Reducing the Tension in the Application of International Humanitarian Law and International Human Rights Law to Asymmetric Warfare

by

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A thesis submitted to the Graduate Program in Law in conformity with the requirements for the Degree of Doctor of Philosophy

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Kingston, Ontario, Canada

February, 2018

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Abstract

There are two similar but competing legal regimes in the international domain that protect people: human rights law and humanitarian law. Currently, the two regimes are in tension. In the last four decades, international human rights norms have expanded to occupy the field previously dominated by humanitarian law and have become the primary legal regime for governing the use of force in non-international armed conflict. The reasons are the changing nature of warfare and its participants and slow modernization of humanitarian law conventions. The tension has created divergent standards of interpretation of the two regimes, which has led to the inconsistent application of human rights and humanitarian law norms. Proponents of international human rights law maintain that it is the only regime capable of adequately protecting the victims of violence in non-international armed conflict. They state that the humanitarian law conventions developed to mitigate the deleterious effects of conventional international armed conflict are ineffective in controlling the consequences of contemporary asymmetric warfare. Human rights conventions have much more rigorous protections for those victims, and access to accountability mechanisms. However, the continuing expansion of human rights norms into the realm of armed conflict is ineffective. While humanitarian law norms applicable to non-international armed conflict lack density in topics such the use of lethal force and the treatment of detainees, rejuvenation of humanitarian law would be a more effective solution. Humanitarian norms were specifically developed to moderate the application of lethal means, to protect the victims of armed conflict, and to
govern the treatment of detainees. The key to reducing the tension lies in leveraging the fundamental principle of humanity, though the creation of a universal framework for the use of force based on the unifying principle of humanity that would apply to every person, at all times, irrespective of characterization of the conflict. Such a framework must reflect the highest norms of precautions and protection found in both regimes, and must be simple understand and apply.
Acknowledgements

Before I embarked on this academic project, I thought I could read and write. Clearly, I was wrong. I did have some minor skills, developed and honed throughout my career, but I was clearly lacking in the attributes needed for success at this level of achievement. I have since learned a great deal about the craft of research and analysis and for this I must acknowledge the efforts of my academic advisor, Professor Darryl Robinson. I thank him for teaching me the fine art of legal written argument and encouraging me to “up my game”. Without his insight, guidance and patience I would not have succeeded. Professor Robinson was not alone in this effort; Professors Sharryn Aiken and Nicolas Lamp also reviewed my drafts and added the benefit of their wisdom and experience to my writing. Their comments and suggestions served to raise the standard and contributed to the quality of the final product. I also acknowledge the staff and faculty of Queen’s Law for the support and encouragement that I received throughout the process.

Finally, I thank my family. As I am a life-long learner, my family has been remarkably patient and resilient as I clawed my way up the greasy academic pole. They were consistently supportive and understanding.
Table of Contents

Abstract .......................................................................................................................i
Acknowledgements .................................................................................................iii
Table of Contents ......................................................................................................iv

Part 1  Creating the Tension

Chapter 1  Introduction
1.1. Introduction.................................................................................................1
1.2. Aim of the Thesis.......................................................................................8
1.3. Structure of the Thesis.............................................................................9
1.4. Scope of the Thesis..................................................................................14
1.5. Current Perspectives on Convergence.................................................15
1.6. A Fictitious Scenario .............................................................................22
1.7. Summary...................................................................................................29

Chapter 2  The Nature of Asymmetric Warfare
2.1. Introduction...............................................................................................31
2.2. Asymmetric Warfare...............................................................................31
2.3. Asymmetric Actors...............................................................................41
2.4. “Three Block War”...............................................................................44
2.5. Summary...................................................................................................46

Chapter 3  The Evolution of Humanitarian and Human Rights Law
3.1. Introduction...............................................................................................49
3.2. International Humanitarian Law.......................................................50
3.3. International Human Rights Law.......................................................63
3.4. Table of Fundamental Differences...................................................69
3.5. Summary...................................................................................................71

Chapter 4  Convergence
4.1. Introduction...............................................................................................73
4.2. Taxonomy of Convergence.......................................................................74
4.3. Trajectory of Convergence.......................................................................82
4.4. Summary...................................................................................................92

Part 2  Reducing the Tension

Chapter 5  Managing the Convergence
5.1. Introduction...............................................................................................94
5.2. Early Attempts at Convergence Management.......................................96
5.3. The Role of Derogation..........................................................................102
5.4. Efficacy of lex specialis.........................................................................104
5.5. The European Court of Human Rights Perspective.........................116
Chapter 6  Reduction
6.1. Introduction.........................................................155
6.2. Pressure Points in Asymmetric Warfare...................159
6.3. Framing the Reduction Analysis...........................169
6.4. Techniques for Reducing the Tension.....................193
6.5. Universal Application of Force Framework..............222
6.6. Summary.........................................................233

Chapter 7  Conclusion
7.1. Introduction.........................................................238
7.2. Restatement of the Thesis....................................238
7.3. Reducing the Tension.........................................245

Bibliography ..........................................................248
Appendices ...........................................................272
Part 1 – Creating the Tension

Chapter 1 - Introduction

1.1. Introduction

The relationship between international human rights law and humanitarian law is tense.¹ The current tension arose primarily as a result of convergence in the application the two regimes of international law to armed conflict, which itself was created by both the changing nature of conflict and the correlated expansion of international human rights. The tension is causing uncertainty and indecision amongst nations currently engaged in non-international, or internal, armed conflict. It has also created some far-reaching and important jurisprudence.² The changing nature and unpredictable characteristics of modern warfare have undermined the hitherto adequately defined relationship between the two streams of law. The purpose of this thesis is to reduce the tension in the concurrent application of international humanitarian law and international human rights law.


At any given time, there are armed conflicts, small and large, internal and international, in progress around the world. A large number of these conflicts can be characterized as non-international in that they are predominately civil wars or asymmetric insurgencies. Those conflicts pose extremely difficult but ultimately surmountable challenges of characterization and attribution to the belligerent participants. Indeed, one of the primary features of modern conflict is the struggle among the governments of the participating states to determine correct body of international and national law and thus the legal foundation, or justification, for the application of force by the participating security forces operating in the conflict space.

Unlike traditional inter-state warfare, such as that practiced under Clausewitz’s Trinitarian Model (that is, international armed conflict *simpliciter*) modern conflict presents enormous and often intractable problems in the application of international covenants to control the conduct of the participating individuals, groups and states. Even the most fundamental of operational tasks,

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3 As of January 2017 there were armed conflicts (internal or international) of varying degrees of lethality in 15 nations. The most serious are taking place in: Syria, Iraq, Afghanistan, Pakistan, Nigeria, eastern Ukraine, South Sudan, Israel (Occupied Territories), Somalia and Yemen. Other less serious conflicts are taking place in India, Uganda, Libya, Sudan and Egypt. Uppsala Conflict Database Program at: http://www.ucdp.uu.se/gpdatabase/search.php.


5 Carl von Clausewitz, “On War” (1873). “The first of these three phases concerns more the people; the second more the general and his army; the third more the Government. The passions which break forth in war must already have a latent existence in the peoples. The range which the display of courage and talents shall get in the realm of probabilities and of chance depends on
such as identifying combatants or capturing and detaining belligerent participants, is at best fraught with legal uncertainty and when mishandled, leave governments vulnerable to rigorous public condemnation, a loss of confidence of their populations, and, at worst, appearances before domestic or international tribunals.

