

The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts

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Abstract

This article explores the relationship between international humanitarian and human rights law during non-international armed conflict. It seeks to answer two questions which are crucial in practice, but where the relationship between the two branches and the answers of humanitarian law alone are unclear. First, according to which branch of law may a member of an armed group be attacked and killed? Second, may a captured member of an armed force or group be detained similarly to a prisoner of war in

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international armed conflicts or as prescribed by human rights? Through application of the lex specialis principle, this article discusses possible answers to these questions.



Much has been written about the relationship between international humanitarian law (humanitarian law or IHL) and international human rights law (human rights or IHRL), their separate origins, and their convergence and mutual influence. Their fields of application, the rights protected and the respective implementation mechanisms have been compared. The International Court of Justice (ICJ) and various human rights bodies have explored the extent to which humanitarian law is the *lex specialis* compared with human rights. What has provoked less jurisprudence is that on some issues human rights constitute the *lex specialis*. The meaning of the *lex specialis* concept and how the *lex specialis* can be identified has been studied by the International Law Commission (ILC)¹ and scholars in general, as has specifically the relationship between the two branches.² A systematic analysis to determine which of the two branches constitutes the *lex specialis* on issues covered by both is still lacking, but can certainly not be the aim of this article.

In practice, the aforementioned theoretical questions do not matter for most problems actually affecting victims of armed conflicts. This is particularly true in international armed conflicts, for which humanitarian law treaties are best developed. First, the rules of both branches have the same addressees: states. Second, for many situations it is difficult to argue that human rights apply at all, because the victims cannot be considered as being in the territory or under the jurisdiction of the state attacking them. Third, with regard to many issues, one or other of the two branches simply contains no rules. There is nothing in humanitarian law about the freedom of the press in occupied territories, and human rights law says nothing about whether and how combatants have to distinguish themselves from the civilian population. Fourth, on most other issues the two branches lead to the same results, one or the other providing more details.

In non-international armed conflicts, too, both branches mostly lead to the same results. The treatment of persons detained or otherwise in the power of a state is prescribed in a very similar way. The judicial guarantees for persons undergoing trial are likewise very similar, but they are better developed in human rights. The jurisprudence of the European Court of Human Rights (ECtHR) – which never explicitly refers to humanitarian law – concerning deliberate or

1 Martti Koskenniemi, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission', UN Doc A/CN.4/L.682, 13 April 2006; Report of the International Law Commission (ILC), Fifty-sixth session, UN Doc A/59/10, paras. 304 ff.

2 See Marco Sassòli, 'Le droit international humanitaire: Une *lex specialis* par rapport aux droits humains?' in Andreas Auer, Alexandre Flückiger, Michel Hottelier (eds.), *Les droits de l'homme et la constitution: Etudes en l'honneur du Professeur Giorgio Malinverni*, Schulthess, Geneva, 2007, pp. 375–95, with further references.

indiscriminate attacks against civilians in Chechnya and eastern Turkey shows that even on such a typical humanitarian law subject as precautionary measures, which have to be taken for the benefit of the civilian population when attacking military objectives, human rights can lead to the same result as humanitarian law.³

However, on two questions which are crucial in practice, not only is the relationship between the two branches unclear but also the answer of humanitarian law alone. First, may a member of an armed group, as according to humanitarian law applicable to international armed conflict, be attacked (and therefore be killed) as long as he or she does not surrender or is not otherwise *hors de combat*, or is this, as in human rights, admissible only exceptionally and when an arrest is not feasible? Second, may a captured member of an armed force or group be detained similarly to a prisoner of war in international armed conflicts, until the end of active hostilities, and without any individual decision, or must the captured person, as prescribed by human rights, have an opportunity to challenge his or her detention before a judge?

These two questions have gained prominence in recent years in relation to some components of the 'war on terror', which have been classified by the US Supreme Court as non-international armed conflict.⁴ Since 11 September 2001 the answer of the US administration has been that it may kill (e.g. in Yemen) and detain (e.g. in Guantánamo) 'unlawful enemy combatants' according to the same standards as the humanitarian law of international armed conflict prescribes for combatants (but without their benefiting from the protection offered to 'lawful' combatants). Critics object that most of these persons may be killed or detained only in accordance with the much more restrictive human rights rules. We shall try to provide answers independently of the particular nature of the 'war on terror', which would add two problems already discussed sufficiently elsewhere: the extraterritorial application of human rights; and whether all, some or any components of the 'war on terror' are armed conflicts at all and, if so, whether they are international in character or not.

While we shall deal with these questions in terms of traditional non-international armed conflicts between a government and rebel forces, we think that our answers constitute a starting point for replies to the same questions in 'transnational armed conflicts'. The answers are made more difficult by several factors that sometimes point in different directions.

First, the treaty rules of the humanitarian law of non-international armed conflicts are more rudimentary than those applicable to international armed conflicts. Under the *lex specialis* principle, this would normally allow greater scope for human rights. In the last twenty years, however, the jurisprudence of international criminal tribunals, the influence of human rights and even some treaty rules adopted by states have instead brought the law of non-international armed

3 See Marco Sassòli, 'La Cour européenne des droits de l'homme et les conflits armés', in Stephan Breitenmoser et al. (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Dike, Zurich, 2007, pp. 724–5.

4 United States Supreme Court, *Hamdan v. Rumsfeld* (29 June 2006) 548 U.S. 557, 126 S. Ct. 2749.

conflicts closer to the law of international armed conflicts, and some even suggest eliminating the difference altogether. In the many fields where the treaty rules still differ, the convergence has been rationalized by the claim that under customary international law the differences between the two categories of conflicts have gradually disappeared. This development reached its provisional peak with the publication of the ICRC study *Customary International Humanitarian Law* (ICRC Study) which claims, after ten years of research on ‘state practice’ (in the form of official declarations rather than actual behaviour), that 136 (and arguably even 141) of 161 rules of customary humanitarian law, many of which parallel rules of Protocol I applicable as treaty law to international armed conflicts, apply equally to non-international armed conflicts.⁵ Our discussion is further complicated by the fact that some of the practice upon which those customary rules are based is that of human rights bodies applying human rights law.

Second, even if the *lex specialis* principle were to provide clear answers for cases in which the two branches of law respond to the same question with different rules (and it does not), it could only operate if the answer provided by each of the branches were clear. We shall show that, at least in humanitarian law, such clarity is not found in response to the two questions under discussion here. As for human rights, the answers are frequently based on general treaties without universal ratification or on regional treaties – while the exact substance of customary human rights is at least as controversial as that of customary humanitarian law. Often those answers are also based on the practice of bodies which cannot take binding decisions and sometimes on soft-law instruments whose binding character is controversial. In addition, human rights limitations are often very flexible, *inter alia* because of vague limitation clauses which allow them to take the specific nature of each case into account. As there are only very few cases in which human rights mechanisms have resolved our questions in actual non-international armed conflicts, we must often base our answers on precedents arising outside armed conflicts, without any certainty that the relevant mechanism would have reached a similar decision if the case had arisen in an armed conflict.

Third, another factor in non-international armed conflicts which renders our discussion particularly complex (and is very neglected in scholarly writings⁶ and even in the ICRC Study) is that the humanitarian law of non-international armed conflict is, as Article 3 common to the Geneva Conventions points out, equally binding for ‘each party to the conflict’ – that is, for the non-state armed group just as much as the government side.⁷ This raises the question whether

5 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005.

6 Laura M. Olson, ‘Practical challenges of implementing the complementarity between international humanitarian and human rights law – demonstrated by the procedural regulation of internment in non-international armed conflict’, *Case Western International Law Journal*, Vol. 40 (2009) (forthcoming, manuscript on file with authors).

7 Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 9–38, with further references.

human rights are equally addressed to armed groups or whether, by virtue of the operation of the *lex specialis* principle, the answer to our questions is not the same for the government and for its opponent.

Fourth, while state practice concerning our two questions in international armed conflicts is fairly uniform (though sometimes blurred by controversies about how a certain conflict should be classified), it is clearly contradictory in non-international armed conflicts. In confrontations with rebel groups, some states let human rights prevail, some apply by analogy the rules of humanitarian law governing international armed conflicts and some a mix of the two. As for the international supervisory mechanisms, their solutions also differ and it is not always clear whether their answer is based on an appreciation of the law in its entirety or limited, due to the subject matter of their jurisdiction, to the application of only one of the two branches under discussion here.

The *lex specialis* principle and its meaning

In this article it is assumed that human rights apply in armed conflicts. Some states disagree, but they have never specifically done so with regard to non-international armed conflicts on their own territory. As for humanitarian law, it is designed specifically to regulate armed conflicts.

