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**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**

*Laura M. Olson**

This article—using the procedural regulation of internment as an example—outlines some of the practical challenges in assessing the inter-relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHRL), in order to draw attention to certain risks so they may be avoided, as well as to stimulate proposals to address these challenges. The international humanitarian treaty law procedurally regulating internment is described briefly. This is followed by an exploration of the relationship between IHL and IHRL. Differences between IHL and IHRL are presented, and, by focusing on the procedural regulation of internment, the way these differences give rise to complications, when attempting to harmonize the two sets of legal norms, is demonstrated. In conclusion, an initiative is proposed that may assist the practitioner in addressing the complementarity between IHL and IHRL in concrete situations, thereby helping to ensure the fullest protection of the law to persons interned.

INTRODUCTION

Internment—the deprivation of liberty of a person without criminal charge as a preventative security measure—frequently occurs during armed conflict. Such deprivation of a person’s liberty is one of the most extreme measures that can be taken and hence requires adherence to safeguards. Respecting and enforcing these safeguards necessitate understanding not only which rules apply to the situation but also the content of those rules. No international humanitarian law (IHL) treaty rules applicable in non-international armed conflicts procedurally regulate internment. International human rights law (IHRL) may provide regulation by complementing IHL. However, without clarity on the relationship between IHL and IHRL, it is impossible to understand and implement the applicable law so as to provide the fullest protection of the law to persons interned, particularly in relation to non-international armed conflict.

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Increased attention to internment—largely caused by the controversy over the Guantanamo Bay Detention Facility—has initiated calls for new international rules—by some to respond to security concerns caused by “modern threats” and by others to ensure greater protection for persons affected by armed conflict or to address the familiar challenge of determining whether a situation reaches the threshold of armed conflict for application of IHL.¹ This has been accompanied by interest to renew the decades-long discussion on the establishment of minimum common standards applicable at all times.² Yet, generally formulated minimum standards will require precise content so as to avoid varying interpretations of the standard. Additionally, prior to engaging in the creation of new treaties, it is important to have as accurate an understanding as possible of the present law, otherwise the outcome could result in the establishment of rules that are lower than existing standards. Such initiatives make the need for clarity on the relationship between IHL and IHRL with regard to internment regulation particularly urgent.

This article—using the procedural regulation of internment as an example—outlines some of the practical challenges in assessing the inter-relationship between IHL and IHRL in order to draw attention to certain risks so they may be avoided, as well as to stimulate proposals to address

¹ See, e.g., Robert P. Barnidge, Jr., *Should National Security Trump Human Rights in the Fight Against Terrorism?*, 37 ISR. Y.B. OF HUM. RTS. 85, 86–94 (2007).

² See Theodor Meron & Allan Rosas, *A Declaration of Minimum Humanitarian Standards*, 85 AM. J. INT'L L. 375, 377–381 (1991) (formulated and adopted by experts in Finland in 1990); See also Asbjorn Eide, Allan Rosas & Theodor Meron, *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 AM. J. INT'L L. 215 (1995). Relevant United Nations documents include: The Secretary General, *Report of the Secretary-General on the Fundamental Standards of Humanity, delivered to the U.N. Econ. & Soc. Council, Sub-Comm. on the Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/2004/90 (Feb. 25, 2004); Commission on Human Rights Res. 1999/65, U.N. Doc. A/RES/1999/65 (Apr. 28, 1999); Commission on Human Rights Res. 2000/69, U.N. Doc. A/RES/2000/69 (Apr. 26, 2000). See generally Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 605 (1983). In 2007, the International Committee of the Red Cross (ICRC) presented its institutional guidelines on internment, which “[set] out a series of broad principles and specific safeguards that the ICRC believes should, at a minimum, govern any form of detention without criminal charges.” INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 11, 30IC/07/8.4 (Oct. 2007), available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/ihl-30-international-conference-101207/\\$File/IHL-challenges-30th-International-Conference-ENG.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/ihl-30-international-conference-101207/$File/IHL-challenges-30th-International-Conference-ENG.pdf); these ICRC institutional guidelines, entitled “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence,” Annex 1, *id.*, were originally published as Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. OF THE RED CROSS 375 (2005), available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/\\$File/30IC_IHL_challenges_Annex1_Detention_FINAL_EN.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/$File/30IC_IHL_challenges_Annex1_Detention_FINAL_EN.pdf) [hereinafter ICRC Guidelines].

these challenges. The first section of this article provides background by briefly describing the international humanitarian treaty law procedurally regulating internment. This is followed by a section discussing the relationship between IHL and IHRL. The third section presents some of the differences between IHL and IHRL and, by focusing on the procedural regulation of internment, demonstrates how these differences can give rise to complications when attempting to harmonize the two sets of legal norms. Finally, the last section presents an initiative that, if accomplished, may assist the practitioner in addressing the complementarity between IHL and IHRL in concrete situations.

PROCEDURAL REGULATION OF INTERNMENT UNDER INTERNATIONAL HUMANITARIAN LAW

This section briefly outlines existing IHL treaty rules³ regulating internment. The purpose in doing so is to provide both a general understanding of the extent of IHL protections and a starting point for the discussion on the IHL–IHRL relationship that follows. Here only the *procedural* protections IHL provides will be highlighted, although IHL also regulates the *treatment* and *conditions* of persons interned during armed conflict. The focus of this article is non-international armed conflict; nevertheless, rules applicable in international armed conflicts will be mentioned. This is done for two reasons: first, to demonstrate the paucity of procedural rules applicable in non-international armed conflict as compared with international armed conflict and, second, because of that paucity, to gain insight from the rules of international armed conflict to evaluate what may best work to address procedural matters in non-international armed conflict.

IHL provides grounds for possible internment in international armed conflict under certain conditions for specific categories of protected persons. The First and Second Geneva Conventions regulate the retention of medical and religious personnel “only in so far as the state of health, the spiritual needs and the number of prisoners of war require.”⁴ The Third Geneva Convention stipulates that “[t]he Detaining Power may subject prison-

³ An articulation of specific customary rules is beyond the scope of this article. Customary international law, of course, must be considered in any analysis undertaken. *See generally* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

⁴ Geneva Convention for the Amelioration of the Conditions of Wounded and Sick in Armed Forces in the Field art. 28, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; *see also id.* at arts. 30, 32; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 36–37, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention].

ers of war to internment.”⁵ Concerning civilians, the Fourth Geneva Convention provides that—as to aliens in the territory of a party to the conflict—“[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”⁶ In an occupied territory, “[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most subject them to assigned residence or to internment.”⁷

In contrast, IHL treaty law applicable to non-international armed conflict provides no specific grounds for internment. Yet, IHL treaty law contemplates that internment occurs in non-international armed conflict, as demonstrated by the references to internment found in Articles 5 and 6 of the Second Additional Protocol.⁸ Article 3 common to the Four Geneva Conventions (Common Article 3) makes no reference to internment.

