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Re-examining The Distinction Between International and Non-International Armed Conflicts in The Backdrop of International Human Rights Law

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Abstract

A majority of armed conflicts in international law have been fought within the boundary of States rather than conventional wars which are fought between States. These internal wars/internal armed conflicts that take place within the boundary of a State involve a confrontation between the authorities of a State and armed groups or among armed groups and are referred to as non-international armed conflicts. Since, these internal conflicts resembled war between States in almost every manner, a need arose to have a body of rules that could make efforts to 'humanize' their conduct on par with the laws governing international armed conflict. This paper reflects upon the debate on the distinction between international and non-international armed conflicts and whether that distinction has been virtually eliminated or not. In doing so, this paper also addresses how international humanitarian law as a body of law governs non-international armed conflict. Further, the debate on the distinction is also looked at from an international human rights perspective to understand the characterization of conflicts under international humanitarian law.

Key Words

International Armed Conflict, Non-International Armed Conflict, International Human Rights Law, International Humanitarian Law, Geneva Conventions

Introduction

There is no doubt that, the body of law governing internal armed conflicts within the boundary of a particular State has had a slower growth rate when compared to the laws on international armed conflict.[1] States, in the past, have been of the view that, allowing international law to regulate internal armed conflicts would pose a threat to their sovereignty and create hindrance in the manner they conduct their internal matters.[2] However, it is also true that, post World War II, a majority of armed conflicts in international law have been fought within the boundary of States rather than conventional wars which are fought between States.[3] These internal wars/internal armed conflicts that "take place within the boundary of a State involve a confrontation between the authorities of a State and armed groups or among armed groups and are referred to as non-international armed conflicts."[4] It is important to note that, non-international armed conflicts do not include civil disorder, small and isolated acts of violence, or any other similar act. Also, a non-international armed conflict does not involve conflicts in which two or more States are fighting against one another.[5] Since, these internal conflicts resembled war between States in almost every manner, a need arose to have a body of rules that could make efforts to 'humanize' their conduct (Nguyen et al., 2021).[6]

In order to address the issue of whether or not the distinction between international and non-international armed conflicts has been virtually eliminated, it is important to reflect upon the following questions: How international humanitarian law as a body of law governs non-international armed conflict? Is there a need to characterize armed conflicts as international and non-international under international law? If yes, why?

The rules governing internal armed conflicts up until the conclusion of the Article 3 common to the 1949 Geneva Conventions were very less developed and did not find mention in international instruments as many States did not like the idea of accepting a new body of international law that would apply to their domestic affairs.[7] It is only after 1949 that internal armed conflict was brought within an international legal framework through the adoption of Article 3 common to the 1949 Geneva

[1] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (1st edn, Oxford University Press 2012) 54.
[2] Sandesh Sivakumaran, Re-envisaging the International Law of Internal Armed Conflicts (2011) 22 (1) European Journal of International Law 219, 222.
[3] Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press, 2008) 605.
[4] Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict With Commentary' (*International Institute of Humanitarian Law*, 2006) <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf> p. 2 accessed 8 September 2022. See also The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72 [70].
[5] ibid.
[6] Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (1st edn, Oxford University Press 2012) 33.
[7] Sivakumaran, *The Law of Non-International Armed Conflict* (n 1) 612.

Conventions and Additional Protocol II of 1977. The concept of non-international armed conflict, therefore, needs to be examined on the basis of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II (Piñeros, 2020).[8]