The problems arising from this simultaneous applicability of the said two branches of law must be solved by reference to the principle '*lex specialis derogat legi generali*'.⁸ This principle seeks to establish, through an objective standard corresponding to the regulated subject matter, a preferential order for two rules that apply to the same problem but regulate it differently. The reasons for preferring the more special rule⁹ are that it is closer to the particular subject matter and takes better account of the uniqueness of the context. It also better represents states' intentions on how to regulate the given problem. Theoretically, a situation should be regulated by applying the most just rule, but in order to avoid evaluations that are too subjective, it is preferable to refer to a more objective standard that still reflects justice.¹⁰ The principle does not indicate an inherent quality in one branch of law, such as humanitarian law, or of one of its rules. Rather, it

8 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, paras. 216–220.

9 Koskeniemi, above note 1, para. 60; Report of the ILC, above note 1, para. 305; Joost Pauwelyn, *Conflict of Norms in Public International Law: How the WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge, 2003, p. 387.

10 Norberto Bobbio, 'Des critères pour résoudre les antinomies', in Chaïm Perelman (ed.), *Les antinomies en droit: Etudes*, Bruylant, Brussels, 1965, pp. 237–41.

determines which rule prevails over another in a particular situation.¹¹ Each case must be analysed individually.¹²

Several factors must be weighed to determine which rule, in relation to a certain problem, is special. When the legal consequences of two norms regulating the same situation are mutually exclusive, speciality in the sense of logic implies that the norm that applies to certain facts must give way to the norm that applies to those same facts *as well as* to an additional fact present in that situation. Between two applicable rules, the one which has the larger ‘common contact surface area’¹³ with the situation applies. The norm with the scope of application that enters completely into that of the other norm must prevail, otherwise it would never apply.¹⁴ It is the norm with the more precise or narrower material and/or personal scope of application that prevails.¹⁵ Precision requires that the norm explicitly addressing a problem prevails over the one that addresses it implicitly, the one providing the advantage of detail prevails over the other’s generality,¹⁶ and the more restrictive norm over the one covering the entire problem but in a less exacting manner.¹⁷

A less formal – and also less objective – factor for determining which of two rules applies is the conformity of the solution to the systemic objectives of the law.¹⁸ To characterize this solution as ‘*lex specialis*’ is perhaps a misuse of language. The systemic order of international law is a normative postulate founded on value judgements.¹⁹ Some consider that in reality the decision-maker first determines which rule is more just and then characterizes it as *lex specialis*.²⁰ In particular, when formal standards do not indicate a clear result, the teleological criterion must weigh in, even though it allows for personal preferences.²¹

11 Koskeniemi, above note 1, para. 112; Heike Krieger, ‘A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC Customary Law Study’, *Journal of Conflict & Security Law*, Vol. 11 (Summer 2006), pp. 269, 271; Philip Alston et al., ‘The competence of the UN Human Rights Council and its special procedures in relation to armed conflicts: extrajudicial executions in the “war on terror”’, *European Journal of International Law*, Vol. 19 (2008), p. 192; Report of the ILC, above note 1, para. 304.

12 Anja Lindroos, ‘Addressing norm conflicts in a fragmented system: the doctrine of *lex specialis*’, *Nordic Journal of International Law*, Vol. 74 (1) (2005), p. 42.

13 This term was first used by Mary Ellen Walker, LL.M. student at the Geneva Academy of International Humanitarian Law and Human Rights in Marco Sassòli’s 2008 international humanitarian law course.

14 Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 6th edn, Springer Verlag, Berlin, 1991, pp. 267–8.

15 Bobbio, above note 10, p. 244.

16 See for examples Seyed Ali Sadat-Akha, *Methods of Resolving Conflicts between Treaties*, Nijhoff, Leyden, 2003, p. 124.

17 See, e.g., the European Court of Human Rights concerning the relationship between Articles 13 and 5(4) of the European Convention on Human Rights 1950 (hereinafter ECHR), ECtHR, *Brannigan and McBride v. UK*, Judgment, 26 May 1993, ECtHR, Series A, No. 258, p. 57, para. 76.

18 Koskeniemi, above note 1, para. 107.

19 Krieger, above note 11, p. 280.

20 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. 1, Stevens, London, 1969, p. 474; Bruno Simma and Dirk Pulkovski, ‘Of planets and the universe: self-contained regimes in international law’, *European Journal of International Law*, Vol. 17 (2006), p. 490.

21 Bobbio, above note 10, pp. 240–1. See also Wilfred Jenks, ‘The conflict of law-making treaties’, *British Yearbook of International Law*, Vol. 30 (1953), p. 450.

In our opinion, the more the formal standard points to a clear conclusion in relation to a certain problem the less necessary it becomes to assess the systemic objective. The inverse is also true – the more clearly the objective can be seen, the easier it is to distance oneself from the formal standard.

Once the *lex specialis* is determined, the *lex generalis* still remains present in the background. It must be taken into account when interpreting the *lex specialis*;²² an interpretation of the *lex specialis* that creates a conflict with the *lex generalis* must be avoided as far as possible and an attempt made instead to harmonize the two norms.²³

According to doctrine, the principle appears to refer implicitly to the antinomies between conventional – that is, treaty-based – rules. Whether the principle also applies to the relationship between two customary rules is less clear. In a traditional understanding of customary law this is theoretically not the case. The customary rule applicable to a certain problem derives from the practice and *opinio juris* of states in relation to that problem. In relation to the same problem, there cannot be a customary ‘human right’ and a different customary ‘humanitarian rule’. The focus is always placed on the practice and the *opinio juris* manifested in relation to problems as similar as possible to the one to be resolved. This appears to be the approach adopted by the ICRC, which refers in its Study to a vast array of practice in human rights, both within and outside armed conflicts.²⁴ In practice, however, when looking for a customary rule one generally consults a text, be it a treaty or other instrument codifying customary law, a text that instigated the development of a customary rule²⁵ or even a doctrinal text. It may then be found that one specific problem is covered by two contradictory texts, both deduced from state practice. The choice between these two texts is, in our opinion, governed by the same principles as the choice between two treaty-based rules. If the state practice clarifying which of the two rules prevails in the given situation is not dense enough to be conclusive, the usual methods must be used to discover which of the two rules, derived from the practice analysed from different perspectives, constitutes the *lex specialis*.

When may an enemy fighter be killed ?

The traditional answer of the humanitarian law of international armed conflicts

In international armed conflicts, members of armed forces belonging to a party to the conflict are qualified as ‘combatants’. Combatants may be attacked at any

22 The *lex generalis* consists of other rules of international law to be taken into account under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

23 See Koskeniemi, above note 1, paras. 31, 37; Report of the ILC, above note 1, paras. 308, 311.

24 Henckaerts and Doswald-Beck, above note 5, Vol. I, pp. 299–383.

25 Marco Sassöli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht – mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Helbing & Lichtenhahn, Basel, 1990.

time until they surrender or are otherwise *hors de combat*, and not only while actually threatening the enemy. Combatants are part of the military potential of the enemy and it is therefore always lawful to attack them for the purpose of weakening that potential. The traditional understanding is that no rule restricts the use of force against combatants only to those circumstances in which they cannot be captured. Within humanitarian law this view has been challenged, citing both the principle of military necessity as a restriction on all violence²⁶ and the prohibition of treacherous killings.²⁷ However, neither of these views has been translated into actual battlefield instructions, even less into actual battlefield behaviour.²⁸

As for the proportionality requirement, it applies to attacks directed at legitimate targets, but only to protect civilians from their possible incidental effects.²⁹ Attacks against combatants are not subject to a proportionality evaluation of the harm inflicted on the combatant and the military advantage derived from the attack.

The unclear answer of the treaty rules of humanitarian law applicable to non-international armed conflicts

In contradistinction to international armed conflicts, it is not clear under the treaty law of non-international armed conflicts when an enemy fighter may be killed (we use the term ‘fighter’ in this article for a member of an armed group with a fighting function and for members of government armed forces). Neither Article 3 common to the Geneva Conventions nor their Protocol II refers to ‘combatants’, because states did not wish to confer the right to participate in hostilities and its corresponding combatant immunity on anyone in non-international armed conflicts. The relevant provisions prohibit ‘violence to life and person, in particular murder’ directed against ‘persons taking no active part in hostilities’, including those who have ceased to take part in hostilities.³⁰ Specifically addressing the conduct of hostilities, Article 13 of Protocol II prohibits attacks against civilians ‘unless and for such time as they take a direct part in hostilities’.³¹

26 Jean S. Pictet, *Development and Principles of International Humanitarian Law*, Nijhoff, Dordrecht, 1985, pp. 75–6.

27 See *Manual on Military Law*, Part III, *The Law of War on Land*, UK War Office, London, 1958, para. 115.

28 See the divergences of opinion in the ICRC expert consultations on the notion of direct participation in hostilities, DPH 2005 (note 31 below) at pp. 45–6; Louise Doswald-Beck, ‘The right to life in armed conflict: does international humanitarian law provide all the answers?’, *International Review of the Red Cross*, Vol. 88 (864) (2006), pp. 881–904, at p. 902; Vincent-Joël Proulx, ‘If the hat fits, wear it, if the turban fits, run for your life: reflections on the indefinite detention and targeted killing of suspected terrorists’, *Hastings Law Journal*, Vol. 56 (2005), pp. 801–900, at pp. 882–3.

