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## Untangling the Complicated Relationship between International Humanitarian Law and Human Rights Law in Armed Conflict

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**UNTANGLING THE COMPLICATED  
RELATIONSHIP BETWEEN  
INTERNATIONAL HUMANITARIAN LAW  
AND HUMAN RIGHTS LAW IN ARMED  
CONFLICT**

*Waseem Ahmad Qureshi\**

*International Humanitarian law (IHL) and human rights law (HRL) share similarities in their goals, purposes, and values, which try to respect and protect human dignity and mitigate human suffering. Similarly, IHL and HRL are interchangeably applicable during peacetime and wartime, each set of rules dependent on the other. Therefore, IHL and HRL interact with each other during armed conflicts and occupations. War is where humanity suffers most, because during war both IHL and HRL are violated regularly on a mass scale. Unfortunately, nations do not respect the prohibition on war. As a result, many decades-long wars have been fought. Most importantly, noncombatants suffer as a result of these kinds of armed conflict. For instance, millions of people in Syria have been affected and displaced owing to the ongoing armed conflicts. Likewise, millions more have been impacted overall in the Middle East in the name of fighting terrorism. In this perpetual state of belligerence, humanity is suffering. Accordingly, to promote the mitigation of human suffering via the limits enshrined in HRL and IHL, this paper will try to comprehend the subtle similarities and differences in the application, relationship, and interaction of IHL and HRL during armed conflicts.*

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TABLE OF CONTENTS

I. INTRODUCTION ..... 204

II. ORIGINS OF HRL AND IHL ..... 206

    A. Origins of HRL ..... 206

    B. Origins of IHL ..... 208

III. APPLICABILITY ..... 211

    A. Jurisprudence of the Simultaneous Application of HRL  
        and IHL ..... 214

    B. Application of HRL and IHL during Emergencies ..... 216

IV. RELATIONSHIP: THE NOTION OF “*LEX SPECIALIS*” ..... 217

V. INTERACTION ..... 225

    A. Transnational Armed Conflict ..... 228

    B. Nontransnational Armed Conflict ..... 230

VI. CONCLUSION ..... 235

I. INTRODUCTION

Human rights law (HRL) and international humanitarian law (IHL) are two separate sets of rules, each of which has its own rich legal framework<sup>1</sup> but strikingly analogous characteristics. Even their names are similar, containing a common word—”human”—which denotes their commonality to protect human dignity and life.<sup>2</sup>

IHL comprises four main legal concepts: the principle of distinction, the principle of military necessity, the principle of proportionality and unnecessary suffering. These principles are based on the desire to mitigate unnecessary human suffering and property destruction.<sup>3</sup> The principle of distinction is laid down in Article 48 of the Additional Protocol of 1977 and the Geneva Convention (GC) of

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<sup>1</sup> Jean-Philippe Lavoyer, Implementation of International Humanitarian Law and the Role of the International Committee of the Red Cross, in *International Humanitarian Law: Challenges* 213, 214 (John Carey et al. eds., 2004).

<sup>2</sup> Daniel Moeckli, Human Rights and Non-discrimination in the “War on Terror” 92 (2008).

<sup>3</sup> Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* 285 (2010).

1949.<sup>4</sup> This concept mandates that belligerents must distinguish between combatants and noncombatants, and noncombatant civilians during armed conflict must be protected from the horrors of war and violence.<sup>5</sup> Similarly, the principle of military necessity is laid down in Article 8 of the same Additional Protocol.<sup>6</sup> This principle dictates that military actions must employ the minimum use of force necessary to attain military goals and objectives, and this principle prohibits the excessive use of force in order to ensure limited civilian casualties and property destruction as collateral damage.<sup>7</sup> The concept of proportionality maintains that the retaliatory force, in response to self-defense, must be reasonable in the context of the devastation it instigates.<sup>8</sup>

HRL is based on the principles of nondiscrimination, such as the right to be treated equally,<sup>9</sup> and on respect for human dignity, such as the right not to be tortured and the right not to be enslaved.<sup>10</sup> To understand the notions of HRL and IHL comprehensively, it is imperative to discuss their origins.

Accordingly, this paper is divided into four sections. The first will fleetingly discuss the origins of HRL and IHL, with Subsection A discussing the origins of HRL and Subsection B the origins of IHL. The second section will cover the applicability of HRL and IHL in situations of armed conflicts, peacetime, and occupations. This

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<sup>4</sup> Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts art. 48 (1977).

<sup>5</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *International Committee of the Red Cross, Customary International Humanitarian Law: Volume 1, Rules 3* (2005).

<sup>6</sup> Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts art. 8 (1977).

<sup>7</sup> IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 44 (2009).

<sup>8</sup> YORAM DINSTEIN, *WAR, AGGRESSION & SELF-DEFENCE* 210 (Cambridge University Press, 2001); *see also*, WASEEM AHMAD QURESHI, *JUST WAR THEORY AND EMERGING CHALLENGES IN AN AGE OF TERRORISM* 174 (2017).

<sup>9</sup> PAUL HUNT, *NEGLECTED DISEASES: A HUMAN RIGHTS ANALYSIS* 16 (2007), [http://www.who.int/tdr/publications/documents/seb\\_topic6.pdf](http://www.who.int/tdr/publications/documents/seb_topic6.pdf).

<sup>10</sup> Andrea Sangiovanni, *Humanity Without Dignity: Moral Equality, Respect, and Human Rights* 25 (2017).

section is also divided into two subsections: Subsection A will consider the jurisprudence of the simultaneous application of IHL and HRL, and Subsection B will explore the applicability of HRL and HL during emergencies. The third section will explore the relationship between IHL and HRL, discussing and building upon the recognized notion of *lex specialis*. Finally, the fourth section will examine the interaction between IHL and HRL. This section is also divided into two subsections: Subsection A will briefly look at the interaction between HRL and IHL in transnational armed conflicts, and Subsection B will examine their interaction in nontransnational armed conflicts.

## II. ORIGINS OF HRL AND IHL

To arrive at a comprehensive understanding of HRL and IHL, this section will briefly discuss their origins. It is divided into two subsections. Subsection A will discuss the origins of HRL, and Subsection B will explore the origins of IHL.

### A. Origins of HRL

The concept of HRL was integrated into the modern legal framework through the work of Greek philosophers during the sixth century BCE, through the concepts of natural law and the universality of human rights. These notions stipulate that all people enjoy human rights by the nature of the fact that they are humans, and these rights are inalienable.<sup>11</sup> From these principles developed several human rights, such as the right to equality, which mandates that all human beings are equal in the eyes of the law.<sup>12</sup> Later, through the same conceptualization, slavery was abolished and slaves were given a legal status equal to their former masters; they were no longer treated as the property of other people.<sup>13</sup> Though slavery was the

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<sup>11</sup> Lynn Hunt, *The Paradoxical Origins of Human Rights*, in HUMAN RIGHTS AND REVOLUTIONS 3, 4 (Jeffrey N. Wasserstrom et al. eds., 2007).

<sup>12</sup> DAVID N. STAMOS, *THE MYTH OF UNIVERSAL HUMAN RIGHTS* 129 (Routledge ed., Paradigm Publishers 2013) (2016).

<sup>13</sup> THOMAS L. KRANNAWITTER, *VINDICATING LINCOLN: DEFENDING THE POLITICS OF OUR GREATEST PRESIDENT* 98 (2008).

bedrock of the Greek and Roman civilizations,<sup>14</sup> these universal rights mandated that all human beings are equal, that no human could be treated as an inferior being based on his ethnic origin, religion, language, or status. These rights can be traced back to Sharia law in the early seventh century.<sup>15</sup> Islam propagated basic human rights, such as the right to equality, long before the incorporation of those rights into the modern legal framework.<sup>16</sup> These modern human rights were even incorporated into seventh-century legal frameworks, such as when inalienable rights were guaranteed in the Constitution of Medina in CE 622.<sup>17</sup>

In essence, HRL is all about protecting human dignity: anything that injures this dignity is prohibited, and anything that complements it is endorsed.<sup>18</sup> HRL is regularized and supplemented through “international laws, declarations, treaties, agreements,” and “national constitutions and legislations.”<sup>19</sup> The basic instrument that lays the international foundations of all HRL is the Universal Declaration of Human Rights of 1948 (UDHR).<sup>20</sup> UDHR includes economic, social, and cultural rights as well as civil and political rights.<sup>21</sup>

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<sup>14</sup> AUGUSTIN COCHIN, *THE RESULTS OF SLAVERY “L’ABOLITION DE L’ESCLAVAGE”* 363 (Mary L. Booth trans., Walker, Wise, & Company, 1863); *see also* DINESH D’SOUZA, *WHAT’S SO GREAT ABOUT CHRISTIANITY* 71 (2008).

<sup>15</sup> Mashood A. Baderin, *Islamic Law and International Protection of Minority Rights in Context*, in *ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CENTRISM FROM A PLURALITY OF PERSPECTIVES* 309, 321 (Marie-Luisa Frick et al. eds., 2013).

<sup>16</sup> Syed Abbas Husain, *The Wavering Waves of Change* (Divine Mode of Culture & Civilization) 105 (2016).

<sup>17</sup> A. Reis Monteiro, *Ethics of Human Rights* 58 (2014).

<sup>18</sup> H. VICTOR CONDÉ, *A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY* 126 (2nd ed., 2004).

<sup>19</sup> Christian Courts, *The Applicability of Human Rights Between Private Parties*, in *HUMAN RIGHTS IN EDUCATION, SCIENCE, AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES* 163 (Yvonne Donders et al. eds., 2007).

<sup>20</sup> Victoria Sutton, *Emergencies, Disasters, Conflicts, and Human Rights*, in *Advancing the Human Right to Health* 379, 380 (José M. Zuniga et al. eds., 2013).

<sup>21</sup> Amitabh Behar, *A Ground Reality to Assess the Realization of Economic, Social, and Cultural Rights in India*, in *HUMAN RIGHTS AND BUDGETS IN INDIA* 597, 601 (Yamini Mishra et al., 2009).

## B. Origins of IHL

By contrast, the chronological progression of IHL can be traced back to the Geneva Convention of 1864 (GC).<sup>22</sup> The first creditable expression of the term IHL was articulated in the GC.<sup>23</sup> This incorporation of IHL was meant to improve the conditions of injured soldiers on the battlefield.<sup>24</sup> IHL can also be seen in the Second Hague Peace Conference of 1907, which discusses excessive suffering along with the humanitarian rights of soldiers.<sup>25</sup> Similarly, the Geneva Conventions of 1949 considers “humanitarian activities” and “humanitarian organizations.”<sup>26</sup> However, besides tracing the use of IHL in the legal framework, the most important reason to analyze the origins of IHL is to examine its true historical understandings. Since IHL is only applicable during war or armed conflict,<sup>27</sup> it is known as the “law of war” or the “law of armed conflict.”<sup>28</sup> The main objective of IHL is to reduce human suffering during conflict. In a sense, IHL humanizes wars by curtailing unnecessary brutality and destruction.<sup>29</sup> It also restricts violence by belligerents in order to protect noncombatants and attempts to proscribe unwarranted obliteration through principles such as the “principle of distinction.”<sup>30</sup> This concept obliges that “... as soon as they [combatants] lay them [their arms] down and surrender, they cease to

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<sup>22</sup> Emily Crawford & Alison Pert, *International Humanitarian Law* 120 (2015).

