the thought is unavoidable that such an approach of an alternative should have been at least tried. Today we suppose using the bomb had been the only way of shortening the war. Glover narrates says a leading study performed at Oxford University, in 1956, has indicated that, under those circumstances of the war with Japan, dropping the bomb probably saved many lives, but pointed out that circumstances included the Allies' demand for unconditional surrender and their disregard of Japan's known desire for negotiated peace. The justification for the bombings was that they reduced the risk of a far greater evil⁴⁷⁶.

Even though, the party launching an attack against a legitimate military objective must always seek to avoid or minimize foreseeable civilian casualties and damage to civilians. There must exist an attempt to minimize the damage inflicted on civilians. While the distinct nature of the principle of proportionality applicable under international humanitarian law must be recognized, it can be said as general rule that excessive foreseeable damage or injury to certain

⁴⁷⁶ JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 97-107 (2nd ed., 2012)

people or objects is prohibited in peacetime as well as in armed conflict⁴⁷⁷. Likewise, European Court of Human Rights has already asserted that it is paramount to examine whether the operation was planned and controlled by the authorities so as “to minimize, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimized” and, also “a balance must be achieved between the aim pursued and the means employed to achieve it”⁴⁷⁸.

As cited above, Resolution 1373 of United Nations Security Council calls on States to work together to prevent and suppress terrorist acts and also requires states to take “the necessary steps” to prevent the commission of terrorist acts⁴⁷⁹. Subsequently, the war in Afghanistan engaged right after and in compliance with Resolution 1373, have shown aerial bombardment and a high number of civilians’ casualties. The aerial bombardment has been justified on “necessity” grounds as being “essential” to NATO’s efforts to clear out Taliban insurgents. According to an annual report issued by the United Nations, in Afghanistan in 2010, there was a significant human cost growth, “2,777 civilian deaths in 2010, an increase of 15 per cent compared to 2009”, but “2,080 deaths (75 per cent of total civilian deaths) were attributed to Anti-Government Elements, up 28 per cent from 2009. Suicide attacks and improvised explosive devices (IEDs) caused the most civilian deaths, totaling 1,141 deaths (55 per cent of civilian deaths attributed to Anti-Government Elements)”⁴⁸⁰. As terrorism has grown in international

⁴⁷⁷ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., §110 (2002).

⁴⁷⁸ *Isayeva v. Russia [Former First Section]*, no. 57950/00, Eur. Ct. H.R. §§175, 181 (February 24, 2005).

⁴⁷⁹ S.C. Res. 1373 (2001), U.N. Doc. S/RES/1373 (September 28, 2001).

⁴⁸⁰ UNITED NATIONS, AFGHANISTAN ANNUAL REPORT ON PROTECTION OF CIVILIANS IN ARMED CONFLICTS 2010, EXECUTIVE SUMMARY (MARCH, 2011).

arena, becoming a real threat to the values our international community holds, a recent Resolution 2249 was enacted with the same purpose of prior ones, only updating the global tragedies and enemies⁴⁸¹.

As pragmatic as we shall be, let's work on some variables to show how this foreseeable assessment on military necessity to achieve a good consequence at the cost of an evil consequence as side effect but, even though, the military action finds acceptance in moral justification in utilitarianism, since a greater good is an end teleologically reached and the harm on targeting civilians is deemed the lesser evil too. Decision-making elements can be predicted to afford proper planning and coordination of necessary actions and we are going to follow Richard Posner formula on cost-benefits analysis in this predictability of proportionality and lesser evil assurance⁴⁸². Like cited in Chapter 4, the use of drones has been used constantly on military operations to fight enemies of the big global commonwealth.

So, hypothetically, let's imagine that a terrorist plot from an ISIS cell hidden in a farm in Brussels countryside is discovered planning an attack, not at military targets, but at a shopping mall in London that has the largest movie theater in town and the last movie of Harry Potter's premier is going to be in screen at 5pm sharply. I chose Harry Potter movie because William Shawcross brings in his book a very curious fact he learned from Guantanamo Bay prisoners, that Harry Potter books are by far the most read book by the inmate population, overtaking any other novel in the whole facility, being a huge success among them⁴⁸³. Curiosity apart, let's say

⁴⁸¹ S.C. Res. 2249 (2015), U.N. Doc. S/RES/2249 (November 20, 2015).

⁴⁸² RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 37 (2001).

⁴⁸³ WILLIAM SHAWCROSS, *JUSTICE AND THE ENEMY: NUREMBERG, 9/11, AND THE TRIAL OF KHALID SHEIKH MOHAMMED* (2011).

that the expected audience to attend the mall in the premier is 1,000 people. A task force under Resolution 2249/UNSC then discovers the plot and plans a preventive attack to this threatening cell hidden in Brussels countryside farm, by drones, when the danger against Harry Potter's audience is imminent (to eliminate the chance of an alternative plan of strike in our hypothetical case). The strike by drone therefore must be performed right away and they get the information that civilians, unrelated to the evil terrorist deed, are in the premises. So, among children, women and farm workers, we have an estimate number of 100 civilian in target that could be harmed as a side effect. In sum, the imminent danger posed to those 1,000 London citizens can be avoided by this military action that will eliminate the terrorists who are plotting the attack, primary targets duly intended, and harm 100 more possible civilians as collateral damage, secondary targets unintended but inevitable (since we removed alternative strive from the picture).

Let's do some math to analyze the cost benefit of the attack, which result will support the double effect argumentation and utilitarian morality validation. First, we need to ascertain to readers that this is a calculus performed anticipatedly, which means that it entails probabilities of occurrences, what is exactly the exercise of predictability that military do in rules of engagement. In sequence, let's identify the formula elements. The evil consequence of the terrorist attack is the harm of 1,000 people that might happen with the probability TA (for terrorist attack). So, the cost of not acting against the terrorist is the Harry Potter's fans human lives, that we call HL (for human lives). The possibility of eliminating such attack would impose a cost of our action, what we call perpetrator burden PB , what would be the 100 civilians targeted as side effect in a drone assault to the farm. The harm on these civilians targeted, in this equation of ours, is PB (for perpetrator burden). Therefore, the cost of avoiding the attack TA is PB and to be morally acceptable in utilitarian terms, as metamorality, it must be less than the expected cost of HL (or

benefit of avoiding the attack) multiplied by the probability of the attack happening TA . Finally, the formula is $PB < TA*HL$.

Once we have the formula prepared, let's run some number. Let's say that the probability that the UNSC task force estimates of the attack happening is 100%, so the representation of TA in our formula will be 1,0. $PB < TA*HL$ equals $100 < 1,0*1,000$, giving us the outcome: $100 < 1,000$. If the mathematic statement portrayed is true, military necessity passed in cost-benefit analysis and lesser evil scrutiny; the former explains the teleological rationality to seek a good end regardless of means (which was solely applied in *Ender's Game*), while the latter seeks to comply with moral argumentation of proportionality and all efforts converged to mitigate the loss, in order to let utilitarian morality trumping human dignity morality as minimum as possible (this is Ender's conundrum grasped in "the way we win matters"). During this second analysis of lesser evil and mitigating the loss, it would be also considered any attempt to minimize the number of civilians targeted in the farm (like creating a deviation in road to the farm so 10 workers would not be there at the moment of the strike, which is similar to the ferry explosion in Norway case, where the engineer selected a Sunday route to make the water transportation because it had less passengers). Nevertheless, whether the final outcome, which is the greatest good, outbalances the evil outcome of civilians harm as collateral damage, the doctrine of double effect is morally acceptable and mutualism benefits met, both to international humanitarian law and human rights law, the latter beneath utilitarian metamorality as primary moral compass during emergency.

Contrariwise, if the probability of occurrence of the terrorist attack is 10%, then the formula is $100 < 0,1*1,000$, giving us the outcome: $100 < 100$. This mathematic statement is

false, thereafter, the drone strike is not morally acceptable or legally justified. In the light of all that have been said, the graphic exposition of our thesis is synthetized as follow:



Utilitarianism rationale affords solution to social-political problems while fulfilling the greatest number of interests possible. Individual interests are considered in the equation, albeit they are considered pursuant the maximization of general welfare of international society. The

good promoted collectively in utilitarian rationality follows the best trail to quantity and quality in the welfare outcome. Obviously, not always utilitarian rationality satisfies individual interests. Notwithstanding, justice, as social value cherished in international community, is met as the favorable measurement to collective body⁴⁸⁴. The doctrine of double effect is invoked to permit some acts which will predictably target civilians, innocent people. Where these deaths are foreseen but not intended consequences and where they are not out of proportion to the good aimed at, the act is morally permissible. Doctrine of double effect is paramount to our work in armed conflicts international regulation because it provides moral identity instead of a moral emptiness.