Over the past fifty years, the nature of conflict has changed more rapidly than international law has been able to adapt. As recent events have shown, the law clearly must adapt in order to govern effectively the conduct of the participants in the contemporary nature of armed conflict. To exacerbate the issue, conflict continues to change. Recent changes to the construct of modern warfare have rejuvenated the review of the legal issues and complex crises arising out of cross-border (or trans-national) conflict. Active debate continues among international lawyers, academics and government officials of the states that study or engage in this type of warfare. Questions abound. What is the nature of asymmetric conflict? Is it non-international conflict for the purposes of the 1977 Protocols Additional to the Geneva Conventions, or is it a purely

the particular characteristics of the general and his army; but the political objects belong to the Government alone” (trans. J.J. Graham).


domestic law enforcement problem? Is it both at the same time? Perhaps it is neither. Perhaps it is a new, hybrid style of conflict and a new lexicon of warfare is needed to describe it. Or it might just be old wine in new bottles.

Additionally, should the troop-contributing states intervening in these types of conflicts be regarded as “occupiers” for the purpose of the Fourth Geneva Convention? Or are they parties to an international conflict for the purpose of detaining belligerents under the Third Geneva Convention? Where do the 1977 Additional Protocols apply? Are the defeated belligerents “captured” in combat operations, and, because they have taken a direct part in hostilities therefore to be considered prisoners of war, or have they simply been subdued and arrested by violent means, at the hands of soldiers acting in a law enforcement capacity? If the latter, are the detainees then protected by the International Covenant on the Civil and Political Rights or other applicable regional and national human rights conventions irrespective of their role as participants in armed conflict? Depending on where your start the analysis, they could be either, and are frequently both, and most recently predominately under the ever-expanding scope of the application of international human rights law.

Unanswered questions about the proper application of international law to this type of warfare have led to uncertainty of use of force modality and inconsistency of policy amongst the participants. Amid this uncertainty and inconsistency, what are the central roles of international human rights and
international humanitarian law norms? Are they in competition with one another, or are they cooperative in nature? Is it even remotely possible to reconcile their fundamental differences? In conducting research for this thesis, I came to the conclusion that it is possible to find a theory of application that protects the rights of the victims while permitting freedom of maneuver and application of force by the security forces.

The essential first step in addressing these questions starts with the identification and application of the correct body of law. In the words of the International Court of Justice:

“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. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. 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.”

And further, in the *Wall* case:

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“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.”

In considering the jurisprudence cited above, how does a governmental legal advisor or a senior military or security official know which branch applies under what circumstance? How does a state government draft coherent and lawful security policy and instructions for the use of force in internal or international armed conflict under this uncertainty? If even possible, how could rules for the use of force by lawfully constituted security forces reflect both branches of law? The excerpts from the International Court of Justice transcript in the *Nuclear Weapons* and *Wall* cases set out above reveal none of the underlying tension that exists in the application of the different bodies of law and, further, do not really assist in the analysis. This is a vexing issue for modern security forces and it deserves a thoughtful response. Therefore, the two questions to be answered in this thesis are:

(1) Is the convergence of international human rights law and international humanitarian law norms creating unsustainable tension in their application to asymmetric conflict?

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10 See Charles Garraway, *To Kill or Not to Kill? Dilemmas on the Use of Force* (2010) 14 Journal of Conflict and Security Law No. 3 at 502. “While all of this is of great interest to the academics, it does not assist the soldier on the ground faced with the instant decision whether or not to open fire”.

(2) if yes, is there a universal framework of application of force that will reduce the tension between the norms?

The answer to both questions is “yes”. Thus the point of this thesis is to show that reduction is possible by examining the first question and answering the second.

The growth and diffusion of human rights have exacerbated the tension. The reasons for the ascension of international human rights law are threefold. First, the nature of warfare has changed dramatically in the past fifty years and the development of humanitarian law conventions cannot keep up with the change. Note that the most recent Additional Protocols to the Geneva Conventions governing the use of force in non-international armed conflict are dated 1977. Armed conflict around the world has changed considerably, even since then. Law, like nature, abhors a vacuum\textsuperscript{12}; the perceived lack of applicability of the existing conventions has caused a vacuum in the protection provided to the innocent victims of conflict. Therefore, the protections afforded by human rights are expanding to fill the legal space. Second, there has been exponential growth in the scope and breadth of human rights since its inception in 1945. The world has become increasingly democratized over the last few decades; nascent democracy carries the very human awareness and desire to use and enforce human rights norms. Third, enforcement of humanitarian law

\textsuperscript{11} Happold, supra at note 1.
\textsuperscript{12} “Horror vacui”. Aristotle, Physics, Book IV, 6-9.
violations remains a slow, difficult and uncertain process with no scope for a personal remedy. Victims of armed conflict (of whatever type) will turn to fora that provide access to justice. Increasingly those fora are the national and regional human rights commissions and courts, where they exist.

1.2. Aim of the Thesis

This thesis is concerned with the manner in which norm convergence has created tension. In particular, two significant pressure points have arisen in the conduct of contemporary armed conflict; unnecessary civilian casualties and abusive detainee management. These pressure points represent the theoretical limit of norm convergence, and are the most vexing issues for national security authorities engaged in conflict. I will advance a new framework for analysing the application of force in order to reduce the inherent tension described above and moderate the effect of force on populations enduring armed conflict. International human rights and international humanitarian law are complex, multi-faceted and context driven, and take a variety of forms, either permissive or prohibitive. Their very complexity compounds the underlying tension. To clarify the complexity I will provide an analytical account of the rules and their effect on each other in conflict. Further, understanding the fundamental difference in the application of the two regimes of law requires that I provide a taxonomy of the ongoing convergence. With this taxonomy complete, I will apply this framework to normative use of force outcomes in an effort to reduce the tension.
Reducing the tension demands compromise and restraint on the part of the parties to the conflict; to achieve this I will propose a universal use of force framework in order to inculcate human rights norms into the humanitarian law-based use of force in non-international armed conflict. One of the outcomes of creating a new use of force framework involves reversing, or “flipping” the kill/capture priority embedded in the principles and rules of international humanitarian law. Flipping this priority into one of capture/kill will inject human rights norms into the military operations modality. As a consequence of flipping the kill/capture paradigm into one of capture/kill, application to armed conflict will, by virtue of built-in restraint, generate more detainees. Thus I will follow up with a proposal for detainee management under the conditions of non-international armed conflict.

1.3. Structure of the Thesis

The thesis is divided into two parts. Part One, “Creating the Tension”, comprises chapters 1 to 4, and is predominately descriptive and linear. Part One will introduce the background material necessary to understand how the tension between the regimes was created and persists to this day. It starts with a description of the current state of warfare and in the next chapter discussed the development and growth of the two bodies of law from inception to the current situation. Part Two, “Reducing the Tension”, comprises chapters 5 to 7 and builds on the groundwork laid in Part One and moves the discussion of the problem into an analytical mode. Following an examination of past and current
attempts to manage contemporary warfare through various human rights fora, Part Two concludes with possible solutions to reduce the tension between the two regimes.