<sup>23</sup> M. Cherif Bassiouni, *Introduction to International Humanitarian Law, in International Criminal Law: Vol. I Sources, Subjects and Contents* 269, 281 (M. Cherif Bassiouni ed., 2008).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Sylvain Beauchamp, “Humanitarian Space” in *Search of a New Home, in Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* 199, 211 (Benjamin Perrin ed., 2012); *see also* Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 444 (3rd ed. 2007).

<sup>27</sup> Jeroen C. van den Boogaard, *Fighting by the Principles: Principles as a Source of International Humanitarian Law, in ARMED CONFLICT AND INTERNATIONAL LAW: IN SEARCH OF THE HUMAN FACE* 3, 21 (Mariëlle Matthee et al. eds., 2013).

<sup>28</sup> Malcolm N. Shaw, *International Law* 847 (7th ed., 2014).

<sup>29</sup> U.C. JHA, *INTERNATIONAL HUMANITARIAN LAW: THE LAWS OF WAR* 216 (2011).

<sup>30</sup> Sandesh Sivakumaran, *International Humanitarian Law, in International Human Rights Law* 479, 480 (Daniel Moeckli et al. eds. 2014).

be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.”<sup>31</sup> IHL is not meant to stop or criminalize wars:<sup>32</sup> its purpose is solely to humanize them.<sup>33</sup> Critics of IHL, however, argue that its application prolongs the duration of a war, which acts paradoxically since elongated wars worsen human suffering.<sup>34</sup> By contrast, the proponents of IHL contend that having a longer war is better than having a shorter, yet more brutal or inhuman war.<sup>35</sup> Nonetheless, IHL balances the intricacies of human suffering, property destruction, and military necessity.<sup>36</sup> This balance is mechanized through the legal framework of regulations known as *jus in bello*, or the laws of war. Any violation of these regulations is referred to as a “war crime.”<sup>37</sup>

IHL and HRL share some similarities owing to their similar goals, purposes, and values, which try to respect and protect human dignity as well as mitigate human suffering.<sup>38</sup> Similarly, IHL and HRL are interchangeably applicable during peacetime and wartime,<sup>39</sup> with

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<sup>31</sup> Daphné Richemond-Barak, *Nonstate Actors in Armed Conflicts*, in *NEW BATTLEFIELDS/OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* 106, 113 (William C. Banks ed., 2011).

<sup>32</sup> Yves Sandoz, *International Humanitarian Law in the Twenty-First Century*, in *Yearbook of International Humanitarian Law Vol. 6* 3, 5 (Timothy McCormack ed., 2003).

<sup>33</sup> William C. Banks, *Towards an Adaptive International Humanitarian Law*, in *NEW BATTLEFIELDS/OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* 1, 19 (William C. Banks ed., 2011).

<sup>34</sup> Hugo Slim, *Wonderful Work: Globalizing the Ethics of Humanitarian Action*, in *The Routledge Companion to Humanitarian Action* 13, 23 (Roger Mac Ginty et al. eds., 2015).

<sup>35</sup> FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 3 (Martinus Nijhoff Publishers, 1987).

<sup>36</sup> Sivakumaran, *supra* note 30, at 480.

<sup>37</sup> DIANE A. DESIERTO, *NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION* 341 (2012).

<sup>38</sup> MOECKLI, *supra* note 2, at 92.

<sup>39</sup> JOST DELBRÜCK, WILFRIED FIEDLER, & JOST DELBRÜCK, *GERMAN YEARBOOK OF INTERNATIONAL LAW/JAHRBUCH FÜR INTERNATIONALES RECHT* 196 (DUNCKER & HUMBLLOT, 1983); *see also* Howard S. Levie, *Violations of Human Rights in time of War as War Crimes*, in *ISRAEL YEARBOOK ON HUMAN RIGHTS* 119, 119 (Yoram Dinstein ed., 1994).



each set of rules dependent on the other for its application.<sup>40</sup> Therefore, IHL and HRL interact with each other during armed conflicts and occupations.<sup>41</sup> War is where humanity suffers most, because during war both IHL and HRL are violated regularly on a mass scale.<sup>42</sup> Unfortunately, nations do not respect the prohibition on war. As a result, decades-long wars are fought repeatedly.<sup>43</sup> Most importantly, noncombatant civilians suffer from these kinds of armed conflict. For instance, millions of people in Syria have been affected and displaced owing to ongoing wars.<sup>44</sup> Moreover, millions more have been impacted generally in the Middle East in the name of fighting terrorism.<sup>45</sup> In these armed conflicts, Western states are arming rebellions<sup>46</sup> and fighting proxy wars against the sovereign nations of the Middle East in the name of supporting regime change.<sup>47</sup> In fact, these arms are used against sovereign states, which

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<sup>40</sup> Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, in *International Humanitarian Law and International Human Rights Law* 250, 251 (Orna Ben-Naftali ed., 2011).

<sup>41</sup> Peter Vedel Kessing, *The Use of Soft Law in Regulating Armed Conflicts: From Jus in Bello to 'Soft Law' in Bello?*, in *Tracing the Roles of Soft Law in Human Rights* 129, 133 (Stephanie Lagoutte et al. eds., 2016).

<sup>42</sup> See generally HUMAN RIGHTS WATCH, *BLOODSHED IN THE CAUCASUS: VIOLATIONS OF HUMANITARIAN LAW AND HUMAN RIGHTS IN THE GEORGIA-SOUTH OSSETIA CONFLICT* (Mar. 1992), <https://www.hrw.org/reports/pdfs/g/georgia/georgia.923/georgia923full.pdf>.

<sup>43</sup> Nigel D. White & Christian Henderson, *Introduction: International Conflict and Security Law*, in *Research Handbook on International Conflict and Security Law* 1, 1 (Nigel D. White & Christian White eds., 2013).

<sup>44</sup> V.G. Julie Rajan, *Women, Violence, and the Islamic State: Resurrecting the Caliphate Through Femicide in Iraq and Syria*, in *Violence and Gender in the Globalized World: The Intimate and the Extimate* 45, 60 (Sanja Bahun et al. eds., 2016).

<sup>45</sup> Tата Mentan, *The Elusiveness of Peace in a Suspect Global System* 300 (2016); see also Kit O'Connell, *4 Million Muslims Killed in Western Wars: Should We Call it Genocide?*, *Mintpressnews* (Aug. 18, 2015), <https://www.mintpressnews.com/4-million-muslims-killed-in-western-wars-should-we-call-it-genocide/208711/>.

<sup>46</sup> To see US is abetting NSA see Paul Battersby, *Global Crime and Global Security*, in *The SAGE Handbook of Globalization* 697, 706 (Manfred B. Steger et al. eds., 2014); see also David Scheffer, *The Impact of the War Crimes Tribunals on Corporate Liability for Atrocity Crimes Under US Law*, in *HUMAN RIGHTS IN THE NEW GLOBAL ECONOMY: CORPORATE SOCIAL RESPONSIBILITY?* 152, 167 (Charlotte Walker-Said & John D. Kelly eds., 2015).

<sup>47</sup> To see Western States are abetting NSA for regime change see Chris Landsberg & Jo-Ansie van Wyk, *A review of South Africa's peace diplomacy since 1994*, in

weakens the infrastructure of a state to such an extent that it is no longer able to fight rebellions.<sup>48</sup> In this perpetual system of belligerence, humanity is suffering. To promote the mitigation of human suffering via the regulations of HRL and IHL, it is vital to comprehend the subtle similarities and differences in the application, relationship, and interaction of IHL and HRL.

### III. APPLICABILITY

According to Common Article 2 of the Geneva Conventions of 1949, IHL is generally applicable during wartime or during an armed conflict.<sup>49</sup> By contrast, HRL is mostly applicable during peacetime; however, certain human rights continue to be applicable during warfare or armed conflict.<sup>50</sup> Emergency clauses in the legal framework allow states to derogate from certain human rights in an emergency situation.<sup>51</sup> The remaining fundamental human rights are deemed non-derogable, such as the right not to be enslaved, even during conflicts or wartime.<sup>52</sup> These non-derogable human rights are also known as the “hardcore of human rights.”<sup>53</sup> Most notably, the International Conference of Human Rights in Tehran of 1968<sup>54</sup> and the Declaration of Minimum Humanitarian Standards of 1990 (also

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SOUTH AFRICAN FOREIGN POLICY REVIEW 84, 106 (Chris Landsberg et al. eds., 2012).

<sup>48</sup> See Rachel Blevins, *Media Silent as Syrian Forces Finally Defeat Isis, Finding Cache of Made in USA Weapons*, The Free Thought Project (Nov. 10, 2017), <http://thefreethoughtproject.com/syrian-forces-defeat-isis-weapons-found/>.

<sup>49</sup> Lindsay Moir, *The Concept of Non-International Armed Conflict*, in *The 1949 Geneva Conventions: A Commentary* 390, 396 (Andrew Clapham et al. 2015).

<sup>50</sup> MOHAMAD GHAZI JANABY, *THE LEGAL REGIME APPLICABLE TO PRIVATE MILITARY AND SECURITY COMPANY PERSONNEL IN ARMED CONFLICTS* 162 (2016).

<sup>51</sup> Evan J. Criddle, *Introduction: Testing Human Rights Theory During Emergencies*, in *Human Rights in Emergencies* 1, 15 (Evan J. Criddle ed. 2016).

<sup>52</sup> CARMEN TIBURCIO, *THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW* 76-78 (2001).

<sup>53</sup> FRANÇOISE BOUCHET-SAULNIER ET AL., *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 192 (Laura Brav & Camille Michel eds. trans., Rowman & Littlefield Pub. 2013).

<sup>54</sup> See Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF.32/41 (May 13, 1968).

known as the Turku Declaration of 1990)<sup>55</sup> considered the application of HRL during armed conflicts. The consideration in these instruments, combined with other international instruments, criticize the division between IHL and HRL and advocate for their application in harmony with each other during armed conflict.<sup>56</sup>

HRL and IHL have multiple objectives in common. For instance, both sets of rules attempt to protect human beings.<sup>57</sup> The only apparent conceptual difference between them is that one set protects human beings during war, the other during peacetime.<sup>58</sup> The non-derogable nature of certain human rights<sup>59</sup> and the application of human rights during armed conflicts,<sup>60</sup> together with the fact that wars have been prolonged for decades<sup>61</sup> and drone attacks are routinely conducted during peacetime,<sup>62</sup> have mitigated the line distinguishing between HRL and IHL.<sup>63</sup> As a result, IHL is applicable during peacetime, without the existence of material wars, in the form

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<sup>55</sup> See Declaration of Minimum Humanitarian Standards, UN Doc. E/CN.4/Sub.2/1991/55 (Dec. 2, 1990).

