

INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS
AND APPLICATION OF INTERNATIONAL HUMANITARIAN LAW
AS LEX SPECIALIS

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Abstract

Does the distinction between international and non-international armed conflicts still exist or has it been virtually eliminated? If there are no distinctions and same set of rules govern both international and non-international armed conflicts, will the international humanitarian law apply as the *lex specialis* to the exclusion of the international human rights law in all armed conflicts, whether international or non-international in character? This article addresses these issues with the help of legal instruments and case laws.

Keywords: Non-international armed conflicts, *lex specialis*, international humanitarian law and international human rights law.

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Non-international armed conflicts also referred to as internal armed conflicts represent the vast majority of armed conflicts in today's world.¹ Generally, they take place within the boundaries of a State and comprise of armed conflict between a State and armed groups or among armed groups that do not operate under the State's authority.² However, it does not include internal disturbances like riots, civil strife or acts of the like nature.³ The primary and most important difference between an international and a non-international armed conflict is due to the actors who take part in them. Traditionally, international armed conflicts are fought between the States, which is not the case in non-international armed conflicts. Development of law regulating non-international armed conflicts grew in a slower pace compared to that of international armed conflict. States were reluctant for any kind of regulation due to a perception that it would constitute a violation of its sovereignty and interference in its domestic affairs.⁴

There was minimum regulation of non-international armed conflict until 1990s. By the time of conclusion of Article 3, which is common to the four Geneva Conventions, till 1949, international law regulated only those non-international armed conflicts which were reaching the level of belligerency or insurgency, while others, though few in number were regulated on an *ad hoc* basis. A broader category of these conflicts were regulated in the period between 1949 and early 1990s. In this time, the

¹Sandesh Sivakumaran (2011), Re-envisaging the International Law of Internal Armed Conflicts *European Journal of International Law*, 22 (1) 219-219; Yoram Dinstein (2014), *Non-International Armed Conflicts in International Law* (1stedn., Cambridge University Press) 1.

²Dieter Fleck (ed) (2008), *The Handbook of International Humanitarian Law* (2ndedn, Oxford University Press) 605.

³Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict With Commentary' (*International Institute of Humanitarian Law*, 2006), p. 2, available at <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf> accessed 19 November 2016; also see Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1(2).

⁴S. Sivakumaran, *supra* note 1, at 222.

Hague Convention for the Protection of Cultural Property and Additional Protocol II to the Geneva Conventions, 1949 came into being. However in this period, under the customary law, the situation was more uncertain.⁵ The next stage of regulation began in the early 1990s and today there is a clear body of international law that governs non-international armed conflict. There are three important bodies of law on the basis on which these laws have developed. Firstly, the law of the non-international armed conflict is modeled on and integrated to the law of international armed conflict. The latter is often seen as a high watermark of legal regulation to which the law of non-international armed conflict should aspire. Secondly, international criminal law has also contributed to the development of the law of non-international armed conflict and thirdly, it has drawn on the international human rights law.⁶ The law regulating non-international armed conflict had to rely on these three lines majorly because of the resistance the States posed to the direct regulation of non-international armed conflict through international humanitarian law as mentioned above. Today, it is more widely accepted that international law is binding on States in their internal affairs as well, not only when it comes to human rights issues but also to norms of international humanitarian law applicable in non-international armed conflicts.⁷

I. Treaties and Conventions

When it comes to treaty law, there are different thresholds for its application in non-international armed conflict. Article 3, which is common to the Geneva Conventions simply refers to ‘the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’⁸, without giving any specific

⁵*Ibid.*, at 220.

⁶ *Ibid.*

⁷ Dieter Fleck (ed) (2013), *The Handbook of International Humanitarian Law* (3rdedn, Oxford University Press) 585.