1.3.1. Part One: Creating the Tension

Following this introductory material, chapter 2 opens with a detailed explanation of the changing nature of conflict. Chapter 2 does so by starting with a description of traditional international conflict as it was understood following the 1648 Peace of Westphalia and the recognition of the state sovereignty paradigm. Stepping quickly into the modern era, the discussion will discuss the changes to the generally accepted paradigm of conflict that occurred in the de-colonization era in the 50’s and 70’s. I will note how international law changed in order to recognize certain types of belligerents who operated outside the traditional nation-state model, and the discussion will culminate with an examination of non-international armed conflict in the post-Cold War era. I will emphasize the continuing change in the characteristics of the belligerents, particularly as it applies to questions of status and treatment of the so-called trans-national armed groups. An understanding of the current state of conflict, the asymmetric warfare model, is critical to acknowledging the need to reduce the tension between the regimes.

Chapter 3 continues to lay the groundwork to support the thesis. Fundamental to my position in this thesis is an understanding of how the two
streams of law developed, and why. Critically, the two streams of law developed at different times for different reasons. It is only by circumstance that they have ended up in tension. To achieve that aim, I will examine both the international law streams by a discussion of their developmental history, recent advances, relevance and application, starting with the older of the two: humanitarian law. This discussion will be supported by reference to the evolution of the various treaties and conventions; case law from the International Court of Justice, the International Criminal Court and the appropriate and accessible regional Human Rights courts. I conclude that the two regimes share common characteristics and principles, specifically, the principle of humanity. I have concluded that one way to reduce endemic tension is to exploit the common principles and apply the blended solution to the modality of operations in contemporary asymmetric warfare.

Chapter 4 “Convergence”, completes Part One of the dissertation with an examination on the convergence of both streams and the subsequent ascension of international human rights law since the 1960s. Specifically, Chapter 4 draws the discussion away from an historical prism and moves into the more recent past. It examines the convergence of the two bodies of law since 1945, with particular emphasis on the period during and following the adoption of the 1977 Protocols Additional to the Geneva Conventions. This discussion also focuses on the effort of the states’ parties to recognize and define the need to create special conventional protections for non-combatant victims and the recognized
participants of the revolutionary wars and insurgencies (also known as “wars of national liberation”) of the 1950s through to the 1970s. This period of growth culminates in the development and adoption of the two Additional Protocols to the Geneva Conventions in 1977.

Chapter 4 also reveals the nascent human rights norms that became embedded in humanitarian law as those conventions evolved in the de-colonization period. This development, motivated as it was by the changing nature of warfare in the post-colonial era, was the start of the co-mingling of the two regimes. I will examine the subsequent affect this development had on the conduct of warfare and the evolving human rights jurisprudence. The chapter continues with an examination of the convergence since then and the current state of affairs.

1.3.2. Part Two: Reducing the Tension

Part Two of this thesis, “Reducing the Tension”, starts with Chapter 5. Titled “Managing the Convergence”, this chapter is central to the thesis. Chapter 5 analyses the reaction to the tension created by the convergence of the two regimes of law, and the various attempts to manage evolving circumstances. In Part One I established the changing nature of war and the evolutionary developments of international law that set the preconditions for the current tension between the two streams of law. In Part Two I will discuss, through further examination of the treaties, commentary, state practice and case law the
method by which international human rights law has expanded to occupy the humanitarian law field. I will include an evaluation of the recent developments in the two regimes of law and determine whether international humanitarian law has lost primacy. If it has, I need to set out what legal and policy implications there are for the future of controlling the conduct of state security forces and non-state actors in contemporary conflict.

Chapter 5 advances the propositions set out in Chapter 4 and will posit several theories in an attempt to manage convergence of human rights law and humanitarian law, and the subsequent dominance of human rights law. It starts with an examination of the role of *lex specialis*, by using both the “rule exclusion” (thin) approach and the “framework exclusion” (thick) approach to measure the effect on the application of human rights Law. I will then explore the role the supposed enhanced reliance on human rights law in modern conflict and the commensurate displacement of international humanitarian law and its effect on tension between the two bodies of law. As part of this chapter I will review some of the most important cases recently arising out of the European Court of Human Rights. These cases have caused a ripple of concern throughout the states’ parties to the European Human Rights Convention, in particular as the cases may impinge on the conduct of coalition operations in foreign countries. The United Kingdom especially has grave concerns about the ability of its forces to conduct lawful operations in a non-international armed conflict.
In Chapter 6, “Reduction”, I will apply the conclusions of Chapter 5 in order to weigh my thesis against the facts and offer both theoretical and practical solutions to reconciling the tension. Generally, I will leverage the common fundamental principles that inform both human rights and humanitarian law and from those principles suggest both academic and practical solutions to the areas of greatest concern in contemporary conflict. Once that is done, I will offer solutions to problems that arise in the two significant pressure points of norm convergence: civilian casualties and detainee management, civilian casualties, and the lawful application of force in the context of both law enforcement and military operations paradigms. I will summarize my contribution in Chapter 7, the conclusion.

1.4. The Scope of the Thesis

To answer the two fundamental questions posed above will require a detailed examination of the current state of armed conflict in many of the major contemporary crises, particularly that type known as asymmetric warfare. Attempts to control the conduct of all belligerents in the various types of armed conflict parties (state security forces, intervention forces and non-state actors) will force me to examine the design, development and fundamental purposes of both human rights and humanitarian law. This examination must include the development of the substantive international conventions in both streams of law,

13 I have listed the most significant cases at note 2, supra.
with particular emphasis on the human rights instruments since their introduction in 1945.

Once the groundwork is complete, I will evaluate recent developments. A proper evaluation will require research into states’ policies, decisions of the various international and regional tribunals\textsuperscript{14}, the text of United Nations Security Council Resolutions, all coupled to an examination of contemporary academic views. With all of the above thoroughly researched and evaluated, I will assess the validity or efficacy of the theoretical trend to human rights dominance in contemporary armed conflict. I will then offer methods to reduce the tension in the convergence. Finally, I have generally limited the geographical scope of my research to the Western Hemisphere, where states subject to the European Convention on Human Rights have been engaged in conflict, and to a lesser extent to the central and southern American area. I did so because I have detailed personal insight into the breadth of the problem through service in Afghanistan as a military lawyer. In that theatre of operations I observed the interaction between the two legal regimes in questions and the participating European states’ responses to the tension, most notably in the handling of detainees and approaches to the application of lethal force.

\textsuperscript{14} \textit{Ibid.}
1.5. Current Perspectives on Convergence

Research reveals that international human rights law is ascendant, and has been since its inception in the late 1940s. As it gains in breadth and depth, I believe that it is displacing International humanitarian law as the primary legal source to govern the conduct of state security officials in modern conflict. I assert that there are several reasons for this; traditional international armed conflict (that is, war between sovereign states) is rare now and has been on the wane since World War 2. Only a few wars in the past few decades, such as the Falklands Islands conflict between the U.K. and Argentina, the Iran-Iraq war, the Kuwait Invasion and the recent conflict between Russia and Georgia have represented this type of conflict. As such, the majority of international treaties governing international armed conflict (except those whose elements are generally recognized as Customary International Law) do not strictly speaking apply to the types of warfare encountered in the modern world.