<sup>56</sup> See TATHIANA FLORES ACUÑA, THE UNITED NATIONALS MISSION TO EL SALVADOR: A HUMANITARIAN LAW PERSPECTIVE 34 (Kluwer Law Int'l, 1995). To see the 1968 instrument in the same context see Orna Ben-Naftali, *Introduction: International Humanitarian Law and International Human Rights Law—Pas de Deux*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 3, 4 (Orna Ben-Naftali ed., 2011). To see the 1990 instrument in the same context see KRISTA NADAKAVUKAREN SCHEFER, SOCIAL REGULATION IN THE WTO: TRADE POLICY AND INTERNATIONAL LEGAL DEVELOPMENT 64 (2010).

<sup>57</sup> See MOECKLI, *supra* note 2, at 92.

<sup>58</sup> Law Soc'y of Ireland, Human Rights Law 143 (Brid Moriarty & Eva Massa eds., 4th ed. 2012).

<sup>59</sup> See TIBURCIO, *supra* note 51.

<sup>60</sup> See LAW SOC'Y OF IRELAND, *supra* note 57.

<sup>61</sup> To see Afghanistan two decades war see LARRY P. GOODSON, AFGHANISTAN'S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN 4 (2001). To see a decade long war on terror see PAUL ROGERS, WHY WE'RE LOSING THE WAR ON TERROR, at chapter 6 (2008).

<sup>62</sup> Mehrdad Vahabi, The Political Economy of Predation: Man-Hunting and the Economics of Escape 5 (2015); see also Gloria Gaggioli, *Remoteness and Human Rights Law*, in Research Handbook on Remote Warfare 133, 171 (Jens David Ohlin ed., 2017).

<sup>63</sup> Ben-Naftali, *supra* note 56, at 9.

of armed conflicts, civil wars, or occupations.<sup>64</sup> Interestingly, the laws of necessity, proportionality, and distinction, which are principles of IHL, are applicable without actual armed conflicts. For example, recent drone attacks conducted in Pakistan and Syria were actually conducted without any armed conflict between states, in the name of fighting terrorism.<sup>65</sup> In this context, the question of collateral damage and the principles of distinction were raised and applied by academics in conducting drone strikes.<sup>66</sup> Moreover, certain IHL instruments from the United Nations General Assembly include mitigating terms such as “Respect of Human Rights in Armed Conflict,”<sup>67</sup> which invigorate the relationship between HRL and IHL. Similarly, HRL is also applicable during armed conflicts and wars.<sup>68</sup> For instance, during armed conflicts between rebels and the Syrian state—where rebellions were armed and supported by other countries<sup>69</sup>—HRL was, and is, still applicable.<sup>70</sup> Moreover, the core of human rights is applicable and enforceable at all times, and states cannot derogate from them in any circumstances.<sup>71</sup> In its famous advisory opinion in the *Wall* case<sup>72</sup> and the case of *Congo v. Uganda*<sup>73</sup>, the International

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<sup>64</sup> Jann K. Kleffner, *Human Rights and International Humanitarian Law*, in *The Handbook of the International Law of Military Operations* 35, 45 (Terry D. Gill & Dieter Fleck eds., 2015).

<sup>65</sup> See U.C. Jha, *Drone Wars: Ethical, Legal and Strategic Implications: Ethical, Legal and Strategic Implications* (2014).

<sup>66</sup> David Turns, *Droning on: some international humanitarian in law aspects of the use of unmanned aerial vehicles in contemporary armed conflicts*, in *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* 191, 208 (Caroline Harvey et al. eds., 2014) (discussing the distinction and collateral damage); Maya Brehm, *International humanitarian law and the protection of civilian from the effects of explosive weapons*, in *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* 235, 241 (Caroline Harvey et al. eds., 2014) (discussing proportionality in Pakistan); *Id.* at 263 (discussing necessity).

<sup>67</sup> See *Respect of Human Rights in Armed Conflict*, UNGA RES 2444, 1968.

<sup>68</sup> JANABY, *supra* note 49, at 162.

<sup>69</sup> Battersby, *supra* note 46, at 706

<sup>70</sup> Janaby, *supra* note 49, at 182; *see also* Kessing, *supra* note 41, at 132.

<sup>71</sup> FRANÇOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 192 (2013).

<sup>72</sup> [2004] ICJ Rep 136

<sup>73</sup> [2004] ICJ Rep 136

Court of Justice (ICJ) established that HRL is applicable during armed conflicts and occupations by belligerents.<sup>74</sup>

#### A. Jurisprudence of the Simultaneous Application of HRL and IHL

For these reasons, it becomes impossible to dichotomize HRL and IHL based on their applicability criteria, since both HRL and IHL are applicable in peacetime as well as in war.<sup>75</sup> In the *Wall* case's famous advisory opinion, the ICJ explicitly discussed this dilution of difference by establishing that HRL and IHL concurrently apply in armed conflicts and occupations.<sup>76</sup> Within the case's context of occupants' belligerent acts, any such actions are "null and void" if they violate pertinent provisions of IHL or HRL.<sup>77</sup> The ICJ further elaborated in this case that construction of a wall in Palestine violated HRL (Articles 46 and 52 of the Hague Regulations of 1907) and IHL (Article 53 of IV Geneva Convention).<sup>78</sup> The ICJ supplemented the argument that the construction of the wall violated IHL by ruling that it was not a "military necessity."<sup>79</sup> In support of the argument that the construction of the wall violated HRL, the ICJ more particularly

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<sup>74</sup> Tom Ruys and Sten Verhoeven, *The Applicability of International Humanitarian Law and Human Rights Law in Occupied Territories*, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* 155, 155 (Roberta Arnold, Noëlle Quéniwet eds., 2008); *see also* Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan: The Legal and Socio-political Aspects* 117 (2014).

<sup>75</sup> JOST DELBRÜCK & WILFRIED FIEDLER, *supra* note 39, at 196; *see also* Levie, *supra* note 39, at 119.

<sup>76</sup> Kessing, *supra* note 41, at 133.

<sup>77</sup> Theodor Schweisfurth, *The International Law Commission's Articles on State Responsibility and the German Federal Constitutional Court*, in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* 1298, 1306 (Ulrich Fastenrath et al. eds., 2011).

<sup>78</sup> Mika Nishimura Hayashi, *The Martens Clause and Military Necessity*, in *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* 141 (Howard M. Hensel ed., 2016); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. ¶ 132 (July 9).

<sup>79</sup> Yutaka Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* 188 (2009); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. ¶ 135 (July 9).

stated that the construction violated the right to work, the right to health, the right to education, and the right to a basic standard of living under the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>80</sup> The court added that the construction also violated the right to movement and the right to choose a place of residence under Article 12 of the International Covenant on Civil and Political Rights (ICCPR).<sup>81</sup>

This parallel application of HRL and IHL can also be seen in the occupation case of *Congo v. Uganda*.<sup>82</sup> In this case, the state of Congo contended that Uganda's occupation of Congolese territory violated HRL and IHL with respect to the Congolese population<sup>83</sup>. The court explicitly established that Uganda had indeed simultaneously violated HRL and IHL.<sup>84</sup> The mere fact that the court established that Uganda had violated both sets of rules simultaneously<sup>85</sup> supports the assertion that both legal frameworks are concurrently applicable. The International Criminal Tribunal (ICT) also validates this assertion, as it has established the concept that HRL and IHL complement each other and their respective scopes and applications overlap.<sup>86</sup> The ICT adds that this nexus exists because IHL and HRL have similarities in their core values, goals, purposes, and terminologies.<sup>87</sup> However, the ICT set criteria for fusing HRL and IHL by stating "that notions developed in the field of human rights can be transposed in international humanitarian law

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<sup>80</sup> Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* 90 (2014).

<sup>81</sup> KAREN DA COSTA, *THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES* 79 (2012).

<sup>82</sup> Morse Tan, *North Korea, International Law and the Dual Crises: Narrative and Constructive Engagement* 133 (2015).

<sup>83</sup> DINAH SHELTON, *REGIONAL PROTECTION OF HUMAN RIGHTS VOL. 1*, 910 (2010).

<sup>84</sup> TAN, *supra* note 82, at 133.

<sup>85</sup> *Id.*

<sup>86</sup> Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 THE EUR. J. OF INT'L LAW 161, 164 (2008).

<sup>87</sup> *Id.*

only if they take into consideration the specificities of the latter body of law.”<sup>88</sup>

## B. Application of HRL and IHL during Emergencies

Further, there are certain derogable human rights that are not applicable during armed conflicts or public emergencies.<sup>89</sup> Article 4 of the ICCPR and Article 15 of the European Convention of Human Rights (ECHR) provide room for the derogability of human rights during such instances.<sup>90</sup> According to these Articles, a state can derogate from its HRL responsibilities in situations where the very existence of the state is at stake.<sup>91</sup> But the derogability of some rights does not mean that the state can ignore its other responsibilities, such as its obligations under IHL.<sup>92</sup> This assertion is explicitly incorporated in the UN Human Rights Committee General Comment No. 29<sup>93</sup>. As soon as the state deviates from its HRL responsibilities, IHL obligations are applicable,<sup>94</sup> because IHL is specifically applicable in situations in which human rights are derogated and IHL is applicable during armed conflicts or war.<sup>95</sup>

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<sup>88</sup> Damien Scalia, *Human rights in the context of international criminal law: respecting them and ensuring respect for them*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 575, 577 (Robert Kolb & Gloria Gaggioli eds. 2013).

<sup>89</sup> HARVEY, SUMMERS, & WHITE, *supra* note 64, at 162; *see also* Evan J. Criddle, *Introduction: Testing Human Rights Theory During Emergencies*, in HUMAN RIGHTS IN EMERGENCIES 1, 3 (Evan J. Criddle ed. 2016).

<sup>90</sup> *See id.* at 64.

<sup>91</sup> ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 344 (2004).

<sup>92</sup> A.H. Abdel Salam, *Constitutional Challenges of the Transition*, in THE PHOENIX STATE: CIVIL SOCIETY AND THE FUTURE OF SUDAN 1,12–13 (A.H. Abdel Salam & Alexander De Waal eds., 2001).

<sup>93</sup> SARAH JOSEPH, MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 916 (3rd ed. 2013).

<sup>94</sup> Arnold & Quénivet, *supra* note 72, at 7, 384.