Notwithstanding, regarding the preconditions of necessity and proportionality, the analysis over cost-benefit must be done as well and, in practical life, procedural observances must be fulfilled alongside. Thus, all information on targeting civilians as side effects unintentionally, the attempts to minimize the harm on civilians, the lack of military alternative to achieve the end pursued and the configuration of the lesser evil, demonstrating that the greatest good reached outweighs the evil consequence, must be confirmed upon evidences – since international investigations not always can rely on proofs⁴⁸⁵ – and impartiality – which is closely linked to unintentionality of action, which indicates an action performed out of any motive discrimination or prejudice⁴⁸⁶.

⁴⁸⁴ DANIEL SARMENTO, *LIVRES E IGUAIS: ESTUDOS DE DIREITO CONSTITUCIONAL* 56-57 (RIO DE JANEIRO: LUMEN JURIS, 2006).

⁴⁸⁵ JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY* 84 (2nd ed., 2012) AND MICHAEL WALZER, *JUST AND UNJUST WARS* 231-232 (4TH EDITION, 2006).

⁴⁸⁶ JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 200-204 (2013).

At last, all moral background and rational reasoning requirements are accomplished in this piece of work. Pragmatically departing from a factual scenario of supreme emergency, which dissociates from normal regular conditions we face in peacetime and social *NTP*, we recognized a mutation in international law able to provide answers to overcome the crisis. Therefore, the mandatory mutualism between international humanitarian law and human rights law remains untouched in respect to their inner interplay and considerations. The important shift in their applicability occurs in utilitarian morality trumping human dignity morality and functioning as metamorality to solve pragmatic problems in armed conflicts. It is sensitive to highlight that human dignity morality is not removed, but instead of being primary moral compass, it becomes secondary moral compass, leaving the leading role to utilitarian metamorality.

As consequence, the deontology rationality reasoning attached to human dignity morality that universally enjoins treating people always as an end, never as a mean, is surpassed by teleology rationality reasoning which is attached to utilitarian morality and, inversely, it accepts treating people as a mean to seek the greatest good to the greatest number. Regarding the civilian targeting, which is the scope of this work, in situations of armed conflicts, targeting civilians is permitted as a side effect, since the good outcome outbalances the evil consequences of the harm inflicted on civilians. More than that, proportionality and the justification of the lesser evil as a duty to minimize the losses or the harm impact on civilians are the moral considerations to comply with human rights rational whose mutual benefit derives from social values fulfillment towards the victory or the great advantaged behind the end pursued as a good effect. Yet, human dignity still plays a supporting role to utilitarianism metamorality when forbidding *jus cogens* violations, for example, like torture. Even in front of utilitarian metamorality, human dignity plays an important role which makes us conclude that, at first glance, there is no predictable

good consequence that outweighs the evil consequence of eroding a *jus cogens* value. We believe it is accurate in utilitarian terms in the manner that the erosion of *jus cogens*, in the long run, can provoke an irreparable harm to mankind flourishing and values enhancement.

CHAPTER 6

CONCLUSION

According to Ricardo Guibourg, the purposes of human knowledge towards the study of law are generally threefold: (i) identify the right in question, so it is possible to discuss its content and controversies; (ii) set the way society really behaves towards the conduct that is under law lens and the way law grabs this conduct and how it react before law; and (iii) establish the value over the law and the action under auspices in such manner that justice can be met⁴⁸⁷. By this very end, we can say we have gone through all these three steps.

Building our idea from the very bottom, we have worked on how war shaped deeply our international society, politically and legally. We left an old conception of state-centric international society which had State as primary subjects and an international legal system mostly focused on political and commercial interests. Even in the beginning of last century, some improvement were made in international arena but after two world wars, the cost of humanity losses in loathsome atrocities, the despicable banalization of evil and the powerless response provided by international framework to deter the progression of such dreadful vices made the world congregate on cooperation and goodness spirits to build a system anew.

Following sociological footsteps of society's robust foundation, first, we generate values, second, we put them in practice, and third, we create institutions spot them, rules of international law and community were drafted commencing with values foundation, all placed in universal

⁴⁸⁷ RICARDO A GUIBOURG, DERECHO, SISTEMA Y REALIDAD 12 (BUENOS AIRES: EDITORIAL ASTREA, 2010).

language with generalization scope to reach every individual in the planet. The structuring rules made international society decentralized, open, egalitarian, universal and cosmopolitan. The number of international actors duly recognized increased significantly and the areas of their agency was enlarged to cover all areas of human interests, which caused a progressive movement of legal codification.

As legal system grew it became more complex, because the sources of international law have exponentially increased and a rationality to organize the management of all these legal sources became imperative. Thus, a vertical hierarchy knowledge has been employed and legal norms, such as ICJ Statute and Vienna Convention, have set the rules of interpreting and applying the law keeping simultaneously the unity, coherence and wholeness of the system. In parallel, international courts have also been decentralized and regional courts have been foisted, especially human rights courts. In their current decision-making practices, through techniques of interpretation and application, jurisprudence overrules its secondary status as source of international law to turn it primary pursuant semantic densification of legal general clauses of multise semantic nature – such as human dignity – giving ductility and dynamism for legal concepts to settle case by case brought before the courts. Then, day by day international courts have shaped intimately international legal provisions through their precedents.

In sequence, we have proceeded a profound grasp over human rights history in humanity, making some longstanding links with natural law and the rebirth of its notions in the rebuilding process of international community and law design. Following this trails, we went deep on human rights roots to reveal its inner basis in morality, rationality and human emotions, unfolding the sacredness of human life, ethos of love and universal respect that all amount to our

Christian values and Kantian reasoning. Thereafter, human dignity takes its place of center of all human rights law and international framework to whom the respect for human dignity irradiates as both value and right, compromising all international actors to obey, enforce and endorse. At international courts practices a lot of divergence on human dignity respectfulness applicability arises, some incommensurability diagnosis is identified, and plurality has been again advised, besides a crescent development of values generalization to meet plurality, community welfare and the promise of peace and ban on human cruelty. Moreover, a vast body of jurisprudence is produced, and judicial decision-making gradually transforms international society and law into a living body, permanently breathing and walking.

In opposition to human rights law, comes international humanitarian law who represents the solution in armed conflict situations, while the former is initially conceive to peacetime regulation only. Nevertheless, international legal understanding started to move forward to add to the law of the war some contemporary values formally acquired during the international society reform which launched Geneva Conventions, and further Protocols, to implement into warlike regulation the principle of humanity to humanize the behavior in armed conflicts. After that, the identification of this branch of law became international humanitarian law, because of its new humanity values borrowed chiefly from human right rationale. Alongside humanity, principles of necessity, proportionality and distinction have been commonly applied to alleviate the horrors of war, taking a huge consideration over civilians, which are the ultimate recipients of this dissertation.

Subsequently, a bunch of legal material was drafted to protect civilians and to strengthen civilians immunities. Nonetheless, armed conflicts necessarily place civilians in danger.

Although we have the moral duty to soften the aspect of the hellishness that is to be in the middle of hostilities, we can only assure the mitigation of dangers they are submitted. Meanwhile, a new specie of war has been formed in international community this century, which poses an immense danger and threatens the good life of all nations, risking of annulation all values so hardly conquered in human history. Furthermore, this new kind of coward and hollow engagement of terrorism becomes the contemporary *hostis humani generis*, enemy of mankind. In order to maintain the order and international welfare and society survival, new traits of law have been fabricated in treaties, international organizations resolutions and official documents and, most important, judicial decision-making.