To further complicate the analysis, international human rights law and International humanitarian law have some fundamental differences. For example, the international human rights law protects the right not to be arbitrarily deprived of one’s life, while conversely international humanitarian law provides for lawful killing in a state of armed conflict under certain conditions. Secondly, international human rights law views operations to control the conduct of the citizens of the state through the law enforcement paradigm, while international humanitarian law operates mostly to control the application of military force.
Conversely, international human rights law protects the innocent from abusive exercises of power of their own state\textsuperscript{15}, whereas international humanitarian law protects states and the victims of war from the use of force by a foreign state. These incongruent attributes of the respective bodies of law contribute to the difficulty in their application; they grind against one another as they are used by state authorities seeking to control and manage the chaos of contemporary conflict. However, one aspect of the application of human rights protection to non-citizens in a foreign country has been solved judicially (albeit controversially) through the development of the extraterritoriality theory of application.\textsuperscript{16} But if one looks closely at both regimes, they have common fundamental attributes, ones that will form the basis of my efforts to reduce the tension between them.

Another facet of contemporary non-state warfare centers on the difficulty in applying an appropriate body of international or domestic law to terrorists and insurgents. The 1949 Geneva Conventions and the two Additional Protocols of 1977 have been overtaken in their effectiveness by the evolution of the nature of warfare, and the emergence of trans-national armed groups. How does a state deal with the criminal acts of an insurgent? How does an armed force intervening in a failed state bring insurgents or terrorist to justice? What body of law

\textsuperscript{15} Recent jurisprudence from the European Court of Human Rights has extended the reach of the European Convention to apply to states’ parties while operating extraterritorially. See for example R. (Al-Jedda) v. Secretary of State for Defence [2007] UKHL 58, [2008] 1 A.C. 332.

\textsuperscript{16} Ibid.
establishes jurisdiction and provides for judicial process? In the words of Francis Bugnion of the International Committee of the Red Cross:

“No amount of legal argument will persuade a combatant to respect the rules when he himself has been deprived of their protection…. It is impossible to demand that an adversary respect the laws and customs of war while at the same time declaring that every one of its acts will be treated as a war crime…”\textsuperscript{17} (translation)

Further, in the absence of domestic judicial infrastructure in a failed state, where does the intervening state party turn for the administration of justice? The experience of coalition forces in Afghanistan and Iraq highlight the difficulty in dealing with captured insurgents once they are removed from their national jurisdiction. International law is not particularly well suited to single acts of violence or resistance; it tends to turn its gaze to catastrophic events on an international scale. Clearly there needs to be clarity and consistency in the approach to dealing with members of trans-national armed groups.

The idea that international human rights law has been increasing in scope and depth since its inception in 1945 is certainly not new; there is already a large body of academic writing on that topic.\textsuperscript{18} Similarly, there has been a wholesale examination of the change to the nature of conflict, including its effect on international humanitarian law since the 1950s caused by the rise of anti-colonial rebellions and insurgent groups in the post-war period. More recently, the effect

\footnote{Francis Bugnion, \textit{Just Wars, Wars of Aggression and International Humanitarian Law} (2002) 84 I.R.R.C. 523 at 538.}
has been accelerated by the rise of trans-national armed groups and their participation in the so-called Three-Block War.\textsuperscript{19} Both of these trends in contemporary conflict have also been combined in the relatively recent research literature to examine the effect they have on each other. In addition, research has examined the need to control conduct through the application and enforcement of international law, irrespective of the characterisation of the conflict.

Jens Ohlin\textsuperscript{20} has examined the lawful use of force by states by reference to the context of the type of conflict. He does so by determining whether the state is acting as a sovereign state (i.e. applying law enforcement norms) or as co-belligerent as a member of a coalition operating in another state (i.e. applying humanitarian law standards). In Ohlin’s work I see the potential to exploit his approach to reduce some of the uncertainty surrounding the application of force in non-international conflict settings. Recent developments have also encouraged research into the development on new instruments to govern new conflicts. On a related trajectory, Francisco Forrest Martin\textsuperscript{21} has urged an adoption of a unified use of force rule that bridges the norms of human rights and humanitarian law by rejuvenating the application of the Martens Clause to contemporary conflict situations.

\textsuperscript{20} Jens Ohlin, \textit{The Duty to Capture} (2013) 97 Minn. L. Rev 1268.
Ryan Goodman, in a critical review\textsuperscript{22} of the recent jurisprudence emanating from the European Court of Human Rights, acknowledges the gaps in the humanitarian rules governing non-international armed conflict but he takes a more nuanced approach. He maintains that the protections provided by humanitarian law are better positioned to moderate the application of force in, and support the victims of, non-international armed conflict. He also states that reliance on a predominately human rights perspective has undermined the legitimacy and protection offered by both regimes, but is particularly damaging to the efficacy of humanitarian law.

To simplify the differing approaches to the problem and to compartmentalise the debate I have divided the adherents into two groups or “camps” within the primacy of regime debate concerning non-international armed conflict. These two camps have emerged in order to grapple with the inherent tension arising out of events of the last two decades. In one camp, advocates of the primacy of international human rights law maintain that human rights norms are better suited to adequately protect the victims of violence in non-international armed conflict, given the paucity of applicable humanitarian law rules. They evoke an abhorrence of two features of humanitarian law: targeted killing and collateral civilian casualties, which are \textit{prima facie} breaches of human rights

norms. Further, humanitarian law is too thin to invoke special status, undermining any use of the *lex specialis* analysis.

In the other camp, advocates of international humanitarian law acknowledge the efficacy of human rights law, with its universal application and access to justice, but maintain that humanitarian law is better suited to govern the use of force in armed conflict. They note that the law enforcement paradigm evinced by a human rights approach is irreconcilable with the war-fighting techniques adopted by contemporary non-state actors and transnational armed groups. For example, Charles Garraway argues\(^\text{23}\) that the cautious, reactive law enforcement approach serves to undermine the mission and endangers members of the security forces. Thus is particularly true when a state is facing a well-armed, aggressive and motivated insurgency which uses war-fighting techniques. He points out that only humanitarian law provides well-established and widely known rules for the use of force against a determined belligerent.

Unsurprisingly, as the torchbearers of humanitarian law, the International Committee of the Red Cross is also in the humanitarian primacy camp. In recognition of the danger of reliance on human rights as the primary governing regime for armed conflict, it has undertaken a project to strengthen the legal protections established under humanitarian law.\(^\text{24}\) Specifically, the International

\(^{23}\) Garraway, *supra* at note 10.

\(^{24}\) International Committee of the Red Cross, "Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Non-international Armed Conflict", background paper, Regional Consultations (Geneva, 2012 – 2013).
Committee of the Red Cross wishes to reinvigorate the protections for persons detained in non-international armed conflict. Helen Dunham points out that there are over 175 provisions regulating the treatment of detainees and the conditions of detention contained in the four Geneva Conventions applicable to international armed conflict.\textsuperscript{25} Conversely, there are very few rules governing the same type of treatment under Common Article 3 or Additional Protocol II. In chapter 6 I will return to the discussion of the two perspectives and their effect on law and policy.

In summary, there is a deep and growing body of both literature and jurisprudence to support the analysis of the inherent tension and provide guidance for reduction of that tension. Therefore, the main thrust of this thesis will be to examine those academic and juridical approaches and evaluate their efficacy in governing post-modern or asymmetric conflict. But what does the future hold? If the trend lines in contemporary asymmetric warfare continue, international human rights law will eventually dominate the entire spectrum in the field of armed conflict and dictate the conditions under which armed force is applied. This enlargement of the scope of human rights norms may detrimentally limit the legitimate use of force, and the appropriate means and methods available to security forces in circumstances of open conflict.