<sup>95</sup> *See id.* at 502.

The norms of IHL are generally based on the notions of military necessity, proportionality, and distinction.<sup>96</sup> These principles attempt to humanize violence and destruction and do not really regulate the rights and powers of the belligerents.<sup>97</sup> The notions of *jus in bello* and *jus ad bellum* combined can be used to evaluate the justification of the belligerent's actions to ensure the legality of the aggression or armed conflict<sup>98</sup> and to see whether, in light of any impact such belligerence may have, IHL regulations come into play.<sup>99</sup> Therefore, the application of HRL in harmony with IHL is appropriate to judge crimes against humanity or evaluate human suffering.<sup>100</sup> For instance, many belligerents argue that IHL is applicable in fighting terrorism;<sup>101</sup> however, in a true sense of the legality of the use of force, since there is no material armed conflict, IHL is not applicable under Article 2 of the Geneva Convention of 1949 and its Additional Protocol I of 1977.<sup>102</sup> As IHL and HRL are closely related and can be interchangeably applicable in certain circumstances, yet cannot change places in others, it is important to discuss the relationship and interaction between IHL and HRL in detail. The next two sections of this paper will respectively discuss the relationship and interaction between IHL and HRL.

#### IV. RELATIONSHIP: THE NOTION OF “*LEX SPECIALIS*”

After concluding that HRL protection is not withdrawn during armed conflicts and emergencies, the ICJ in its *Wall* case

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<sup>96</sup> Noah Weisbord & Carla Reyes, *War Crimes, in International Crime and Justice* 321, 326 (Mangai Natarajan ed., 2010).

<sup>97</sup> Sandoz, *supra* note 32, at 5; *see also* Banks, *supra* note 33, at 19.

<sup>98</sup> Asa Kasher, *The Gaza Campaign (Operation cast lead) and the Just War Theory, in EDUCATIONAL CHALLENGES REGARDING MILITARY ACTION* 25, 37 (Hubert Annen et al. eds., 2010).

<sup>99</sup> Marko Milanovic & Vidan Hadzi-Vidanovic, *A taxonomy of armed conflict, in Research Handbook on International Conflict and Security Law* 256, 256 (Nigel D. White & Christian Henderson eds., 2013).

<sup>100</sup> *See id.* at 256.

<sup>101</sup> *See* U.C. JHA, DRONE WARS: ETHICAL, LEGAL AND STRATEGIC IMPLICATIONS: ETHICAL, LEGAL AND STRATEGIC IMPLICATIONS 102-3 (2014).

<sup>102</sup> Keiichiro Okimoto, *Violations of International Humanitarian Law by United Nations Forces and their Legal Consequences, in Yearbook of International Humanitarian Law* Vol. 6 199, 209 (Timothy McCormack ed., 2003).



advisory opinion established certain conditions for a relationship between HRL and IHL.<sup>103</sup> The court said that:

Some rights may be exclusively matters of [IHL]; others may be exclusively matters of [HRL]; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>104</sup>

ICJ bifurcated all humanitarian law into HRL and IHL by defining an exclusive framework of these rights regarding their applicability in certain distinct circumstances. Yet, it also acknowledged that there can be situations in which these lines can merge and both sets of rules can be simultaneously applied.<sup>105</sup> ICJ ruled that, in such a relationship between HRL and IHL, the doctrine of *lex specialis* is applicable.<sup>106</sup>

In legal doctrine, *lex specialis* is a guideline principle related to the interpretation of a law that is applicable in both the domestic and international legal settings.<sup>107</sup> *Lex specialis* is a Latin phrase that means

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<sup>103</sup> Stuart Casey-Maslen & Sharon Weill, *The use of weapons in armed conflicts, in Weapons Under International Human Rights Law* 274 (Stuart Casey-Maslen ed., 2014).

<sup>104</sup> Martin Dixon et al., *Cases & Materials on International Law* 242 (6th ed., 2016).

<sup>105</sup> Matthew Happold, *International Humanitarian Law and Human Rights Law, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW* 444, 460 (Nigel D. White et al. eds., 2013).

<sup>106</sup> Sarah McCosker, *The Interoperability of International Humanitarian Law and Human Rights Law: Evaluating the Legal Tools Available to Negotiate their Relationship, in INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION* 145, 155 (Andrew Byrnes et al. eds., 2013)

<sup>107</sup> Vik Kanwar, *Treaty Interpretation in Indian Courts: Adherence, Coherence, and Convergence, in The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* 239, 254 (Helmut Philipp Aust et al. eds., 2016).

“law governing a specific subject matter,”<sup>108</sup> derived from a renowned axiom, *lex specialis derogat legi generali*, which means “special laws override general laws.”<sup>109</sup> This concept mandates that, in certain settings, if two sets of laws simultaneously govern the legal framework of a given situation, then the rules with specific scope (*lex specialis*) will override the general set of rules (*lex generalis*).<sup>110</sup>

For instance, in the specific setting of the right not to be arbitrarily deprived of life under Article 6 of ICCPR, the ICJ illustrated the notion of *lex specialis*<sup>111</sup> as follows:

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.<sup>112</sup>

By establishing this, the ICJ overlooked the general applicability of *lex generalis* in relation with HR and concentrated on the specific applicability of *lex specialis*, which overrode the prior set of general rules.<sup>113</sup> It is interesting to note here that if the relevant facts involved a general deprivation of life, then the general right to life should have been applied. But, since the case concerned the *arbitrary* deprivation of life, the court only analyzed applicable IHL

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<sup>108</sup> UNITED NATIONS ENVIRONMENT PROGRAMME, PROTECTING THE ENVIRONMENT DURING ARMED CONFLICT: AN INVENTORY AND ANALYSIS OF INTERNATIONAL LAW 56 (2009), [http://www.un.org/zh/events/environmentconflictday/pdfs/int\\_law.pdf](http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf).

<sup>109</sup> Klaus Vogel, *The domestic law perspective*, in TAX TREATIES AND DOMESTIC LAW 3, 3 (Guglielmo Maisto ed., 2006).

<sup>110</sup> RESEARCH HANDBOOK ON EU HEALTH LAW AND POLICY 565 (Tamara K. Hervey et al. eds., 2017).

<sup>111</sup> Gerd Oberleitner, Human Rights in Armed Conflict: Law, Practice, Policy 90 (2015).

<sup>112</sup> *Id.*

<sup>113</sup> McCosker, *supra* note 102, at 155.

under Article 6, while explicitly making reference to *lex specialis* doctrine.<sup>114</sup>

Michael Dennis argues that during armed conflicts, the application of IHL categorically excludes the application of HRL, such that HRL ceases to exist by applying the principle of *lex specialis*.<sup>115</sup> This is because HRL is more generalized law whereas IHL is largely specific in nature, applying directly to the particular settings of armed conflicts.<sup>116</sup> Analyses like this are underhanded attempts to undermine the application of HRL during armed conflicts, which goes against the conventional standards of the international community. For instance, the ICJ went so far as to explicitly establish that HRL does not cease to exist during wars.<sup>117</sup> Dennis's argument is also not in congruence with the principle of *lex specialis*, which concerns two set of rules simultaneously applying, and conflicting, within a particular condition.<sup>118</sup> There can be situations where HRL and IHL are both *lex specialis*.<sup>119</sup> Therefore, the applicability of HRL and IHL can be delineated within the confines of a given situation of armed conflict, where one set of rules cannot *ab initio* exclude the other without considering the appropriation of the other's relevant laws.<sup>120</sup>

Inversely, the true interpretation of the doctrine of *lex specialis* by rational scholars shows that specific IHL are given preeminence

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<sup>114</sup> See OBERLEITNER, *supra* note 107, at 90.

<sup>115</sup> See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?*, 12 ILSA J. OF INTERNATIONAL & COMPARATIVE LAW 459, 472-480; see also Conor McCarthy *Legal Conclusion of Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 101, 107 (Roberta Arnold et al. eds., 2008).

<sup>116</sup> Patrick Knäble, *The Relationship Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, THE NEW ZEALAND POSTGRADUATE LAW E-JOURNAL 20 (2017), <https://cdn.auckland.ac.nz/assets/nzpglejournal/Subscribe/Documents/2006-2/1-PatrickHRHL.pdf>.

<sup>117</sup> Jordan J. Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror* 210 (2007).

<sup>118</sup> See Oberleitner, *supra* note 107, at 101.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

over generalized HRL when both HR and IHL present contradictory resolutions against unchanged given settings.<sup>121</sup> For instance, during an armed conflict, IHL would allow killing of belligerents within the rules of distinction, necessity, and proportionality;<sup>122</sup> however, under HRL, it would be a violation to kill the same individuals due to the wider regulations of proportionality in HRL.<sup>123</sup> However, it is pertinent to note here that, while such an analysis dismisses the contradiction between HRL and IHL, it is ambiguous whether it accommodates the ICJ's established norms under the *Wall* case and the distinguished advisory opinion of the *Nuclear Weapons* case. For instance, it is essential to ask why the ICJ established that life could not be deprived *arbitrarily* by IHL and reasoned that IHL only interprets an interjection of the word *arbitrary* within the same context,<sup>124</sup> while disregarding the fact that IHL did not completely overlook or abrogate the right to life under HRL; rather, it complemented the right to life.<sup>125</sup>

The works of Professor Martti Koskenniemi, an international lawyer and a former Finnish diplomat, are key to understanding the scope and functions of the doctrine of *lex specialis* in relation to *lex generalis* in such a situation.<sup>126</sup> According to Koskenniemi, the relationship between HRL and IHL is best demonstrated in two ways:

[Primarily], a particular rule may be conceived as an expression to the general rule. In this case, the particular derogates from the general rule.

[Secondly], a particular rule may be considered an application of the general rule in a given

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<sup>121</sup> Kjetil Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* 257 (2012).

<sup>122</sup> Jens David Ohlin & Larry May, *Necessity in International Law* 105 (2016).

<sup>123</sup> William A. Schabas, *The Right to Life*, in *The Oxford Handbook of International Law in Armed Conflict* 365, 385 (Andrew Clapham et al. eds., 2014).

<sup>124</sup> See Knäble, *supra* note 112, at 20.

<sup>125</sup> See *id.* at 20–22.