29 Protocol Additional to the Geneva Conventions (Protocol I), Article 51(5)(b).

30 See Article 3 common to the Geneva Conventions I–IV; and the Protocol II, Article 4.

31 The ICRC, in consultation with experts, was recently engaged in a process of researching, examining and clarifying the notion of ‘direct participation in hostilities’ under IHL. This process has not yet shown definitive results, but it has clearly demonstrated deep divisions of opinion on the question of when enemy fighters may be killed in a non-international armed conflict. See reports of the 2003 meeting (hereinafter DPH 2003 Report), the 2004 meeting (DPH 2004 Report) and the 2005 meeting (DPH 2005 Report), available at www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?

It may be deduced from these rules and from the absence of any mention of ‘combatants’ that in a non-international armed conflict everyone is a civilian, and that no one may be attacked unless he or she directly participates in hostilities. However, the ICRC *Commentary* on Protocol II states that ‘[t]hose belonging to armed forces or armed groups may be attacked at any time.’³² Otherwise it would, first of all, indeed be astonishing that Article 13 uses the term ‘civilian’ instead of a broader term such as ‘person’.³³ Second, if everyone is a civilian, the fundamental principle of distinction becomes meaningless and impossible to apply.³⁴ Third, Common Article 3 confers its protection on ‘[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those [otherwise] placed *hors de combat*’. The latter phrase suggests that the mere fact of no longer taking active part in hostilities is not enough per se for such members of armed forces³⁵ to be immune from attack: they must take additional steps and actively disengage. Fourth, on a more practical level, to prohibit attacks by government forces on clearly identified fighters unless engaged by those fighters is militarily unrealistic, as it would oblige the government forces to act purely reactively while facilitating hit-and-run operations by the rebel group. The objection that such rebels may be arrested anyway (and their resistance, if any, to arrest would be direct participation in hostilities) is convincing only if the rebels do not control territory.

There are two ways to conceptualize the conclusion that fighters may be attacked at any time until they disengage from the armed group. First, ‘direct participation in hostilities’ can be understood as encompassing the mere fact of remaining a member of the group³⁶ or of retaining a fighting function.³⁷ Second, fighters can be considered not to be ‘civilians’ (who are entitled to protection against attacks unless and for such time as they directly participate in hostilities).³⁸ However, both interpretations raise difficult questions in practice. How are government forces to determine membership of an armed group so long as the individual in question commits no hostile acts? How can membership of the armed group be distinguished from simple affiliation with a party to conflict for

opendocument (last visited 21 May 2008). On the basis of those discussions, the ICRC is currently preparing a reference text, ‘Interpretative guidance on the notion of direct participation in hostilities’.

32 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 4789.

33 Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1–2 September 2005, University Centre for International Humanitarian Law, available at www.adh-geneva.ch/events/expert-meetings.php (last visited 21 May 2008) (hereinafter UCIHL Report), p. 34.

34 DPH 2005 Report, above note 31, p. 64; David Kretzmer, ‘Targeted killing of suspected terrorists: extrajudicial executions or legitimate means of defence?’, *European Journal of International Law*, Vol. 16 (2) (2005), pp. 197–8.

35 Under Common Article 3, the term armed forces includes rebel armed groups (see Marco Sassòli, ‘Terrorism and war’, *Journal of International Criminal Justice*, Vol. 4 (2006), p. 977).

36 DPH 2005 Report, above note 31, pp. 48–9.

37 Israeli Supreme Court sitting as the High Court of Justice, *Public Committee against Torture in Israel v. Government of Israel et al.*, HCJ 769/02, 11 December 2005, para. 39 (hereinafter *Public Committee against Torture*).

38 DPH 2005 Report, above note 31, pp. 43–4.

which the group is fighting – in other words, membership in the political, educational or humanitarian wing of a rebel movement? One of the most convincing avenues envisaged is to allow attacks only against a person who either actually directly participates in hostilities or has a function within the armed groups to commit acts that constitute direct participation in the hostilities.³⁹

Customary humanitarian law provides no answer

According to the ICRC Study, in both international and non-international armed conflicts '[a]ttacks may only be directed against combatants',⁴⁰ while 'civilians are protected against attack unless and for such time as they take a direct part in hostilities'.⁴¹ 'Civilians are persons who are not members of the armed forces.'⁴² The commentary clarifies, however, that the term 'combatant' in non-international armed conflicts simply 'indicat[es] persons who do not enjoy the protection against attacks accorded to civilians'.⁴³ 'While State armed forces may be considered combatants ... practice is not clear as to the situation of members of armed opposition groups'.⁴⁴ Furthermore, the authors add, '[p]ractice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians'.⁴⁵ If they are the latter, an imbalance between such groups and government armed forces could be avoided by considering them to take a direct part in hostilities continuously.⁴⁶ Customary law is therefore as ambiguous as the treaty provisions on the crucial question of whether fighters in non-international armed conflicts may be attacked in the same way as combatants in international armed conflicts.

Arguments for and against an analogous application of the rule applicable in international armed conflicts

As mentioned above, the general tendency is to bring the law of non-international armed conflicts closer to that of international armed conflicts; this also has the positive side effect that controversies on whether a given conflict is international or non-international, and on what law to apply in conflicts of a mixed nature, are rendered moot. Even those who remain sceptical as to whether state practice has truly eliminated the difference to the extent claimed in the ICRC Study suggest that questions not answered by the law of non-international armed conflicts must be dealt with by analogy to the law of international armed conflicts, except in cases where the very nature of non-international armed conflicts does not allow for such

39 *Ibid.*, p. 64; Kretzmer, above note 34, pp. 198–9, takes a similar line.

40 Henckaerts and Doswald-Beck, above note 5, Rule 1, p. 3.

41 *Ibid.*, Rule 6, p. 19.

42 *Ibid.*, Rule 5, p. 17.

43 *Ibid.*, p. 3.

44 *Ibid.*, p. 12.

45 *Ibid.*, p. 17.

46 *Ibid.*, p. 21.

an analogy (e.g. concerning combatant immunity from prosecution and the concept of occupied territories).⁴⁷ There is, moreover, no real difference between a non-international armed conflict such as the fighting between Sri Lankan government forces and the LTTE in northern Sri Lanka in 2008 and the international armed conflict between Eritrea and Ethiopia. To require soldiers in non-international (but not in international) conflicts to capture enemies whenever feasible rather than kill them is unrealistic on the battlefield. In addition, the decision when an enemy may be shot at must be taken in a split second by every soldier on the ground, and cannot be left to commanders and courts (as can the decision, discussed later, to intern a person). Clear instructions must exist. Whenever possible, the training of soldiers must be the same for both international and non-international armed conflicts in order to create reflexes that work in the stress of battle.

On the other hand, strong arguments question the appropriateness of applying the same rules as in international armed conflicts. Many non-international armed conflicts are fought against or between groups that are not well structured. It is much more difficult to determine who belongs to an armed group than who belongs to government armed forces. The positive humanitarian law of non-international armed conflicts does not even explicitly prescribe, as does the law of international armed conflicts, that fighters must distinguish themselves from the civilian population. Individuals join and quit armed groups in an informal way, whereas members of government armed forces are formally incorporated and formally dismissed. As armed groups are inevitably illegal, they will do their best not to be recognized as such and to conceal their militant nature. Claiming that fighters may be shot at on sight may therefore put many civilians in danger,⁴⁸ whether they are sympathizers of the group, members of the 'political wing', belong to the same ethnic group or simply happen to be in the wrong place at the wrong time. And while a clear distinction exists, in international armed conflicts, between the conduct of hostilities by combatants against combatants and law enforcement vis-à-vis civilians by the police, there is no equivalent clear distinction in non-international armed conflicts. Indeed, in a non-international armed conflict, insurgency always constitutes a crime under domestic law. Criminals should be dealt with by courts and may not be 'punished' by instant extrajudicial execution.

The arguments in favour of a different rule for non-international armed conflicts obviously apply mainly to armed groups and could therefore be seen as requiring a distinction between government forces and armed groups rather than between international and non-international armed conflicts. The problem is that to have the slightest chance of being respected, humanitarian law must be the same

47 Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?* 2nd edn, ICRC, Geneva, 2006, p. 251.