⁸The Geneva Conventions of 12 August 1949, Common Article 3.

definition. There is no requirement of armed groups fighting against the government of the territory in which operations are conducted as per the definition. Rather, the conflict may be fought between armed groups or between an armed group and the State outside the territory of the State.⁹ Since the threshold of common Article 3 is not specified in greater detail, an interpretation as to text, contents and purpose has to acknowledge that Article 3 was deliberately confined to few minimum rules, which should receive the widest scope of application. It is due to this limitation States avoided a more specific definition of the scope of application which probably would have been controversial. The concept of ‘armed conflict not of an international character’ in itself reflects the dynamics of war in its changing character.¹⁰ There is no precise definition of that term even in the International Committee for the Red Cross Manual.¹¹ The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (hereinafter “ICTY”), the *Tadić*¹² case referred to non-international armed conflict as a situation of ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.¹³ Article 8(2)(f) of the Statute of the International Criminal Court also accepts this test and excludes ‘situation of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature’ from the purview of non-international armed conflict.¹⁴

⁹D. Fleck (ed) (2013), *The Handbook of International Humanitarian Law* (3rdedn), *supra* note 7, at 587.

¹⁰*Ibid.*

¹¹*Ibid.*

¹²The Prosecutor v. DuskoTadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72.

¹³The Prosecutor v. DuskoTadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 [70].

¹⁴Rome Statute of International Criminal Court, 1998, Article 8(2) (d) (f).

In the years that followed the drafting of the Geneva Conventions, due to the changing nature of armed conflict, in terms of methods, means, participants and the increase in frequency and brutality of non-international armed conflict, there felt a need to develop a new law that was apparent.¹⁵ Hence, the Additional Protocol II was drafted to address non-international armed conflicts and fill the gaps left by the regulatory system of Common Article 3.¹⁶ As in the case with Common Article 3, Additional Protocol II does not apply to situations of internal disturbance and tensions.¹⁷ However, as per Article 1(1) of the Additional Protocol II the rules contained therein apply only to armed conflicts which take place on the territory of a party 'between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations to implement this Protocol'.¹⁸ This provision applies only to Additional Protocol II and is more rigorous than the threshold for the application of Common Article 3.¹⁹ It is said that in practice, it is often hard to identify situations to which the criteria established by Additional Protocol II be applied, especially due to the territorial control which it deals with.²⁰ Contrary to Common Article 3, Additional Protocol II provides for restriction with respect to its field of application to armed conflict between governmental forces and dissident armed forces or other organized armed

¹⁵Emily Crawford (2007), Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts *Leiden Journal of International Law*, 20 (2) 441-448.

¹⁶*Ibid.*

¹⁷Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1(2).

¹⁸Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1(1).

¹⁹ Elizabeth Wilmshurst (ed) (2012), *International Law and the Classification of Conflicts* (1stedn, Oxford University Press) 54.

²⁰Sylvain Vite (2009), Typology of armed conflicts in international humanitarian law: legal concepts and actual situations *International Review of the Red Cross*, 91 (873) 69-79.

groups.²¹ The fact that there are different thresholds for the application of Common Article 3 and Additional Protocol II shows that there are at least two types of non-international armed conflicts, those that are covered by Additional Protocol II (and also by Common Article 3) and those that are only covered by Common Article 3.²² The ICTY, on the other hand, has identified a body of customary international humanitarian law, which are equally applicable to international and non-international armed conflicts and they include rules such as the prohibition on attacks against civilians, attack against civilian objects, prohibition on the wanton destruction of property, protection of religious objects and cultural property, prohibition on plunder and the prohibition on the use of chemical weapons.²³ It was rightly noted in the *Tadić* case “*What is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife*”.²⁴ As mentioned above, the law of non-international armed conflict draws heavily from the law of international armed conflict and with respect to legal regulation, the traditional view is that the law of international armed conflict remains the pinnacle towards which the law of non-international armed conflict has to aim.²⁵

II. Distinction between International and Non-International Armed Conflicts

Traditionally, law of international armed conflict was applied only to wars between States.²⁶ This however changed with the passage of time and the distinction between the law of international and non-international armed conflicts were made by the

²¹Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Nijhoff M., Geneva/The Hague, 1987 p. 4461 as cited in *Ibid.*

²²E. Wilmschurst (ed), *supra* note 19, at 56.

²³S. Sivakumaran, *supra* note 1, at 228.