<sup>126</sup> See Martti Koskenniemi, *Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes"*: Preliminary Report: Addendum (UN, 2004).

circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand.<sup>127</sup>

Koskenniemi states that *lex generalis* falls under HRL because it offers a general scope of rights, whereas *lex specialis* falls under IHL because it offers a specific scope of application.<sup>128</sup> Through Koskenniemi's analysis, it becomes clear that particular rules (*lex specialis*) offer two major functions. One, such rules can either abrogate general rules by expressing exclusion; or, two, they can complement general rules by lending specificity to the given situation by expressing inclusion.<sup>129</sup> Either way, *lex specialis* governs the setting of facts in a given situation.<sup>130</sup>

Consequently, the question of *lex specialis* is either expressly included in the general rules or deliberately excluded from the legal frameworks.<sup>131</sup> These conditions will be referred to as the inclusion and exclusion, respectively, of *lex generalis* while applying *lex specialis*. On one side, the deviation of state laws from HRL in times of war or emergency is an example of deliberately excluding certain rules by explicit expression. The application of *lex specialis* does not necessarily exclude *lex generalis*.<sup>132</sup> If the legal framework does not specifically exclude *lex generalis*, then it is not necessarily excluded by only the application of *lex specialis*. On the other side, principles of *jus cogens* and the incorporation of non-derogatory human rights are examples of expressing the inclusion of *lex generalis* in the application of *lex specialis*.<sup>133</sup> Other than these two scenarios, in situations where the law is silent on a given issue regarding *lex specialis*, courts are entrusted to interpret the predominance of legal sets.<sup>134</sup>

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<sup>127</sup> Omer Faruk Direk, Security Detention in International Territorial Administrations: Kosovo, East Timor, and Iraq 103 (2015).

<sup>128</sup> See Knäble, *supra* note 112, at 20–22.

<sup>129</sup> *Id.*

<sup>130</sup> Carla Ferstman, International Organizations and the Fight for Accountability 98 (2017).

<sup>131</sup> See Knäble, *supra* note 112, at 20–22.

<sup>132</sup> *Id.*

<sup>133</sup> See Knäble, *supra* note 112, at 20–22.

<sup>134</sup> *Id.*

As discussed, legal frameworks may expressly include or exclude general rules while applying *lex specialis*. Application of *lex specialis* can build up details upon general rules in a specific scenario. This consideration is applicable in situations where *lex specialis* merely adopts the same principles of general rules while applying them in more specific situations with additional rubrics.<sup>135</sup> This kind of application of *lex specialis* requires close judicial scrutiny and interpretation. An analysis of the ICJ on the inclusion of word “arbitrary” under Article 6 of the ICCPR in the *Nuclear Weapons* advisory opinion provides a precise illustration of this type of *lex specialis* application.<sup>136</sup>

Koskenniemi’s model of analysis of *lex specialis* concerns the application of *lex specialis* and *lex generalis*, yet it raises certain novel questions as well. Koskenniemi argues that “IHL must be regarded as *lex specialis* in relation to—and thus override—rules laying out the peacetime norms relating to the same subjects.”<sup>137</sup> Koskenniemi’s consideration of IHL as *lex specialis* and HRL as *lex generalis* raises multiple questions: is this consideration always applicable in every situation? In a same given situation, does IHL always supersede HRL? And does perpetually considering IHL as *lex specialis* encumber HRL’s jurisprudence?

Koskenniemi argues that, since *lex specialis* is about applying more specific rules against general rules, IHL is *lex specialis*, because it is applied during armed conflicts and is therefore more specific.<sup>138</sup> Koskenniemi acknowledges that general and special rules are identified through their application in a given situation.<sup>139</sup> By considering IHL as *lex specialis* in armed conflicts, he overlooks the possibility that the criterion of an existing armed conflict does not necessarily particularize a situation by prioritizing IHL, because there can be situations within armed conflicts in which HRL can offer

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<sup>135</sup> Nehal Bhuta, *States of Exception: Regulating Targeted Killing in a Global Civil War*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 243, 255 (Philip Alston et al. eds., 2008)

<sup>136</sup> *See id.* at 255.

<sup>137</sup> *See* Knäble, *supra* note 112, at 20–23.

<sup>138</sup> DIREK, *supra* note 123, at 103.

<sup>139</sup> *See id.*

more comprehensive regulation than IHL.<sup>140</sup> For instance, the ICESCR (HRL) is more specific regarding regulations of health than Article 55 of GC IV (IHL).<sup>141</sup> More specifically, Articles 7, 10, and 12 of the ICESCR (HRL) complement Article 55 of GC IV (IHL).<sup>142</sup> There seems to be no reason why HRL in this situation cannot complement IHL during armed conflict. Thus, it is rationally established that during an armed conflict, HRL can be more elaborative than IHL.<sup>143</sup> Therefore, HRL can be considered *lex specialis* during an armed conflict.<sup>144</sup> The next section of this paper will illustrate in detail that HRL can be more fitting and elaborative in certain situations than IHL can be. Consequently, both HRL and IHL can be considered *lex specialis*, and the application of the doctrine of *lex specialis* does not obstruct HRL jurisprudence.<sup>145</sup> Moreover, it can also be seen that *lex specialis* can complement general rules by adding details to their specific application.<sup>146</sup>

Another perspective from which to scrutinize the relationship between HRL and IHL in *lex specialis* is to consider whether, when *lex specialis* are applicable to a given situation and *lex generalis* are derogable within same context, interpreting *lex generalis* can offer any consideration. For instance, in the *Nuclear Weapons* advisory opinion, the ICJ considered the interpretation of the word “arbitrary” in analyzing IHL as *lex specialis*, or specific rules.<sup>147</sup> In this opinion, does analyzing the right to life under Article 6 of the ICCPR offer any benefit? Why did the ICJ even discuss the ICCPR’s general notion of the right to life when it could have easily just applied HRL as a specific law? Some scholars argue that such inclusion is meant to

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<sup>140</sup> SIKANDER AHMED SHAH, INTERNATIONAL LAW AND DRONE STRIKES IN PAKISTAN: THE LEGAL AND SOCIO-POLITICAL ASPECTS 114 (2015).

<sup>141</sup> See *id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> KNUT BOURQUAIN, FRESHWATER ACCESS FROM A HUMAN RIGHTS PERSPECTIVE: A CHALLENGE TO INTERNATIONAL WATER AND HUMAN RIGHTS LAW 169 (2008).

<sup>145</sup> See Knäble, *supra* note 112, at 20–22.

<sup>146</sup> See BOURQUAIN, *supra* note 1407, at 169.

<sup>147</sup> Ian Henderson, *The Contemporary Law of Targeting* 33–34 (2009).

encompass the exercise of jurisdiction over a treaty,<sup>148</sup> while others argue that such an inclusion of HRL alongside IHL is to demonstrate moral condemnation that an action undignifies the human right to life.<sup>149</sup> However, this inclusion is merely embellishment; it does not offer any supplemental security to people's lives during armed conflict. For these reasons, it can be cogently construed that discussion of the term "arbitrary" in the advisory opinion includes both IHL and HRL.<sup>150</sup>

Moreover, to complement HRL, the use of the word "arbitrary" has to consider the rules of IHL, such as the notion of necessity during armed conflict. Within the same context, the term has to also consider guidelines of HRL, such as the right to life.<sup>151</sup> The combined effect of the considerations of HRL and IHL makes it more difficult for an oppressor or aggressor to justify its actions regarding the killing of civilians during the course of an armed attack.<sup>152</sup> Through such inclusion, the conventional protection of the right to life during an armed conflict can be easily reinforced. In conclusion, such protection of reinforcement demands that *lex specialis* must also incorporate interaction between HRL and IHL.<sup>153</sup>

## V. INTERACTION

In one school of thought, a handful of scholars believe that HRL can be used to complement IHL by simultaneously applying both sets of rules.<sup>154</sup> In the other school of thought, academics argue that, since IHL is more specific and particular, resorting to HRL

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<sup>148</sup> Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* 210 (2009).

<sup>149</sup> See Knäble, *supra* note 112, at 20–23.

<sup>150</sup> *Id.*

<sup>151</sup> Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, in *International Humanitarian Law and International Human Rights Law* 95, 99 (Orna Ben-Naftali ed., 2011).

<sup>152</sup> U.N. Office of the High Comm'r for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, at 3, U.N. Sales No. E.04.XIV.3, (2004).

<sup>153</sup> See Knäble, *supra* note 112, at 23.

<sup>154</sup> See SHAH, *supra* note 136, at 114.



while considering IHL cannot add considerable value in application.<sup>155</sup> The latter school substantiates its argument by contending that during armed conflicts, military personnel in action need concrete, practical rules.<sup>156</sup> This school adds that, within the same context, the practical application of IHL offers specific and concrete scope, while HRL is more generalized and abstract.<sup>157</sup> Therefore, during an armed conflict, abstract HRL cannot add any value, and IHL and HRL shouldn't be applied simultaneously.<sup>158</sup> For instance, the guidelines under GC III do not abstractly ask military personnel to just treat injured people compassionately. Rather, it provides a detailed framework, substantial guidelines about running camps, and positive duties regarding helping injured people.<sup>159</sup>

Consequently, IHL can offer more extensive protections to individuals during armed conflicts owing to its specificity and practicality.<sup>160</sup> Nonetheless, these protections are guided through regulations via a planned legal framework, and the planning of this legal framework requires guidance and direction.<sup>161</sup> In such a scenario, the frameworks and guidelines of HRL are indispensable. In a way, HRL is used to lay the foundations of IHL guidelines, essentially creating a system in which HRL and IHL work side-by-side.<sup>162</sup> For instance, careful planning about what type of property can and cannot be targeted during an armed conflict stems from the principles of HRL.<sup>163</sup> Analogous to the second school of thought above, it can be argued that military personnel do not directly follow the guidelines of IHL but instead follow directives of military codes of conduct; therefore, IHL is not applicable at all. Such a conclusion

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<sup>155</sup> DIREK, *supra* note 123, at 103-4.

<sup>156</sup> Nehal Bhuta, *The Frontiers of Extraterritoriality—Human Rights Law as Global Law*, in *The Frontiers of Human Rights: Extraterritoriality and Its Challenges* 1, 17 (2016).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Emily Crawford, *Armed Conflict, International*, in *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* 44, 48 (Frauke Lachenmann & Rüdiger Wolfrum eds., 2017).

<sup>160</sup> See Bhuta, *supra* note 152, at 17.

<sup>161</sup> See Crawford, *supra* note 155, at 48.

<sup>162</sup> PHIL ORCHARD, *A RIGHT TO FLEE* 231 (2014).