48 Alexander Orakhelashvili, 'The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?', *European Journal of International Law*, Vol. 19 (1) (2008), p. 167.

for both sides. The principle of the equality of the belligerents before humanitarian law also applies in non-international armed conflicts.⁴⁹

Rules on the peacetime use of force under human rights law

Human rights treaties prohibit the arbitrary deprivation of life. Most instruments, however, do not specify when a killing is arbitrary. Only the European Convention on Human Rights specifies that the deprivation of life will not be deemed arbitrary when it results from the use of force ‘absolutely necessary’:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection’.⁵⁰

In its case law outside armed conflicts, the European Court of Human Rights has admitted the lawfulness of killing a person the authorities genuinely thought was about to detonate a bomb, but found that the insufficient planning of the operation violated the right to life.⁵¹ With regard to arrest, the Court has found that the life of a fugitive may not be put at risk for the purpose of arresting him if he poses no threat to life and is not suspected of a violent offence, even if he cannot be arrested otherwise.⁵²

By and large, other universal and regional human rights bodies take the same approach.⁵³ The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide an authoritative interpretation of the principles that authorities must respect when using force, so as not to infringe the right to life. Those principles limit the use of firearms to cases of

self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

49 François Bugnion, ‘*Jus ad bellum, jus in bello* and non-international armed conflict’, *Yearbook of International Humanitarian Law*, Vol. 6 (2003), pp. 167–98; Marco Sassòli, ‘*Jus ad bellum* and *ius in bello*: the separation between the legality of the use of force and humanitarian rules to be respected in warfare – crucial or outdated?’, in Michael Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Nijhoff, Leiden/Boston, 2007, pp. 254–7.

50 ECHR, Article 2(2).

51 ECtHR, *McCann v. United Kingdom*, Application No. 18984/91, Judgment, 5 September 1995, Series A No. 324, paras. 200–205.

52 ECtHR, *Nachova v. Bulgaria*, Application No. 43577/98, Judgment, 6 July 2005, Reports 2005-VII, para. 95.

53 See e.g. Inter-American Court of Human Rights, *Las Palmeras Case*, Judgment, 26 November 2002, Series C No. 96 (2002).

The intentional lethal use of firearms is only admissible ‘when strictly unavoidable in order to protect life’. In addition, law enforcement officials

shall ... give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.⁵⁴

It must, however, be stressed that the Basic Principles are addressed to officers ‘who exercise police powers, especially the powers of arrest or detention’. Military authorities are included, but only if they exercise police powers,⁵⁵ which could be interpreted as meaning *e contrario* that the rules are not binding for military authorities engaged in the conduct of hostilities. If human rights are to provide an answer as to when a fighter may be killed, it would thus be imperative to know when military authorities, in a situation of armed conflict, are or should be exercising police powers.

The few precedents of human rights bodies in armed conflicts

Theoretically, human rights are the same in international and non-international armed conflicts and outside armed conflicts. The right to life is furthermore not subject to derogations except, under the European Convention, in respect of ‘lawful acts of war’.⁵⁶ The classic instance in which a human rights body has assessed the right to life in the context of an armed conflict is the *Tablada* case, concerning a group of fighters who attacked an army base in Argentina. The Inter-American Commission on Human Rights held that ‘civilians ... who attacked the Tablada base ... whether singly or as a member of a group thereby ... are subject to direct individualized attack to the same extent as combatants’ and lose the benefit of the proportionality principle and of precautionary measures.⁵⁷ It then exclusively applied humanitarian law (applicable to international armed conflicts) to those attackers. Only civilian bystanders and attackers who surrendered were considered to be entitled to benefit from the right to life. The Commission did not raise the issue whether the fighters should have been arrested whenever possible, rather than killed.

54 See Articles 9 and 10 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 9th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August–7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990) (hereinafter Basic Principles).

55 In the Basic Principles a footnote added to the term ‘law enforcement officials’ clarifies this by referring to the commentary on Article 1 of the Code of Conduct for Law Enforcement Officials.

56 ECHR, Article 15(2). It has been argued that this refers only to international armed conflicts (see Doswald-Beck, above note 28, p. 883). In any case, no state has ever tried to derogate on the basis of this exception.

57 Inter-American Commission on Human Rights, *Abella v. Argentina (Tablada)*, Case No. 11.137, Report No. 55/97, 18 November 1997, para. 178.

In the *Guerrero* case, the Human Rights Committee found Colombia to have arbitrarily deprived persons of their right to life who were suspected – but not proved, even by the subsequent inquiry – to be kidnappers and members of a ‘guerrilla organization’. The police waited for the suspected kidnappers in the house where they had believed the victim of a kidnapping to be held, but which they found empty. When the suspected kidnappers arrived, they were shot without warning, without being given an opportunity to surrender and despite the fact that none of the kidnappers had fired a shot, but simply tried to flee.⁵⁸

A national human rights body, the Nepali Human Rights Commission, deemed that the Nepali security forces had seriously violated ‘humanitarian law’ when they shot at a group of armed Maoists forcing students and teachers at a local school to follow a ‘cultural programme’. Six Maoists and four students were killed and five students were injured. The Commission stressed that there was no firing by the Maoists when the army encircled them and that the Maoists were only lightly armed. In the Commission’s view, after giving them a warning the army could easily have arrested them. It is not clear whether the Commission found a violation only because of the killed and injured students, or whether it considered that shooting at the armed Maoists without an attempt to arrest them also constituted a violation of ‘humanitarian law’.⁵⁹

The jurisprudence of the European Court of Human Rights in cases involving the right to life in the non-international armed conflict in Chechnya includes statements which appear to require that in the planning and execution even of a lawful action against fighters, any risk to life and the use of lethal force must be minimized.⁶⁰ While these statements were not limited to protection of the lives of civilians, the actual victims in the case were civilians. In all other cases in which human rights bodies and the ICJ applied the right to life to armed conflicts not of an international character, the persons killed were either *hors de combat* or not alleged to have been fighters.⁶¹ Although fighters are very often killed, for example bombed, while they are not *hors de combat*, no such case has been brought before an international human rights monitoring body. Some observers have deduced from the absence of any such case law that such killings do not violate the right to life, it being ‘unthinkable’ that a case would be brought before the Inter-American system by a surviving relative of an FARC member.⁶²

The limited body of case law thus gives no conclusive answer as to what human rights law requires of government authorities using force against fighters.

58 Human Rights Committee, *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982, UN Doc. Supp. No. 40 (A37/40) (hereinafter *Guerrero* case).

59 Kedar Prasad Poudyal, ‘The role of national human rights institutions in armed conflict situations, with special reference to NHRC–Nepal’, Danish Institute for Human Rights, 2006, pp. 87–8.

60 ECtHR, *Isayeva v. Russia*, Application No. 57950/00, Judgment 24 February 2005, paras. 175–176.

61 See an overview by Nils Melzer, *Targeted Killing under International Normative Paradigms of Law Enforcement and Hostilities*, Oxford University Press, Oxford, 2008, pp. 169–73 and pp. 384–92.

62 UCIHL Report, above note 33, p. 36.

Possible solutions under the *lex specialis* principle

First, we would like to emphasize that there is a good deal of common ground between the two branches of law. In a ‘battlefield-like’ situation, arrest is virtually always impossible without exposing the government forces to disproportionate danger. A fighter presents a great threat to life, even if that threat consists of attacks against armed forces. The immediacy of that threat might be based not only on what the targeted fighter is expected to do, but also on his or her previous behaviour.⁶³ In such situations lethal force could therefore be used, even under human rights law. On the other hand, the life of a fighter who is *hors de combat* is equally protected by both branches.

It is where the solutions found in the two branches actually contradict each other that the need to determine the applicable rule by reference to the *lex specialis* principle arises. The quintessential example of such a contradiction is that of a guerrilla leader shopping in a supermarket in the government-controlled capital of the country. Many interpret humanitarian law as permitting authorities to shoot to kill, since he is a fighter, but this is controversial. Human rights law would clearly say that he must be arrested and a graduated use of force must be employed, but this conclusion is based on precedents which arose in peacetime and human rights are always more flexible according to the situation.

In our view, some situations are more characteristic of those for which the humanitarian law rule was established, and others are characterized more by facts for which human rights were typically established. There is a sliding scale⁶⁴ between the lone FARC member in a supermarket in Bogotá and the soldier in Franco’s forces during the Battle of the Ebro. It is impossible and unnecessary to provide a ‘one size fits all’ answer; as shown above, the *lex specialis* principle does not determine priorities between two rules in the abstract, but offers a solution to a concrete case in which competing rules lead to different results. The famous ICJ dictum that ‘[t]he test of what constitutes an arbitrary deprivation of life ... must be determined by the applicable *lex specialis*, namely the law applicable in armed conflicts’⁶⁵ should not be misunderstood. It has to be read in the context of the opinion⁶⁶ in which the ICJ had to determine the legality *in abstracto* of the use of a certain weapon.

Such a flexible solution, in which the actual behaviour required depends upon the situation, is dangerous – especially in our context, where it has to be applied by every soldier and leads to irreversible results. It is therefore indispensable to determine factors which give precedence either to the rule derived from the humanitarian law of international armed conflicts or to human rights.