\textsuperscript{25} Ibid. at 3.
1.6. A Fictitious Scenario

Before we delve into the main body of the thesis, I will set out a fictitious scenario to illustrate the practical problems presented in asymmetric warfare and the effect on the ability of the security forces to execute their lawful mandate. While fictitious, and perhaps a bit too simplistic for some, the scenario will resonate with those who follow international events or have participated in contemporary United Nations-mandated missions, or international coalition- (i.e. NATO) led intervention operations. The scenario I will describe deliberately reveals the critical pressure points that exacerbate the tension between the streams of law as described in the introduction. I have done this to illustrate the key points of my thesis; the scenario will add an “air of reality” to what is primarily a remote theoretical problem for many jurists and academics.

Consider this all-to-common contemporary peace support scenario. An unnamed small developing sovereign nation is suffering from a lengthy insurgency. It doesn’t matter where or which hemisphere. This anonymous state sits on one major pathway of historical human migration and trade. It has endured a lengthy history of conflict with invading forces as well as internal conflict between resident tribal groups. From time to time over the centuries it has been a client state of several major foreign powers. This state is a party to every current international human rights and humanitarian law treaties and conventions. While not yet a failed state, the organs of the government of the afflicted country are very fragile, not having had a long period of peaceful
democratic existence. The national government is under considerable strain as it attempts to defeat the insurgency. To further complicate matters, the insurgency has covertly spread to neighbouring states, and thus threatens to destabilise peace and security in the region.

After several years of failed attempts to solve the situation peacefully and politically, the state is unable to either contain or defeat the insurgents. The national security forces have been severely weakened by the conflict and have lost confidence in their ability to manage the crisis. They have suffered many casualties, have high absenteeism, low and inconsistent pay, and have difficulty recruiting and training new members. Seeing no relief in the pursuit of the same unsuccessful national security strategy, the state appealed for assistance from the United Nations and guidance from its allies. As a result a coalition consisting of like-minded states was created and armed with a robust United Nations mandate to provide military aid, training, security and support to the host state, with consent. The participating states are operating under the authority of a United Nations Security Council Resolution (UNSCR) that invokes Chapter 7 of the UN Charter, and specifically permits “all necessary means” to enable mission success. The participating states have also entered into a Military Technical Arrangement (MTA) with the host state. The MTA sets out the duties, responsibilities and liabilities of the participating states’ troop contingents. Most importantly, the MTA amplifies the UNSCR by providing express authority for the
use of military force and security detention (under certain conditions) by the coalition troops.

The troop contributing states have provided a robust combat capability including land, air, naval and Special Forces components. In addition, there are military and police training teams organised and equipped to support and restore the host state military and security forces, which have been severely depleted and demoralised as a result of the insurgency. It is important to note that the UNSCR, while authorising “all necessary means”, does not permit any incursion into the airspace, or any military action in the territory of the neighbouring states. This limitation is viewed with disappointment by the coalition as it limits their ability to pursue and attack the insurgents, who frequently take refuge in adjacent states, albeit without the express consent of the neighbouring states.

The insurgents are an elusive and undefined group. They have no apparent established hierarchy (the state intelligence agency has not yet detected one) and they hold no ground in the territory of the afflicted state. They claim no state sponsor and hitherto have not been clearly linked to a neighbouring state. Flying well under the international law radar, they are truly a trans-national armed group of non-state actors. They eschew status-based identification and have remained below the threshold of recognition and attribution as an armed group in non-international armed conflict. However, their level of violence and their combat capability appears to be above the threshold of
riots and minor disturbances, which classifies their acts as reaching the level of armed conflict.

Unable to contain the situation through traditional policing, the host state has now defined the problem as a military one and not a situation of law enforcement. However, the host state government has not declared any derogation from the International Covenant of Civil and Political Rights or a regional human rights convention. In addition, neither have any of the participating members of the coalition. The military tasks given to the force of contributing states and, most importantly, their rules of engagement resemble those found in armed conflict. Indeed, the headquarters of the coalition treats the insurgency from a war-fighting frame of mind, and all tasks to locate and defeat the insurgency are planned as combat operations. In taking this approach the coalition has unwittingly sown the seeds for potential serious legal consequences.

Ongoing security operations in the zone of insurgency include the establishment of checkpoints in the capital city and at important transportation and communication nodes throughout the rural areas. The checkpoints typically consist of a roadblock staffed by a mixed force of local police and coalition soldiers. The purpose of the roadblocks is to interdict the movement of insurgents in general and specifically to provide security and stability in the capital city to facilitate the restoration of normal commerce and governance. As a
practical matter, the local police approach the vehicles and conduct identification checks at the roadblock while the soldiers provide overall security to the site. That is, the police conduct law enforcement and the troops provide the safe cordon.

Concurrently, the coalition is planning and conducting searches of suspected insurgent compounds and safe houses, mostly in the rural areas adjacent to the capital city. These missions reflect law enforcement operations conducted by military forces. The host state government has prudently determined that any military action should occur away from the densely populated areas in order to reduce civilian casualties and avoid collateral damage to infrastructure in the city.

The insurgents have other plans. They wish to bring the fight into the capital city where they can hide among the citizenry in the densely populated, ungovernable urban spaces and take refuge within striking distance of the vulnerable centres of governmental power. In the city they have greater access to resources to support their efforts and the help of sympathetic civilians to provide refuge and supplies. In addition, they know that any violent incidents they commit in the capital will provoke a disproportionate armed response by the security forces. The resulting civilian casualties and damage to property will support the insurgency’s propaganda campaign and generate more sympathy and support for their cause.
As another operational tool of the counterinsurgency campaign, the coalition uses the integral special forces component for seeking and capturing the leadership of the insurgency – the so-called “high value targets”. Using electronic and human intelligence resources, the special forces component acquires the potential targets and develops plans to capture them, normally by means of night-time raids on residential compounds and safe houses. The detainees are evacuated to holding facilities under the control of the detaining power for interrogation and processing. The detaining powers exercise three options for the management of detainees: release, if they pose no serious threat; transfer to the domestic police forces for prosecution and sentence under the law of the state; or, in the case of those insurgents posing a continuing threat, retention by the detaining power. It is in this modality of the operation that the Coalition is most vulnerable to criticism and legal challenge in human rights fora.

To the military commander and planner, the foregoing mission and operational approach seem perfectly reasonable from a war-fighting perspective, and, if executed properly, fall well within the acceptable boundaries of conduct under international humanitarian law, especially as taught and practised by the coalition member states’ militaries. To the human rights advocates, though, the very same missions and operational approaches cause alarm. The very processes and procedures viewed as lawful under humanitarian law by the

26 Additional Protocol 1, Article 83. “The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programs of
military component legal advisors are considered *prima facie* violations of 
human rights law by those human rights advocates. Both parties may be correct 
– it is possible, under the current state of international law and jurisprudence to 
simultaneously obey one regime while violating the other. Such a situation of 
tension, if unresolved, leads to uncertainty and confusion amongst the security 
forces participating in the mission. Legal uncertainty will inevitably lead to 
catastrophic results, especially in circumstances where lethal force is applied.