Article 3 common to the 1949 Geneva Conventions

Common Article 3 is applicable "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[9] First and foremost, by making the reference, armed conflict not of an international character, this provision, indirectly hints towards common Article 2, which is, applicable to armed conflicts occurring between States.[10] Common Article 3 does not clearly define non-international armed conflict; it only refers to a distinction between what is an armed conflict and what is not an armed conflict and this distinction is said to be based upon situations that reach up to a certain level of intensity after which they are to be classified in one category of conflicts or other.[11] It is to be noted that, the level of intensity for a non-international armed conflict is lower than that of an international armed conflict.[12] A non-international armed conflict is seen as comprising of two elements i.e., the intensity of the violence and the organization of the parties. It can be said that the hostilities have reached a certain level of intensity, "when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces."[13] Also, armed groups involved in the conflict must be considered 'parties to the conflict', which means that "they should have a minimum level of organization, some sort of a command structure and the capacity to sustain military operations."[14] More importantly, the above mentioned factors relating to the level of intensity and organization of parties have to be taken into consideration on a case by case basis, as these factors need not exist concurrently.[15] Finally, common Article 3 only applies to armed conflicts that occur in the territory of one of the State parties to the Convention.[16] This statement is generally, interpreted to exclude the occurring of non-international armed conflicts in two or more State territories and is thereby, understood as hinting towards the limit to application of common Article 3.[17] It is even argued that, the sole purpose

[8] ibid.
[9] The Geneva Conventions of 12 August 1949, common art 3.
[10] Sylvain Vite, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations (2009) 91 (873) International Review of the Red Cross 69, 75.
[11] ibid 76.
[12] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), art 1(2).
[13] 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (*International Committee of the Red Cross (ICRC) Opinion Paper*, March 2008) <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> p. 3 accessed 8 September 2022.
[14] ibid.
[15] Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (1st edn, Oxford University Press 2011) 58.
[16] The Geneva Conventions of 12 August 1949, common art 3.
[17] Wilmshurst (ed), *International Law and the Classification of Conflicts* (n 6) 51.

of including the wording, occurring in the territory of one of the High Contracting Parties was to make it clear that common Article 3 is only applicable in relation to those States that have ratified the 1949 Geneva Conventions.[18] Another reason for interpreting common Article 3 in such a manner is to ensure that the principle of humane treatment recognized under both international and non-international armed conflict is not compromised. Moreover, limits to the application of common Article 3, is necessary to ensure the binding nature of the basic protections laid down in the Article (Soldatos, 2021).[19]

Additional Protocol II of 1977

As per Article 1(1) of Additional Protocol II, the Protocol is only applicable to non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[20] Similar to common Article 3, Additional Protocol II is not applicable to situations of internal disturbances and tensions.[21] It is noteworthy that, the Protocol lays down a set of more detailed conditions than common Article 3 in terms of applicability of the Protocol. The Protocol under Article 1(1) uses terms like, responsible command, control over a part of the territory and sustained and concerted military operations which certainly indicate towards a higher level of organization on part of the non-State armed groups.[22] Under common Article 3, although, there is a requirement that the non-State armed groups need to show a degree of organization, there is no necessity as such that these groups should also be in a position to control part of the territory. A controversy may, therefore arise, vis a vis the interpretation of Additional Protocol II in relation to common Article 3. However, the degree of territorial control over the territory has to be perceived on a case by case basis.[23] The new factors added to Additional Protocol II (fundamental guarantees, protections for detainees, fair trial guarantees, protection of cultural objects etc), not only expand but also complement common Article 3; however, they do not change the basic principles of the convention.[24] The additional restrictions provided for in Article 1(1) therefore only define the field of application of the Protocol and do not extend to the entire law of non-international armed conflict. Common Article 3 thus preserves its autonomy and covers a larger number of situations.[25]

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[18] ibid.
[19] Jelena Pejic, The protective scope of Common Article 3: more than meets the eye (2011) 93 (881) International Review of the Red Cross 189, 195.
[20] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), art 1(1).
[21] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), art 1(2).
[22] Naftali, *International Humanitarian Law and International Human Rights Law* (n 15) 57.
[23] Wilmshurst (ed), *International Law and the Classification of Conflicts* (n 6) 54.
[24] ibid 55.
[25] Vite, Typology of armed conflicts in international humanitarian law: legal concepts and

Having briefly looked at some of the rules governing non-international armed conflict, the next section will focus upon the following question: Is there a need to characterize armed conflicts as international and non-international under international law? If yes, why?