In the first wave, international decisions set the union of international humanitarian law and human rights law that from this moment forward are not separated as two independent branches of law whose scope of applicability differs from war to peacetime, respectively. From that moment in history onwards, an interplay between international humanitarian law and human rights law is conceived and their mutual interaction is placed within legal system methods of interpretation and application of the law over apparent colliding provisions of these two branches as the former being *lex specialis*, while the latter is *lex generalis*. Then, any apparent collision between provisions from these two branches, humanitarian provision shall prevail. As we have seen all over this work, new understandings held by international courts, particularly human rights courts, have significantly developed international law. The mutual influence between international humanitarian law and human rights law has been mandatory and it has foisted international law development in interpretation and application of legal concepts and values. It is well known that “there are many instances in which human rights law and humanitarian law do

not contradict each other, but rather regulate different aspects of a situation or regulate a situation in more or less detail and can therefore mutually reinforce each other”⁴⁸⁸.

From this interplay comprehension between the two branches of law we fostered a sensitive apprehension over what it really means in practical life and day after day decision-making process. From Biology we took that analogy of living organism that together works in symbiosis relationship which two situations might appear, the mutualism, where both organism benefits from the symbiotic relationship and equality functions and shares duties and gains of the union, and commensalism, where one organism takes a leading role, coordinate actions and benefits solely from the union. A mandatory mutualism is the regency we recognize from international humanitarian law and human rights law intertwined relation. The umbilical cord between them is the principle of humanity which, from human rights end, is enriched with human dignity morality evaluation.

The second wave, then, is the formal observance of human dignity roots in armed conflicts situations, which provides guidance to caselaw solution brought before international courts of human rights. In this vein, both Inter-American Court and Commission and European Court and Council deliver a considerable number of precedents recognizing human dignity values as limitation to State agency toward the adversary, which has been, in many occasions, terrorist groups that deny all international rules of war and refuse to follow any moral rule to govern their deeds. Derogation clause in human rights conventions is often claimed by State to lift international obligation on human rights during the war on terror, but none is achieved to

⁴⁸⁸ Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in ISRAELI LAW REVIEW. VOL. 40, NO.2, 310, 343-344 (2007).

overturn the safeguards and guarantees on human rights built in conventions and jurisprudence. In a piecemeal, especially in European Court, where the fight is constantly happening, they realize human dignity morality represents a setback in warzone and hostilities engagement, which brings us to the third and current wave, established openly in *Hassan* case.

It is understandable that the rationale in *Hassan* is fruit of a process which amounts precedents piling – some cited above – that leave us to the final conclusion met: the interplay between international humanitarian law and human rights law is no longer mutualism, rather it is commensalism where the former takes the leading role, under *lex specialis* status, and says what is permissible or not. On this regard, not even derogation clause claim is needed in accordance to Article 4 of ICCPR, Article 15 of ECHR and Article 27 of ACHR, since it is a human rights disposition that, in armed conflicts situation, has no command over facts ongoing. Therefore, commensalism is formally recognized by this leading case and human rights law has no benefit from its interwoven relationship with humanitarian law. Resting only a supporting role to perform towards *jus cogens* human rights value – like prohibition of torture – at least for now.

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override, says Michael Sandel⁴⁸⁹. It is not entirely true. Human dignity is founded on justice, but it does not constrain justice. As grasped in *Hassan* and other background cases, wartime legal framework is formally and substantially different from peacetime framework. Sandel's statement is perfect for peacetime, just as much as the European Court has entailed on their new commensalism understanding of the interplay between IHL and HRL that

⁴⁸⁹ MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 16 (2ND EDITION, 1998).

the latter is fully applicable only on peacetime⁴⁹⁰. Whilst we do not agree with the affirmative made by the court, we take advantage on its inner idea, which is the very notion of separating the use of law in peacetime – surrounded by normality and political stability – and in crisis, or emergency time, or state of exception, or wartime – surrounded by abnormality and political instability. The goal of the former is to keep the legal order functional with tendency to improvement to leave society better off, while the goal of the latter is to recover normality and stability as soon as possible, since the more we persist in crisis, the more damage in society we get.

So, under normal conditions of political stability without threat posing to the very existence of society and international community as we value it, is accurate to affirm that each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. When we are under abnormal condition of political instability with threat to erode the very existence of society and international community as we praise it, in this occasion, the welfare of society *must* override individual rights until recovered normality. The main focus of legal order shifts, especially regarding the branches of law mingled by mandatory mutualism, but without giving space to anomie. The nature of mutualism mutates from deontology to teleology in order to restore the *status quo*. And for that, we do not need to step aside from justice, neither we need to let human rights law aloof. To meet justice, we ought to pin it down on other value than individuality, and to comprise human rights we ought to grapple on a morality that overlaps human dignity morality, which means, we have to bring a metamorality that fits the rule of law. Afterall, incommensurability of values on a pluralistic society requires

⁴⁹⁰ *Hassan v. The United Kingdom [GC]*, no. 29750/09 Eur. Ct. H.R., §§103-106 (2014).

reason for justifying actions while accepting some conceptual room for explaining a wrongful act which teleology and end pursued might turn it into a rightful action.

In order to be able to act according to necessity, the perpetrator must judge the nature of the situation. Besides of cost-benefits analysis, the evaluation of the type of situation in which is appropriate to proceed aiming on the end and accepting collateral damage. Pragmatism retrieved from real cases explains why situations of armed conflicts are not merely a neutral field of activity for intentions conceived outside of that situation. Rather, it calls for certain actions already in our perception which is suitable to replace the deontology of means-ends as primary basic category of international law. The relationship between action and the situation is not one-sided, comporting teleological interpretation as well. Constitutive actions, which can be considered that kind of human agency that makes judgement on abnormality or exceptional situations, takes into account cost-benefit analysis and moral perceptions of values aimed to a certain end is the only way out of a moral dilemma whose nature of action shall be teleological. This dialogue between deontology and teleology is a reciprocal condition to regulate a complex legal order based on incommensurable pluralistic values.

Teleology shows us that the end in pursuit justifies the means employed and the law, in general terms, national or international, points to social greater good. Human agency is set to accomplish purposes, it always has a goal to achieve. Human behavior is teleologically aimed to an end and governed by values. The ultimate components of meaningful human action are initially bound to the categories of “ends” and “means”⁴⁹¹. Reasoning about the purpose and ends is an unavoidable feature of arguing about justice. The link between justice and the good is

⁴⁹¹ HANS JOAS, THE CREATIVITY OF ACTION 148-161 (2005).

unavoidable and principles of justice depend for their justification on the moral worth or the intrinsic good of the ends. There is certain legitimacy on heavy attacks on military and industrial targets that makes the targeting of civilians inevitable. But there must be a fair balance between the means employed and the purpose achieved.

For instance, it is crucial in *Hassan* that the denial of his liberty is justified in the name of an overriding good for others, since his liberty poses risk to welfare of other and society. Therefore, his right became instrumental to the advancement of some end held to be precedent, which is the common good and welfare of society and international community. Human rights law and philosophy does not work binarily, like either we fulfil individual right and dignity, or we face a human rights void. As remarked by Michael Sandel, it has been assumed that universal morality is based on binary terms: either you respect human dignity, or you treat human being as a mean instead of an end; you treat human being as a thing. However, this duality is passed. It has expired the position of take-or-leave-it regarding morality in human rights⁴⁹². There is something in between using humanity as an end and as a mean. In this vein, the argument that human rights are entirely unfit for the context of armed conflicts is misleading.

The justice pursued by human rights law and international humanitarian law, even crafted in humanity, is rightly measured in terms of the treatment and protection of persons, peoples, and a community of nations⁴⁹³. Many defenders of moral philosophy rights think individual rights morality and social welfare morality are incompatible concepts, but they are not, they actually

⁴⁹² MICHAEL SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* 126-127 (2007).

⁴⁹³ RUTI G. TEITEL, *HUMANITY'S LAW* 103 (2011).

coexist harmoniously⁴⁹⁴. To understand utility, as social welfare, and to set boundaries by necessity and proportionality, a cost-benefit analysis must be employed. With a very persuasive pragmatic scope, cost-benefit analysis targets deep issues and designs “to assist people in making complex judgements where multiple goods are involved”. However, cost-benefit analysis cannot be the only rule used in decision-making process, some value must be attached to it⁴⁹⁵, reason why proportionality and necessity step in to attain principle of humanity rationale. Also, human dignity remains a human rights morality; remains present, albeit working as secondary enjoyment. Utilitarianism is a theory of both personal morality and social justice, and the absence human dignity morality within utilitarian metamorality would conceive all sort of asocial traits, such as cruelty and intentional evil deeds⁴⁹⁶.