1.7. Summary

This thesis is not a cry of distress but rather a plea to rebalance the 
application of the two international legal regimes to internal armed conflict. The 
International Committee of the Red Cross has recognized the need to revitalize 
humanitarian law norms as they apply to non-international armed conflict.  
Overall, accidental civilian casualties and collateral damage in contemporary 
armed conflict have been dropping over the past decades. While the number of 
deliberate civilian deaths and damage to infrastructure is still unacceptably high, 
the reduction is mainly due to more accurate weapons, better intelligence, and 
the inculcation of international humanitarian law into the training of security 
forces. Concurrently, human rights awareness is penetrating the most abusive 

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27 See International Committee of the Red Cross. “International Humanitarian Law and the 
Challenges of Contemporary Armed Conflicts”, Report of the 31st International Conference, 
(Geneva, 2011) and more recently, “Strengthening Compliance with International Humanitarian 

28 Deliberate civilian deaths by non-state groups have risen dramatically in the same period, 
underscoring the need to permit state authorities to use force to restore peace and security.
regimes. However, deliberate civilian deaths remain \textit{anathema} to international jurists, academics and government leaders.

I have introduced the problem, described a common operational scenario to illustrate my concern. The stage is set to answer the two crucial questions posed above. In summary, the purpose of this thesis is to examine the tension between the scope and application of international humanitarian law and international human rights law in an era of increasingly complex and non-traditional conflict. Following a review of the two bodies of international law, I will examine their relevance and application to contemporary conflict with specific reference to the current friction points. I will do so by using the humanitarian principles governing both streams of law and thus offer the best chance of norm reconciliation. I will conclude by introducing a framework of application of force that serves the needs of both international legal regimes, enabling humane outcomes while reducing the inherent tension.
Chapter 2 - The Nature of Asymmetric Warfare

2.1. Introduction

Why is the nature of conflict so important to the conflicted application of humanitarian and human rights law? In this chapter I will explain how the changing face of war in the last thirty years has fundamentally changed the very nature and characteristics of armed conflict for which humanitarian law was designed. The significance of this chapter lies in the context within which international law norms are exercised. One of the premises of this thesis revolves around the assumption that the changing nature of conflict has created the tension between international human rights law and humanitarian law.

2.2. Asymmetric Warfare

To give a sense of the current state of affairs, consider this excerpt from Rupert Smith’s seminal work The Utility of Force:

“Our understanding of military force is based in large measure on the old paradigm of interstate industrial conflict: concepts founded on conflict between states, the maneuver of forces en masse, and the total support of the state’s manpower and industrial base. (...) In contrast, the new paradigm of war amongst the people is based on a concept of continuous criss-crossing between confrontation and conflict, regardless of whether a state is facing another state or a non-state actor.”29

While I agree with Rupert Smith, the effect of change on the practise of international humanitarian law has been underappreciated. It is trite to state that the nature of conflict has changed since the last great struggles between states and strategic alliances in the 20th century. The political order of the world has changed drastically in the five decades since the end of the Second World War and the techniques of warfare have changed to match the changing geopolitical imperatives.30 While this chapter is not meant to be an exhaustive study of the recent history of armed conflict, understanding the reasons why human rights and humanitarian law are in tension requires an analysis of the changing face of warfare and the applicability of international legal norms.

Humanitarian law norms are predicated on a long-established method of waging war between states and also between states and recognized liberation movements. Currently, the coherence between the nature of conflict and legal norms is strained. Recently, Michael Schmitt stated succinctly that:

“Twenty-first century conflict is subjecting international law to ever-growing pressure. Unless this pressure is somehow relieved, or the law fortified, the legal regimes governing armed conflict risk losing much of their prescriptive influence over states and armed forces.”31

The current situation is neither new nor unique; after all, international law went through a dramatic modernization in the late 1970’s in response to the large

number of civil wars in the de-colonization period immediately following the
Second World War. The effect of those civil wars on the citizens of those
collapsing colonies caused a major extension to the 1949 Geneva Conventions;
specifically the two Additional Protocols of 1977.\textsuperscript{32} International law needs to be
modernized again in the face of contemporary conflict; it takes time for the
parties to acknowledge that the change in warfare is permanent and to build
consensus among the member states.

Critics of the changing warfare theory indicate that this is just old wine in
new bottles.\textsuperscript{33} They state that the recent types of belligerents are not new; rebels
and partisans have existed throughout the history of conflict. While I agree to a
limited extent, the difference now lies in scale and motivation. What distinguishes
the modern asymmetric actor from his rebellious forbears are the strategic reach,
the long-term geopolitical aims, internationally coordinated destructive attacks,
the potential access to weapons of mass destruction, the use of modern
technology, world-wide secure communications, and the exploitation of mass
media. Regardless, the latest developments in conflict are of a different
character; the new belligerents operate across state borders, and their declared
opponent may not be the government of their state of residence or occupation. In

International Law at 443.
\textsuperscript{32} The development and scope of application of the 1977 Additional Protocols will be discussed in
detail in chapter 3 and applied to the proposed use of force framework in chapter 6.
\textsuperscript{33} For detailed analyses of the distinction between traditional civil wars and modern insurgencies,
see S. Kalyvas, "New" and "Old" Civil Wars: A Valid Distinction? (2001) 54 World Pol 99, and
Wash. Int'l. L. Rev. 551.
fact, the opponent may not be a government at all but an idea, a belief system, or culture.

At the risk of oversimplifying the notion for the purpose of illustration, in the recent past warfare was relatively straightforward. While insurgencies or civil wars have existed for millennia, war was primarily organized violence between recognized political entities first by custom, and later by convention. Soldiers gazed across the battlefield at their opponents, who were frequently members of an armed force of a state and its allies, wearing identifiable (and often gaudy) uniforms, visible weapons, and with obvious commanders mounted on horses and wearing distinctive plumed hats. While the above description may be a trifle quaint, this is the construct of combat that humanitarian law was originally designed to moderate.

More importantly, the warring participants knew that their opponent could, in most situations, be expected to abide by the customary rules of chivalry and reciprocity in the conduct of the battle and the aftermath. In the centuries since the recognition of the doctrine of sovereignty and the state as it exists today, established by *The Peace of Westphalia*, armies fought armies and warriors fought warriors. Civilians were primarily bystanders and observers, other than in

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35 *The Peace of Westphalia* (24 October 1648), *Between the Holy Roman Emperor and the King of France and their respective Allies. The Peace of Westphalia* consisted of two treaties; The Treaty of Munster and the Treaty of Osnabruck. The Peace has three important principles that established a discipline of international relations that endures. They are the fundamental right of
the obvious exception of sieges. The customs and usages of war evolved over time, from simple codes of conduct to international convention designed to control this type of inter-state warfare.

Within the Westphalian model, a trinity governed the relationship between the constitutional organs of the state. A philosophical construct espoused by the leading military thinker of his era, Carl Philipp Gottlieb von Clausewitz, the Trinitarian model\(^\text{36}\) envisaged three distinct bodies contained within the sovereign state: the people, the government and the army, operating in a triangular relationship. The people provided the recruits to the use of the state; the state created and directed the army; and the army pursued the government’s national and international policy goals.\(^\text{37}\) War took place between states, not people. This model came to be accepted by most western developed states and is the ruling paradigm in many existing countries.\(^\text{38}\) The important characteristic for the purpose of this discussion of the changing paradigm is the relationship between the army and the state: the army remains subordinate to governmental control and as such enjoys all the privileges, responsibilities and liabilities of a sovereign state under international law. Such is not the case for trans-national belligerents or non-state actors; the connection between conduct and responsibility is severed.