As stated earlier, post 1949, the regulation of non-international armed conflict in international law has come a long way. Today, there exists a large body of rules governing non-international armed conflict.[26] But, the diverse nature of conflicts post 1949 (apart from international and non-international) and the general application of international humanitarian law (assessing every situation on the lines of rules on armed conflict), has given rise to a debate in international law regarding the characterization of armed conflicts. Much of this debate is based around the following statement: should there be a distinction between international and non-international armed conflict.[27] Before further assessing the above statement, it is necessary to once again highlight a key difference between international and non-international armed conflict. International armed conflicts are fought between States whereas; non-international armed conflicts are fought between a State and a non-State armed group or among armed groups.[28] Now, if the distinction between the two categories of conflicts has been recognized by both treaty and custom, should there not remain a difference in the legal rules that are applied to them. In other words, in light of the distinction, is it correct to apply legal norms from international armed conflict to non-international armed conflict?[29] According to some scholars, there is a need to adopt a uniform body of rules on international humanitarian law similar to international human rights law and international criminal law to avoid any confusion regarding the interpretation of the law. Moreover, the structuring of internal armed conflict on the lines of the law on international armed conflict is a major step in that direction.[30] "As per the traditional view, it is the law of international armed conflict which represents the high watermark and the standard towards which to aim. It is simply a matter of common sense that the relevant rules should be equally applicable in international and non-international armed conflicts."[31]

Furthermore, State practice in the area of application of international humanitarian law irrespective of the nature of conflict has led to the blurring of the legal distinction between international and non-international armed conflicts.[32] According to M. Bassiouni and P. Manikas, there is a need to rethink the definition of international and non-international armed conflicts keeping in mind the scale of

actual situations (n 10) 80.
[26] ibid.
[27] Sivakumaran, Re-envisaging the International Law of Internal Armed Conflicts (n 2) 220.
[28] ibid 221.
[29] ibid 232.
[30] ibid 235.
[31] ibid 232.
[32] Emily Crawford, Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts (2007) 20 (2) Leiden Journal of International Law 441, 449.

violence, the resulting instability, and the necessity to uphold humanitarian norms. It is only by adopting a new approach to international humanitarian law that the international community can take effective action towards protecting the victims of conflict.[33] The fact that there has been a more general application of the rules on international armed conflict in non-international armed conflicts, the legal distinction between the two categories of conflict has become almost insignificant. It is even argued that, the legal distinction only leaves scope for two types of conflicts to be recognized by law leaving aside certain new types of conflicts (conflicts between a government and an armed group carried out on the territory of two or even of several States, referred as transnational armed conflicts etc) from being regulated.[34] According to W. Reisman, the distinction between the two armed conflicts is nothing more than a policy error which needs to be rectified because this distinction does not take into account the various changes (nature etc.) taking place in armed conflict, thereby, leaving many gaps in the application of humanitarian law.[35] Another problem with regard to maintaining the legal distinction is in relation to there not being a clear definition of non-international armed conflict under common Article 3.[36] The definition provided in common Article 3 is a negative one and it does not help in precisely conveying the true meaning of what is a non-international armed conflict. Although, common Article 3 lays down certain basic principles of the Convention, but it has no specific provisions per se, which can outline the true nature of an internal armed conflict.[37]

The argument of eliminating the distinction between the two categories of armed conflict in international humanitarian law got a further push with the decision in the Tadic case by the Appeals Chamber of The International Criminal Tribunal for the Former Yugoslavia (ICTY) for the interlocutory appeal on jurisdiction.[38] In the Tadic case, the ICTY noted that, a change had taken place in the manner modern armed conflict was being perceived by States because of the increase in the number of internal armed conflicts, specially, after the Second World War. Therefore, preserving the legal distinction between international and non-international armed conflict in light of these changes, is quite unreasonable as the distinction itself had began to fade away.[39] But, despite a strong debate among