63 DPH 2005 Report, above note 31, p. 52.

64 UCIHL Report, above note 33, p. 38; according to several experts in DPH 2005 Report, above note 31, pp. 51–2.

65 *Nuclear Weapons*, above note 8, para. 25.

66 Alston, above note 11, pp. 183–209, 192–3.

The existence and extent of government control over the place⁶⁷ where the killing occurs points to human rights as the *lex specialis*.⁶⁸ For government forces acting on their own territory, control over the place where the attack takes place is not a requirement for human rights to apply,⁶⁹ but simply a factor causing human rights to prevail over humanitarian law. The latter was designed to regulate hostilities against forces on or beyond the front line – that is, in a place not under the control of those who attack them, whereas law enforcement concerns persons under the jurisdiction of the enforcers. In traditional conflict situations the question here would be how far away the situation is from the battlefield,⁷⁰ although fewer and fewer contemporary conflicts are characterized by front lines and battlefields. What, then, constitutes sufficient control to warrant human rights predominating as the *lex specialis*? A government cannot simply argue that the presence of a solitary rebel or even a group of rebels on a stable part of its territory indicates that in fact it is not fully in control of the place, and therefore act under humanitarian law as *lex specialis*. The question is rather one of degree. If a government could effect an arrest (of individuals or groups) without being overly concerned about interference by other rebels in that operation, then it has sufficient control over the place to make human rights prevail as *lex specialis*.

This criterion of government control leaves the solution slightly more open in an area within the territory of the state whose government is fighting the rebels,⁷¹ but which is neither under firm rebel nor under firm government control (such as regions of central Peru at the time of the Sendero Luminoso insurgency).⁷² Even where the strict requirements of necessity under human rights law are not fulfilled (if they are, both branches of law lead to the same result), the impossibility of arresting the fighter,⁷³ the danger inherent in an attempt to do so,⁷⁴ the danger the fighter represents for government forces and civilians and the immediacy of this danger⁷⁵ may cause the conclusion to be reached that humanitarian law is the *lex specialis* in that situation. These factors are interlinked with the elements of control described above. In addition, where neither party has clear geographical control, the higher the degree of certainty that the target is actually a fighter, the easier it is in our view for the humanitarian law approach to be regarded as

67 If the very person targeted is under government control, both branches of law prohibit any summary execution.

68 Doswald-Beck, above note 28, p. 897; UCIHL Report, above note 33, p. 36; Kretzmer, above note 34, p. 203; Cordula Droege, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict', *Israel Law Review*, Vol. 40 (2007), p. 347.

69 For the responsibility of a state for human rights violations committed on a part of the territory of a state that is not under government control, see ECtHR, *Ilascu and others v. Moldova and Russian Federation*, Application No. 48787/99, Judgment, 8 July 2004, para. 333.

70 Droege, above note 68, p. 347.

71 We do not deal in this article with the law applicable to extraterritorial action.

72 UCIHL Report, above note 33, p. 37.

73 *Public Committee against Torture*, above note 37, para. 40; Doswald-Beck, above note 28, p. 891.

74 *Public Committee against Torture*, above note 37, para. 40.

75 Kretzmer, above note 34, p. 203.

lex specialis.⁷⁶ Attacks are lawful against persons who are actually fighters, while law enforcement is by definition directed against suspects.

Even where human rights prevail as the *lex specialis* in the context of armed conflict, humanitarian law remains present in the background and relaxes the human rights requirements of proportionality and warning once an attempt to arrest has been made unsuccessfully or is not feasible. By the same token, where humanitarian law prevails, human rights likewise remain present and require that an inquiry be conducted whenever a person has been deliberately killed.⁷⁷

If such a flexible approach to determining the *lex specialis* is accepted, the question arises whether it is valid for members of both armed groups and government forces. The applicable humanitarian law stipulates the equality of both parties, but they are not equal in terms of human rights obligations.⁷⁸ Indeed, it is controversial whether the latter apply to non-state actors.⁷⁹ Even if they are, they can only require from them certain conduct towards persons in an area under their control, since such actors have no jurisdiction over a territory.⁸⁰ In practice, government soldiers do not shop in supermarkets in rebel-controlled areas. Moreover, a government has the alternative of law enforcement and of applying domestic criminal law and is therefore able to plan an operation that maximizes the possibility of arresting persons.⁸¹ Conversely, the question whether armed groups may enforce government legislation or legislate to make government action illegal is controversial. Requiring rebels to detain rather than kill could in some respects increase the asymmetry of conflicts, since detention by rebels is often seen as

76 *Guerrero* case, above note 58, para. 13.1–13.3; *Public Committee against Torture*, above note 37, para. 40; Orna Ben-Naftali and Keren R. Michaeli, ‘“We must not make a scarecrow of the law”: A legal analysis of the Israeli policy of targeted killings’, *Cornell Journal of International Law*, Vol. 36 (2) (2003–4), p. 290.

77 Thus, for the killing of what it terms civilians directly participating in hostilities, see *Public Committee against Torture*, above note 37, para. 40. For human rights law, precisely in situations of non-international armed conflict, see ECtHR, *Kaya v. Turkey*, Application No. 22729/93, Judgment, 19 February 1998, Reports 1998-I, paras 86–91 (where it was controversial whether the killed person was or was not an armed rebel and the Court criticized the enquiry for not determining this issue); ECtHR, *Ergi v. Turkey*, Application No. 23818/94, Judgment, 28 July 1998, Reports 1998-IV, p. 1778, para. 85; ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Application Nos. 57947–57949/00, 24 February 2005, paras. 209–213. Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ‘Report to the Human Rights Commission’, 8 March 2006, UN Doc. E/CN.4/2006/53, paras. 25–26, even argues that such an obligation exists under humanitarian law. We would limit that obligation to possible violations. To require that an enquiry be conducted every time an enemy soldier is killed on the battlefield is unrealistic.

78 Doswald-Beck, above note 28, p. 890.

79 For an affirmative view see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, and for a more sceptical view see Nigel S. Rodley, ‘Can armed opposition groups violate human rights standards?’, in Kathleen E. Mahoney and Paul Mahoney (eds.), *Human Rights in the Twenty-First Century*, Nijhoff, The Hague, 1993, p. 297. See also para. 47 of the ‘Report of the consultative meeting on the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law’, UN ESCOR, 59th Sess., UN Doc E/CN.4/2003/63 (27 December 2002).

80 Even Clapham, above note 79, p. 284, considers that human rights obligations apply to them only ‘to the extent appropriate to the context’.

81 Doswald-Beck, above note 28, p. 890; UCIHL Report, above note 33, p. 35.

‘hostage taking’ and demands are frequently made of them to release government forces they have captured.

It is therefore not unreasonable to consider armed groups as bound only by humanitarian law and domestic law (which in any case renders any killing by them unlawful), whereas government forces are bound by both humanitarian law and human rights, the latter prevailing in some situations and to a certain extent as *lex specialis*. The fact that rebels do not have human rights obligations limiting attacks on security forces does not mean that there are no humanitarian law limits on such attacks. While police forces cannot be considered to be civilians (as in international armed conflicts) if engaged in law enforcement operations to search for and arrest rebels,⁸² attacks on police units not involved in a non-international armed conflict but performing normal peacetime police activities would violate the prohibition on attacking civilians.⁸³

The main problem with our solution is whether it is practicable in actual armed conflicts. If the permissible conduct varies, depending on the specific situation, how can a soldier know which rules to apply? This problem can be solved only by precise instructions and rules of engagement for each and every operation and sortie. In addition, guidelines might be developed at international level in discussions between humanitarian law experts, human rights experts, law enforcement practitioners and military representatives. Logically, (former) fighters should also be involved – especially if the guidelines also cover the conduct of such groups – to ensure that they can be applied in practice.

On which basis and following which procedures may a member of armed forces or groups be interned in non-international armed conflict?

In peacetime and during armed conflict, persons may be detained pending trial or after conviction for a crime. For the individual non-state actor, participation in a conflict constitutes a crime under the domestic law of the state affected by that conflict. A more specific feature of armed conflicts is that enemies may also be interned without criminal charge as a preventive security measure. In international armed conflicts this is the essence of prisoner-of-war status for combatants and internment for civilians.

However, the lack of clarity, particularly as to the legal safeguards to be applied by non-state actors in non-international armed conflict, gives cause for concern. The present section focuses on procedural regulation of this particular

82 See also ‘Report of the International Commission of Enquiry on Darfur to the UN Secretary-General’, 25 January 2005, para. 422, available at www.un.org/news/dh/sudan/com_inq_darfur.pdf (last visited 21 May 2008).