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\(^{36}\) Carl von Clausewitz, “On War” (1873) Book 1, Ch. 1, Para 8.

\(^{37}\) *Ibid.*, Clausewitz is better known for his often-misquoted maxim: “war is nothing but a continuation of political intercourse, with the intermixing of other means”. Contemporary warfare certainly meets the intent of the second clause of his maxim.
In his research paper *Non-linearity of Engagement*, Mohammad-Mahmoud Ould Mohamedou states that warfare has undergone a paradigmatic shift in the late 20th and early 21st centuries. The paradigmatic shift was triggered in some measure by the end of the Cold War and the concomitant breakdown in the international order established by the major powers at the end of the Second World War. In his view, this shift has four salient features of direct and critical impact on International Law. First, the change in duration and place of conflict; second, changes to the identity and status of belligerents; third, the expansion of the selection of targets; and last, the establishment of asymmetrical warfare as a system of conflict. Each of these features impinges directly on the applicability of extant humanitarian law norms. In addition, each feature will be examined in the next few paragraphs.

Prior to the rise of the so-called asymmetric warfare in the late 20th century, warfare used to exist at a specific moment in time and at a particular place. The traditional armed conflict arose between sovereign states; normally with a declaration by the state (following some perceived or real slight by an opponent) and ended when one side capitulated or was defeated. The clash of

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38 As evidenced by the preponderance of States who are parties to the Geneva and Hague Conventions.
40 *Ibid* at 2.
41 The term "asymmetric warfare" describes the conflict between a small group of relatively weak non-state actors with limited resources and an advanced nation with abundant military resources and sophisticated weapons. The non-state actor sees the disparity as an opportunity rather than a limitation. See for example Ivan Arreguin-Toft. "How the Weak Win Wars – A Theory of Asymmetric Conflict", (Cambridge University Press, 2005).
armies was confined in time to the duration of the actual campaign. The fighting ended with a treaty or convention between the state parties.

Contemporary conflict, by contrast, seems endless. For example, the so-called war on terror (which is not a simple armed conflict but a series of measures ranging from internal security restrictions to expeditionary military campaigns against diverse trans-national armed groups) has already lasted longer than many of the recent major international armed conflicts. As an aside, one notable exception is the 1950 Korea conflict, which is still in a condition of cease-fire and is therefore a continuing armed conflict by definition. At the time of writing this thesis there is no anticipated end to the hostilities grouped under the collective title “the war on terror”.

Confined as it was in time, traditional conflict was also confined in space. Battles took place in open fields in mostly rural areas with the potential for minimum collateral damage. The battlefield was a few square kilometers in area and consisted for the most part of muddy fields and trampled crops. The local rural population certainly suffered deprivations, but mostly by the loss of shelter, the destruction of crops and appropriation of livestock by the maneuvering armies, all of which frequently contributed to the inevitable famine.

Even as recently as the early 20th century warfare was limited to rural areas. For example, the First World War was fought for the most part in the north
European, Middle Eastern and African countryside. With a genesis in the 1930’s Spanish Civil War, conflict moved into urban areas. The Second World War witnessed the first deliberate and planned mass destruction of civilian objects and the widespread killing of civilians resulting from military operations. This was particularly noted in the bombing campaigns against large urban areas from the air (the cities of Coventry, London, Berlin, Dresden, and Hiroshima provide stark examples of aerial bombing's destructive power) and the advent of major fighting in densely populated cities such as Stalingrad, Berlin, and Manila.

In contemporary warfare, the *locus* is predominately urban and indeterminate. There are no dangerous “front lines” or safe “rear areas” as in traditional linear warfare; the belligerents can attack anywhere, anytime. This puts an insurmountable burden on most state security forces; one simply cannot provide effective security at every piece of vital infrastructure at all times. Mohamedou calls this feature of asymmetric warfare the “dissolution of territorial power”.\(^\text{42}\) It has a negative effect on state attribution for acts of misconduct by the belligerent parties to a conflict.

The belligerents are disconnected from the territorial sovereignty of a state in two ways; one physical and one legal. The area of conflict is no longer confined in physical space, that is, acts of violence can happen at any time and any place on the face of the globe. Disconnection from a state also means that

\(^{42}\) Ibid. at 6.
the international law principle of state responsibility is inapplicable. In addition because the asymmetric belligerents are frequently stateless and are not members of lawfully constituted governmental forces, the principles of command responsibility and individual responsibility are difficult to apply to those same belligerents. The factor of geographical dispersion forces the state powers to spread their legitimate forces very thin in order to protect their national interests domestically and abroad. The new belligerents operate with and among the population; not being a regularly constituted military force, they have no permanent garrisons. Frequently they establish firm bases in failing or failed states, such as al Qaeda did in Afghanistan and ISIS does in Syria, where their ideology is welcome.

Alternatively, if they reside in unwelcoming states, local security forces are either unwilling or unable to confront their unlawful presence or acts of criminality. This inability is often due to poor training, a lack of equipment and corruption. Even when there is an operating police force, often the judiciary is dysfunctional or absent in failed or failing states. Occasionally the insurgents establish temporary austere rural training camps but they conduct their insurgent acts in the urban areas and particularly near the centres of government power and administration. Thus the contemporary conflict space tends to be heavily populated urban areas; the risk of causing collateral damage and civilian

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43 “...responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.” Huber, J. Spanish Zone of Morocco (1923) 2 ILR 641.
casualties in the pursuit of legitimate security objectives is extremely high. This feature of asymmetric warfare has a negative effect on the lawfully constituted security forces that are trying to restore order. As cogently stated by Rupert Smith,

“Every time the innocent, even if they support the lawbreaker, are attacked or arrested, killed or imprisoned, the law is diminished and the ultimate objective of the people’s will to support it is made more difficult to achieve.”

It is at this juncture that the rules governing lawful targeting of military objectives under international humanitarian law directly clash with the human rights objective of protecting persons and property from the exercise of state power. As example, recall the recent multi-lateral intervention operations in Iraq and Libya and consider the ongoing civil war in Syria. Large swaths of the inner sectors of the major cities in those countries have been reduced to uninhabitable rubble by asymmetric, urban conflict. Conducting legitimate military operations within humanitarian law norms becomes increasingly difficult; the very nature of the conflict space militates against efforts to avoid the effects of collateral damage effects and civilian casualties while combating the belligerents.