A creative dimension of human action shall be incorporated into this conceptual structure to enrich its content, since social order establishes a valid nexus between creativity and action and it makes clear that an emphasis on rationality is a normative orientation just as much as on dignity. So, utilitarian value applicable as metamorality in order to maintain human rights endorsable in mandatory mutualism of armed conflicts is, as Joas puts it, “the creative model superior to the normativist model, because it leads to the examination of two questions that would otherwise remain unsolved. The first is the question of how norms and values are to be applied to specific situations, and the second is the question of how values that guide our actions can arise in the first place”⁴⁹⁷.

⁴⁹⁴ RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 69-70 (1996).

⁴⁹⁵ RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 123 (2001).

⁴⁹⁶ RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 83 (1996).

⁴⁹⁷ HANS JOAS, WAR AND MODERNITY 190 (2003).

Contemporary armed conflicts have shown us that it is not always possible to deduce how values should be applied in particular situations, instead, the opposite occurs, particular situations call for independent creative specifications of these values. In this equation, which is far away from our sense of social normality and political stability (*NTP* analogy), a commitment to specific values does not arise through intention, but through powerful experiences. On this regard, not all experiences come from enthusiasm, rather, experiences of powerlessness, like terrorist attacks, and violence, that causes trauma, open up a space in which there is scope for this third model of creative action and reshape of positive universalistic values⁴⁹⁸. Thus, the achievement of collective good, the greatest good for the greatest number, is a positive universalistic value that embeds utilitarian morality and underpins community values. By this token, teleology can be understood as a form of action that rationalizes ends, values and consequences, which remains ideal to armed conflicts situations⁴⁹⁹, because universal values mutate from case to case⁵⁰⁰. Only teleology can rationally galvanize the probabilities and social phenomena involved in military necessity and proportionality in action when civilians are targeted as side effect.

Utilitarian morality comprehends a normativist theory of social order that implies decision-making and people often have to make decisions under conditions of profound uncertainty, pure contingencies. Even though, some decision-making elements can be predicted to afford proper planning and coordination of necessary actions. When we deal with social values into decision-making process, we shed into light social goals which are based on reason

⁴⁹⁸ HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* 69-76 (2013).

⁴⁹⁹ HANS JOAS, *WAR AND MODERNITY* 191 (2003).

⁵⁰⁰ ALASDAIR MACINTYRE, *AFTER VIRTUE* 91 (3RD EDITION, 2007).

towards individual and collective welfare. Morality and welfare merge to a common ground, becoming a common currency. The conventional philosophy of social science has asserted that the task of the social scientist is the production of law-like generalizations, that's the contemporary duty of social scientists who have to foresee the outcomes of alternative policies that derive from a knowledge of law-like generalizations⁵⁰¹. On this regard, utilitarianism, by the equation of the greatest good for the greatest number, trumps human dignity morality, serving armed conflicts dilemmas, such as targeting civilians for military necessity, as metamorality content.

Teitel enlists six clusters of threats which international community must be concerned now and in the decades ahead, which would fit the abnormality conditions that shifts morality density and application, recalling NTP chemistry analogy: “(1) economic and social threats, including poverty, infectious diseases and environmental degradation; (2) Inter-State conflict; (3) Internal Conflict, including civil war, genocide and other large-scale atrocities; (4) nuclear, radiological, chemical and biological weapons; (5) terrorism; and (6) transnational organized crime”⁵⁰². Some critics on utilitarianism comes from the fact that its ethics treats people as cell in the overall social organism rather than individuals and has no boundary principles, except possibly sentience. Nevertheless, some objections to utilitarianism ethics can be suppressed by replacing wealth for utility as the maximand, taking for wealth a context not in strictly monetary terms but rather as the summation of all the valued tangible and intangible objects in society⁵⁰³.

⁵⁰¹ ALASDAIR MACINTYRE, *AFTER VIRTUE* 88-90 (3RD EDITION, 2007).

⁵⁰² RUTI G. TEITEL, *HUMANITY'S LAW* 109 (2011).

⁵⁰³ RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 97-98 (2001).

It is just a matter of argumentative allocation. Placing utilitarian morality into judgement call on military actions covered by mandatory mutualism scope shall not put human rights law aside, as did *Hassan*. Respecting the idea of mutual reinforcement, utilitarian morality fits human rights law goals as metamorality over human dignity. Not to say that utilitarianism displaces the central role of human dignity deontology, but it prevails as metamorality under armed conflict exceptionalism in order to perform a good outcome towards international community and general values. Therefore, the conflict of interests and aim between international humanitarian law and human rights law is merely apparent. The alleged incompatibility between them is hence misled. In essence, there is no conflict between them; there is no need to establish the commensalism between them, giving to international humanitarian law the preference over human rights law in order to its benefit only. Conversely, utilitarian metamorality fits both branches and mutually provides them benefit of application without erasing the broad knowledge of humanitarian law as *lex specialis* and human rights law as *lex generalis*.

What is being defended here is international community which international legal system is designed to protect, just as much as the lives and liberties of the members of this community. Thus, like a Latin catchphrase, *fiat justitia ruat coelom*, do justice even if the heavens fall, calls for extreme necessity upon an intense crisis, a supreme emergency which authorizes the exceptional action to recover normality and stability. The identification of supreme emergency, by the way, can be made international courts or international governmental organization, such as United Nations. As we have seen, international legal system allows the usage of legal general clauses which might be filled by interpretation and application of international law (Article 31 Vienna Convention). Moreover, this law-making process through decision-making rationale has to take into account the unity, coherence and wholeness of the entire legal system, forwarded by

a systematic and teleological interpretation. The mandatory mutualism between international humanitarian law and human rights law, by this token, complies with international law standards when applying utilitarian metamorality to combat imminent danger of high impact where targeting civilians might appear necessary and proportional as a side effect to overcome the supreme emergency.

In such cases, international humanitarian law and human rights law intermingle by mandatory mutualism. Human dignity morality remains primary moral compass into this mutual relationship, at least while preserved social *NTP*, social normality and political stability of international community. Once eroded such traits, an exceptional state takes over and *NTP* morality becomes secondary, for the sake of mutualism integrity. Furthermore, in the middle of human agency to recover *status quo* of international community and defend our cherished values and cooperative fellowship, some acts deemed necessary shall be performed. Among them, we can eventually have a civilian target situation which can be accommodated into legal-moral wall whether some conditions are met. The harm that shall fall upon them must be unintended but assumed by predictions as a side effect. For that, a primary target of military necessity shall be the one truly intended whose outcome will contribute to the overall goal of overcoming supreme emergency, definitely or partially, or giving to the battle a great advantage.

To make this operation possible, doctrine of double effect must be argumentatively placed with the additional considerations of cost-benefit analysis, where all costs (including the evil consequence of harming targeted civilians as collateral damage) shall face the benefits to reach a certain end. The path to reach this intended end with good consequence, the greatest good, is rationally constructed by teleology reasoning, to whom the ends justifies the means,

what is basically a mathematical assessment. To morally evaluate this cost-benefit analysis teleologically connected to the greatest good of the end pursued, utilitarianism shall provide moral grounds to challenge the action as primary moral compass during emergency time. As the value that will contrast all action is the welfare of international community and collective great achievements, moral consideration on proportionality and duty to mitigate the harm to amount a lesser evil effect are pushed forward in front of the evil consequence of targeting civilians.

Considering the formula we provided above, $PB < TA * HL$, military necessity must go through cost-benefit analysis and lesser evil scrutiny. The former explains the teleological rationality to seek a good end regardless of means, while the latter seeks to comply with moral argumentation of proportionality and all efforts converged to mitigate the loss, in order to let utilitarian morality trumping human dignity morality as minimum as possible. During this second analysis of lesser evil and mitigating the loss, it would be also considered any attempt to minimize the harm on targeted civilians. Nevertheless, whether the final outcome, which is the foreseeable greatest good, outbalances the evil outcome of civilians harm as collateral damage, the doctrine of double effect is morally acceptable and mutualism benefits equally met, both to international humanitarian law and human rights law, the latter beneath utilitarian metamorality as primary moral compass during supreme emergency.