²⁴The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 [119]; *Ibid.*, at 230.

²⁵S. Sivakumaran, *supra* note 1, at 232.

²⁶R. Bartels (2009), ‘Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts’ *International Review of the Red Cross*, 91 (873) 35-48.

Geneva Conventions of 1949 and further confirmed by the Additional Protocols I and II to the Geneva Conventions in 1977. The Geneva Conventions of 1949 in its entirety, the Hague Conventions which preceded them and the Additional Protocol I apply to the international armed conflicts. These treaties contain the rules relating to the conduct of hostilities and rules relating to the protection of those who do not take part, or who no longer take part in hostilities.²⁷ On the other hand, the non-international armed conflict has limited number of treaty rules applicable on them, as explained above, they are restricted to Common Article 3, provisions of the Additional Protocol II and Article 8(2)(c) and (e) of the ICC Statute.

With regard to the actors involved, in international armed conflict, combatants who meet the necessary elements generally get a right to participate in armed hostilities, which is not the case in non-international armed conflict since the members of armed group do not have combatant status.²⁸ Due to the difference in the actors involved in the two types of armed conflict, it becomes clear why certain legal norms cannot be transposed directly from international armed conflict to non-international armed conflict without some modification.²⁹ The test for internationalization was laid down in the *Tadić* case where the Appeals Chamber of the ICTY stated, “if an armed conflict takes place between two or more States, it is indisputably international. However, an internal armed conflict within the territory of a State may also become international depending upon the circumstances like those cases where another State intervenes in that conflict through its troops or those cases where some participants in the internal

²⁷E. Wilmshurst (ed), *supra* note 19, at 34-35.

²⁸D. Fleck (ed) (2008), *The Handbook of International Humanitarian Law* (2ndedn), *supra* note 2, at 627.

²⁹S. Sivakumaran, *supra* note 1, at 221.

armed conflict act on behalf of that other State.”³⁰ In the wake of this decision, considerable amount of academic debate was seen with scholars arguing that it is difficult to apply objective criteria to determine whether an armed conflict is international or non-international in character. Some scholars agreed that there needs to be a difference in the application of laws while some were of the view that laws could be applied universally.³¹

Notwithstanding the difference in the nature and regulation of international and non-international armed conflicts, some scholars are of the view that the distinction between them is being eroded and this is evident by the fact that today there is greater unity in the laws applicable to these two forms of conflict including the Biological Weapons Convention, 1972, the Chemical Weapons Convention 1993 and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999.³² Some scholars are also of the view that in order to avoid confusion with regard to the interpretation of the law, there is a need to adopt a uniform body of rules on international humanitarian law like that of international criminal law and international human rights law. And the fact that the law of non-international armed conflict draws heavily from the law of international armed conflict is a major step in that direction.³³ Additionally, it is also argued that State practice over the years have contributed for the blurring of the legal distinction between international and non-international armed conflicts. “The evolution of the law points to the fact that basic

³⁰The Prosecutor v. DuskoTadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 [84]; James G. Stewart (2003), Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict *International Review of the Red Cross*, 85 (850) 313- 323.

³¹E. Crawford, *supra* note 15, at 452.

³²L. Moir, ‘Towards the Unification of International Humanitarian Law?’ in R. Burchill, N. White & J. Morris (eds), *International Conflict and Security Law* (2005) 108 as cited in E. Wilmshurst (ed), *supra* note 19, at 35.

³³S. Sivakumaran, *supra* note 1, at 235.

humanitarian norms are to be applied regardless of whether individuals to be protected are combatants or non-combatants, or whether the conflict is international or non-international in character. New operating definitions of international and non-international conflicts are to be evolved keeping in mind factors such as the level of violence and the threat to regional and international stability.”³⁴ Some scholars even argue that the distinction between international and non-international armed conflicts is merely a policy error, which needs to be rectified since the distinction does not consider the various changes taking place in armed conflict, consequently leaving many gaps in the application of humanitarian law.³⁵

More importantly, it has been argued that customary international law provides for broader rules that govern non-international armed conflicts thereby help in filling the gaps left by the treaty laws. The Appeals Chamber of the ICTY in the *Tadić* case also noted this.³⁶ The ICRC takes a similar approach in its comprehensive study of customary international humanitarian law, which was published in 2005 and found that almost all the rules identified in the study applied both to international and non-international armed conflicts.³⁷ Another important argument, which scholars often look into is the problematic definition in common Article 3 where “armed conflict not of international character” is not precisely defined anywhere. Since it is a negative definition it does not convey in exact terms what non-international armed conflict

³⁴M. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 479 as cited in E. Crawford, *supra* note 15, at 449-450.