<sup>163</sup> See Knäble, *supra* note 112, at 23–24.

would be wrong and irrational, as “military codes of conduct” are developed by following the strict guidelines of IHL.<sup>164</sup> Similarly, it would be unreasonable to draw the conclusion that HRL is not applicable during armed conflict because military personnel only use specified IHL: IHL guidelines were developed following the principles of HRL.<sup>165</sup> In other words, if military codes can resort to HRL, there is no reason why IHL cannot do so.<sup>166</sup>

In fact, when a set of rules degenerates and requires richness in a certain area, it can always resort to the other set.<sup>167</sup> This means that the legal framework of HRL often relies on the specificity of IHL, and rules of IHL often rely on the establishment and application of HRL.<sup>168</sup> So, the interpretations of HRL and IHL routinely interact with each other for reference, application, practicality, and specificity.<sup>169</sup> For instance, while interpreting the right to life under Article 6 of ICCPR (HRL) in an armed conflict, the ICJ relied on IHL owing to its particularity of the word “arbitrariness.”<sup>170</sup> Similarly, IHL under Article 3 of GC III relied on HRL for the interpretation of “inhumane treatment” in the context of the war camp.<sup>171</sup> More specifically, civilians’ judicial guarantees under the Geneva Convention cannot be ascertained without resorting to the understandings and practicality of HRL.<sup>172</sup> Similarly, other prevailing guarantees for individuals and courts under Article

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<sup>164</sup> United Nations, United Nations: General Assembly, Resolutions and Decisions Adopted by the General Assembly During Its Fifty-ninth Session: Volume I - Resolutions (14 September–23 December 2004), Issue 49, 66 (UN, 2005).

<sup>165</sup> ORCHARD, *supra* note 158, at 231.

<sup>166</sup> See Knäble, *supra* note 112, at 23–24.

<sup>167</sup> Tristan Ferraro, *The law of occupation and human right law: some selected issues*, in, RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 273, 275 (Robert Kolb & Gloria Gaggioli eds. 2013).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See OBERLEITNER, *supra* note 107, at 90.

<sup>171</sup> CONDÉ, *supra* note 18, at 126.

<sup>172</sup> See Knäble, *supra* note 112, at 24.

84 of GC III are complemented by the HRL concepts of fairness, neutrality, and liberty.<sup>173</sup>

#### A. Transnational Armed Conflict

In transnational armed conflicts, HRL and IHL readily interact with each other in order to expand protections to people living in hostile territories.<sup>174</sup> More particularly, during international armed conflicts some individuals may not be protected by IHL at all, and the application of expansive HRL can protect their lives and well-being. IHL offers protection to nationals of an attacked and oppressed nation,<sup>175</sup> whereas HRL can expand this protection to nationals of an aggressive state.<sup>176</sup> For instance, Article 4 of GC IV under IHL only covers nationals of an oppressed or attacked nation.<sup>177</sup> Scholars argue that the right to life under HRL can be extended to safeguard the rights of citizens of the aggressor state.<sup>178</sup> Similarly, nationals of any country neutral to a conflict are not protected under Article 4 of GC IV;<sup>179</sup> the HRL right to life can be extended to safeguard the rights and lives of these individuals in a similar manner.<sup>180</sup>

Analogously, the principles of IHL interact with HRL in the situations and scenarios of occupied territories.<sup>181</sup> When any territory is occupied, many citizens living in that territory as civilians continue to live under military occupation. The belligerent state rules these

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<sup>173</sup> *Id.*

<sup>174</sup> See kinds of armed conflict and interaction between HR and HL in Christine Bell, *Post-conflict Accountability and the Reshaping of Human Rights and Humanitarian Law*, in *International Humanitarian Law and International Human Rights Law* 328, 338 (Orna Ben-Naftali ed., 2011).

<sup>175</sup> Roberta Arnold, *The liability of civilians under international humanitarian law's war crimes provisions*, in *Yearbook of International Humanitarian Law* 344, 358 (H. Fischer & Avril McDonald eds., T.M.C. Asser Press, Vol. 5 2002).

<sup>176</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* 74–75 (2009).

<sup>177</sup> See Arnold, *supra* note 170, at 358.

<sup>178</sup> See DINSTEIN, *supra* note 172, at 74–75.

<sup>179</sup> See Arnold, *supra* note 170, at 358.

<sup>180</sup> See *id.*; see also DINSTEIN, *supra* note 169, at 74–75.

<sup>181</sup> DIREK, *supra* note 123, at 103.

occupied territories and the lives of these civilians. In this context, however, HRL does not offer much help regarding the protection of the usual rights of these civilians other than providing rudimentary principles, such as the notion of distinction.<sup>182</sup> Rather than only offering the protection of HRL, the protection of the normal human rights applicable during peacetime must also be extended to civilians living in these occupied territories.<sup>183</sup> Scholars have pointed out that the protection offered under IHL is obsolete, and this protection was only meant for wartime and armed conflicts. Situations like military occupations that last decades, such as the occupations currently going on in the Middle East, were never envisioned when the rules of IHL were laid down.<sup>184</sup> Therefore, in the occupied territories, normal peacetime principles of HRL must also be extended to civilians.<sup>185</sup> For example, the right to a fair trial must be exercisable when individuals are routinely detained without probable cause, as has been the case in Palestine for decades.<sup>186</sup> Similarly, the freedom of expression and non-derogable human rights must also be offered to civilians living under occupation.<sup>187</sup> Likewise, legal doctrines of HRL regarding national security and public order can be evaluated to determine the reasonability of transfers of civilian population during armed conflict under Article 49 of GC IV.<sup>188</sup>

Similarly, IHL must be used to complement HRL in situations where HRL lacks detailed orientation. For instance, HRL does not offer detailed protection for civilians in missing persons cases in wartime or peacetime,<sup>189</sup> whereas GC III and GC IV have a detailed framework regarding the protection of missing persons in occupied territories.<sup>190</sup> GC obliges occupying states to provide

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<sup>182</sup> See Arai, *supra* note 77, at 310.

<sup>183</sup> See *id.*

<sup>184</sup> See Knäble, *supra* note 112, at 25–26.

<sup>185</sup> See ARAI, *supra* note 77, at 310.

<sup>186</sup> ENCYCLOPEDIA OF THE PALESTINIANS 206 (Philip Matta ed., 2005).

<sup>187</sup> See ARAI, *supra* note 77, at 310 & 491.

<sup>188</sup> See Vincent Chetail, *The Transfer and Deportation of Civilian*, in *The 1949 Geneva Conventions: A Commentary* 1185, 1188 (Andrew Clapham et al. 2015).

<sup>189</sup> Julie Martin, *The Returning Casualty: the excavation of a communist re-education camp cemetery at Lang Da, Yen Bai Province, Vietnam*, in *FORENSIC ARCHAEOLOGY: A GLOBAL PERSPECTIVE* 507, 521 (W.J. Mike Groen et al. eds., 2015).

<sup>190</sup> See Oberleitner, *supra* note 107, at 71.

particulars of detained persons regarding the locations and reasons of their imprisonment. GC even goes as far as to oblige states to recover missing persons and investigate their cases.<sup>191</sup> Moreover, IHL can extend more protection to civilians than HRL, because IHL does not derogate in times of war. Rather, IHL is more particularly applicable to emergencies and armed conflicts.<sup>192</sup>

## B. Nontransnational Armed Conflict

The interaction of HRL and IHL is more ad hoc in non-international armed conflicts than in transnational armed conflicts, as IHL is more easily applicable in transnational armed conflicts<sup>193</sup> and HRL is more easily applicable in non-transnational armed conflicts.<sup>194</sup> Article 3 of GC provides for rudimentary IHL principles in non-transnational armed conflicts;<sup>195</sup> though these principles are appended by additional protocols and other developed nations within IHL, the overall legal framework for the situations of non-transnational armed conflict is still less developed than in transnational armed conflicts.<sup>196</sup> For these reasons, it is only reasonable and efficient to resort to HRL during non-transnational armed conflicts while applying IHL.<sup>197</sup> For instance, Article 14 of ICCPR and Article 6 of ECHR, together with jurisprudential scope of HRL,<sup>198</sup> give a true understanding of the functioning of IHL in application and practicality of Article 3 of

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<sup>191</sup> *Id.*

<sup>192</sup> Council of Europe, *Guantánamo: Violation of Human Rights and International Law* 98 (Council of Europe Publishing, 2007).

<sup>193</sup> *See id.*

<sup>194</sup> Laura Perna, *The Formation of the Treaty Rules Applicable in Non-international Armed Conflicts* 47 (2006); *see also*, Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* 118 (2010).

<sup>195</sup> *See* Lindsay Moir, *The concept of Non-International Armed Conflict*, in *The 1949 Geneva Conventions: A Commentary* 391, 401 (Andrew Clapham et al. 2015); *see also* Anthony D. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010).

<sup>196</sup> *See* Solis, *supra* note 3, at 285.

<sup>197</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* 500 (2012).

<sup>198</sup> Yusuf Aksar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court* 59 (2004); *see also* Scalia, *supra* note 85, at 581.

GC,<sup>199</sup> which provides basic judicial and general guarantees for civilians and courts.<sup>200</sup>

By conjoining the legal sets of rules of HRL and IHL, the protection of civilians can be expanded during non-transnational armed conflicts.<sup>201</sup> On one side, the legal framework of HRL is already in place to protect individuals against infringements of their rights.<sup>202</sup> On the other side, during an internal armed conflict between two groups or between the state and organized groups, a government can choose to apply the legal mechanisms of IHL.<sup>203</sup> Applying IHL during non-transnational conflicts together with HRL in an interaction is made possible<sup>204</sup> by the malleability of the threshold to apply IHL under Article 3 of GC.<sup>205</sup> For instance, Article 3 of GC does not outline the limits or severity of violence necessary to constitute an armed conflict which would trigger the application of IHL.<sup>206</sup> However, Article 1 of Additional Protocol II (AP II) details prerequisites of Article 3 of GC to constitute an armed conflict.<sup>207</sup> The threshold under AP II is higher than that of Article 3 of GC,<sup>208</sup> since AP II requires two main prerequisites that allow the application of IHL. The first prerequisite is that the rebel forces must be sufficiently “organized” so as to be able to use substantial force.<sup>209</sup> The second precondition is that these groups must retain a considerable part of the state’s territory from which they can organize

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<sup>199</sup> See Yutaka Arai-Takahashi, *Law-Making and the Judicial Guarantees in Occupied Territories*, in *THE 1949 GENEVA CONVENTIONS: A Commentary* 1421, 1433 (Andrew Clapham et al. 2015)

<sup>200</sup> *Id.*

<sup>201</sup> SIVAKUMARAN, *supra* note 193, at 500.

<sup>202</sup> PERNA, *supra* note 190, at 47; *see also* CRAWFORD, *supra* note 190, at 118.

<sup>203</sup> SIVAKUMARAN, *supra* note 193, at 500.

<sup>204</sup> *See id.*

<sup>205</sup> William A. Schabas, *Developments in the law of genocide*, in *Yearbook of International Humanitarian Law* 131, 141 (H. Fischer & Avril McDonald eds., T.M.C. Asser Press, Vol. 5 2002).

<sup>206</sup> Kresimir Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* 240 (2017).

<sup>207</sup> *See* Schabas, *supra* note 201, at 142.