For this account, departing from a factual scenario of supreme emergency, which dissociates from normal regular conditions we face in peacetime and social *NTP*, we recognized a mutation in international law able to provide answers to overcome the crisis. Therefore, the mandatory mutualism between international humanitarian law and human rights law remains untouched in respect to their inner interplay and considerations. The important shift in their

applicability occurs in utilitarian morality trumping human dignity morality and functioning as metamorality to solve pragmatic problems in armed conflicts. It is sensitive to highlight that human dignity morality is not removed, but instead of being primary moral compass, it becomes secondary moral compass, leaving the leading role to utilitarian metamorality.

As consequence, the deontology rationality reasoning attached to human dignity morality that universally enjoins treating people always as an end, never as a mean, is surpassed by teleology rationality reasoning which is attached to utilitarian morality and, inversely, it accepts treating people as a mean to seek the greatest good to the greatest number. Regarding the civilian targeting, which is the scope of this work, in situations of armed conflicts, targeting civilians is permitted as a side effect, since the good outcome outbalances the evil consequences of the harm inflicted on civilians. More than that, proportionality and the justification of the lesser evil as a duty to minimize the losses or the harm impact on civilians are the moral considerations to comply with human rights rational whose mutual benefit derives from social values fulfillment towards the victory or the great advantaged behind the end pursued as a good effect. Yet, human dignity still plays a supporting role to utilitarianism metamorality when forbidding *jus cogens* violations, for example. Even in front of utilitarian metamorality, human dignity plays an important role which makes us conclude that, at first glance, there is no predictable good consequence that outweighs the evil consequence of eroding a *jus cogens* value. We believe it is accurate in utilitarian terms in the manner that the erosion of *jus cogens*, in the long run, can provoke an irreparable harm to mankind flourishing and values enhancement.

That is why we agree with *Hassan* conclusion, however we disagree with its terms. For the sake of this work's idea, human rights law should not be removed from equation in order to

give international humanitarian law all benefits of international law fulfillment, which we called commensalism. Rather, reaching the same conclusion, the rational we would apply regards utilitarian metamorality to fight against *hosti humani generis* of our time, which causes significant risks to the foundational values of our international community and the welfare of its members. The danger they pose is imminent and of high impact, what complies with supreme emergency, endorses the mandatory mutualism between international humanitarian law and human rights law whose benefits of law applications ought to be left for both branches. However, in violating human rights in order to fight this abnormality, particularly overlapping human dignity morality, a metamorality underpinned in social values is measured pursuant its symmetry towards necessity and proportionality, even whether targeting civilians as side effect, whose harm is not intended but it is foreseen in order to achieve a greatest good. The survival and freedom of the community are the utmost values – also embedded in human right morality frame – of international society in situations of armed conflicts characterized such peril that *NTP* social conditions are no longer assessed. The teleology and systematic interpretation which allows us to get to the end and restore social normality and political stability is morally acceptable and preserve legal order unity, coherence and wholeness.

Notwithstanding, regarding the preconditions of necessity and proportionality, the analysis over cost-benefit must be done as well and, in practical life, procedural observances must be fulfilled alongside. Thus, all information on targeting civilians as side effects unintentionally, the attempts to minimize the harm on civilians, the lack of military alternative to achieve the end pursued and the configuration of the lesser evil, demonstrating that the greatest good reached outweighs the evil consequence, must be confirmed upon evidences – since international investigations not always can rely on proofs – and impartiality – which is closely

linked to unintentionality of action, which indicates an action performed out of any motive discrimination or prejudice. Under such auspices, both substantial and procedural comprehension of international law are met. More, the mandatory mutualism between international humanitarian law and human rights law is entirely preserved, opening space for their mutual relationship to thrive and develop granting benefits for both sides. Even this consideration attains to utilitarian morality since it is international community who will be better off from the continuity of interwoven interpretation and application of these two humanely branches of law.

Bibliography

Books

Accioly, Hildebrando et al. *Manual de Direito Internacional Público*. 20ª edição. São Paulo: Saraiva, 2012.

Agamben, Giorgio. *Estado de Exceção*. São Paulo: Boitempo, 2004.

Amaral Júnior, Alberto do. *Curso de Direito Internacional Público*. 2ª edição. São Paulo: Atlas, 2011.

Armstrong, David; Farrell, Theo; et Lambert, Helene. *Internantional Law and International Relations*. Cambridge: Cambridge University Press, 2007

Barcellos, Ana Paula de. *A Eficácia Jurídica dos Princípios Constitucionais: o princípio da dignidade da pessoa humana*. Rio de Janeiro: Renovar, 2002.

Barral, Weber Oliveira. *Metodologia da Pesquisa Jurídica*. 3rd edition, Belo Horizonte: Del Rey, 2007.

Blank, Laurie R. et Noone, Gregory P. *International Law and Armed Conflict: fundamental principles and contemporary challenges in the law of war*. New York: Wolters Kluwer Law & Business, 2013.

Bobbio, Norberto. *A Era dos Direitos*. Trad. Regina Lyra. Rio de Janeiro: Elsevier, 2004.

_____. *Da Estrutura à Função – Novos Estudos de Teoria do Direito*. Trad. Daniela Beccaccia Versiani. Barueri: Manole, 2007.

_____. *Teoria do Ordenamento Jurídico*. Trad. Maria Celeste Cordeiro Leite dos Santos. 10ª edição. Brasília: UnB, 1999.

Borsa, Merve Ozkan, *The Contribution of International Court of Justice to the Development of International Humanitarian Rules and Principles*, in PUBLIC AND PRIVATE INTERNATIONAL LAW BULLETIN VOL. 36 N. 2, 83-130 (2016).

Buergenthal, Thomas. *Manual de Derecho Internacional Público*. México: Fondo de Cultura Económica, 1994.

Butler, Paul. *Foreword: terrorism and utilitarianism*. In *The Journal of Criminal Law & Criminology*, Northwestern University, Vol. 93, n° 1, pp. 1-22, 2003.

Campos, German J. Bidart. *Jerarquía y Prelación de Normas en un Sistema Internacional de Derechos Humanos*. In *Liber Amicorum*, Héctor Fix-Zamudio Vol. I 447-480 (San José, Costa Rica: Corte Interamericana de Derechos Humanos, 1998).

Cárcova, Carlos María. *Las Teorías Jurídicas Post Positivistas*. 2ª edición. Buenos Aires, Argentina: Abeledo Perrot, 2009.

Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2nd edition, 2005.

Coupland, Robin. *Humanity: what is it and how does it influence international law?* In *IRRC* December 2001 Vol. 83 N. 844, 969-989 (2001).

Daly, Erin. *Dignity Rights: courts, constitutions, and the worth of the human person*. Philadelphia: University of Pennsylvania Press, 2013.

Descartes, René. *Discurso do Método*, in *Obras Escolhidas* 39, 41 (São Paulo: DIFEL, 2nd edition, 1973).

Desimoni, Luis María. *Los Derechos Humanos y La Guerra Contra el Terror*. Buenos Aires: Editorial Ábaco de Rodolfo Depalma, 2009.

Droege, Cordula. *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in *ISRAELI LAW REVIEW*. VOL. 40, NO.2, 310-355 (2007).

Durkheim, Émile. *Individualism and the Intellectuals*, in *Durkheim on Religion* 59-73. American Academy of Religion (1994).

Escalante, Rodolfo E. Piza. *El Valor Del Derecho y La Jurisprudencia Internacionales de Derechos Humanos en el Derecho y la Justicia Internos – El Ejemplo de Costa Rica*. In *Liber Amicorum*, Héctor Fix-Zamudio Vol. I 169-192 (San José, Costa Rica: Corte Interamericana de Derechos Humanos, 1998).

Fayt, Carlos S. *Los Derechos Humanos y El Poder Mediático, Político y Económico: su mundialización en el siglo XXI*. Buenos Aires: La Ley, 2001.

Fernandes, Bernardo Gonçalves. *Curso de Direito Constitucional*. 3ª edição. Rio de Janeiro: Lumen Juris, 2011.