83 Nepal Human Rights Commission, ‘Minimum immediate steps for CPN-(Maoist) to respect international humanitarian law and human rights principles’, in *Annual Report 2004* (ch. 8, Section 8.3), pp. 99–100.

form of deprivation of liberty – internment.⁸⁴ By analysing the two branches of law and their complementary relationship, an attempt will be made to work out the basis and procedures for possible internment of a member of government armed forces or a member of an armed group (hereinafter: participant in hostilities) in relation to a non-international armed conflict.

The traditional answer of humanitarian law applicable to international armed conflict

Treaty-based humanitarian law applicable to international armed conflict provides rules procedurally regulating internment. The Third Geneva Convention permits the detaining power to ‘subject prisoners of war to internment’,⁸⁵ and the Fourth Geneva Convention allows for internment of a person ‘if the security of the Detaining Power makes it absolutely necessary’⁸⁶ or ‘for imperative reasons of security’.⁸⁷

Having stipulated when internment may occur, humanitarian law also indicates when it must cease. Some prisoners of war must be repatriated during armed conflict for medical reasons,⁸⁸ and all must be released and repatriated, without delay, after the cessation of active hostilities.⁸⁹ A civilian must be released ‘as soon as the reasons which necessitated his internment no longer exist’.⁹⁰ For those civilians not released during the armed conflict, it states that their ‘[i]nternment shall cease as soon as possible after the close of hostilities’.⁹¹

Treaty-based humanitarian law applicable to international armed conflict recognizes that in the case of civilians, who, unlike prisoners of war, cannot be automatically interned for the duration of an armed conflict, compliance with the legal basis for internment requires an assessment to determine whether an individual continues to pose a threat to security and may remain interned, or no longer poses a threat and must be released. Accordingly the Fourth Convention lays down procedures for reviewing the internment of civilians, whether they are aliens in the territory of a party to the conflict or interned in occupied territory, designating the type of review body – either a court or administrative board – and providing for appeal and periodic review.⁹² Protocol I introduces an additional safeguard into the process: the person interned is to ‘be informed promptly, in a language he understands, of the reasons why these measures were taken’.⁹³ Finally, it

84 The terms ‘internment’ and ‘security detention’ are used interchangeably in this article.

85 GC III, Article 21.

86 GC IV, Article 42 (for an alien in the territory of a party).

87 *Ibid.*, Article 78(1) (in occupied territory).

88 GC III, Articles 109–117.

89 *Ibid.*, Articles 118–119.

90 GC IV, Article 132(1). See also P I, Article 75(3).

91 GC IV, Article 133(1).

92 *Ibid.*, Articles 43 and 78(2).

93 P I, Article 75(3).

should be noted that unlawful confinement is a grave breach of the Fourth Convention.⁹⁴

The uncertain answer of treaty-based humanitarian law applicable to non-international armed conflict

In non-international armed conflict, treaty-based humanitarian law prescribes how persons deprived of their liberty for reasons related to the armed conflict must be treated, and lays down judicial guarantees for those undergoing prosecution for offences also related thereto, but it does not clarify for which reasons and by which procedures a person may be interned. Yet the drafters of Protocol II recognized the possibility of internment in non-international armed conflicts, as shown by the specific reference to internment in Articles 5 and 6 thereof.⁹⁵

Customary humanitarian law

Customary humanitarian law prohibits the arbitrary deprivation of liberty in both international and non-international armed conflicts.⁹⁶ But how is this prohibition to be understood with regard to internment in non-international armed conflicts – that is, what is the basis for it and with which procedures must there be compliance so that such internment does not amount to arbitrary deprivation of liberty? The non-binding commentary⁹⁷ in the ICRC Study interprets this rule by significant reference to human rights. Applying the two criteria of the principle of legality, it states that the basis for internment must be previously established by law and stipulates two procedural requirements: (i) an ‘obligation to inform a person who is arrested of the reasons for arrest’; and (ii) an ‘obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention’, described as the ‘so-called writ of *habeas corpus*’.⁹⁸

Human rights rules on the procedural regulation of security detention

Human rights provisions regulating the deprivation of liberty can be found in a variety of different treaties. Treaty-based human rights stipulate that a person may be deprived of liberty only ‘on such grounds and in accordance with such

94 GC IV, Article 147. See also Article 8(2)(a)(vii) of the Statute of the International Criminal Court and Article 2(g) of the Statute of the International Criminal Tribunal for the former Yugoslavia.

95 Protocol II, Articles 5 and 6(5).

96 Henckaerts and Doswald-Beck, above note 5, pp. 344–52.

97 Henckaerts and Doswald-Beck, above note 5, Vol. I, 2007 reprint (with corrections), p. li, cited in Jean-Marie Henckaerts, ‘Customary international humanitarian law: a response to US comments’, *International Review of the Red Cross*, Vol. 89 (866) (2007), p. 484.

98 Henckaerts and Doswald-Beck, above note 5, pp. 348–51.

procedure as are established by law'.⁹⁹ All treaties prohibit arbitrary arrest or detention,¹⁰⁰ but only the European Convention specifically lists the bases for depriving a person of his or her liberty.¹⁰¹ Treaty-based law articulates two procedures with which compliance is obligatory for a person to be lawfully deprived of his or her liberty when not specifically charged with a crime. First, an arrested person must be promptly informed of the reasons for arrest.¹⁰² Second, any person deprived of liberty 'shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.¹⁰³

Unlike the four Geneva Conventions, however, none of these treaties is universally ratified, most are regional instruments, and in certain circumstances derogations from the provisions relevant to security detention are possible.¹⁰⁴ It would therefore be helpful to have an assessment of the status of universally applicable customary human rights, as well as whether and to what extent such rules are derogable. The same applies to the judicial review requirement, the so-called writ of *habeas corpus*, because even though it or at least some of its aspects are widely claimed, by among others the Human Rights Committee, to be non-derogable, this is not stipulated in treaty-based human rights law.¹⁰⁵

99 International Covenant on Civil and Political Rights (ICCPR), Article 9(1). See also ECHR, Article 5(1); American Convention on Human Rights (ACHR), Article 7; and African Charter on Human and Peoples' Rights (ACHPR), Article 6.

100 ICCPR, Article 9(1); ECHR, Article 5; ACHR, Article 7(3); and ACHPR, Article 6.

101 ECHR, Article 5(1). Of these provisions, Article 5(1)(b) and (c) appears to authorize security detention; neither provision has, however, been interpreted to do so. See D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Butterworth, London, 1995, pp. 113, 117 (citing ECtHR, *Lawless v. Ireland*, Application No. 332/57, Judgment, 1 July 1961, Series A No. 3, section on 'The law', paras. 8–15; and ECtHR, *Guzzardi v. Italy*, Application No. 7367/76, Judgment, 6 November 1980, Series A No. 39, paras. 101–102).

102 ICCPR, Article 9(2); ECHR, Article 5(2); ACHR, Article 7(4).

103 ICCPR, Article 9(4); ECHR, Article 5(4); ACHR, Article 7(6); and ACHPR, Article 7(1)(a).

104 Of course, such derogation must only be 'to the extent strictly required by the exigencies of the situation' – ICCPR, Article 4(1). See also ECHR, Article 15(1), and ACHR, Article 27(1). The ACHPR contains no derogation clause.

105 For a list of practice pointing to the non-derogability of *habeas corpus*, see Henckaerts and Doswald-Beck, above note 5, pp. 350–1 and accompanying footnotes (including UN Human Rights Committee General Comment 29, para. 16, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001)). See also Doug Cassel, 'Pretrial and preventative detention of suspected terrorists: options and constraints under international law', *Journal of Criminal Law and Criminology*, Vol. 98 (3) (2008), pp. 811–52, at p. 829 and nn. 130–132; 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', Annex 1 to 'International humanitarian law and the challenges of contemporary armed conflicts' (ICRC document prepared for the 30th International Conference of the Red Cross and Red Crescent, 30IC/07/8.4, at 11), available at [www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/\\$File/30IC_IHLchallenges_Annex1_Detention_FINAL_EN.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/$File/30IC_IHLchallenges_Annex1_Detention_FINAL_EN.pdf) (last visited 29 May 2008) (originally published as Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', *International Review of the Red Cross*, Vol. 87 (858) (2005), p. 387 (2005)) (hereinafter ICRC Guidelines).

The few precedents of human rights bodies in armed conflicts

Human rights bodies have elaborated upon the content of human rights through their jurisprudence, which does not exist to the same extent for humanitarian law as there are fewer expert bodies mandated to apply it.¹⁰⁶ Thus recourse to human rights is appealing when interpreting humanitarian law, but it must be borne in mind that such jurisprudence is often not binding or not binding universally. In addition, precedents of human rights bodies specifically addressing both aspects, the procedural regulation of security detention and in relation to armed conflict, are rare.