[33] ibid 450.
[34] Vite, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations (n 10) 88.
[35] Crawford, Unequal before the Law (n 32) 450.
[36] James G Stewart, Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict (2003) 85 (850) International Review of the Red Cross 313, 318.
[37] ibid.
[38] The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72.
[39] The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72 [97] -"In the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed

scholars in international law to eliminate the distinction between international and non-international armed conflict, the same has not been done because of the fear that the elimination would lead to gaps in the overall application of international humanitarian law and the protection of the rights of individuals.[40] As mentioned above, the law on non-international armed conflict was framed on the lines of the law on international armed conflict because it was easier to expand an already existing law to newer situations than to have a new body of law framed altogether. But, the regulation of internal armed conflicts by applying the rules of international armed conflict can have few problems of its own.[41] For example, what happens in a case, wherein, the rules of international armed conflict are not sufficient to solve a situation specific to internal armed conflict or the rules of international armed conflict simply do not apply to a situation of internal armed conflict?[42] The question then is, do we still try to somehow fit in every situation within the framework of international armed conflict just because this would lead to a single body of law or do we rethink the entire concept on international humanitarian law, especially the rules on armed conflict, in order to evolve rules that are specific to a particular category of armed conflict and not all?[43] The law of belligerent occupation can be used here as an example to highlight the point that, certain rules on armed conflict cannot be made applicable to each and every category of conflicts in international humanitarian law.[44]

As per the general view, the law of belligerent occupation applies to international armed conflict.[45] The law of belligerent occupation governs the relationship among three principal actors, namely, the occupying power, the State under occupation (wholly or partly) and the people of the State. In addition, the rules relating to the seizure of property which reflect a complex division of interests among the three actors cannot be directly applied to a situation of non-international armed conflict.[46] Apart from the law of belligerent occupation, the rule on combatant immunity and prisoners of war is another area which is considered by scholars to be specific to international armed conflict only. The rules on internal armed conflict do not speak of combatant immunity or prisoners of war.[47] Even the ICTY, inspite of making an argument against preserving the dichotomy, emphasized that, "the emergence of the general rules on internal armed conflict does not imply that internal strife is regulated by general international law in all its

violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."

[40] Crawford, Unequal before the Law (n 32) 452.

[41] David Kretzmer, Rethinking the Application of IHL in Non-International Armed Conflicts (2009) 42 (1) Israel Law Review 8, 39.

[42] Sivakumaran, Re-envisaging the International Law of Internal Armed Conflicts (n 2) 237.

[43] ibid.

[44] ibid 243.

[45] ibid.

[46] ibid.

[47] ibid 244.

aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[48] Therefore, the dichotomy, if not important, is certainly helpful in order to classify armed conflicts in one category or other and promote greater compliance with international humanitarian law in general.[49]

The following section will focus upon the question: is international humanitarian law applicable as the *lex specialis* to the exclusion of international human rights law in all armed conflicts, whether international or non-international in character?

A general question that is often being raised is, when there is already a separate body of law present i.e. international humanitarian law to regulate armed conflict, is there a need for another body of law i.e. international human rights law to be applied in the same context.[50] Before making an attempt to answer the above question, it is desirable to first give a very brief overview of the applicability of these two branches of law. To begin with, international human rights law is a body of law developed to regulate the behavior between the State and its citizens. The rules under international human rights law are designed in order to protect individuals from the problems faced by them in their own State.[51] International humanitarian law, on the other hand, is known as the law of war or law of armed conflict and it mainly regulates the conduct of two parties at war.[52] The rules on humanitarian law have originated based on the principle of humanity i.e., the idea of humane treatment of troops by States during wartime. Therefore, conventionally, while human rights law was considered to be an internal affair of States, international humanitarian law regulated the relations between States in international law during armed conflict.[53] However, the development in international jurisprudence has led to the applicability of human rights treaties to situations of armed conflicts which subsequently raised a question regarding the interplay between these two branches of law.[54] It is essential to note that, the rules regarding international human rights apply both in times of peace and during armed conflict and this has been recognized by the International Court of Justice (ICJ).[55]