As IHL applicable to international armed conflict provides guidance on when internment may occur or begin, it should, thus, also stipulate when the captivity must end. Retention of medical and religious personnel must cease if prisoners of war are not in need.⁹ According to the Third Geneva Convention, repatriation of prisoners of war takes place due to medical reasons *during* the conflict,¹⁰ and release and repatriation for all, without delay, must occur *after* the cessation of active hostilities.¹¹ Unlike prisoners of war (with no medical reason requiring release), civilian internees may not necessarily be interned until the end of conflict. The Fourth Geneva Convention provides that a civilian must be released “as soon as the reasons which necessitated his internment no longer exist;”¹² this may be during the conflict. If, however, civilians remain interned for the duration of the conflict, “[i]nternment shall cease as soon as possible after the close of hostilities.”¹³

⁵ Geneva Convention Relative to the Treatment of Prisoners of War art. 21, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 152 [hereinafter Third Geneva Convention].

⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 42, Aug. 12, 1949, 6 U.S.T. 356, 75 U.N.T.S. 134 [hereinafter Fourth Geneva Convention].

⁷ *Id.* at art.78.

⁸ See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 5, June 8, 1977, 1125 U.N.T.S. 609, 612 [hereinafter Additional Protocol II]. “[T]he following provisions shall be respected as a minimum with regard to persons deprived of liberty for reasons related to the armed conflict, whether they are interned or detained . . .”

⁹ First Geneva Convention, *supra* note 4, at art. 28; Second Geneva Convention, *supra* note 4, at art. 37.

¹⁰ Third Geneva Convention, *supra* note 5, at 109–17.

¹¹ *Id.* at art. 118. *But see, id.* at art. 119(5).

¹² Fourth Geneva Convention, *supra* note 6, at art. 132.

¹³ *Id.* at art. 133.

Of the above-mentioned grounds for internment, generally only the basis for interning a civilian requires an assessment,¹⁴ as civilians—unlike combatants who are captured and become prisoners of war—may only be interned if and for the duration that they pose a security threat. The Fourth Geneva Convention provides internment review procedures applicable to civilian internees, giving some detail regarding the type of body and timing of review. For aliens in the territory of a party to the conflict, the Fourth Geneva Convention states:

Any protected person who has been interned . . . shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board If the internment . . . is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favorable amendment of the initial decision, if circumstances permit.¹⁵

For those interned in occupied territory, the Fourth Geneva Convention similarly provides that:

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.¹⁶

And, the First Additional Protocol indicates certain safeguards for the individual in the process:

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offenses, such persons shall be released with the mini-

¹⁴ Reviews of medical reasons for the release of prisoners of war also take place. Third Geneva Convention, *supra* note 5, at arts. 109–17. The issue of a person’s status, *i.e.*, whether he or she fits into a specific protected person category, is not addressed for the purposes of this discussion. If it were addressed, reference would be made to Article 5 of the Third Geneva Convention, which provides for determination of prisoner of war status by a competent tribunal when such status is in doubt. *Id.* at art. 5.

¹⁵ Fourth Geneva Convention, *supra* note 6, at art. 43(1).

¹⁶ *Id.* at art. 78(2).

mum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.¹⁷

The Second Additional Protocol applicable in non-international armed conflict briefly mentions internment,¹⁸ but provides no guidance regarding procedures either to assess the decision to intern or to terminate captivity. Again, Common Article 3 does not speak to the issue.

While IHL treaties applicable to international armed conflict provide greater detail on the regulation of internment than does IHL applicable to non-international armed conflict, some consider the law applicable to international armed conflict to lack sufficient precision with regard to procedural regulation.¹⁹ If, however, IHRL were to complement IHL, then the applicable procedural rules may not be so sparse.²⁰ Understanding the IHL–IHRL relationship could alleviate protection concerns in *international* armed conflicts, but it is crucial for providing procedural protection to persons interned in situations of *non-international* armed conflicts.²¹

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts art. 75(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

¹⁸ The Second Additional Protocol only states that “[i]f it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.” Additional Protocol II, *supra* note 8, at art. 5(4). In the Second Additional Protocol’s suggestion to grant amnesty for participation in hostilities, internment is mentioned: “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are *interned* or detained.” *Id.* at art. 6(5) (emphasis added).

¹⁹ Even though internment in international armed conflicts is regulated by the Fourth Geneva Convention and Additional Protocol I, these treaties do not sufficiently elaborate on the procedural rights of internees, nor do they specify the details of the legal framework that a detaining authority must implement. In non-international armed conflicts there is even less clarity on how internment is to be organized.

ICRC Guidelines, *supra* note 2, at 377.

²⁰ See International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Sept. 3, 1953, 213 U.N.T.S. 222; American Convention on Human Rights art. 7, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights arts. 6–7, June 27, 1981, 1520 U.N.T.S. 246.

²¹ A specific analysis of customary IHL regulating this matter would be worthwhile. See generally 1 HENCKAERTS & DOSWALD-BECK, *supra* note 3.

A RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

The relationship between IHL and IHRL is often referred to as complementary.²² However, both disagreement and obscurity remain as to what that means in practice. Some consider that IHL totally displaces IHRL, and others argue for complete application of IHRL in times of armed conflict, nearly displacing IHL. These extreme propositions are asserted with little or no explanation, and in practice both positions risk undermining the protection provided by these two bodies of law that seek to protect the person, but do so in different ways.²³ This section seeks to outline some of the complexities of the IHL–IHRL relationship in hopes of better understanding it and facilitating its practical implementation in a manner that does not undermine the protection provided by either body of law.

Looking first to the treaties of IHL and IHRL, they indicate a relationship between the two branches of law. Both the First and Second Additional Protocols make reference to human rights. The First Additional Protocol provides:

The provisions of this Section [Treatment of Persons in the Power of a Party to the Conflict] are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly parts I and III thereof, *as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.*²⁴

The Second Additional Protocol recalls in its preamble that "international instruments relating to human rights offer a basic protection to the human person."²⁵ It "establishes the link between Protocol II and the inter-

²² See U.N. Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004); ICRC Guidelines, *supra* note 2, at 377.

²³ See generally Yoram Dinstein, *The International Law of Inter-State Wars and Human Rights*, 7 ISR. Y.B. HUM. RIGHTS 139 (1977); Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 345 (T. Meron ed. 1983); Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. OF THE RED CROSS 94 (1993); Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. OF CONFLICT & SECURITY LAW 265, 266–68 (2006); Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for the New Instrument*, 77 AM. J. INT'L L. 589 (1983).

²⁴ Additional Protocol I, *supra* note 17, at art. 72 (emphasis added). See also *id.* at art. 75(8).

²⁵ Additional Protocol II, *supra* note 8, at pmbl.

national instruments on human rights,”²⁶ which include, for example, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as regional instruments on human rights.²⁷ The ICRC Commentary explains that “[h]uman rights continue to apply concurrently in time of armed conflict,”²⁸ although some human rights treaties provide for suspension of some rights “[i]n time of public emergency which threatens the life of the nation.”²⁹

Human rights treaties generally do not specifically delimit their temporal scopes of application in the same way as do IHL treaties, which confine application to situations of armed conflict. Application of certain IHRL treaties may be limited, however, by provisions such as derogation clauses, among others. The possible non-applicability in extreme situations,³⁰ such as armed conflict, of certain provisions of these IHRL treaties through their derogation clauses indicates that IHRL applies in such circumstances, unless an affirmative step is taken to derogate.³¹ The inclusion of derogation clauses in IHRL treaties would not be necessary if the treaties never applied in those extreme situations, such as armed conflict,³² thus, demonstrating concurrent application of IHL and IHRL.

²⁶ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS 1339 (Yvez Sandoz et al. eds., 1987).