The European Court of Human Rights has upheld state security detention during situations described as ‘terrorist campaign[s]’;¹⁰⁷ it remains to be seen how the Court would assess whether the measures adopted by the state – after derogation – do or do not go beyond ‘the extent strictly required by the exigencies’¹⁰⁸ of a situation characterized as armed conflict. In relation to the ‘war on terror’ and detention at Guantánamo Bay, the Human Rights Chamber for Bosnia and Herzegovina found that the state had breached the European Convention ‘by handing over [persons] into illegal detention by US forces’, as information on the basis for their detention was neither sought nor received.¹⁰⁹

Human rights bodies of the Inter-American system have addressed issues relating to armed conflict, but few refer to security detention. In *Coard v. US*, the Inter-American Commission found detention without any review, during an international armed conflict, ‘incompatible with the terms of the Declaration as understood with reference to art. 78 of Geneva Convention IV’.¹¹⁰ The Commission stated that,

pursuant to the terms of Geneva Convention IV and the Declaration, [the necessary review of detention] could have been accomplished through the establishment of an expeditious judicial or board (quasi-judicial) review process carried out by US agents with the power to order the production of the person concerned, and release in event the detention contravened applicable norms or was otherwise unjustified.¹¹¹

106 Theodor Meron, ‘The humanization of humanitarian law’, *American Journal of International Law*, Vol. 94 (2000), p. 247. See also Christine Byron, ‘A blurring of the boundaries: the application of international humanitarian law by human rights bodies’, *Virginia Journal of International Law*, Vol. 47 (2007), pp. 839–96.

107 ECtHR, *Ireland v. United Kingdom*, Application No. 5310/71, Judgment, 18 January 1978, [1978] ECHR 5310/71, para. 11. See also e.g. *Lawless v. Ireland*, above note 101.

108 ECHR, Article 15(1).

109 Human Rights Chamber for Bosnia and Herzegovina, *Boudellaa and others v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (Case nos. CH/02/8679, CH/02/8689, CH/02/8690, CH/02/8691), 13 BHRC 297 (2002), paras. 233 and 237.

110 Inter-Am. C.H.R., *Coard et al. v. US*, Case No. 10.951, Report No. 109/99, 9 BHRC 150 (29 Sept. 1999), para. 57.

111 *Ibid.*, para. 58.

In the said case there was no discussion, however, of applicable rules for non-international armed conflict. In 2002 the Commission – in the context of the United States considering ‘itself to be at war with an international network of terrorists’ – adopted precautionary measures requesting the United States ‘to take urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal’ rather than by a political authority, in order to ensure that the detainees ‘are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights’.¹¹²

Application of human rights as *lex specialis*

When comparing the treaty-based provisions regulating internment in both branches of law, human rights are more elaborate than the sparse treaty-based humanitarian law rules applicable to non-international armed conflict. However, this is not the case when comparing human rights law with humanitarian law applicable to civilians in international armed conflict.¹¹³ For example, humanitarian law explicitly guarantees, for civilian internees, a right to appeal and a time frame for periodic review if not released; treaty-based human rights do not specify this with regard to security detention. Moreover, the relevant human rights provisions are derogable, at least under the formal terms of the treaties; these provisions of humanitarian law, at least in occupied territories, are not derogable.¹¹⁴ But human rights law does stipulate that the body reviewing the deprivation of liberty must be judicial, whereas humanitarian law provides for either a court or an administrative board in the case of civilians but grants no review at all for prisoners of war, except in determining prisoner-of-war status.¹¹⁵

As humanitarian law applicable to non-international armed conflict is silent on the procedural regulation of internment, it would seem clear that in accordance with the *lex specialis* principle as a maxim of logic, human rights should step in to fill the gap. The ICRC Study appears to adopt this approach when it interprets the humanitarian law rule prohibiting the arbitrary deprivation of liberty through the lens of human rights.¹¹⁶ The fact that internees – unlike persons to be attacked – are always under the control of those who detain them, reinforces the human rights approach. In this formalistic application of the *lex specialis* principle, the only exception where humanitarian law would take precedence is when the

112 Inter-American Commission on Human Rights, *Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures* (13 March 2002).

113 Droege, above note 68, p. 350.

114 Article 5(2) of GC IV allows for derogations in occupied territories from the communication rights of a person ‘under definite suspicion of activity hostile to the security of the Occupying Power’, while paragraph 1 of that article allows for derogations from ‘rights and privileges’ of enemy civilians on the own territory of a party to the conflict who are ‘definitely suspected of or engaged in activities hostile to the security of the State’.

115 GC III, Article 5.

116 See Henckaerts and Doswald-Beck, above note 5, pp. 344–52.

parties to a non-international armed conflict agree thereto¹¹⁷ or when the government unilaterally concedes prisoner-of-war status to captured fighters. Despite the appeal of this formal *lex specialis* approach, difficulties remain.

Difficulties involved in applying human rights

The human rights requirement that internment be subject to judicial review – if no derogation is made, or cannot be made as the rule is found to be customarily non-derogable – demonstrates some of these difficulties. One is whether it is realistic to expect states and non-state actors, possibly interning thousands of people, to bring all internees before a judge without delay during armed conflict. If it is not, such an obligation risks severely hampering the effective conduct of war and could thus lead to less compliance with the rules in the long term – for example, summary executions disguised as battlefield killings.

A second concern stems from the differences between state and non-state actors, which have equal obligations under humanitarian law but not under human rights. Even if the question of whether non-state actors are bound by human rights were settled, how is the non-state actor to meet the obligation of judicial review? The question of whether a non-state actor may establish a court remains controversial.¹¹⁸ The requirements that there be a legal basis and procedures established by law for internment give rise to the same concern. While human rights themselves set at least two procedural requirements, neither they nor humanitarian law applicable to non-international armed conflict provide a specific legal basis for internment. A state can do so in its domestic law, but how is the non-state actor to establish that legal basis?

Even if human rights are found to be binding on some non-state actors – that is, those ‘capable of fulfilling the conditions to exercise those rights’,¹¹⁹ the difficulties may not be fully resolved and additional ones may arise. For example, could a non-state actor derogate from human rights? What is the standard to determine which non-state actor qualifies to do so and which does not? And this approach would not, of course, resolve the difficulties remaining with regard to those non-state actors which do not ‘qualify’.

Application of human rights seems to make it impossible for one party to an armed conflict – the non-state actor – to intern legally. Parties to armed conflicts intern persons, hindering them from continuing to bear arms, so as to gain the military advantage. If the non-state actor cannot legally intern, it is left with little option – for it is a serious violation of humanitarian law to deny quarter¹²⁰ – but to release the captured enemy fighters. However, if rules applicable

117 As encouraged by Article 3(3) common to GC I–IV.

118 Jonathan Somer, ‘Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict’, *International Review of the Red Cross*, Vol. 89 (867) (2007), pp. 655–90.

119 *Ibid.*, p. 687.

120 Article 8(2)(e)(x) of the Statute of the International Criminal Court. See also Henckaerts and Doswald-Beck, above note 5, p. 161.

to armed conflict make efficient fighting impossible, they will not be respected, undermining any protection the law provides.¹²¹

Apply the humanitarian law of international armed conflicts by analogy?

In view of the complications generated by applying human rights, perhaps the correct solution requires applying the humanitarian law of international armed conflict to non-international armed conflicts by analogy.¹²² The humanitarian law applicable to non-international armed conflict indicates that internment occurs in such conflicts, but contains no indication of how it is to be regulated. Such regulation is necessary so that internment can take place in practice. While the provisions regulating internment in international armed conflict are set out according to protected person categories, 'no fundamental difference between the regimes applicable to the two situations prohibits the application of those same' provisions, as long as the rules are applied according to the person's function rather than status.¹²³ Such a legal analogy is also consistent with the noted gradual erosion of the distinction between the law applicable in international and non-international armed conflicts.

Applied by analogy, the humanitarian law of international armed conflict allows for internment and provides for review procedures. It leaves open the option for the internment review to be carried out by an administrative board or a court. Given the organizational criteria a non-state actor must meet to be considered a party to an armed conflict,¹²⁴ any non-state actor should be able to fulfil these obligations, particularly as it can opt for an administrative review procedure rather than review by a court.

The humanitarian law of international armed conflict applies if 'the government of the State affected by the non-international armed conflict [has] claimed for itself belligerent rights'.¹²⁵ While 'the recognition of belligerency has fallen into disuse as a legal concept',¹²⁶ application by analogy appears to continue to make sense; Common Article 3 moreover urges parties to non-international armed conflicts to agree on such application. The ICRC Study in fact indicates application by analogy in such conflicts of the standards of the Fourth Geneva Convention to civilians and those of the Third Geneva Convention to persons designated as 'combatants'.¹²⁷ Making this distinction between 'combatants' and

121 Daniel O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces', *International Review of the Red Cross*, Vol. 88 (864) (2006), p. 876 (explaining similar reasoning for proposals to exclude acts legal under IHL from the acts prohibited in the draft comprehensive convention against terrorism).