[48] The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72 [126].
[49] Christine Byron, Armed Conflicts: International or Non-International? (2001) 6 (1) Journal of Conflict and Security Law 63, 90.
[50] Daniel Moeckli, Snageeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2010) 526.
[51] Naftali, *International Humanitarian Law and International Human Rights Law* (n 15) 50.
[52] Cordula Droege, Elective affinities? Human Rights and Humanitarian Law (2008) 90 (871) International Review of the Red Cross 501, 503.
[53] ibid.
[54] ibid 504.
[55] Naftali, *International Humanitarian Law and International Human Rights Law* (n 15) 50.

The ICJ in the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons stated the following: "The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities."[56]

In the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ again reiterated the point regarding the application of human rights treaties in armed conflict by stating that, the human rights treaties continue to apply during wartime except the provisions on derogation.[57] The application of human rights law during armed conflicts has also been reaffirmed by various universal and regional human rights bodies, like the UN Human Rights Committee, the Inter-American Commission and the Court, the European Court of Human Rights etc.[58] If, both international humanitarian law and human rights law apply to situations of armed conflict, then the question arises with regard to how these two branches of law interact with each other and if there is a conflict how is the same resolved. As per the view of the ICJ in Nuclear Weapons case, an issue regarding the application of international humanitarian law and human rights law is to be resolved through the maxim *lex specialis derogat legi generali*.[59] The principle of *lex specialis*, is an useful tool of interpretation in international law, according to which, in situations regulated by two branches of law, the specific law displaces the general law.[60] The Inter-American Commission on Human Rights, following the ICJ's opinion has stated that, in a situation of armed conflict, the more specific rules of international humanitarian law are more relevant for the purposes of the interpretation of a particular right protected by the American

[56] Legality of the Threat or Use of Nuclear Weapons, I.C.J., Advisory Opinion, 1996 I.C.J. 266 [25].
[57] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Advisory Opinion, 2004 I.C.J. 136 [106].
[58] Droege, Elective affinities? Human Rights and Humanitarian Law (n 52) 508.
[59] Alexander Orakhelashvili, The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence? (2008) 19 (1) The European Journal of International Law 161, 169. See also page 176 - "The UN Report on Guantanamo Detainees explains the relationship between human rights and humanitarian law provisions on the detention of individuals as the relationship between general and special law in the following terms: any person having committed a belligerent act in the context of an international armed conflict and having fallen into the hands of one of the parties to the conflict (in this case, the United States) can be held for the duration of hostilities, as long as the detention serves the purpose of preventing combatants from continuing to take up arms against the United States. Indeed, this principle encapsulates a fundamental difference between the laws of war and human rights law with regard to deprivation of liberty. In the context of armed conflicts covered by international humanitarian law, this rule constitutes the *lex specialis* justifying deprivation of liberty which would otherwise, under human rights law as enshrined by Article 9 of ICCPR, constitute a violation of the right to personal liberty."
[60] Marco Sassoli and Laura M. Olson, The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts (2008) 90 (871) International Review of the Red Cross 599, 603.