²⁷ *Id.* ¶ 4428.

²⁸ *Id.* ¶ 4429. *See also* ICRC COMMENTARY, *supra* note 26, ¶ 2933.

²⁹ ICCPR, *supra* note 20, at art. 4(1).

³⁰ For example, the ICCPR, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights contain derogation clauses, although they are formulated differently. Extreme situations are understood as follows: “[i]n time of public emergency which threatens the life of the nation” ICCPR, *supra* note 20, at art. 4(1); “[i]n time of war or other public emergency threatening the life of the nation” Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 20, at art. 15(1); “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party” American Convention on Human Rights, *supra* note 20, at art. 27(1).

³¹ If this step is taken then the suspension measures may only affect the derogable provisions and those only “[t]o the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with . . . other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion and social origin.” ICCPR, *supra* note 20, at art. 4(1). *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 20, at art. 15(1); American Convention on Human Rights, *supra* note 20, at art. 27(1).

³² Unlike the Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights, the ICCPR, in its derogation clause, does not specifically mention war. *See* ICCPR, *supra* note 20, at art. 4(1); Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 20, at art. 15(1); Ameri-

Furthermore, the International Court of Justice (ICJ) reaffirmed that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation”³³ This confirmation of the complementarity of IHL and IHRL permits a starting point to understanding the relationship of the one branch of law to the other. Yet, the ICJ provided little guidance on how complementarity is to function in practice or specifically how to resolve situations of conflict, and the ICJ’s 2004 Advisory Opinion, while definite and wide-ranging in its scope, remains controversial.³⁴ The task, therefore, is to figure out how to apply this assertion such that: (1) relevant rules and their content may be identified and applied in practice; or (2) gaps in international law may be revealed.

In 1996, the ICJ stated that “the test of what is an arbitrary deprivation of life . . . then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”³⁵ Citing this ICJ Advisory Opinion, IHL is regularly referred to as *lex specialis* vis-à-vis human rights law; this reference is frequently pronounced but rarely given precision. Can it adequately explain the relationship between IHL and IHRL? Does *lex specialis* fully explain what it means to declare that the two bodies of law are complementary? More concretely, can applying the *lex specialis* maxim answer questions regarding what IHL and IHRL mandate with respect to procedural regulation of internment during non-international armed conflict? To answer these

can Convention on Human Rights, *supra* note 20, at art. 27(1). However, the Human Rights Committee clarified this point in its General Comment 31:

As implied in General Comment 29 [on States of Emergencies], the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specifically relevant for the purposes of interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

U.N. Human Rights Committee, *General Comment No. 31*, *supra* note 22, ¶ 11 (citing U.N. Human Rights Committee, *General Comment No. 29*, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (July 24, 2001)).

³³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9, 2004). *See also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

³⁴ Adam Roberts, *Transformative Military Occupation*, 100 AM. J. INT’L L. 580, 597 (2006). *See also* Lori Fisler Damrosch and Bernard H. Oxman, *Agora: ICJ Advisory Opinion on Construction of the Wall in the Occupied Palestinian Territory*, 99 AM. J. INT’L L. 1 (2005).

³⁵ Legality of the Threat or Use of Nuclear Weapons, *supra* note 33, ¶ 25. “[T]he Court will have to take into consideration both of these branches of law, namely human rights law and international humanitarian law.” Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory, *supra* note 33, ¶ 106.

questions first requires further consideration of the maxim *lex specialis derogat legi generali*.

Lex specialis derogat legi generali is a tool of interpretation and conflict resolution.³⁶ When applied narrowly, it is employed only “to resolve a genuine conflict between two norms,”³⁷ thus, “in the event of conflict, the more special norm prevails over the more general norm.”³⁸ The broader conception of *lex specialis* has the rule operating in “two different contexts . . . , namely *lex specialis* as an elaboration or application of general law in a particular situation and *lex specialis* as an exception to the general law.”³⁹ In other words, the *lex specialis* maxim indicates the order of preference between two rules that apply to the same problem, but regulate it differently.

The priority given to the more specific is “justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law.”⁴⁰ The rationale behind the maxim—to apply the most specific rule—is to give effect to the intentions of the parties and to take into account the particularities of the case. In this sense, it is an expression of con-

³⁶ Case law containing reference to *lex specialis* doctrine is limited, and academic literature conducts little analysis of the maxim itself. See Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 61, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC Report of Study Group]; Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. OF INT'L LAW 27, 37–38 (2005); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUROPEAN J. OF INT'L L. 483, 488 (2006). Such traditional resolving devices, such as *lex specialis*, are not completely unquestioned. See Jörg Kammerhofer, *Unearthing Structural Uncertainty Through Neokelsenian Consistency: Conflicts of Norms in International Law*, ESIL Research Forum on International Law: Contemporary Issues, available at <http://www.esil-sedi.eu/english/pdf/Kammerhofer.pdf>.

³⁷ JOOST PAUWELYN, CONFLICT OF NORMS IN INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 385 (2003). See also Lindroos, *supra* note 36, at 46–47; Martti Koskenniemi, *Study on the Function and Scope of Lex Specialis Rule and the Question of “Self-Contained Regimes,”* ¶¶ 61–81, ILC, ILC(LVI)/SG/FIL/CRD.1 (May 7, 2004). There are also varying definitions of conflict, some broader than others. See Eric Vranes, *The Definition of “Norm Conflict” in International Law and Legal Theory*, 17 EUROPEAN J. OF INT'L L. 395 (2006).

³⁸ PAUWELYN, *supra* note 37, at 385.

³⁹ U.N. International Law Commission, *Report of the International Law Commission on its Fifty-Fifth Session*, ¶ 431, U.N. Doc. A/58/10(Supp) (Jan. 1, 2003). The ILC Report “adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem.” ILC Report of Study Group 2006, *supra* note 36, ¶ 25.

⁴⁰ U.N. International Law Commission, *Report of the International Law Commission on its Fifty-Eighth Session*, ¶ 251(7), U.N. Doc. A/61/10 (Jan. 10, 2006).

sent and can easily be accepted in the international legal system, which of course has a strong consensual basis.”⁴¹

There are, however, fundamental limitations to the *lex specialis* maxim.⁴² This maxim functions when it is clear which rule is the more general rule and which is the more specific, but it cannot be applied without knowing that starting point. The challenge then becomes to assess appropriately the general rule and the specific rule in order to apply the maxim. What should guide this assessment within the international legal system, which does not conform to the familiar logic of domestic legal systems? The differences between the international and domestic systems must be considered, as they may indicate limitations to the role that the traditional maxim of *lex specialis* can play in the international legal system.⁴³ For example, it has been questioned “to what extent this maxim [*lex specialis*] can be used in an international legal system which lacks hierarchy and institutional structures.”⁴⁴

Another challenge in applying the *lex specialis* maxim, which specifically affects the IHL–IHRL relationship, is that “[t]he increased fragmentation of international law has been accompanied by a more problematic phenomenon: institutional fragmentation that has strengthened the role of specialized regimes (e.g., WTO, EU, human rights and environmental regimes) within the international legal system.”⁴⁵ As both IHL and IHRL are

⁴¹ Lindroos, *supra* note 36, at 36.