³⁵E. Crawford, *supra* note 15, at 450.

³⁶The Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 [127], “Notwithstanding...limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules...cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities”; also see E. Wilmschurst (ed), *supra* note 19, at 35.

³⁷J. M. Henckaerts & L. Doswald-Beck, Customary International Humanitarian Law Study (2004) as cited in E. Wilmschurst (ed), *supra* note 19, at 36.

really is.³⁸ Even though Article 3 defines principles of the Conventions, it does not contain specific rules with respect to non-international armed conflict.³⁹ The Appeals Chamber of the ICTY in the *Tadić* case also supported the removal of distinction between the two categories of armed conflict. The ICTY noted that due to the changes that have taken place post Second World War with regard to the increase in the number of internal armed conflicts, preserving legal distinction between international and non-international armed conflict is unreasonable as the distinction itself had begun to fade away with time.⁴⁰

However, in spite of the arguments of the scholars who support the elimination of distinction between the international and non-international armed conflict, the distinction still exists. The scholars who support the distinction argue that elimination of distinction would lead to gaps in the overall application of international humanitarian law and the protection of the rights of individuals.⁴¹ Even in the legal sphere certain distinctions between the two types of conflicts do exist. For example, the status of actors involved, which is explained above; with respect to public property, seizure of military equipment belonging to an adverse party as war booty by combatants may be allowed in an international armed conflict and in occupied territories they can take public property that can be used for military operations and

³⁸J. G. Stewart, *supra* note 30, at 318.

³⁹*Ibid.*

⁴⁰The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 [97] “In the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”

⁴¹E. Crawford, *supra* note 15, at 452.

will not be under an obligation to compensate the State to which it belongs. But, such seizures are not regulated by the international law in a non-international armed conflict.⁴² In an international armed conflict, prisoners of war must be released without delay after cessation of hostilities. However, in a non-international armed conflict, there is no universal treaty provision on the release of persons deprived of their liberty.⁴³ In extreme cases, parties to an international armed conflict may resort to reprisals, subject to stringent conditions and where they are not expressly prohibited. However, parties to non-international armed conflict do not have to right to resort to reprisals.⁴⁴

These are some of the cases where the law of international armed conflict cannot be applied. If there is an elimination of distinction between international and non-international armed conflict, then how will one address these issues? Also, in case of there being a conflict which is outside the purview of both international and non-international armed conflicts how will it be addressed in a scenario where there is no legal distinction between the two? The sole intention of making all the laws come under one canopy might in fact do a lot of injustice with some issues, which deserve attention and better laws so that they can be addressed in a just manner.

III. On *lex specialis*

International human rights law consists of a body of laws, which protect human beings in all situations. Formally, there is no material limitation on the field of their application; they apply in times of peace as well as in times of armed conflict. Bodies such as the United Nations Security Council, the UN General Assembly, the UN High

⁴²D. Fleck (ed) (2013), *The Handbook of International Humanitarian Law* (3rdedn), *supra* note 7, at 604.