<sup>208</sup> *See id.*

<sup>209</sup> Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS AND RESULTS* 79, 120 (Roy S. Lee ed., 1999).

extensive attacks against the state.<sup>210</sup> Because states rarely acknowledge that they have lost substantial territory to rebellious groups, AP II has not been used in practice.<sup>211</sup> Arguably, since the threshold of IHL in non-transnational force is intangible,<sup>212</sup> the legal framework of HRL can extend assistance in safeguarding the rights of civilians.<sup>213</sup>

Furthermore, IHL and HRL can interact through application in internal conflicts and disorders.<sup>214</sup> Article 1 of AP II explicitly excludes internal conflicts and disorders from the ambit of armed conflicts and application of IHL,<sup>215</sup> however, internal disorders can invoke its application.<sup>216</sup> Still, internal armed conflicts can deteriorate state conditions, and escalated violence—such as riots and tensions—can instigate a state emergency such that states can derogate from basic human rights obligations<sup>217</sup> and apply IHL.<sup>218</sup> Within the same context, a strict division between HRL and IHL will hamper protection to civilians, such that neither IHL nor HRL would be applicable, because in practice most human rights are not applicable during emergencies<sup>219</sup> and IHL is not applicable in an

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<sup>210</sup> Emily Crawford, Identifying the Enemy: Civilian Participation in Armed Conflict 179 (2015).

<sup>211</sup> See Knäble, *supra* note 112, at 26–29.

<sup>212</sup> See Schabas, *supra* note 201, at 142.

<sup>213</sup> Sivakumaran, *supra* note 193, at 500.

<sup>214</sup> Claude Bruderlein, *HPCR Advanced Practitioner's Handbook on Commissions of Inquiry*, in *Practitioner's Handbook on Monitoring, Reporting, and Fact-Finding: Investigating International Law Violations* 7, 25 (Rob Grace et al. eds., 2017).

<sup>215</sup> Kriangsak Kittichaisaree, *Public International Law of Cyberspace* 225 (2017).

<sup>216</sup> Yutaka Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction With International Human Rights Law* 300 (2009).

<sup>217</sup> See Dieter Fleck, *Development of new rule or application of more than one legal regime?*, in *CONTEMPORARY CHALLENGES TO THE LAWS OF WAR: ESSAY IN HONOUR OF PROFESSOR PETER ROWE* 51, 64 (Caroline Harvey et al. eds., 2014)

<sup>218</sup> A.H. ABDEL SALAM & ALEXANDER DE WAAL, *THE PHOENIX STATE: CIVIL SOCIETY AND THE FUTURE OF SUDAN* (2001).

<sup>219</sup> See Fleck, *supra* note 217, at 64.

emergency that is not an armed conflict.<sup>220</sup> Therefore, it is only reasonable to incorporate both HRL and IHL in harmony to expand protection to civilians.<sup>221</sup> Conclusively, a hybrid application of non-derogable human rights and IHL can be fused together to ensure tranquility of society and protection of civilians, where each set of rules will work efficiently irrespective of the characteristics of the case.<sup>222</sup>

However, including HRL in non-transactional conflicts poses certain problems regarding practicality and application. This is because HRL usually obliges states not to infringe upon individuals' rights.<sup>223</sup> In an internal conflict or non-transnational armed conflict, it is nonstate bodies, groups, or organizations that violate human rights.<sup>224</sup> So, in practice, invoking HRL in the legal realms of IHL is not truly practical.<sup>225</sup> To resolve this issue of practicality, scholars argue that the interpretation of HRL must be made in such a way that nonstate bodies, groups, and organizations must also be held accountable for violating human rights.<sup>226</sup> On the other hand, other scholars suggest that the application of HRL requires effective control over the boundaries of a state, and if certain forces have gained control over parts of a country then HRL is unenforceable.<sup>227</sup> Therefore, the practicality and enforcement of HRL application remain intangible during particular conditions of armed conflict

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<sup>220</sup> Hebel & Robinson, *supra* note 205, at 120; *see also*, EMILY CRAWFORD, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT 179 (2015).

<sup>221</sup> ARAI, *supra* note 212, at 310

<sup>222</sup> TATHIANA FLORES ACUÑA, THE UNITED NATIONS MISSION IN EL SALVADOR: A HUMANITARIAN LAW PERSPECTIVE 34 (Martinus Nijhoff Publishers, 1995); *see also* Milanovic & Hadzi-Vidanovic, *supra* note 95, at 256.

<sup>223</sup> Mona Rishmawi, *The Developing Approaches of the International Commission of Jurists to Women's Human Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 340, 342 (Rebecca J. Cook ed., 2012).

<sup>224</sup> *See* Jean-Marie Henckaerts & Cornelius Wiesener, *Human rights obligations of non-state armed groups: a possible contribution from customary international law?*, in RESEARCH HANDBOOK OF HUMAN RIGHTS AND HUMANITARIAN LAW 146, 149 (2013).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 154, 159.



within the uncontrolled territories of a state.<sup>228</sup> Nevertheless, lawmakers are trying to resolve this issue by integrating individual responsibility in addition to state responsibility under HRL. The system they are trying to create prohibits grave violations of HRL by individuals.<sup>229</sup> For instance, Article 2 of the Declaration of Minimum Humanitarian Standards (DMHS) states that “standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.”<sup>230</sup> Here the DMHS’s explicit obligation to nonstate bodies to respect HRL is an example of the assimilation of the problem of HRL’s practicality during nontransnational armed conflicts.<sup>231</sup> Similar to Article 2 of DMHS, Article 28 of the African Charter of Human Rights (ACHR) states that “[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”<sup>232</sup> Moreover, the ACHR also unambiguously obliges individuals and nonstate bodies to respect HRL.<sup>233</sup> References and articulations of approaches, such as Article 28 of the ACHR and Article 2 of the DMHS, provide feasibility in the application, enforceability, and practicality of HRL in integration with IHL during nontransnational armed conflicts.<sup>234</sup>

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<sup>228</sup> *Id.* at 161-62.

<sup>229</sup> *See generally* LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* (Martinus Nijhoff Publishers, 1992).

<sup>230</sup> Nils Geissler, *Der völkerrechtliche Schutz der Internally Displaced Persons* 314 (1999); *see also* Christian Tomuschat, *Human Rights: Between Idealism and Realism* 314 (2nd ed. 2008).

<sup>231</sup> *See* TOMUSCHAT, *supra* note 226, at 314.

<sup>232</sup> BLACKSTONE’S INTERNATIONAL HUMAN RIGHTS DOCUMENTS 410 (Alison Bisset ed., 10th ed. 2016); *see also* ANNE-MARIE MOONEY COTTER, *THIS ABILITY: AN INTERNATIONAL LEGAL ANALYSIS OF DISABILITY DISCRIMINATION* 129 (2006).

<sup>233</sup> Anne-Marie Mooney Cotter, *Race Matters: An International Legal Analysis of Race Discrimination* 109 (2016); *see also* Luis Gabriel Franceschi, *The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective* 129 (2014).

<sup>234</sup> *Id.*; TOMUSCHAT, *supra* note 226, at 314.

Another perspective on the interaction between IHL and HRL is in the enforceability of HRL by HRL bodies.<sup>235</sup> Some scholars contend that HRL bodies like the Human Rights Committee (HRC) cannot review violations and infringement of IHL while enforcing and reviewing HRL.<sup>236</sup> They substantiate their contentions by arguing that HRL bodies can only encompass the legal frameworks that define them; therefore, they cannot outstep their jurisdictional limits.<sup>237</sup> For instance, individuals and complainants can only file complaints, in general, regarding guaranteed rights under the ICCPR.<sup>238</sup>

By examining the detailed discussions above regarding IHL and HRL interactions, it is evident that HRL bodies can review IHL in their interpretations.<sup>239</sup> For instance, HRL bodies can refer to IHL to understand the context of infringements of HRL during an armed conflict, whether transnational or internal.<sup>240</sup> The courts need to rely on the concepts of IHL to interpret principles of HRL,<sup>241</sup> such was the case in elaborative discussion of interpreting the term *arbitrary* while reviewing the right to life under Article 6 of ICCPR.<sup>242</sup>

## VI. CONCLUSION

IHL and HRL were historically developed in specific situations for entirely different purposes.<sup>243</sup> Both bodies of law

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<sup>235</sup> William C. Banks, *Counterinsurgency Law: New Directions in Asymmetric Warfare* 14 (2013).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Larissa van den Herik & Helen Duffy, *Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches*, in *Towards CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW: APPROACHES OF REGIONAL AND INTERNATIONAL SYSTEMS* 366, 374 (Carla M. Buckley et al. eds., 2016).

<sup>240</sup> See Walter Kalin, *Universal human rights bodies and humanitarian law*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW* 441, 445 (Robert Kolb & Gloria Gaggioli eds. 2013).

<sup>241</sup> See *id.*; see also Herik & Duffy *supra* note 235, at 374.

<sup>242</sup> See OBERLEITNER, *supra* note 107, at 90.

<sup>243</sup> Lavoyer, *supra* note 1, at 214.

therefore have different parameters and dynamics, with IHL being essentially tactical and contractual in nature<sup>244</sup> and HRL being much more universalistic and idealistic.<sup>245</sup> This is because the logic of IHL hinged on the realization of mutual obligations between parties, both of whom—at least in theory—had an interest in defining and limiting the character of war.<sup>246</sup> Meanwhile, HRL has its origins in the desire to limit the circumstances in which conflict might be engendered; it is, moreover, concerned with far wider areas of human activity than simple conflicts.<sup>247</sup> It is these essential tensions that underpin the difficulties of balancing the two frameworks within armed conflicts, especially when some participants do not perceive themselves as bound by the constraints of IHL.<sup>248</sup>

In terms of their provenance and development, IHL and HRL are both branches of general international law.<sup>249</sup> The distinction between the two may be illustrated through the situations in which they are invoked and applied.<sup>250</sup> International humanitarian law is most commonly applied to persons or communities *in extremis*, where combatants or noncombatants may be denied the right to life through various means.<sup>251</sup> Meanwhile, HRL is drawn into a much wider range of situations, both inside and outside the context of armed conflicts.<sup>252</sup> In this respect, the remit of one may be said to begin where that of the other ends: as the equivalent pressures of

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<sup>244</sup> See Moir, *supra* note 48, at 396.

<sup>245</sup> See JANABY, *supra* note 49 at 162.

<sup>246</sup> Timothy McCormack, Yearbook of International Humanitarian Law - 2003, Volume 6; Volume 2003, 5 (CUP, 2006); See Also, William C. Banks, New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare, 19 (COLUMBIA UNIVERSITY PRESS, 2011).

<sup>247</sup> See JANABY, *supra* note 49, at 162.

<sup>248</sup> William C. Banks, Counterinsurgency Law: New Directions in Asymmetric Warfare, 14 (OUP, 2013).

<sup>249</sup> Orna Ben-Naftali, International Humanitarian Law and International Human Rights Law (OUP, 2011).

<sup>250</sup> See Moir, *supra* note 48, at 396; see also Janaby, *supra* note 49 at 162.