⁴² Not all limitations of the *lex specialis* maxim are discussed here. For elaboration, see ILC Report of Study Group 2006, *supra* note 36, ¶¶ 58–122; Lindroos, *supra* note 36, at 39–44; Simma & Pulkowski, *supra* note 36, at 488–90; Marco Sassòli, *Le Droit International Humanitaire, Une Lex Specialis par Rapport aux Droits Humains?*, in *LE DROITS DE L’HOMME ET LA CONSTITUTION, ETUDES EN L’HONNEUR DU PROFESSEUR GIORGIO MALINVERNI* (AUER, FLÜCKIGER, HOTTELLIER EDS.) 375, 380–85 (2007).

⁴³ See Lindroos, *supra* note 36, at 27–28; ILC Report of Study Group 2006, *supra* note 36, ¶ 324. For further discussion on norm hierarchy, specifically regarding *jus cogens*, article 103 of the UN Charter and *erga omnes*, see ILC Report of Study Group 2006, *supra* note 36, ¶¶ 324–409; Michael J. Matheson, *The Fifty-Eighth Session of the International Law Commission*, 101 AM. J. INT’L L. 407, 424–26 (2007). Even if one accepts the role of *jus cogens*, there are few norms of *jus cogens* and “their content is often unclear.” Lindroos, *supra* note 36, at 29. See also Simma & Pulkowski, *supra* note 36, at 498. Rules of both IHL and IHRL are considered *jus cogens*, e.g., racial discrimination, torture and “the basic rules of international humanitarian law applicable in armed conflict.” U.N. International Law Commission, *supra* note 40, ¶ 251(33); See also INT’L COMM. OF THE RED CROSS, *supra* note 26, ¶ 4430. “[W]hile some members [ILC] were interested in expanding the list of *jus cogens* norms (in particular in the area of human rights), the group realized—after much discussion—that negotiating a new list was not feasible or desirable, and in the end the conclusions merely note that the ‘most frequently cited examples’ are the ones already affirmed in the 2001 commentary.” Matheson, *supra*, at 424, citing U.N. International Law Commission, *supra* note 40, ¶ 251(33).

⁴⁴ Lindroos, *supra* note 36, at 30.

⁴⁵ Lindroos, *supra* note 36, at 27; See generally Vranes, *supra* note 37.

specialized regimes,⁴⁶ how effective can the maxim of *lex specialis* be if there is no clear solution to determine relations between two specialized regimes?

The limitations of the *lex specialis* maxim can be better understood if one remembers that it is “not a hard and fast rule but an *interpretive* tool to be used with other factors and principles in reaching a sensible result.”⁴⁷ This leads to the final limitation of the maxim that will be mentioned: *lex specialis* is only one of several *interpretive* tools. “[T]he relationship between *lex specialis* and other norms of interpretation [*e.g.*, *lex posterior derogat legi priori*] or conflict solution cannot be determined in a general way . . . [but] should be decided contextually.”⁴⁸

That is, in a given situation one answer to a conflict between norms may be suggested by *lex specialis* but another by the later-in-time principle . . . , and there is no overriding rule that determines which must prevail. Rather, decision makers or adjudicators must consider all aspects of the context of the specific situation, including the apparent intent of the parties and the overall object and purpose of the regimes in question.⁴⁹

Most IHRL treaties entered into force after many of the IHL treaties. Thus, the maxim of *lex posterior* must be considered when evaluating the IHL–IHRL relationship.

The *lex specialis* maxim is a contextual principle and, as such, is better suited to determine relations between two legal norms in concrete cases rather than in the abstract.⁵⁰ For example, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ was “reluctant to state that one area of law could override another as *lex specialis* and generally be considered the special law.”⁵¹ The ICJ noted that IHRL does not cease in times of war and is “not categorically set aside”⁵² by IHL. IHL

⁴⁶ U.N. International Law Commission, *supra* note 40, ¶ 251(12). For further discussion on self-contained regimes, see ILC Report of Study Group 2006, *supra* note 36, ¶¶ 123–219; Simma & Pulkowski, *supra* note 36.

⁴⁷ Matheson, *supra* note 43, at 427 (emphasis added).

⁴⁸ U.N. International Law Commission, *supra* note 40, ¶ 251(6).

⁴⁹ Matheson, *supra* note 43, at 427.

⁵⁰ Lindroos, *supra* note 36, at 42.

⁵¹ *Id.* at 43.

⁵² *Id.* With regard to this case, Koskeniemi points out that “the use of the *lex specialis* maxim did not intend to suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an aspect of the pragmatics of the Court’s reasoning. However, desirable it might be to discard the difference between peace and armed conflict by abolishing the latter altogether, the exception that war continues to be the normality of peace could not simply be overlooked when determining what standards should be used to judge behavior in those (exceptional) circumstances.” Koskeniemi, *supra* note 37, at

and IHRL demonstrate how difficult it is to designate one area of law as being special over another, even with IHL and IHRL, where both branches of law seek to protect the person but do so with “distinct aims and normative scopes.”⁵³

It is not the body of the law that should be the focus, but the specific provision and the unique situation in which the provision is applied. Thus, it cannot be presumed in situations where IHL and IHRL both regulate the matter that IHL is always *lex specialis*. As the ICJ wrote, “[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: 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.”⁵⁴

The limitations of the *lex specialis* maxim mean that it alone cannot explain the complementary relationship between IHL and IHRL. To apply *lex specialis*, the initial determination of which rule is the more specific and which the more general leaves much discretion to the decision maker:

Giving priority to a special norm within the system of unclear norm relations in which a decision cannot rely on such relations, the decision actually relies on political or other considerations. Whether environmental protection should be higher priority than trade norm . . . is a highly value-based decision. Such decisions are political choices.⁵⁵

Yet, are there no constraints to the decision maker’s discretion? What ensures predictability and uniformity? The final section of this article proposes an initiative that may respond to these questions, but, first, the next section takes a look at some important differences between IHL and IHRL and how they impact the complementary application of IHL and IHRL.

¶ 76. One can, therefore conclude that “[d]etermining a rule to be *lex specialis* does not mean the exclusion of the normative environment, but modification of certain rules to the extent provided by the specific rule.” Lindroos, *supra* note 36, at 65.

⁵³ Lindroos, *supra* note 36, at 44.

⁵⁴ Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory, *supra* note 33, ¶ 106. See Sassòli, *supra* note 42, at 385–95 (presenting six possible situations as regards the IHL–IHRL relationship).

⁵⁵ Lindroos, *supra* note 36, at 42. “Such issues also demonstrate the interplay between the legal and the political and challenge the idea that these realms can be hermetically sealed from one another.” Barnidge, *supra* note 1, at 14.