Declaration of the Rights and Duties of Man. The reasons for preferring the more special rule is that, the rule (international humanitarian law) appears to be more related to the particular subject matter (armed conflict) and has been formulated to take better account of the situation.[61] Nonetheless, a controversy does exits regarding the precise meaning of the *lex specialis* principle in the context of international humanitarian and human rights law in international law. However, if one goes by the ICJ's opinion regarding the relationship between the two branches of law in the Nuclear Weapons case, it can be argued that, when both international humanitarian and human rights law are applicable, international humanitarian law is the *lex specialis*.[62] In the Israeli Wall case, the ICJ opined that, there could be three possible situations with regard to the relationship between international humanitarian and human rights law: "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[63] The ICJ's statement in the Israeli Wall case was also confirmed in the DRC v. Uganda case.[64] Considering the ICJ's opinion in the above cases, it is clear that, human rights law is applicable even in times of conflict. Going by the ICJ's views, it can be said that, international humanitarian law tends to always prevail as it offers more protection in almost every situation for which it has a specific set of rules.[65] In other words, while trying to solve a conflict considering a particular rule of human rights law, which also finds a place in international humanitarian law, the judgment should always be based upon international humanitarian law, simply because it is a body of law specific to situations of armed conflict.[66] It is always more preferable to apply the more detailed rule which is more precise vis a vis the situation and the problem.[67] Hence, in light of the above, it would not be incorrect on part of States to take a stand that, when provisions of human rights are applied in the context of an international armed conflict, international humanitarian law (being the *lex specialis*) displaces

[61] Naftali, *International Humanitarian Law and International Human Rights Law* (n 15) 70.
[62] Legality of the Threat or Use of Nuclear Weapons, I.C.J., Advisory Opinion, 1996 I.C.J. 266 [25]. - "The right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."
[63] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Advisory Opinion, 2004 I.C.J. 136 [106].
[64] Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), 2005 I.C.J. (Dec. 19) [216].
[65] Francoise J. Hampson, The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body (2008) 90 (871) International review of the Red Cross 549, 559.
[66] ibid.
[67] ibid.

such provisions. Also, when human rights provisions do apply in situations of armed conflict they are required to be modified in their application keeping in mind international humanitarian law, in order to avoid any clash.[68]

Despite the ICJ's reliance on the *lex specialis* principle in order to explain the relationship between the two branches of law, the same has been criticized on the point that, the principle of *lex specialis* does not truly indicates the dominance of one branch of law over the other. The *lex specialis* principle, at best, is a tool of interpretation and not a rule to solve conflict between two norms as it does not indicate towards a hierarchy of norms.[69] According to Martti Koskenniemi, "*lex specialis* is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts and there is no specific legislative intention of the *lex specialis* maxim, highlighting its role as an informal part of legal reasoning that is of the pragmatic process through which lawyers go about interpreting and applying formal law."[70] Some scholars are also, of the opinion that, the principle of *lex specialis* was originally meant to be applied only to domestic law and its application to international law, therefore, is unwarranted. Moreover, the principle *lex specialis*, fails to point out which of the two branches of law is the *lex specialis* and *lex generalis*.[71] The *lex specialis* principle has often been termed as being vague because of its use as a conflict solving device, which may lead to decisions being made based upon political motives and not on legal foundations. Therefore, it would not be wrong to admit, considering the diverse views among scholars, that there exists some confusion regarding the true meaning and application of the *lex specialis* principle, particularly in the context of international humanitarian and human rights law.[72] In an attempt to solve this confusion pertaining to the applicability of the *lex specialis* principle, some scholars are of the view that, a harmonious interpretation between the two branches of law is required as these two bodies of law complement and not contradict each other.[73]

As per the principle of complementarity, both humanitarian law and human rights law can support each other and provide a strong regulation because they share almost the same values. This principle suggests that international law as a whole is one system and the various rules that form part of this system can function in a harmonious fashion. Thus, human rights can be interpreted in the light of international humanitarian law and vice versa.[74] The judgment by the European

[68] Hassan v United Kingdom, [2014] ECHR 29750/09 [87].
[69] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (*Report of the Study Group of the International Law Commission*, 2006) <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf > p. 49 accessed 8 September 2022.
[70] Anja Lindroos, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis* (2005) 74 (1) Nordic Journal of International Law 27, 36.
[71] Nancie Prud'homme, *Lex specialis*: Oversimplifying a more complex and multifaceted relationship? (2007) 40 (2) Israel Law Review 355, 359.
[72] ibid 383.
[73]Orakhelashvili, The Interaction between Human Rights and Humanitarian Law (n 59) 169.
[74] Droege, Elective affinities? Human Rights and Humanitarian Law (n 52) 521.