Fukuyama, Francis. *As Origens da Ordem Política: dos tempos pré-humanos até a Revolução Francesa*. Rio de Janeiro: Rocco, 2013.

Fuller, Lon L. *The Morality of Law*. New Haven: Yale University Press, 1969.

Gadamer, Hans-Georg. *Verdade e Método I*. Trad. Flávio Paulo Meurer. Petrópolis: Vozes, 1997.

_____. *Verdade e Método II*. Trad. Flávio Paulo Meurer. Petrópolis: Vozes, 1997.

Gallardo, Helio. *Teoria Crítica: matriz e possibilidade de direitos humanos*. São Paulo: Unesp, 2013.

Gartner, Scott Sigmund. *Strategic Assessment in War*. New Haven: Yale University Press, 1997.

Giddens, Anthony. *Durkheim on Politics and the State*. California: Stanford University Press, 1986.

Glendon, Mary Ann. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2002.

Glover, Jonathan. *Humanity: a moral history of the 20th century*. 2nd Edition. London: Yale University Press, 2012.

Gonçalves, Joannisval Brito. *Tribunal de Nuremberg 1945-1946*. 2ª edição. Rio de Janeiro: Renovar, 2004.

Graves, Robert. *Good-bye to All That: an autobiography*. New York: The Penguin Press, 2014.

Greene, Joshua. *Moral Tribes: emotions, reason, and the gap between us and them*. New York: The Penguin Press, 2013.

Greer, Steven. *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*. Strasbourg, France: Council of Europe, 1997.

Guerra, Sidney. *Curso de Direito Internacional Público*. 5ª edição. Rio de Janeiro: Lumen Juris, 2010.

Guibourg, Ricardo A. *Derecho, Sistema y Realidad*. Buenos Aires: Editorial Astrea, 2010.

Habermas, Jürgen. *Direito e Democracia: entre facticidade e validade, volume I*. 2ª edição. Rio de Janeiro: Tempo Brasileiro, 2012.

_____. *Direito e Democracia: entre facticidade e validade, volume II*. Rio de Janeiro: Tempo Brasileiro, 2011.

Harbele, Peter. *A Dignidade Humana como Fundamento da Comunidade Estatal*. In *Dimensões da Dignidade* 89-154, Porto Alegre: Livraria do Advogado, 2005.

Hart, Herbert L. A. *O Conceito de Direito*. 5ª edição. Lisboa: Fundação Calouste Gulbenkian, 2007.

Hayden, Patrick. *The Philosophy of Human Rights*. St. Paul: Paragon House, 2001.

Hicks, Donna. *Dignity: its essential role in resolving conflict*. New Haven: Yale University Press, 2011.

Higgins, Rosalyn. *Problems and Process: International Law and How We Use It*. Oxford: Oxford University Press, 2004

Huerta, Tania Gabriela Rodríguez. *Tratado sobre Derechos Humanos : el sistema de reservas*. Porruá, México : ITAM, 2005.

Hunt, Lynn. *Inventing Human Rights : a history*. New York : W.W. Norton & Company, 2007.

Hurd, Heidi M. *O Combate Moral*. São Paulo : Martins Fontes, 2003.

Ignatieff, Michael. *The Lesser Evil: political ethics in an age of terror*. New Jersey: Princeton University Press, 2004.

Jankélévitch, Vladimir. *O Paradoxo da Moral*. São Paulo: Martins Fontes, 2008.

Jellinek, Georg. *The Declaration of the Rights of the Man and Citizens*. Frankfurt, Germany: Outlook, 2018.

Joas, Hans. *The Creativity of Action*. Chicago: The University of Chicago Press, 2005.

_____. *The Genesis of Values*. Chicago: The University of Chicago Press, 2000.

_____. *The Sacredness of the Person: a new genealogy of human rights*. Washington DC: Georgetown University Press, 2013.

_____. *War and Modernity*. Malden: Blackwell Publishing Inc., 2003.

Jorge Junior, Alberto Gosson. *Cláusulas Gerais no Novo Código Civil*. São Paulo: Saraiva, 2004.

Kamm, F. M. *The Moral Target: aiming at right conduct in war and other conflicts*. New York: Oxford University Press, 2012

Kant, Immanuel. *Fundamentação da Metafísica dos Costumes*. São Paulo: Martin Claret, 2006.

Keane, Fergal. *Season of Blood: a Rwandan Journey*. New York: The Penguin Press, 1996.

Kolb, Robert et al. *Research Handbook on Human Rights and Humanitarian Law*. Northampton, MA: Edward Elgar Publishing Limited, 2013.

Korkut, Ekrem. *Turkey and the International Law of the Sea*. London, England: Wildy, Simmonds & Hill Publishers, 2017.

Kunz, Josef Laurenz. *La Filosofía del Derecho Latinoamericana del Siglo XX*. Buenos Aires, Argentina: Lousada S.A., 1951.

Larenz, Karl. *Metodologia da Ciência do Direito*. 3ª edição. Lisboa, Portugal: Fundação Calouste Gulbenkian, 1997.

Li, Xiaorong. "Asian Values" and the Universality of Human Rights. In *The Philosophy of Human Rights* 397-408, St. Paul: Paragon House, 2001.

MacIntyre, Alasdair. *After Virtue*. 3rd edition. Indiana: University of Notre Dame Press, 2007.

Magnoli, Demétrio. *O Mundo Contemporâneo: relações internacionais 1945-2000*. São Paulo: Moderna, 1997.

Martinez, Jenny S. *The Slave Trade and the Origins of International Human Rights Law*. New York: Oxford University Press, 2012.

Maximiliano, Carlos. *Hermenêutica e Aplicação do Direito*. 19ª edição. Rio de Janeiro: Forense, 2006.

Mazzuoli, Valério de Oliveira. *Curso de Direito Internacional Público*. 5ª edição. São Paulo: RT, 2011.

McCrudden, Christopher. *Human Dignity and Judicial Interpretation of Human Rights*. In *International Law and Justice Working Papers 2008/8* (Institute for International Law and Justice of New York University School of Law, 2008).

Mello, Celso Albuquerque de. *Curso de Direito Internacional Público*. 15th edition, Rio de Janeiro: Renovar, 2004.

Melzer, Nils. *International Humanitarian Law: a comprehensive introduction*. Geneva, Switzerland: ICRC, 2016.

Mercier, Hugo et Sperber, Dan. *The Enigma of Reason*. Cambridge, Massachusetts: Harvard University Press, 2017.

Miéville, China. *Between Equal Rights: a Marxist Theory of International Law*. Chicago: Haymarket Books, 2006.

Moncayo, Guillermo R. et al. *Derecho Internacional Público*. Buenos Aires, Argentina: Zavalia, 1990.

Moreira, Eduardo Ribeiro. *Critérios de Justiça*. São Paulo: Saraiva, 2014.

Moyn, Samuel. *Human Rights and the Uses of History*. New York: Verso, 2014.

_____. *The Last Utopia: human rights in history*. Cambridge, Massachusetts: Harvard University Press, 2010.

Neff, Stephen C. *Justice Among Nations*. Cambridge, Massachusetts: Harvard University Press, 2014.

Neves, Marcelo. *Transconstitucionalismo*. São Paulo: Martins Fontes, 2009.

Nussbaum, Martha C. *Fronteiras da Justiça: deficiência, nacionalidade, pertencimento à espécie*. São Paulo: Martins Fontes, 2013.

Pardo, Carlos A. Fernández. *Carl Schmitt en la Teoría Política Internacional*. Buenos Aires, Argentina: Biblos, 2007.

Pejic, Jelena. *The Protective Scope of Common Article 3: more than meets the eye*, in *International Review of The Red Cross* Vol. 93 N. 881, 189-225, 2011.

Piovesan, Flávia. *Direitos Humanos e o Direito Constitucional Internacional*. 8ª edição. São Paulo: Saraiva, 2007.

Posner, Richard A. *The Economics of Justice*. Cambridge, Massachusetts: Harvard University Press, 1983.

_____. *Frontiers of Legal Theory*. Cambridge, Massachusetts: Harvard university Press, 2001.

Rabinovich-Berkman, Ricardo David. *Derechos Humanos: una introducción a su naturaleza y a su historia*. Buenos Aires: Quorum, 2007.