HOW DIFFERENCES BETWEEN IHL AND IHRL IMPACT THEIR
COMPLEMENTARY REGULATION OF INTERNMENT IN NON-INTERNATIONAL
ARMED CONFLICT

Although IHL and IHRL both aim to protect the human person, their respective approaches to that end differ. These differences must be respected in order for each body of law to achieve its protective aims. The purpose and scope of the two bodies of law and their different historical origins and development must be considered when determining how IHL and IHRL interrelate.⁵⁶

For example, a main distinction between IHL and IHRL is who is bound by the law. IHL applies equally to all parties to the armed conflict:

This is necessary not only because victims must equally be protected from rebel forces but also because, if IHL did not respect the principle of the equality of belligerents before it in non-international armed conflicts, it would have an even smaller chance of being respected by either the governmental forces, because they would not benefit from any protection under it, or by the opposing forces, because they could claim not to be bound by it.⁵⁷

Thus, while in non-international armed conflict IHL equally binds states and non-state actors, the traditional position is that IHRL creates legal obligations only for state authorities. Thus, private individuals or groups, i.e., non-state actors, do not have the legal capacity to violate IHRL.⁵⁸

⁵⁶ See generally Dinstein, *The International Law of Inter-State Wars and Human Rights*, *supra* note 23; Dinstein, *Human Rights in Armed Conflict: International Humanitarian*, *supra* note 23; Doswald-Beck, *supra* note 23; Krieger, *supra* note 23; Meron, *supra* note 23.

⁵⁷ MARCO SASSÒLI, ANTOINE BOUVIER ET AL., 1 HOW DOES LAW PROTECT IN WAR? 214 (2d ed. 2006).

⁵⁸ Modern trends in human rights practice indicate some modification of the traditional position; nevertheless, “the exact meaning, scope, pertinence and legal implications of an assertion that . . . non-State actors are bound by human rights law and may be held accountable for violating it remain very controversial.” U.N. Econ. & Soc. Council, Sub-Comm. on the Promotion and Protection of Human Rights, *Terrorism and Human Rights*, ¶ 54, U.N. Doc. E/CN.4/Sub.2/2004/40 (June 25, 2004) (prepared by Kalliopi K. Koufa). “The major argument against application of human rights obligations to non-State actors stresses that this would carry the risk that States might defer their responsibility onto these actors, which might diminish existing State obligations and accountability. In fact, the development of human rights law as a means of holding Governments accountable to a common standard has been one of the major achievements of the United Nations.” *Id.* ¶ 55 (citation omitted). Accordingly, United Nations experts have cautioned against giving non-state actors the capacity to violate IHRL, as it could provide an excuse to governments for their own human rights violations. These UN experts maintain that focus should be on the adverse effects that actions by non-state actors have on the enjoyment of human rights, rather than citing such groups as possible IHRL violators. *Id.* On the other side, it is argued that “the overall human rights movement may have been concentrating, possibly for too long, on the repressive measures adopted by Governments only, without paying much attention to the means used by

This difference in application between IHL and IHRL must be taken into account when addressing their complementarity in non-international armed conflict. The procedural regulation of internment provides a demonstration of how critical this difference can be. Take, for example, the prohibition of the arbitrary deprivation of liberty, which is considered to be a rule of customary IHL applicable in non-international armed conflict.⁵⁹ As few IHL treaty rules exist to provide guidance on regulating internment in non-international armed conflict,⁶⁰ how is the IHL prohibition on arbitrary deprivation of liberty applicable in non-international armed conflict to be interpreted—what is the content of the rule?

Applying the maxim of *lex specialis*, one could use IHRL to reinforce IHL. If in a given situation IHRL is the general law, the *lex specialis* maxim permits interpretation of the IHL rule “in light of the more general human rights norm.”⁶¹ In such a case, the customary IHL rule prohibiting the arbitrary deprivation of liberty in non-international armed conflict can be seen as an application of the more general human rights law, such that the IHL rule is interpreted through the lens of IHRL.

For example, one of the safeguards required by IHRL treaty provisions so as not to violate the prohibition on the arbitrary deprivation of liberty provides that no person may be deprived of liberty except for reasons previously established by law.⁶² Applying the *lex specialis* maxim as just

those opposing them.” *Id.* (citation omitted). As non-state actors are not currently considered as capable of violating human rights, they avoid the scrutiny of the international community despite the fact that their actions may constitute massive violations of human rights if they were committed by a state. *Id.* This contradiction in accountability is more pronounced in situations where non-state actors control territory and populations and resemble *de facto* governments.

However, it should not be forgotten that non-state actors may still be held accountable for their actions, as they are bound by domestic law. Moreover, international human rights bodies such as the European Court of Human Rights, the Inter-American Commission and Court of Human Rights and the Human Rights Committee have dealt with positive obligations of states to protect persons from abuses committed by non-state actors, such as violence, environmental impact of industries, or investigations and punishment of crimes committed by private individuals.

⁵⁹ 1 HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 344.

⁶⁰ 1 HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 344 (“Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require that all civilians and persons *hors de combat* be treated humanely . . . , whereas arbitrary deprivation of liberty is not compatible with this requirement.”) (citation omitted). See also discussion *supra*, notes 3–21.

⁶¹ Krieger, *supra* note 23, at 275. The maxim of *lex specialis* “is not exclusively restricted to the specific norm overriding the more general norm. . . . [A] special norm can be seen as an application of the more general norm,” and the former interpreted in light of the latter. *Id.*

⁶² 1 HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 348. See also ICCPR, *supra* note 20, at art. 9(1); Convention for Protection of Human Rights and Fundamental Freedoms, *supra* note 20, at art. 5(1); American Convention on Human Rights, *supra* note 20, at art. 7; African Charter on Human and Peoples’ Rights, *supra* note 20, at art. 6.

mentioned, the IHL rule could then be interpreted to require, among its other safeguards, that the law provide the reasons for the internment. In other words, parties to a non-international armed conflict would violate the IHL rule prohibiting arbitrary deprivation of liberty if the parties interned persons without the basis for internment being derived from law.⁶³

This seems fairly straightforward except that there is one difficulty—IHL treaty law applicable in non-international armed conflict provides no legal basis for internment.⁶⁴ States, in order to ensure that they do not violate the IHL rule prohibiting the arbitrary deprivation of liberty, can easily meet the requirement by incorporating such a provision in their domestic law. However, what about the non-state actor? It is highly unlikely that a state's domestic law would authorize a "rebel" group to deprive the state's citizens, including members of its armed forces, of their liberty. How are non-state actors to provide by law the reasons for internment? Can non-state actors respect an IHRL concept, which was inherently constructed as an obligation on states? If the non-state actor cannot provide by law the reasons for internment, the non-state actor violates IHL by interning persons.

Until the use of IHRL to interpret or give content to the IHL customary rule prohibiting the arbitrary deprivation of liberty, treaty rules of IHL applicable to non-international armed conflict did not address this substantive aspect of the principle of legality. It was addressed by applicable IHRL as well as domestic law, and violations of the principle were not violations of IHL but of these other bodies of law. Given the structure of IHL, this change is cause for concern.⁶⁵

⁶³ 1 HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 347–48.

⁶⁴ This is in contrast to IHL applicable in international armed conflicts. *See* discussion *supra*, notes 4–8. Customary IHL applicable to non-international armed conflict appears not to provide the legal basis. *See generally* 1 HENCKAERTS AND DOSWALD-BECK, *supra* note 3. However, specific inquiry into the existence of customary IHL regulating this matter would be worthwhile.