⁴³*Ibid.*

⁴⁴*Ibid.*

Commission and its Special Rapporteurs and the International Court of Justice (hereinafter “ICJ”) have re-affirmed the applicability of the International Human Rights Law during armed conflicts.⁴⁵ The ICJ stated that ‘the protection offered by human rights conventions does not cease in case of armed conflict, save for the effect of provisions for derogation...’⁴⁶ Given that the international humanitarian law is designed specifically to regulate armed conflict, one may question the need for another body of law namely the international human rights law to also apply in a situation when the former is applicable.⁴⁷ The above statement by the ICJ shows the importance of the application of the international human rights law during armed conflict, which is primarily regulated by the international humanitarian law. Traditionally, the rules of the international human rights law were developed to address the problems individuals faced during peacetime and at times when they confronted their own State.⁴⁸ On the other hand, international humanitarian laws are the laws of war, which regulate the conduct of parties during armed conflicts.⁴⁹ Even though human rights law started as an internal affair of States and humanitarian law started as a law between two States with respect to war, with the passage of time and development of legal jurisprudence the application of human rights law was seen in armed conflicts which subsequently raised questions on the interplay of these two branches of international law.⁵⁰ If both these branches apply in case of an armed conflict, then how will they interplay and in case of a dispute which will prevail? The

⁴⁵Orna Ben-Naftali (2011), *International Humanitarian Law and International Human Rights Law* (1stedn, Oxford University Press) 50.

⁴⁶Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Advisory Opinion, 2004 I.C.J. 136 at 178 [102-106] Legality of the Threat or Use of Nuclear Weapons, I.C.J., Advisory Opinion, 1996 I.C.J. 266 [25]; *Ibid.*, at 50-51.

⁴⁷Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds) (2014), *International Human Rights Law* (2ndedn., Oxford University Press) 483.

⁴⁸Orna Ben-Naftali, *supra* note 45, at 50.

⁴⁹ Cordula Droege (2008), Elective affinities? Human Rights and Humanitarian Law *International Review of the Red Cross*, 90 (871) 501-503.

⁵⁰*Ibid.*

ICJ in the *Nuclear Weapons case* said that this issue could be resolved through the maxim *lex specialis derogate legi generali*.⁵¹ This principle seeks to establish a preferential order for two rules or laws that apply to the same scenario but regulate it differently. This principle prefers the more special rule over the general rule, since it is closer to the particular subject matter and takes better account of the uniqueness of the context.⁵² The principle does not indicate an inherent quality in one branch of law, rather it determines which rule or law prevails over the other in a particular scenario. Each case must be analyzed individually.⁵³ The ICJ in the *Nuclear Weapons case* noted the inter-connectedness between the international humanitarian law and the international human rights law and established the *lex specialis* of international humanitarian law.⁵⁴ It also proposed a parallel application of the two disciplines, which acknowledges the continued application of human rights during armed conflict but granting some sort of primacy and prevalence to international humanitarian law over the international human rights law.⁵⁵

The interplay between the two disciplines came up before the ICJ for the second time

⁵¹Alexander Orakhelashvili (2008), The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence? *The European Journal of International Law*, 19 (1) 161-169.

⁵²Marco Sassoli & Laura M. Olson (2008), The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts *International Review of the Red Cross*, 90 (871) 599, 603-604.

⁵³Anja Lindroos (2005), 'Addressing norm conflicts in a fragmented system: the doctrine of *lexspecialis*' *Nordic Journal of International Law*, 74 (1) 42 as cited in *Ibid.*, at 604.

⁵⁴Nancie Prud'homme (2007), *Lexspecialis*: Oversimplifying a more complex and multifaceted relationship? *Israel Law Review*, 40 (2) 355-372; Legality of the Threat or Use of Nuclear Weapons, I.C.J., Advisory Opinion, 1996 I.C.J. 266 [25], the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lexspecialis*, namely, the law applicable in armed conflict. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

⁵⁵*Ibid.*, at 372.

in the *Israeli Wall*⁵⁶ case, to which the Court proposed three possible situations: “(a) some rights may be exclusively matters of international humanitarian law; (b) others may be exclusively matters of human rights law; (c) some others may be matters of both. In order to answer this, the Court will have to take into consideration both these disciplines of law, namely human rights law and as *lex specialis*, international humanitarian law.”⁵⁷ There appears to be lack of legal literature with regard to the precise definition of *lex specialis*⁵⁸ but by a careful perusal of the ICJ’s opinions in these cases one can conclude two things, first, where both international humanitarian law and international human rights law are applicable, the former tends to prevail as it offers more protection in almost every situation for which it has precise set of rules; second, human rights law remains applicable at all times including in armed conflicts.⁵⁹