Court of Human Rights (ECtHR) in Hassan v. United Kingdom, further demonstrates this point.[75] In this case, the ECtHR rejected the State's contention that international humanitarian law should apply to the exclusion of international human rights law and held that the two bodies of law should be applied together, stating: "to accept the Government's argument on this point would be inconsistent with the case law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently. As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part. This applies equally to Article 1 as to the other articles of the Convention."[76]

Conclusion

As stated in the earlier sections, the regulation of non-international armed conflict, post 1949, has come a long way and it cannot be denied that, framing the rules on the basis of the law of international armed conflict has led to greater acceptance of a host of issues related to internal armed conflict. However, the categorization of armed conflict into international and non-international and its overall significance has often been a subject matter of debate among scholars in international law. Some have even gone to the extent of referring this distinction as a 'policy error' which requires immediate rectification.[77] Although, the increase in the number of internal armed conflicts post 1949 has changed the manner in which States look at the notion of armed conflict, yet, there is a strong opinion against preserving the legal distinction between international and non-international armed conflict in international law. But, despite the arguments against maintaining the legal distinction, the same has not been done. What needs to be borne in mind is that, modeling of non-international armed conflict on the lines of international armed conflict does not make the two one and the same.

There are major differences in terms of involvement of actors, scope of application etc. which cannot be simply overlooked. Also, in what manner the conflicts that fall outside the purview of both international and non-international armed conflict would be regulated, if this legal distinction is eliminated? Likewise, resorting to other bodies of international law, for example, international criminal law and international human rights law to justify the arguments for unification of the law on armed conflict may even disregard some of the basic differences in international and non-international armed conflict. Therefore, the need to characterize armed conflicts as international and non-international under international law is justified. Furthermore, there is no doubt that, internal armed conflict has given rise to many of the worst atrocities committed today in international law, hence, the need of the hour is to adopt a practical mechanism for stringent regulation rather than going for the one size fits all approach to regulation.

[75] Hassan v United Kingdom, [2014] ECHR 29750/09 [77].
[76] ibid.
[77] Crawford, Unequal before the Law (n 32) 450.

Coming to the question of whether international humanitarian law is applicable as the *lex specialis* to the exclusion of international human rights law in all armed conflicts, it can be concluded from the above discussions that, the preconceived approach of humanitarian law (being the *lex specialis*) displacing human rights law is not supported by everyone in international law. There still remains much controversy vis a vis the true meaning and application of the *lex specialis* principle, especially in international armed conflict. "Generally speaking, international humanitarian law is considered to be *lex specialis* only for a limited purpose and it in a way complements and not curtails the level of protection under human rights law."[78] It is to be understood that, by the mere reference of international humanitarian law as the *lex specialis*, the protection offered by human rights law in situations of armed conflict does not become insignificant. On the other hand, the provisions of human rights law provide for a better understanding of some of the principles of international humanitarian law (proportionality, military necessity etc). Therefore, instead of trying to replace/modify the rules of human rights law with those of international humanitarian law without examining the interaction between the specific rules of these bodies of law, a harmonious approach to problem solving would prove better for the stringent regulation of international armed conflict.

To sum up, the protection of individual rights only through international humanitarian law appears to be quite problematic, in light of increased application of human rights law in armed conflict. The confusion among scholars that, each of the two bodies of law applies to the relevant armed conflict without relying on one another can only be done away by adopting a harmonious approach. As noted earlier, it is true that, the subjects governed by one body of law are governed by the other body of law, thereby, making the point clear that, the protection offered by international humanitarian and human rights law almost go hand in hand with regard to regulation of international armed conflict. On the other hand, a question still remains as to how these two branches of law will interact as per the harmonious approach. Certain mechanism has to be devised in order to harmoniously interpret the two different laws. Nonetheless, it is only through the principle of complementarity that both international humanitarian and human rights law can be interpreted in a manner which will contribute to better protection of individual rights in armed conflict.