⁶⁵ Application of judicial guarantees could pose a similar concern, if IHRL is used to interpret the IHL provisions. *See* Fourth Geneva Convention, *supra* note 6, at art. 3(1)(d); Additional Protocol I, *supra* note 17, at art. 6. *See generally* Jonathan Somer, *Jungle Justice: passing sentence on the equality of belligerents in non-international armed conflict*, 89 INT'L REV RED CROSS 655 (2007). However, the problem is not exactly the same. IHL does not require the non-state actor to intern persons, but the exigencies of armed conflict will most likely result in or require internment. In contrast, neither IHL nor the urgent reality of armed conflict require a non-state actor to try persons. For example, the customary IHL obligation with regard to investigating and prosecuting serious violations of IHL committed in non-international armed conflict rests only with states. *See* 1 HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 607. IHL can only apply equally to parties to a non-international armed conflict if it recognizes the practical differences between the state and the non-state actor. *See, e.g.*, Additional Protocol II, *supra* note 8, at art. 6(5) (specifying that the "authorities in power" should undertake the action).

In order to explain this concern, a parallel will be drawn to the issue of the legality of non-state actors taking up arms against the state—engaging in armed conflict. This is not a matter regulated by IHL, but by domestic law,⁶⁶ and it is hard to imagine domestic legislation doing anything but prohibiting such action.⁶⁷ Thus, while a non-state actor by the mere fact of engaging in armed conflict violates domestic law, it does not violate IHL. IHL addresses the reality that non-international armed conflict exists—and that internment will occur during it—“by regulating it to ensure a minimum of humanity in this . . . illegal situation.”⁶⁸

If a non-state actor cannot legally intern under IHL, what is a non-state actor to do when it captures, say, members of the state’s armed forces? Usually a party to the armed conflict will intern them until the end of hostilities so that they cannot again take up arms against them. Unless the law provides the reason for internment, however, IHL prohibits the non-state actor from interning, and it is a serious violation of IHL to deny quarter.⁶⁹ Left with little option, the non-state actor is required to return captured enemy fighters. Is that a viable rule of IHL? If IHL rules make efficient fighting impossible, it is unlikely that the rules will be respected, thereby undermining the minimum of humanity that IHL seeks to ensure.⁷⁰ “For practical, policy, and humanitarian reasons, IHL has . . . to be the same for both belligerents From a practical point of view, the respect of IHL could otherwise not be obtained”⁷¹

⁶⁶ The use of force between states (international armed conflict) is a matter regulated by international law, i.e., *jus ad bellum* (as distinct from *jus in bello*).

⁶⁷ This explains the incorporation of art. 6(5) into the Second Additional Protocol of 1977. Additional Protocol II, *supra* note 8, at art. 6(5) (stating that at the end of hostilities authorities should grant broad amnesty to armed conflict participants and those deprived of liberty in relation to the armed conflict). Without amnesty, non-state actors may be reluctant to put down their arms because they likely violated domestic criminal law by their participation in hostilities.

⁶⁸ 1 SASSÒLI & BOUVIER ET AL, *supra* note 57, at 102–03.

⁶⁹ Rome Statute of the International Criminal Court, UN Doc. A/CONF 183/9, 37 ILM 1002 (1998) 2187 UNTS 90, arts. 8(2)(b)(xii), 8(2)(e)(x) (July 1, 2002). *See also* 1 HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 161.

⁷⁰ Similar reasoning drives proposals for the inclusion of an exclusionary clause in the draft comprehensive convention against international terrorism. By excluding acts legal under IHL from the draft convention’s prohibited acts, state and non-state actors are treated equally; “the advantage of this . . . is that, it gives the latter [non-state actors] an incentive to accept and abide by international standards.” Daniel O’Donnell, *International Treaties Against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces*, 88 INT’L REV. OF THE RED CROSS 853, 876 (2006).

⁷¹ 1 SASSÒLI & BOUVIER ET AL, *supra* note 57, at 103.

This dilemma can possibly be avoided, if IHRL is not used to *interpret*⁷² an IHL rule, but instead IHRL is used as a complement to IHL in the sense of applying simultaneously, yet separately. In other words, apply IHRL “next to” IHL, instead of “within” IHL. IHL would apply to parties to the conflict, both 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 more 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.

Even when a situation appears simple, such as in the next example, assessing the IHL–IHRL relationship can raise questions not so easily answered. It would seem straightforward that, if there is no conflict between an IHL rule and one of IHRL because the former is silent on the matter, IHRL automatically applies to fill in the gap. Yet, one must not be too hasty to use IHRL to fill apparent gaps in IHL.

For example, IHL applicable in international armed conflicts provides no review of a prisoner of war’s continued internment. As IHL is silent, it would seem that the IHRL rule requiring judicial review of the lawfulness of the deprivation of liberty⁷³ should apply. IHRL is clearly more precise on this point than IHL. However, the fact that IHL’s silence prevails over IHRL in this circumstance requires an understanding of the specific purpose for the internment of prisoners of war under IHL. Captured combatants, simply because they are opposing combatants, are interned in order to prevent them from returning to the battlefield. Except when doubt arises as to whether the person is a combatant,⁷⁴ there is no need for an individual review, as the internment is not based on any particular individual characteristic and would run counter to the objective of IHL, as concerns the internment of prisoners of war.⁷⁵

As the reasoning behind the basis for internment of prisoners of war under IHL is unique, the reasoning does not extend to interned civilians in an international armed conflict or persons interned in a non-international

⁷² For other concerns regarding use of IHRL to interpret IHL, see generally Krieger, *supra* note 23.

⁷³ See, e.g., ICCPR, *supra* note 20, at art. 9(4).

⁷⁴ See Third Geneva Convention, *supra* note 5, at art. 5.

⁷⁵ Sassòli, *supra* note 42, at 386–87. See also 1 SASSÒLI & BOUVIER ET AL, *supra* note 57, at 154–55. Thus, this “gap” in IHL is instead an intentional omission, a “qualified silence.” Gloria Gaggioli and Robert Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, 37 *ISR. YEARBOOK ON HUM. RTS.* 115, 122 (2007).

armed conflict. Focusing on non-international armed conflicts, as IHL treaty law does not provide rules to regulate the procedural aspects of internment, it would seem that the IHRL rule requiring judicial review of the lawfulness of the deprivation of liberty—if not derogated—should step in to fill the gap.⁷⁶ After all, IHRL was designed to regulate relations between individuals and the State, which is the precise relationship placed under stress during traditional civil wars. In addition, the maxim of *lex posterior* would further support the application of IHRL, as most IHRL rules are post IHL—at least Common Article 3, if not the Second Additional Protocol.

Is such review by a court feasible while engaging in armed conflict?⁷⁷ It would, for example, seem feasible for the fewer than 300 interned on Guantanamo Bay,⁷⁸ but what about in Iraq where there are nearly 30,000 persons interned?⁷⁹ Perhaps it is inappropriate to ask about mere feasibility, but IHL, unlike IHRL, strikes a balance between military necessity and humanity. The question is posed out of concern that, if rules protecting the person—whether IHL or IHRL—make it impossible or even extremely difficult to conduct war, fewer and fewer such rules will be respected in the long term. If feasibility is a legitimate question to ask, the next questions then become who and how is one to judge what is the right balance, and

⁷⁶ ICCPR, *supra* note 20, at art. 9; Convention for Protection of Human Rights and Fundamental Freedoms, *supra* note 20, at art. 5; American Convention on Human Rights, *supra* note 20, at art. 7; African Charter on Human and Peoples' Rights, *supra* note 20, at arts. 6–7. See Sassòli, *supra* note 42, at 387, 392–93.