In spite of the ICJ’s reliance on the principle of *lex specialis*, considerable debate has sprung up on the issue that this principle does not indicate the dominance of one branch of law over the other. According to many scholars, the Court proposed a theoretical basis for the parallel application of the two branches of law. However, it failed in providing clear guidance or sufficient details on how the maxim *lex specialis* should function thereby falling short of presenting a framework capable of clarifying the interplay between the two disciplines.⁶⁰ At best, the maxim is a tool of interpretation and not a rule to solve dispute between two disciplines of law, as it does

⁵⁶Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Advisory Opinion, 2004 I.C.J. 136.

⁵⁷*Ibid.*, at para 106; also see N. Prud’homme, *supra* note 54, at 377.

⁵⁸C. Droegge, *supra* note 49, at 523.

⁵⁹Francoise J. Hampson (2008), The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body *International Review of the Red Cross*, 90 (871) 549-559.

⁶⁰N. Prud’homme, *supra* note 54, at 378.

not indicate towards a hierarchy of norms.⁶¹ Some scholars believe that *lex specialis* is only a technique for resolution of normative conflicts.⁶² According to the maxim *lex specialis derogate legi generali*, a special norm will prevail over the general norm. Yet, the rule is silent as to what is specific and what is general; it does not provide any clear guidance to set apart the *lex specialis* from the *lex generalis*.⁶³ The most common example used to show the relevance of *lex specialis* is the violation of right to life during an armed conflict. While this example is apt, the principle is of less assistance when it comes to many other issues where both international humanitarian law and the international human rights law have to be applied together. For instance, in a non-international armed conflict where there is no agreed status of combatant and there is a potential violation of the right to life, international humanitarian law becomes less clear making the application of *lex specialis* even more difficult.⁶⁴ Perhaps due to the difficulty in distinguishing the *lex specialis* and the *lex generalis*, the maxim appears to have limited use when dealing with situations of detention during armed conflicts.⁶⁵ Hence it can be said that in specific circumstances like that of violation of right to life in an armed conflict, the principle of *lex specialis* adequately addresses the interplay between the international humanitarian law and the international human rights law, however it is of less assistance in dealing with many other complex scenarios that might arise during an armed conflict.⁶⁶

In an attempt to solve the confusion surrounding the application of the rule of *lex*

⁶¹ Martti Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (*Report of the Study Group of the International Law Commission*, 2006), p. 48, available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf accessed 19 November 2016.

⁶²A. Lindroos, *supra* note 53, at 36.

⁶³N. Prud'homme, *supra* note 54, at 382.

⁶⁴Noam Lubell (2005), *Challenges in Applying Human Rights Law to Armed Conflict* *International Review of the Red Cross*, (860) 737,746-750 as cited in N. Prud'homme, *supra* note 54, at 382.

⁶⁵N. Prud'homme, *supra* note 54, at 382.

⁶⁶*Ibid.*

specialis, some scholars suggested that a harmonious interpretation be made between the two disciplines of law as these two branches complement and not contradict each other.⁶⁷ Hence, according to the principle of complementarity, both human rights and humanitarian law are based on similar principles and values and can influence and strengthen each other mutually. This principle preserves the idea that international law be understood as a coherent system. International law is seen as a regime in which different sets of rules and laws cohabit in a harmonious manner. This enables the interpretation of human rights in the light of humanitarian law and vice versa.⁶⁸ This is reiterated by the decision of the European Court of Human Rights (hereinafter “ECtHR”) in *Hassan V. the United Kingdom*.⁶⁹ The State’s contention that the international humanitarian law should apply to the exclusion of international human rights law was rejected by the Court which went on to hold that the two bodies of law should be applied together and stated that “if the Court accepts the arguments of the government, it would be inconsistent with the case law of the International Court of Justice which has held that international human rights law and international humanitarian law may apply concurrently. It also pointed out that as the ECtHR has observed in many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part.”⁷⁰

Conclusion

The paper has attempted to discuss vital issues with regard to international and non-international armed conflicts and application of international humanitarian law as the

⁶⁷A. Orakhelashvili, *supra* note 51, at 169.