Ramírez, Manuel Becerra. *Las Decisiones Judiciales como Fuente del Derecho Internacional de Los Derechos Humanos*. In *Liber Amicorum, Héctor Fix-Zamudio* Vol. I 431-446 (San José, Costa Rica: Corte Interamericana de Derechos Humanos, 1998).

Ráo, Vicente. *O Direito e a Vida dos Direitos*. 5 edição. São Paulo: RT, 1999.

Rawls, John. *Uma Teoria da Justiça*. 3ª edição. São Paulo: Martins Fontes, 2008.

Raz, Joseph. *The Morality of Freedom*. New York: Oxford University Press, 1988.

Reale, Miguel. *Teoria Tridimensional do Direito*. 5ª edição. São Paulo: Saraiva, 1994.

Rieff, David. *Humanitarianism in Crisis*. In *Foreign Affairs Magazine* Vol. 81 N. 6 (2002).

Rodin, David; et Shue, Henry. *Just and Unjust Warriors: the moral and legal status of soldiers*. New York: Oxford University Press, 2008.

Rosen, Michael. *Dignity: its history and meaning*. Cambridge, Massachusetts: Harvard University Press, 2012.

Rosenvald, Nelson. *Dignidade Humana e Boa-fé no Código Civil*. São Paulo: Saraiva, 2005.

Sandel, Michael J. *Justice: a reader*. New York: Oxford University Press, 2007.

_____. *Justiça: o que é fazer a coisa certa*. Rio de Janeiro: Civilização Brasileira, 2012.

_____. *Liberalism and the Limits of Justice*. 2nd edition, Cambridge: Cambridge University Press, 1998.

_____. *Public Philosophy: essays on morality in politics*. Cambridge: Harvard University Press, 2005.

_____. *The Case Against Perfection: ethics in the age of genetic engineering*. Cambridge: Harvard University Press, 2007.

Sarmiento, Daniel. *Livres e Iguais: estudos de Direito Constitucional*. Rio de Janeiro: Lumen Juris, 2006.

Schmitt, Carl. *Teologia Política*. Belo Horizonte: Del Rey, 2006.

Shaw, Malcolm N. *International Law*. 6th edition. Cambridge, United Kingdom: Cambridge University Press, 2008.

Shawcross, William. *Justice and the Enemy: Nuremberg, 9/11, and the trial of Khalid Sheikh Mohammed*. New York: Public Affairs, 2011.

Sidgwick, Henry. *The Methods of Ethics*. Cambridge: Cambridge University Press, 2012.

Simpson, A. W. Brian. *Human Rights and the End of Empire – Britain and the Genesis of the European Convention*. New York: Oxford University Press Inc., 2004.

Singer, Peter. *Ética Prática*. 3^a edição. São Paulo: Martins Fontes, 2002.

_____. *The Expanding Circle*. New Jersey: Princeton University Press, 2011.

Singer, Peter et Singer, Renata. *The Moral of The Story: an anthology of ethics through literature*. Oxford: Blackwell Publishing, 2005

Steiner, Henry J.; Alston, Philip et Goodman, Ryan. *International Human Rights in Context*. 3rd Edition. New York: Oxford University Press, 2007.

Streck, Lênio. *Hermenêutica Jurídica e(m) Crise – Uma Exploração Hermenêutica da Construção do Direito*. 4^a edição. Porto Alegre: Livraria do Advogado, 2003.

Orend, Brian. *Kant on International Law and Armed Conflict*. Canadian Journal of Law and Jurisprudence, Vol. XI, n° 2, pp. 329-381, July/1998.

Teitel, Ruti G. *Humanity's Law*. Oxford: Oxford University Press, 2013.

Temkin, Larry S. *Rethinking the Good: moral ideals and the nature of practical reasoning*. New York: Oxford University Press, 2015.

Tesón, Fernando R. *International Human Rights and Cultural Relativism*. In *The Philosophy of Human Rights* 379-396, St. Paul: Paragon House, 2001.

Trindade, Antônio Augusto Cançado. *A Contribuição dos Tribunais Internacionais à Evolução do Direito Internacional Contemporâneo*, in *O Direito Internacional e o Primado da Justiça* 03-48 (Rio de Janeiro: Renovar, 2014).

_____. *A Humanização do Direito Internacional*. Belo Horizonte: Del Rey, 2006.

_____. *Direito das Organizações Internacionais*. 5th edition. Belo Hozironte: Del Rey, 2012.

Walzer, Michael. *Just and Unjust Wars*. 4th edition. New York: Basic Books, 2006

Williams, Bernard. *Moral: uma introdução à ética*. São Paulo: Martins Fontes, 2005.

Internet Resources

Barack Obama, Obama's 2006 Speech on Faith and Politics (June 28, 2006), <https://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html> (last visited in Oct. 2, 2019)

LibreTexts Library, [https://bio.libretexts.org/Bookshelves/Human_Biology/Book%3A_Human_Biology_\(Wakim_and_Grewal\)/24%3A_Ecology/24.04%3A_Community_Relationships](https://bio.libretexts.org/Bookshelves/Human_Biology/Book%3A_Human_Biology_(Wakim_and_Grewal)/24%3A_Ecology/24.04%3A_Community_Relationships) (last visited September 2, 2019).

Meron, Theodore. *The Case for War Crimes Trials in Yugoslavia*. In *Foreign Affairs Magazine*, Summer 1993, <https://www.foreignaffairs.com/articles/yugoslavia/1193-06-01/case-war-crimes-trials-yugoslavia> (last visited August 15, 2019)

The Engineering ToolBox, https://www.engineeringtoolbox.com/stp-standard-ntp-normal-air-d_772.html (last visited September 21, 2019).

The Pennsylvania State University, <http://chemistry.bd.psu.edu/jircitano/gases.html> (last visited September 21, 2019)

Films Materials

Ender's Game, directed by Gavin Hood, based on the novel of Orson Scott Card, Summit Entertainment, 2013.

Sophie Scholl – The final days, directed by Marc Rothemund, Zeitgeist Films, 2005.

The Man in the High Castle, TV series, Amazon Studios, 2015-.

Weapons of the Spirits, documentary, directed by Pierre Sauvage, Chambon Foundation and Pierre Sauvage Productions, 1990.

International Materials, International law cases, International Court of Justice

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. (December 19).

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. (June 27).

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. (February 14).

Interpretation of the Agreement of 25 March 1951 Between The WHO and Egypt, Advisory Opinion, 1980 I.C.J. (December 20).

LaGrand Case (Germany v. United States of America), 2001 I.C.J. (June 27).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. (June 21).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9).

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (July 8).

International Materials, International law cases, International Criminal Tribunal for Rwanda

The Prosecutor v. Jean-Paul Akayesu [Chamber I], Case No. ICTR-96-4-T, 1998 I.C.T.R. (September 2).

International Materials, International law cases, International Criminal Tribunal for the Former Yugoslavia

The Prosecutor v. Anto Furundzija [Trial Chamber], Case No. IT-95-17/1-T, 1998 I.C.T.Y. (December 10).

The Prosecutor v. Blaskic [Trial Chamber], Case No. IT-95-14-T, 2000 I.C.T.Y. (March 03).

The Prosecutor v. Dusko Tadic [Appeal Chamber], Decision of the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 1995 I.C.T.Y. (October 2).

The Prosecutor v. Galic [Trial Chamber], Case No. IT-98-29-T, 2003 I.C.T.Y. (December 05).

The Prosecutor v. Kupreskic et al. [Trial Chamber], Case No. IT-95-16-T, 2000 I.C.T.Y. (January 14).

The Prosecutor v. Ramush Haradinaj et al [Trial Chamber], Case No. IT-04-84-T, 2008 I.C.T.Y. (April 3).

International Materials, International law cases, Court of Justice of the European Union

Case C-402/05 P and C-415/05 P, Kadi v. Council of the European Union and Commission of the European Communities [GC], 2008 E.C.R.

International Materials, International law cases, European Court of Human Rights

A. and others v. The United Kingdom [GC], no. 3455/05 Eur. Ct. H. R. (2009).

Al-Adsani v. the United Kingdom [GC], no. 35763/97 Eur. Ct. H.R. (2001).