⁷⁷ The Fourth Geneva Convention, for example, does not mandate *judicial* review of the internment of civilians in international armed conflict. See Fourth Geneva Convention, *supra* note 6, arts. 43, 78. The reasoning of the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, “has been interpreted in a more general manner as to indicate that ‘the rules developed for peacetime circumstances cannot be applied in an unqualified manner to the conduct of armed conflict. Rather they must be integrated in a sensible way into the structure of the law of armed conflict’” Jochen Abr. Forwejn, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 ISR. YEARBOOK OF HUM. RTS. 1, 12 (1998), citing Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417, 423 (1997). “However, the Court’s reasoning cannot be generalized with regard to human rights law as it refers to the specific provision . . . as formulated in the ICCPR This . . . allowed the ICJ not to address the question of whether rights laid down in human rights treaties in general are not absolute but relative to considerations of belligerent aims as reflected in the law of armed conflict.” Forwejn, *supra*, at 12.

⁷⁸ Press Release, U.S. Dep’t of Defense, Detainee Transfer Announced No. 1443-07 (Dec. 28, 2007), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=11591>.

⁷⁹ Gordon Lubold, *Do U.S. Prisons in Iraq Breed Insurgents?*, THE CHRISTIAN SCIENCE MONITOR, Dec. 20, 2007.

accordingly, what is impossible or even extremely difficult to accomplish during armed conflict such that the rule might undermine respect for IHL?⁸⁰

The *pro homine* principle requires that IHRL “norms must always be interpreted and applied in a way that most fully and adequately protects human beings” and, if more than one norm applies, “the one that give the most protection or freedom to the individual should prevail.”⁸¹ This IHRL principle can serve as guidance even in situations of armed conflict where a balancing between military necessity and considerations of humanity takes place. However, determining what provides the greater protection of persons must be seen through a broad and long-term perspective, rather than through a narrow and short-term perspective. Otherwise, one runs the risk of undermining the bodies of law and the overall protection they provide:

[A]nalysis has shown significant differences between human rights and humanitarian law. More telling, it has demonstrated that each displays a peculiar normative richness and resilience likely to be weakened, if anything, by over simplistic or overenthusiastic attempts to recast one in terms of the other. Thus, while there is indeed space for enlightened cross-pollination and better integration of human rights and humanitarian law, each performs a task for which it is better suited than the other, and the fundamentals of each system remain partly incompatible with that of the other.⁸²

SO WHAT IS THE PRACTITIONER TO DO?

All the various factors that must be considered, as well as the lack of specificity on how to integrate those factors so as to implement the complementary relationship between IHL and IHRL in an actual situation, can

⁸⁰ What are the standards for applying the legal rule *ad impossibile nemo tenetur*? If, given the lower numbers and location, it is feasible to provide judicial review to internees on Guantanamo Bay, those on Guantanamo would be entitled to judicial review but not those in Iraq. This contextual analysis appears very similar to that applied in IHRL when determining the extent of permissible derogations under IHRL treaties. If so, is transplantation of IHRL standards, such as its employment of the principle of proportionality—a principle understood differently in IHL—into an analysis of an armed conflict appropriate? Do IHRL principles sufficiently take account of the specificities of IHL and armed conflict situations as well as the importance of *jus ad bellum* and *jus in bello* distinction? See H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 208 (2nd ed. 2004) (defining the principle of proportionality: “wherein the measure taken bears a reasonable relationship to the aim of the measure”). Cf. Gaggoli and Kolb, *supra* note 75, at 137–138 (discussing equivalent operation of the principle of proportionality in IHRL and IHL with regard to the use of force).

⁸¹ CONDÉ, *supra* note 80, at 207.

⁸² RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 349–50 (2002), cited in Michael Bothe, *Books on International Law: Book Review: International Human Rights and Humanitarian Law by René Provost*, 98 AM. J. INT'L L. 383, 387 (2004). See Barnidge, *supra* note 1, at 95.

be quite frustrating for the practitioner. How is the practitioner to advance beyond unsatisfactory generalities describing the IHL–IHRL relationship and apply the appropriate rule in a particular situation?

One suggested solution is to write a treaty of IHL enlightened by IHRL and a treaty of IHRL applicable in wartime enlightened by IHL, and hope that the two reach the same conclusions.⁸³ Another option would be to analyze the inter-relationship between each provision of IHL and IHRL and draft a restatement of the law from the results of that analysis. However, a theoretical analysis of the rules alone will not provide a clear picture of the rules' relationships to one another, as the differing situations in which they are applied must be taken into account. Also, any such analysis first requires the development of a framework to guide the analysis.

Perhaps that is where one should start—by establishing, for the practitioner, guidelines by which to assess the relationship between IHL and IHRL in a given situation. The guidelines would need to direct the harmonization of the IHL and IHRL norms without compromising the two branches' specific objectives and purposes. Ideally, application of these guidelines would provide consistent solutions regarding the potential overlap between the two bodies of law. The guidelines should be able to address diverse issues—from procedural regulation of internment to application of IHRL in occupied territories.⁸⁴

The guidelines need to begin with a basic framework: a preliminary checklist to determine the general application of the specific IHRL (and IHL) rules to a particular armed conflict situation. Some initial suggestions for the contents of this preliminary checklist outlined below may appear obvious, but if IHRL does not apply to the particular armed conflict situation, one need not proceed with further analysis regarding an IHL–IHRL relationship. If IHRL does apply, the results of this preliminary checklist can also indicate any limitations in the IHRL rule's content for the given situation, which is necessary for further analysis of the relationship.

The first two items proposed for the checklist are of a general nature. The first item is the temporal scope of application. If there were a strict dichotomy between IHRL and IHL, such that IHL applies during armed conflict and IHRL during peacetime, complementarity between IHL and IHRL would be understood in a very restrictive manner where they do not intersect, but complement each other by working in the separate scopes of

⁸³ Sassòli, *supra* note 42, at 395.

⁸⁴ See, e.g., HUMAN RIGHTS IN TIMES OF OCCUPATION: THE CASE OF KUWAIT (Walter Kälin ed., 1994); Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 *ISR. L. REV.* 17 (2003–2004); Damrosch & Oxman, *supra* note 34; Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 99 *AM. J. INT'L L.* 44 (1990); Roberts, *Transformative Military Occupation*, *supra* note 34.

temporal application. This is, however, not a tenable position. Both IHL and IHRL treaties refer to their inter-relationship,⁸⁵ and the ICJ has reaffirmed that IHRL as a branch of law does not cease to apply during armed conflict.⁸⁶

The second item on the checklist is the extra-territorial application of IHRL; i.e., that a state's responsibility with regard to IHRL is not purely territorial but also arises extra-territorially in respect of persons who are subject to its jurisdiction or in its power or effective control. Extra-territorial application of IHRL need only be addressed in the checklist if the matter to be regulated is not within the territory of the state party. Given disagreement over the extra-territorial application of IHRL, it merits a deeper discussion than that provided within the scope of this article.⁸⁷ For purposes of outlining these guidelines, suffice it to say here that for assessing extra-territorial application, each IHRL treaty at issue—whether the ICCPR,⁸⁸ the (European) Convention for the Protection of Human Rights and Fundamental Freedoms,⁸⁹ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁹⁰ or others—should be analyzed individually.

⁸⁵ See discussion *supra*, notes 22–32. See also, e.g., U.N. Human Rights Committee, *supra* note 22, ¶ 11.