⁶⁸C. Droege, *supra* note 49, at 529.

⁶⁹*Hassan v United Kingdom*, [2014] ECHR 29750/09 [77].

⁷⁰*Ibid.*

lex specialis. With regard to the issue of whether there should be an elimination of distinction between international and non-international armed conflicts it can be said that even though there have been strong and valid arguments in favour of the elimination of the distinction, the distinction still exists. One of the main reasons for the existence of this distinction is the view by States that if non-international armed conflicts are equated with international armed conflicts then it would undermine State sovereignty and in particular national unity and security. States have been very concerned and were reluctant in eliminating the distinction since according to them treating non-international armed conflicts in the same way as international armed conflicts would encourage secessionist movements by giving them status under international law and also restrain the powers of the State in seeking to put down the rebellions.⁷¹ For instance, if the rule of combatant immunity, which prevents prosecutions of combatants merely for taking part in armed conflict, which is applicable in international armed conflicts, is made applicable to non-international armed conflicts then States would not be able to criminalize acts, which are traditionally regarded as constituting treason. These concerns of the States have been reflected in treaties as well, like the inclusion of Article 3 in Additional Protocol II according to which nothing in the Protocol restricts the responsibility of the State ‘by all legitimate means, to maintain or re-establish law and order.’⁷²

Apart from these concerns, the paper has also dealt with certain issues that might arise if there is an elimination of the distinction between international and non-international armed conflicts. There are certain issues under non-international armed conflicts

⁷¹F. Bugnion, ‘*Jus Ad Bellum, Jus in Bello and Non-International Armed Conflicts*’ (2003) 6 *Yearbook of International Humanitarian Law* p. 167-168, available at <https://www.icrc.org/eng/resources/documents/article/other/francois-bugnion-article-150306.htm> accessed on 19th November 2016.

⁷²E. Wilmshurst (ed), *supra* note 19, at 37-38.

where the law of international armed conflict cannot be applied. Mere intension of bringing both the laws under one umbrella might end up in not adequately addressing certain issues, which deserve attention. Hence, it can be concluded that the distinction between international and non-international armed conflicts still exists and it should not be eliminated so that all the issues can be addressed in a just and equitable manner.

With regard to issue of international humanitarian law being the *lex specialis* and being applicable to the exclusion of international human rights law to all armed conflicts, international or non-international, the paper has discussed the opinions of the International Court of Justice which sees international humanitarian law as *lex specialis* in armed conflicts but also notes the importance of application of international human rights law in armed conflicts. It is also made abundantly clear that by mere application of international humanitarian law as the *lex specialis*, the application of international human rights law will not cease. However, as the paper noted, there are some inherent problems with the application of this maxim, like the maxim gives priority to a special rule over the general rule. But it fails to give sufficient guidance as to what is *lex specialis* and *lex generalis*. While it is true that there are certain circumstances where the principle of *lex specialis* adequately addresses the interplay between international humanitarian law and international human rights law by regarding international humanitarian law as the *lex specialis*, it is equally true that many other circumstances cannot be addressed by this principle, as shown in the paper.

Hence it is hereby suggested that a harmonious interpretation be made between the two disciplines as they complement each other. Once this is done then human rights law can be interpreted in the light of humanitarian law and vice versa. This will

enable in solving various issues that might need the interaction between these two branches of international law without there being a priority in application. But the problem remains as to how to have a harmonious interpretation of these two disciplines of law, which approach an issue in different ways. It is hereby suggested that suitable mechanisms be devised including necessary legislations and covenants, which will help in a harmonious interpretation of these two branches of law. Hence it can be concluded that *lex specialis* as a principle, falls short in several respects with regard to addressing the interplay between the international humanitarian law and international human rights law. But by adopting a harmonious interpretation this issue can be addressed so that the individual rights are addressed in an appropriate manner during an armed conflict.