Al-Jedda v. The United Kingdom [GC], no. 27021/08 Eur. Ct. H.R. (2011).

Al-Skeini and Others v. The United Kingdom [GC], no. 55721/07 Eur. Ct. H.R. (2011).

Bouyid v. Belgium [GC], no. 23380/09 Eur. Ct. H.R. (2015).

Chahal v. the United Kingdom, no. 22414/93 Eur. Ct. H.R. (1996).

Demir and Baykara v. Turkey [GC], no. 34503/97 Eur. Ct. H.R. (2008).

Hassan v. The United Kingdom [GC], no. 29750/09 Eur. Ct. H.R. (2014).

Ilascu and Others v. Moldova and Russia [GC], no. 48787/99 Eur. Ct. H.R. (2004).

Isayeva v. Russia [Former First Section], no. 57950/00, Eur. Ct. H.R. (2005).

Khlaifia and Other v. Italy [GC], no. 16483/12 Eur. Ct. H.R. (2016)

Labita v. Italy, no. 26772/95 Eur. Ct. H.R. (2000).

Lambert and Others v. France [GC], no. 46043/14, Eur. Ct. H.R. (2015).

L.C.B. v. the United Kingdom [GC], no. 23413/94 Eur. Ct. H.R. (1998).

Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99 Eur. Ct. H.R. (2005).

McCann and Others v. The United Kingdom [GC], no. 18984/91 Eur. Ct. H.R. (1995).

Parrilo v. Italy [GC], no. 46470/11 Eur. Ct. H.R. (2015).

Pretty v. United Kingdom [Fourth Section], no. 2346/02, Eur. Ct. H.R. (2002).

Saadi v. the United Kingdom [GC], no. 13229/03 Eur. Ct. H.R. (2008)

Salah Sheekh v. the Netherlands, no. 1948/04 Eur. Ct. H.R. (2007).

Stec and Others v. The United Kingdom [GC], nos. 65731/01 and 65900/01 Eur. Ct. H.R. (2006).

Varnava and Others v. Turkey [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 Eur. Ct. H.R. (2009).

Vo v. France [GC], no. 53924/00, Eur. Ct. H. R. (2004).

Von Hannover v. Germany [Third Section], no. 59320/00, Eur. Ct. H.R. (2004).

International Materials, International law cases, Inter-American Commission on Human Rights

Coard et al v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report N° 109/99, OEA/Ser.L/V/II.106, Doc. 6 rev (1999).

Franklin Guillermo Aisalla Molina, Ecuador v. Colombia, Case IP-02, Inter-Am. Comm'n H.R., Report N° 112/10, OEA/Ser.L/V/II.140, doc. 10 (2010).

Jose Isabel Salas Galindo and Others v. United States, Case 10.573, Inter-Am. Comm'n H.R., Report N° 121/18, OEA/Ser.L/V/II.169, doc. 138 (2018).

Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report N° 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. at 271 (1997).

Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (2002).

International Materials, International law cases, Inter-American Court of Human Rights

Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 257 (November 28, 2012).

Bámaca-Velásquez v. Guatemala, Merits, Inter-Am. Ct. H. R. (ser. C) No. 91 (November 25, 2000).

Bámaca Velásquez v. Guatemala, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 91 (Febrero 22, 2002).

Barrios Altos v. Peru, Merits, Inter-Am. Ct. H.R. (ser.C) No. 83 (March 14, 2001).

Blake v. Guatemala, Fondo, Inter-Am. Ct. H.R. (ser. C) No. 36 (Enero 24, 1998).

Caesar v. Trinidad and Tobago, Merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 123 (March 11, 2005).

Case of the Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 148 (July 1, 2006)

Case of the “Mapiripán Massacre” v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No. 22 (September 15, 2005).

Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H. R. (ser. C) No.328 (November 30, 2016).

Case of the Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146 (March 29, 2006).

Contreras et al. v. El Salvador, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 232 (August 31, 2011).

Defensor de Derechos Humanos y Otros Vs. Guatemala, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 283 (Agosto 28, 2014).

El hábeas corpus bajo suspensión de garantías (artículos 27.2, 25 y 8 Convención Americana sobre Derechos Humanos), Opinión Consultiva OC-8/87, Inter-Am. Ct. H. R. (January 30, 1987).

Espinoza Gonzáles v. Peru, Preliminary objections, merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 289 (November 20, 2014).

Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 282 (August 28, 2014).

Garantías Judiciales en Estados de Emergencia (arts. 27.2, 25 y 8 Convención Americana sobre Derecho Humanos), Opinión Consultiva OC-9/87, Inter-Am. Ct. H. R. (October 06, 1987).

Gonzales Lluy y otros Vs. Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 298 (Septiembre 1, 2015).

Juridical Conditions and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) No. 18 (September 17, 2003).

Loayza-Tamayo v. Peru, Merits, Inter-Am. Ct. H. R. (ser. C) No. 33 (September 17, 1997).

Neira-Alegría et al. v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 20 (January 19, 1995).

Norín Catrimán et al. (Leaders, Members and Activists of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 279 (May 29, 2014).

Restricciones a la Pena de Muerte (artículos 4.2 y 4.4 Convención Americana sobre Derechos Humanos), Opinión Consultiva OC-3/83, Inter-Am. Ct. H. R. (ser. Fallos y opiniones) No. 3 (September 08, 1983).

Rosendo Cantú et al. v. Mexico, Preliminary objection, merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 216 (August 31, 2010).

The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, Advisory Opinion OC-2/82, Inter-Am. Ct. H. R. (ser. A) No. 2 (September 24, 1982).

The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (October 1, 1999).

Velásquez Paiz y Otros v. Guatemala, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 307 (Noviembre 15, 2015).

Velásquez Rodríguez Vs. Honduras, Fondo, Inter-Am. Ct. H. R. (ser. C) No.4 (July 29, 1988).

United Nations Materials

C.C.P.R. General Comment No. 29, State of Emergency (Article 4 of International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001).

E.S.C. Report on the Thirty-Sixth Session, Official Records, 1980, Supplement No. 3, U.N. Doc. E/1980/13, E/CN.4/1408 (February 4 – March 14, 1980).

G.A. Res. 804 (VIII), Question of atrocities committed by the North Korean and Chinese Communist forces against United Nations prisoners of war in Korea, U.N. Doc. A/RES/804/VIII (Dec. 3, 1953).

G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960).

G.A. Res. 1904 (XVIII), United Nations Declaration on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/RES/18/1904 (Nov. 20, 1963).

G.A. Res. 1312 (XIII), The Situation in Hungary, U.N. Doc. A38/49 (Dec. 12, 1958).

G.A. Res. 2443 (XXIII), Respect for and implementation of human rights in occupied territories, U.N. Doc. A/RES/2443/XXIII (Dec. 19, 1968).

G.A. Res. 2444 (XXIII), Respect for human rights in armed conflicts, U.N. Doc. A/RES/2444/XXIII (Dec. 19, 1968).

G.A. Res. 2675 (XXV), Basic principles for the protection of civilian populations in armed conflicts, U.N. Doc. A/RES/2675/XXV (Dec. 09, 1970).

G.A. Res. 2908 (XXVII), Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/RES/2908 (XXVII) (Nov. 02, 1972).

Manuel Wackenheim v. France, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002).

S.C. Res. 1373 (2001), U.N. Doc. S/RES/1373 (September 28, 2001).

S.C. Res. 2249 (2015), U.N. Doc. S/RES/2249 (November 20, 2015).

United Nations, Afghanistan Annual Report on Protection of Civilians in Armed Conflicts, 2010, (March, 2011).

United Nations, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, A/CONF.32/41, Sales No. E68.XIV.2 (1968).

European Union Materials

Council of Europe – European Court of Human Rights. Human Rights and the Fight Against Terrorism. Strasbourg, France: Council of Europe, 2005.

Inter-American Commission on Human Rights Materials

Comisión Inter-Americana de Derechos Humanos, Informe sobre Terrorismo y Derechos Humanos (2002).

Foreign Jurisdiction: Germany

Bundesverfassungsgericht [German Constitutional Court] December 15, 1999, Case of Von Hannover v. Germany, BverfGE 101, 1 BvR 653/96, 1999 (Ger.).