⁸⁶ See *supra* notes 33–35.

⁸⁷ See Sassòli, *supra* note 42, at 263–68 (providing a fuller discussion of the extra-territorial application of human rights). See generally EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (F. Coomans & M. Kamminga eds., 2004) (discussing applications of international human rights law); Michael Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupations*, 99 AM. J. INT'L L. 119 (2005) (discussing extraterritorial application of human rights treaties including the ICCPR and the International Covenant on Economic, Social and Cultural Rights). See also Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) ¶¶ 215–20, Dec. 29, 2005, available at <http://www.icj-cij.org/docket/files/116/10455.pdf>; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 33, ¶¶ 107–13.

⁸⁸ See recent decisions of the International Court of Justice, *supra* note 87. See also U.N. Human Rights Committee, *supra* note 22, ¶ 10. The Human Rights Committee reaffirmed its position. See U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/REV.1 (Dec. 18, 2006). For the United States' arguments, see *id.* at Annex 1.

⁸⁹ See *Bankovic v. Belgium*, 2001-XII EUR. CT. H.R. 335 (addressing whether the protection of the Convention for the Protection of Human Rights and Fundamental Freedoms extended to extra-territorial acts of NATO member states). See also *Al-Skeini v. Secretary of the State for Defense*, [2004] EWHC 2911 (Admin.) (concerning alleged violations of the Convention for the Protection of Human Rights and Fundamental Freedoms and the United Kingdom's Human Rights Act committed by British forces in Iraq in 2003), *appealed*, [2005] EWCA Civ. 1609, Dec. 21, 2005, *appealed*, [2007] UKHL 26, June 13, 2007.

⁹⁰ The U.N. Committee Against Torture concluded that “the Convention protections extend to all territories under the jurisdiction of a State party and . . . that this principle includes all areas under the *de facto* effective control of the State party's authorities.” U.N.

Next, in relation to a specific situation, one must ensure that the particular human right and IHL rule at issue applies. One cannot look at a particular IHRL rule in the abstract but must consider the parties involved in the particular situation. Quite obviously, the states concerned must have ratified the treaty in question, unless the rule is customary international law. This is not such a concern in IHL given that the Hague Conventions of 1907 are generally considered to reflect customary international law and the Four Geneva Conventions are universally ratified. Nonetheless, it remains an issue for other IHL treaties, such as the Second Additional Protocol applicable to non-international armed conflict and IHRL treaties without universal ratification. Also, some IHRL treaties pertain only to states of a particular region, such as Europe, the Americas, or Africa. Just as the rule of a particular treaty is non-binding on a non-state party, so is the jurisprudence generated by its treaty body or a court interpreting that treaty rule.⁹¹ Finally, before ascertaining whether an IHRL provision may provide a complement to an IHL rule in a given context, it is necessary to determine if the provision in question is derogable and whether the State formally derogated from it. Of course, such derogation must only be “to the extent strictly required by the exigencies of the situation.”⁹²

Having worked through the preliminary checklist, one is left with the treaty and customary rules, including their limitations,⁹³ which apply to a given armed conflict between specific parties. From there, one can move on to the guidelines that direct the analysis between the rules themselves, in order to determine their inter-relationship. Those guidelines would need to outline an approach regarding the use of interpretative tools, such as *lex*

Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories*, ¶ 4(b), U.N. Doc. CAT/C/CR/33/3 (Dec. 10, 2004). The Committee Against Torture restated this position in a subsequent report. Committee Against Torture, *Conclusions and Recommendations on the United States' Second Periodic Report*, ¶15, U.N. Doc. CAT/C/USA/CO/2 (Jul. 25, 2006). See also U.N. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Response of the United States to the List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America*, at 32–37, <http://www.state.gov/documents/organization/68662.pdf> (arguing the U.S. position on the non-extra-territorial application of article 3 of the Convention).

⁹¹ See Kreiger, *supra* note 23, at 278. This can be damaging to both IHL into IHRL. See *id.* at 290–91.

⁹² ICCPR, *supra* note 20, at art. 4(1); see also Convention for Protection of Human Rights and Fundamental Freedoms, *supra* note 20, at art.15(1); American Convention on Human Rights, *supra* note 20, at art. 27(1). The principle of proportionality as applied here under IHRL should not be confused with the principle of proportionality as applied by IHL. See, e.g., Additional Protocol I, *supra* note 17, arts. 51(5)(b), 57(2)(a)(iii).

⁹³ See, e.g., Kreiger, *supra* note 23, at 281–82 (discussing human rights' limitation clauses).

specialis and *lex posterior*. If the use, for example, of *lex specialis* is deemed appropriate, the guidelines need to help determine which of the applicable rules is the more general and which is the more specific for the application of *lex specialis*. Such guidelines need to be sufficiently flexible to take into account that *lex specialis* is contextual, in that it addresses individual rules in specific circumstances (rather than entire bodies of law), and yet rigid enough to assess the goals of the branches of law concerned and the international system in its totality. Despite the challenges of doing so,⁹⁴ such guidelines would provide a framework for decision makers and practitioners in order to better ensure that subjective determinations do not exploit the international legal system. Finally, in the development of guidelines, attention needs to be paid to the differences between IHL and IHRL, in particular, the fact that IHL of non-international armed conflicts applies equally to state and non-state actors.

This is a highly complex (and very ambitious) endeavor, but the successful development of such guidelines would provide an analytical format for clarifying the relationship between IHL and IHRL rules, including their content. In this way, a clearer picture of applicable law can be drawn. This picture may show that there are gaps in the law applicable to armed conflict, particularly non-international armed conflict. Or, it may indicate the existence of *specific* and *legally binding* minimum standards applying at all times, thus avoiding the difficult qualification of a situation as an international armed conflict, non-international armed conflict, or internal disturbances. It could permit the practitioner to confidently promote the creation of a new treaty, because knowing the existing law ensures that an inadvertent lowering of protective standards will not occur. Regardless, the results will harmonize existing law and avert pitfalls.

Some may postulate that this is a useless endeavor—not only because of its difficulty but also due to the inherent limitations of IHRL, such as its derogation clauses. While it is true, for instance, that the procedural IHRL provisions regulating internment are subject to possible derogation during armed conflict, that is hardly the case for all IHRL provisions relevant to armed conflict situations. In addition, rules are not always derogated, and, even if they are in certain instances, knowing how IHL and IHRL apply when IHRL is not derogated, enables one to set the minimum bar to be used when negotiating new instruments to protect persons applicable at all times.

⁹⁴ “[I]t has been difficult or even impossible to apply the said requirements or to create any specific guidelines for the application of *lex specialis*.” Lindroos, *supra* note 36, at 48. Recent attention to the matter of norm conflict in international law will facilitate this effort. See PAUWELYN, *supra* note 37; ILC Report of Study Group, *supra* note 36; Koskenniemi Study, *supra* note 37. See also Simma & Pulkowski, *supra* note 36; Lindroos, *supra* note 36.

The urgent need, often expressed today, to address the challenges of regulating the procedural aspects of internment—whether in armed conflict or peacetime—may not await development and application of these proposed guidelines. Perhaps on this specific issue, new rules—whether in the form of a new treaty or minimum standards—should, despite the risks mentioned, now be written . . . but, once created, how would the relationship between these new rules and the other IHL and IHRL rules be determined?