BIBLIOGRAPHY

Legal Instruments

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

[78] Orakhelashvili, The Interaction between Human Rights and Humanitarian Law (n 59) 182.

Cases

- Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), 2005 I.C.J. (Dec. 19).
- Hassan v United Kingdom, [2014] ECHR 29750/09.
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Advisory Opinion, 2004 I.C.J. 136.
- Legality of the Threat or Use of Nuclear Weapons, I.C.J., Advisory Opinion, 1996 I.C.J. 266.
- The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72.

Secondary Sources

- 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (*International Committee of the Red Cross (ICRC) Opinion Paper*, March 2008) <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> accessed 8 September 2022.

(*Report of the Study Group of the International Law Commission*, 2006) <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf > accessed 8 September 2022.

- Alexander Orakhelashvili, The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence? (2008) 19 (1) The European Journal of International Law.
- Anja Lindroos, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis* (2005) 74 (1) Nordic Journal of International Law.
- Christine Byron, Armed Conflicts: International or Non-International? (2001) 6 (1) Journal of Conflict and Security Law.
- Cordula Droege, Elective affinities? Human Rights and Humanitarian Law (2008) 90 (871) International Review of the Red Cross.
- Daniel Moeckli, Snageeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2010).
- David Kretzmer, Rethinking the Application of IHL in Non-International Armed Conflicts (2009) 42 (1) Israel Law Review.
- Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press, 2008).
- Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (1st edn, Oxford University Press 2012).
- Emily Crawford, Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts (2007) 20 (2) Leiden Journal of International Law.
- Francoise J. Hampson, The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body (2008) 90 (871) International review of the Red Cross.
- James G Stewart, Towards a single definition of armed conflict in

international humanitarian law: A critique of internationalized armed conflict (2003) 85 (850) International Review of the Red Cross.

- Jelena Pejic, The protective scope of Common Article 3: more than meets the eye (2011) 93 (881) International Review of the Red Cross.
- Marco Sassoli and Laura M. Olson, The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts (2008) 90 (871) International Review of the Red Cross.
- Martti Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law'
- Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict with Commentary' (*International Institute of Humanitarian Law*, 2006) <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf> accessed 8 September 2022.
- Nancie Prud'homme, *Lex specialis*: Oversimplifying a more complex and multifaceted relationship? (2007) 40 (2) Israel Law Review.
- Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (1st edn, Oxford University Press 2011).
- Sandesh Sivakumaran, Re-envisaging the International Law of Internal Armed Conflicts (2011) 22 (1) European Journal of International Law.
- Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (1st edn, Oxford University Press 2012).
- Sylvain Vite, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations (2009) 91 (873) International Review of the Red Cross.
- Nguyen, C.-H., Ngo, Q.-T., Pham, M.-D., Nguyen, A.-T., & Huynh, N.-C. (2021). Economic linkages, technology transfers, and firm heterogeneity: the case of manufacturing firms in the Southern Key Economic Zone of Vietnam. *Cuadernos de Economía, 44*(124), 1-25. https://cude.es/submit-a-manuscript/index.php/CUDE/article/view/143
- Piñeros, M. L. (2020). Economic sectors and the monetary policy risk-taking channel. *Cuadernos de Economía, 43*(123), 275-290. https://cude.es/submit-a-manuscript/index.php/CUDE/article/view/3
- Soldatos, G. T. (2021). In/Stability under Ideal Income Tax and Ideal Consumption Tax. *Cuadernos de Economía, 44*(125), 29-37. https://cude.es/submit-a-manuscript/index.php/CUDE/article/view/187