<sup>251</sup> Marco Sassoli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts*, in International Humanitarian Law and International Human Rights Law 34, 79 (Orna Ben-Naftali ed., 2011).

<sup>252</sup> MOHAMAD GHAZI JANABY, THE LEGAL REGIME APPLICABLE TO PRIVATE MILITARY AND SECURITY COMPANY PERSONNEL IN ARMED CONFLICTS 162 (2016).

reconstruction supplant the immediate perils and uncertainties of conflict, HRL emerges parallel to IHL operation.<sup>253</sup> The latter may not always be discontinued on the cessation of hostilities, as the onset of famine or diseases may require its continued operations.<sup>254</sup>

Meanwhile, the application of HRL is derogable.<sup>255</sup> For instance, Article 15 of the ECHR, Article 4 of the ICCPR, and Article 27 of the ACHR collectively provide a tariff whereby states can derogate from their treaty responsibilities.<sup>256</sup> In brief, these are as follows: the state(s) concerned must officially recognize an emergency that threatens sovereignty and make the correlative public declaration to the relevant authority.<sup>257</sup> However, there are certain “non-derogable” rights, such as the right to life, that remain in place.<sup>258</sup> A state cannot derogate from an entire convention, but only from those elements to which the perceived threat applies.<sup>259</sup> Furthermore, the state’s response should be proportionate to that threat.<sup>260</sup> The final condition lies in the principle that derogation

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<sup>253</sup> Ben-Naftali, *supra* note 61, at 9; *see also* TATHIANA FLORES ACUÑA, THE UNITED NATIONS MISSION IN EL SALVADOR: A HUMANITARIAN LAW PERSPECTIVE 34 (Martinus Nijhoff Publishers, 1995).

<sup>254</sup> *See* Herik & Duffy *supra* note 235, at 374; *see also* Kalin, *supra* note 236, at 445.

<sup>255</sup> *See* Bhuta, *supra* note 152, at 59.

<sup>256</sup> *Id.*

<sup>257</sup> *See* Robert K. Goldman, Extraterritorial application of the human rights to life and personal liberty, including habeas corpus, during situations of armed conflict, in *Research Handbook on Human Rights and Humanitarian Law* 104, 105 (Robert Kolb & Gloria Gaggioli eds. 2013); & Roberta Arnold, Terrorism in International Humanitarian Law and Human Rights Law, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* 475, 483 (Roberta Arnold et al. eds., 2008).

<sup>258</sup> *See* for example Article 4, International Covenant on Civil and Political Rights (ICCPR), 1976. *See also* FRANCISCO FORREST MARTIN, STEPHEN J. SCHNABLY, RICHARD WILSON, JONATHAN SIMON, & MARK TUSHNET, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES, AND ANALYSIS 35 (2006); *see* *McCann v United Kingdom* (1996) 21 EHRR 97, para 161.

<sup>259</sup> *See* Oberleitner, *supra* note 107, at 345.

<sup>260</sup> Jacques Delisle, *States of exception in an exception state: emergency powers law in China*, in *Emergency Powers in Asia: Exploring the Limits of Legality* 342, 380 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010)

should not result in action that is in any way discriminatory to any particular individual or group.<sup>261</sup>

Conversely, the veracious interpretation of the doctrine of *lex specialis* by rational scholars construes that specific IHL are given preeminence over generalized HRL, where both HRL and IHL present contradictory resolutions against unchanged given settings.<sup>262</sup> Through Koskeniemi's analysis it becomes clear that particular rules (*lex specialis*) can do both: they can either derogate general rules by expressing exclusion, or they can complement general rules by providing specificity to the given situation by expressing inclusion.<sup>263</sup> Either way, it is the *lex specialis* that governs the given setting of facts in a situation.<sup>264</sup> IHL is easily applicable in transnational armed conflicts,<sup>265</sup> and HRL is more easily applicable in nontransnational armed conflicts.<sup>266</sup> By examining detailed discussions above regarding IHL and HRL interactions, it is evident that HRL bodies can review IHL in their interpretations.<sup>267</sup> For instance, HRL bodies can refer to IHL to understand the context of the infringements of HRL during an armed conflict, be it a transnational armed conflict or an internal conflict.<sup>268</sup>

If this is accepted, then IHL is further dependent upon the idea that the limiting of violence is not strictly necessary to achieve strategic ends had benefits for both sides.<sup>269</sup> By avoiding a reciprocal escalation of the conflict—for example, as with massacre and

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<sup>261</sup> Jean-François Durieux, *Temporary Protection: Hovering at the Edges of Refugee Law*, in Netherlands Yearbook of International Law 2014: Between Pragmatism and Predictability: Temporariness in International Law 221, 216 (Mónika Ambrus & Ramses A. Wessel eds., 2015).

<sup>262</sup> KJETIL MUJEZINOVIĆ LARSEN, THE HUMAN RIGHTS TREATY OBLIGATIONS OF Peacekeepers 257 (2012).

<sup>263</sup> See Knäble, *supra* note 112, at 20–23.

<sup>264</sup> CARLA FERSTMAN, INTERNATIONAL ORGANIZATIONS AND THE FIGHT FOR ACCOUNTABILITY 98 (2017).

<sup>265</sup> GUANTÁNAMO: VIOLATION OF HUMAN RIGHTS AND INTERNATIONAL LAW?, *supra* note 188, at 98.

<sup>266</sup> Perna, *supra* note 190, at 47; see also CRAWFORD, *supra* note 190, at 118.

<sup>267</sup> See Herik & Duffy *supra* note 235, at 374.

<sup>268</sup> See Kalin, *supra* note 236, at 445.

<sup>269</sup> See Delisle, *supra* note 256, at 380.

reprisal—both sides could avoid an internecine escalation of hostilities, which would obscure or neutralize the original strategic objectives.<sup>270</sup> Solis, for example, sees this as exemplified in eighteenth-century international conflicts, where, even though states might be competing for the same resources, neither has any incentive to risk the breakdown of military conventions or the unleashing of an uncontrolled holocaust.<sup>271</sup>

As a result, two important themes develop. First, there is an increased conflation on the responsibility of states toward individuals, especially toward noncombatants.<sup>272</sup> Second, such responsibilities are ultimately deemed to be operating on a new, universal, and almost super-legal basis, since they are no longer contingent upon formal treaties between combatants.<sup>273</sup> As Duffy points out, for their operation, all concerned parties are bound by formal treaties, such as the Hague Regulations of 1907, the four Geneva Conventions of 1949 and AP of 1977, and the Hague Convention on Cultural Property of 1954.<sup>274</sup> However, the GC of 1949 in particular exceeded this requirement by extending liability to all parties irrespective of their treaty status.<sup>275</sup> Moreover, the 1949 Convention simultaneously removed the basis for any justification that might be claimed because of breaches or excesses by one or other party;<sup>276</sup> this principle was reemphasized by the International Criminal Tribunal for the former Yugoslavia (ICTY). As Duffy points out, “Non-observance of particular binding rules by one party does not justify violations by another . . . the ICTY has emphasized that crimes committed by an adversary can never justify the perpetration of serious violations of IHL.”<sup>277</sup> For instance, the 30-article tariff was intended to be “disseminated, displayed, read and expounded . . . without distinction

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<sup>270</sup> *Id.*

<sup>271</sup> See SOLIS, *supra* note 3, at 8

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> HELEN DUFFY, *THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW* 360 (2005).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> See *id.* at 361.

based on the political status of countries or territories.”<sup>278</sup> The preamble then continues to assert that recognition of humankind’s inalienable rights “is the foundation of freedom, justice and peace in the world.”<sup>279</sup>

The application of IHL in armed conflicts becomes more problematic when facing opponents who are prepared to engage with civilian populations. For example, attacks may be deemed unlawful when they are directed against civilians or “civilian objects,” or where insufficient distinction is made between military and civilian targets: no protagonists can escape censure when they accept that collateral damage among civilians is unavoidable.<sup>280</sup> As may be construed from the above, the cardinal rule within IHL is that civilians should be protected from attacks. Such immunity is only surrendered “where the person takes an active and direct part in hostilities. Direct participation should be narrowly construed, and does not include, for example support for or affiliation to the adversary.”<sup>281</sup> It is in these kinds of areas that the interplay of IHL and HRL can become particularly complex, especially given the growth of irregular warfare and terrorist techniques. It is, however, problematic to attach such logic to guerrilla or terrorist strategies.<sup>282</sup> Further complications are implied where force is applied in the guise of humanitarian intervention, i.e., the opening of hostilities against a combatant for the specific declared purpose of preventing humanitarian crimes.<sup>283</sup>

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<sup>278</sup> Daniel Helle & Maarit Kohonen, *Publicity for the Universal Declaration of Human Rights: General Assembly Resolution 217D(III)*, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 725, 727 (Gudmundur Alfredsson et al. eds., 1999).

<sup>279</sup> Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; see also Corinna Mieth, *The Double Foundation of Human Rights in Human Nature*, in HUMAN RIGHTS AND HUMAN NATURE 11, 11 (Marion Albers et al. eds., 2014).

<sup>280</sup> See DUFFY, *supra* note 270, at 229, 366–369, 425.

<sup>281</sup> See *id.*, at 367–369.

<sup>282</sup> Joost Herman, International Law and Humanitarian Space in the Twenty-First Century: Challenged Relationships, in *Humanitarian Action* 11, 14 (Andrej Zwitter et al. eds., 2014).

<sup>283</sup> See DUFFY, *supra* note 270, at 334.

In conclusion, this brings the discussion back full circle, since the principles of international law—which enshrine universal human rights—are indivisible from those set out in the UN Charter.<sup>284</sup> Just as IHL proscribes justification for excesses through the actions of an opponent, so HRL provides a minimum and extra-treaty tariff of rights for individuals and communities. As Chesterman points out, an examination of the doctrine of humanitarian intervention must consider “not merely the law concerning the use of force by states, but the status of an international rule of law more generally.”<sup>285</sup> The aggregate experience within any armed conflicts is that it will face actions by some elements that are totally contrary to both the spirit and letter of HRL and IHL, as expressed in the principle that “[n]othing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the responsibilities, rights and freedom set forth in this Declaration and in the Universal Declaration of Human Rights of 1948.”<sup>286</sup> Therefore, it remains to be seen whether these tensions will be alleviated by some harmonization of IHL and HRL in the future.

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<sup>284</sup> JANELLE M. DILLER, *SECURING DIGNITY AND FREEDOM THROUGH HUMAN RIGHTS: ARTICLE 22 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 9–10 (2011).

<sup>285</sup> SIMON CHESTERMAN, *JUST WAR OR JUST PEACE: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 2 (2003).

<sup>286</sup> Article 19, *A Universal Declaration of Human Responsibilities* (Interaction Council, 1997).