122 See ICRC Guidelines, above note 105, p. 377.

123 Sassöli and Bouvier, above note 47, p. 258: '[T]he law of non-international armed conflict does not protect according to the status of a person but according to his or her actual activities.'

124 See e.g. ICTY decision in *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgment, April 3, 2008, Case No. IT-04-84-T, paras. 60 and 89.

125 Henckaerts and Doswald-Beck, above note 5, p. 352.

126 Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 41.

127 Henckaerts and Doswald-Beck, above note 5, p. 352.

civilians in non-international armed conflict would also be consistent with current discussions by experts on use of the ‘membership approach’ to interpret ‘direct participation in hostilities’ in such conflict.¹²⁸ As analogous application does not confer any status, there would still, for example, be no combatant immunity. The Geneva Conventions, while allowing for internment, would therefore not prevent the repression of acts prohibited by domestic law. Nor would application by analogy of the Third Convention to members of armed forces and groups, as suggested by the ICRC Study, entitle them to any review procedure; such procedural regulation could only be found in the Fourth Convention.

Does the analogous application of the law of international armed conflicts sufficiently consider, however, the fundamental distinction between that law and the law of non-international armed conflict – that is, that the rules applicable to international armed conflict generally¹²⁹ apply only to protected person categories, such as prisoners of war or enemy civilians, and that no such categories exist in non-international armed conflict? Even if the distinction in non-international armed conflict could be made by function rather than status, on which criteria should the assessment of a civilian or ‘combatant’ be based? Should ‘combatants’ be measured against the criteria in Article 4 of the Third Convention or Article 44 of Protocol I, or perhaps through the ‘membership approach’?¹³⁰ Would Article 5-type tribunals¹³¹ need to be instituted in non-international armed conflicts to make the determination?

Apply the Fourth Convention rather than the Third Convention?

If the Third Geneva Convention is applied by analogy, a participant in hostilities could be detained without any individual determination for the whole duration of the conflict.¹³² However, as seen above, it is much more difficult in non-international than in international armed conflicts to determine who is actually a fighter. Such a determination must therefore be made on an individual basis. It is also much harder to determine the actual end of hostilities than in an international armed conflict between states that may conclude a ceasefire or surrender. All this may support application, if at all, of the law of international armed conflict to non-international armed conflict by analogy to the Fourth Convention alone, as there are no combatants and hence no concomitant prisoner-of-war status in

128 See notes 36–39 above, and in particular DPH 2005 Report, above note 31, p. 43.

129 Except e.g. Article 75 of P I.

130 DPH 2005 Report, above note 31, pp. 41–58.

131 GC III, Article 5.

132 For a standpoint rejecting such an analogy, see UN Commission on Human Rights, ‘Situation of the detainees at Guantánamo’, report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, UN Doc E/CN.4/2006/120 (27 February 2006), para. 24.

non-international armed conflict. Analogy with the Fourth Convention could be founded on a determination of the *lex specialis* according to the overall systemic purposes of the international legal order. In non-international armed conflict it would avoid internment of persons without review for the duration of the conflict.

Apply both branches of law in parallel?

Can an analogy legally be made to humanitarian law applicable to international armed conflict when doing so displaces specific human rights rules and thus directly overrides the formal *lex specialis* maxim? As human rights addressing security detention do exist, such an analogy on this issue may be unlike analogies made, for example, to the definition of ‘military objectives’, a term unique to humanitarian law. Furthermore, analogy to the humanitarian law of international armed conflict may not avoid the difficulties raised by human rights, as these may still apply. For example, if humanitarian law procedures applicable to international armed conflict that regulate internment of civilians are inadequate, human rights may be required to fill the gap.¹³³

Consideration of the manner in which human rights complement humanitarian law may help to find a solution for some of the difficulties encountered when applying human rights in non-international armed conflicts, particularly to non-state actors.

[I]f IHRL is not used to *interpret* an IHL rule, but instead IHRL [is applied] ... ‘[parallel] to’ IHL ... IHL would apply to parties to the conflict, State and non-State actors, and IHRL would continue to apply to State actors, as it was traditionally designed to do. This avoids the problematic application to non-State actors, and, yet, mandates States to continue to meet their international legal obligations. One may claim this is unfair, as States would need to abide by additional obligations than non-State actors in a non-international armed conflict. This is true at the international law level, where States are traditionally the legal actors, but it would only be true of the rules to which the States obligated themselves. Also, it must not be forgotten that non-State actors remain bound by domestic law.¹³⁴

This approach remains consistent with the understanding that both bodies of law are complementary and implemented through the maxim of *lex specialis*, and it respects the maxim of *lex posterior*, as most human rights developed after the main humanitarian law provisions discussed here. Also, the concern about impracticable obligations arising, such as a judicial review of internment without delay in all cases, remains limited, as human rights treaties include derogation clauses providing states with a regulated ‘way out’ in such situations.

133 ICRC Guidelines, above note 105, pp. 377–8.

134 Olson, above note 6 (citation omitted).

However, reliance solely on human rights to compensate for the lack of procedural regulation of internment in non-international armed conflict may offer only a minimal solution, for unless supplemented by customary law¹³⁵ it clarifies the obligations of states only if the state is party to the human rights treaty, and it is limited by any derogation made. In addition (but this issue is not covered in the present article) the extent to which human rights apply extraterritorially is controversial, which weakens the solution relying on the application of human rights law to non-international armed conflicts abroad. Thus human rights may provide no regulation of state internment. As for the non-state actors – *if* they are bound at all, they will face conceptual difficulties in complying.

So perhaps the solution is not *either* to apply human rights *or* to draw an analogy with the humanitarian law of international armed conflict, but to harmonize appropriately both approaches. The recognized relationship between the two branches of law, the objectives of both, as well as the differences between states and non-state actors, may in fact call for this complementary approach.

Application to non-international armed conflicts of the rules of the humanitarian law of international armed conflicts on civilians provides procedures for internment that are binding on both the state and the non-state actor, as well as places a constraint on the basis for internment. These obligations apply equally to all parties to the conflict. Such application does not preclude the corresponding parallel application of human rights. Thus, if application of the latter is required to provide further details about the regulation, for example of civilian internment,¹³⁶ consistent with the maxim of *lex specialis*, human rights may step in and clarify state obligations, particularly with regard to judicial review. While derogation from human rights may still occur, analogous application of the humanitarian law of international armed conflicts – from which no derogation is possible¹³⁷ – would set a baseline below which no derogation from the human rights rules could go, as humanitarian law provisions already apply in situations most threatening to a nation. This complementary approach would ensure procedural protection for interned non-state actors and would bring much needed clarity to the non-state actor's obligations, thus also procedurally protecting members of the state's armed forces captured in non-international armed conflict. The practicality of this approach, however, does not make it legally binding and the concerns mentioned above remain, particularly as to the appropriateness of drawing an analogy to the humanitarian law of international armed conflict and – within that law – to the Fourth Convention rather than the Third Convention.

To sum up, unfortunately no ideal, straightforward solution exists. While the application of human rights is more satisfactory under the formal *lex specialis*

135 As the prohibition of arbitrary deprivation of liberty is a customary IHL rule applicable during armed conflict (Henckaerts and Doswald-Beck, above note 5, p. 344), it seems logical that it would also be a customary rule in less exigent peacetime situations; however, disagreement may remain as to the rule's content.

136 ICRC Guidelines, above note 105, p. 377.

137 Except under Article 5 of GC IV (see note 114).

principle, it is unrealistic, particularly for the non-state armed group. Moreover, the content of the applicable human rights is controversial. To apply by analogy the regulation provided for civilians by the humanitarian law of international armed conflicts may therefore correspond better to the overall systemic purposes of both branches. In practice, the only difference between the two approaches is that the humanitarian law approach is satisfied by an administrative review, while the human rights approach stipulates judicial review. Most people detained in relation to a non-international armed conflict would already greatly appreciate having any opportunity at all for an independent and impartial review of their internment. The establishment of guidelines to assess the relationship between humanitarian law and human rights law in a given situation could be helpful, particularly for the practitioner. Such guidelines would help to ensure consistent solutions that do not compromise the two branches' specific objectives and purposes.¹³⁸

Conclusion

On both issues discussed in this article, the result of a formal application of the *lex specialis* principle is not entirely satisfactory. The sliding scale for the respective application of human rights and international humanitarian law to attacks against fighters in non-international armed conflicts leads to much uncertainty in borderline situations and establishes different obligations for the government and the rebels. To give captured fighters the benefit of *habeas corpus* as defined by human rights may be unrealistic and even counterproductive in many conflicts and raises serious conceptual problems when required from armed groups. While these limits have to be accepted with regard to the use of force and must be mitigated by instructions and guidelines, they may be overcome in the procedural regulation of internment by applying by analogy the regime foreseen in the humanitarian law of international armed conflicts for civilians. In both cases, humanitarian law applies as a minimum whenever human rights, for whatever reason, do not apply.

138 Olson, above note 6.