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44 In the opening stages of the campaign against terror in 2001, the primary targets of the NATO coalition were the Al Qaeda training camps in the remote mountains of eastern Afghanistan.
45 Rupert Smith, supra, note 29 at 380.
46 See, generally, Arts. 49 to 53 of the First Additional Protocol to the Geneva Conventions (1977). The application of these rules will be discussed in detail later in this thesis.
2.3. Asymmetric Actors

Contemporary conflict also has a new type of actor – the asymmetric warrior. Also known as the non-state actor, or collectively, the trans-national armed group, the aggression of such individuals or collectives transcends nationality and borders. The new belligerent is wedded to an idea, not a state. Incorporated in the idea is the notion that the citizens of the offending state, region or religion are somehow responsible as accessories for the acts of perceived abuse and oppression of that entity and are therefore involved, even if tangentially, in the conflict. Thus any member of that entity is a legitimate target in the non-state actor’s justification theory of the conflict. This attitude is well expressed in Osama bin Laden’s “Letter to America “:

“…the American people have given their consent to the incarceration of the Palestinian people, the demolition of Palestinian homes, and the slaughter of the children of Iraq. The American people have the choice to refuse the policies of their government, yet time and again, the polls show that the American people support the policies of the elected government... This is why the people are not innocent. The American people are active members in all these crimes.” 47

Certainly the letter could be dismissed as mere puffery. But, while intended for an American audience, the quote could equally apply to the citizen of any state who has committed forces or resources to multi-national operations against Al Qaeda and the Taliban; it perfectly encapsulates the non-state actors’ view that citizens are culpable for the acts of their governments. Events since 2001 have shown

the strength of this belief; far more civilians have been killed in the so-called war against terror than have members of government security forces. So how do sovereign states respond? Security forces are prohibited from responding in kind by political realities and by the rules of distinction in targeting coupled with a bar against civilian reprisal.\textsuperscript{48}

Prior to the paradigmatic shift in the mode of conflict only sovereign states and certain recognized forces of liberation (at least since 1977) had the right, the privilege and the means to engage in military activity. Since the shift, non-governmental actors have claimed the right to act as a quasi-military power to pursue strategic aims.\textsuperscript{49} Hence their popular titles of "unlawful combatant" or "unprivileged belligerent". Facing oppression and injury, real or perceived, these individuals and groups act outside the ambit of lawful state authority in order to project strongly held ideals, either religious or political (and sometimes both) onto others, or to act in defence of those same ideals. In other words, they have usurped the fundamental task of the state: to protect them from what they feel to be external threats to their values and beliefs. As such, what is known to most as terrorism becomes a legitimate method of waging war in the minds of the belligerents. This state of mind is very hard to change by the application of traditional force.

\textsuperscript{48} Additional Protocol I, Arts 51-56 specifically prohibits reprisals against civilians.
By necessity, the new belligerent also brings new methods. Weaker militarily than the state or region they oppose, the non-state actors are forced to use methods that let them maintain the advantage and control the timetable. They know that the citizens of states are impatient with long conflicts; similarly, democratic governments are trapped in the electoral cycle, which inhibits long-term planning.\(^{50}\) Moreover, they can fight with relative impunity knowing that the legitimate forces opposing them are fighting according to domestic rules and international humanitarian law norms\(^{51}\) governing the use of force.

Thus, rather than resorting to the traditional strategy of attacking one’s opponent’s military forces, equipment and means of production of military power, the non-state actor deliberately and randomly attacks civilians and civilian infrastructure, causing chaos and fear. In effect, the distinction between civilian and military objects disappears.\(^{52}\) The central problem for the state is reacting to terrorist or insurgent attacks that stand bestride two separate and distinct governmental functions: the maintenance of law and order, which is a criminal policing function, and the maintenance of national defence and security of territorial sovereignty, which is a military function.

\(^{50}\) There is a saying in Afghanistan attributed to the Taliban and directed at the NATO mission: “You have the watches, but we have the time”. Probably not the original source. \(^{51}\) Additional Protocol I, art 51 prohibits “acts or threats of violence the purpose of which is to spread terror among the civilian population” in international armed conflict. Art 13 of Additional Protocol II creates the same prohibition for acts of terror in non-international armed conflict. \(^{52}\) William S. Lind et al., *The Changing Face of War: Into the Fourth Generation*. The Marine Corps Gazette, October 1989, at 23. The distinction between “civilian” and “combatant” is fundamental to the use of force in international humanitarian law and is one of the distinguishing features between it and human rights law.
Other than small arms and surplus rockets purchased on the black-market or supplied by a patron state, the new belligerents are denied access to the research, development and manufacture of the modern weapon systems deployed by states. Consequently they are adept at transforming innocuous civilian objects and common household or agricultural chemicals (such as fertilizer) into lethal weapons, to great effect. Black market or abandoned land mines, the suicide bomb vest, and improvised explosive devices packed into cars are examples of the lethal currency and contemporary threats to state security forces and more frequently the local civilians. Furthermore, they control the time and place of attack. The resultant terror and uncertainty contributes to a loss of the peoples’ confidence in the ability of the state security apparatus to maintain the safety of its citizens and seek to leverage their relative strengths against the weaknesses of the regularly constituted state security forces. This type of timeless, unpredictable conflict and its commensurate terror has become the modern conflict paradigm.

2.4. “Three Block War”

General Charles Krulak of the United States Marine Corps coined the term “Three-Block War” as a shorthand descriptor to illustrate the complexity of modern asymmetric conflict.53 The Three-Block War model envisages a situation where the armed forces of a state, participating in a non-international armed

53 Krulak, supra at note 19.
conflict, experience three different modalities of asymmetric warfare within a three-block radius of a crowded urban area.

In block one, security forces are engaged in full scale combat against the belligerents; in block two, they are supporting the security forces of the legitimate government in law enforcement operations. In the third adjacent block, forces in the same mission are escorting humanitarian aid workers as they deliver essential supplies and aid to victims of the conflict. Differing international and domestic legal frameworks govern all three activities, with the consequence that the participating security forces need to know more than just the laws of war or the rules of policing.

In block one of the urban setting described above, the security forces are fighting insurgent belligerents. It is a condition of armed conflict, which normally attracts the humanitarian law conventions (or law of armed conflict), if the parties are states. If one party is not a state but a trans-national armed group, the rules may differ, but they are still within the realm of humanitarian law.

Modern military forces in developed countries have, at the very least, a basic understanding of the laws of war, and would hopefully conduct their operations in the “first block” within that humanitarian law paradigm. In the “second block”, the same security force is conducting (or supporting) law enforcement operations. The legal structure for law enforcement contains a
completely different set of rules from that of armed conflict, particularly in the application of force. Thus the soldiers engaged in law enforcement cannot rely on the humanitarian rules and policies that they were trained on to govern their activities in this block.

In the “third block”, the situation is similar. Soldiers escorting humanitarian aid convoys and guarding dispersal sites are governed by human rights law norms and would normally only be permitted to use force in self-defence (unless they were subjected to a major attack by an organized and determined insurgent force). It is worth contemplating the difficulty in developing and training competent general-purpose security forces for the above types of operations, where the government, the policy writers, the commanders and individuals participating in the mission have to know which body of law to apply at any time in their daily work. Experience has shown that this is a monumentally difficult task with a large scope for critical error and mission failure.

2.5. Summary

Asymmetric conflict eschews the customary limits of duration and location, and the principle of distinction. The conflict seems timeless, and the theatre of operations is without geopolitical boundaries. The affected state loses the monopoly on the use of force domestically and internationally. The main targets of the new paradigm are civilians. States have gone to great lengths to avoid the deliberate targeting of civilians since the end of the Second World War, bound by
the conventions put in place in the last five decades and assisted by increasingly accurate weapon systems. Conversely, non-state actors have adopted a strategy of specifically targeting civilian infrastructure as well as civilians themselves to engender fear and terror, using any lethal means. The intended result is the undermining of the legitimacy of the state, which must in turn struggle to protect citizens from the unpredictable and destructive attacks.

Consequently, state officials must choose the level of force to be brought to bear on the belligerents.54 Is it a situation of close combat where the rules of targeting dominate (the humanitarian law paradigm), or is it an escalatory law enforcement operation, where the security forces have a duty under human rights law to use minimum force? The state, frustrated by the lack of strategic success and a seeming inability to bring either law enforcement or conventional military means to bear successfully on the belligerents, may resort to unlawful actions, further alienating the civilian population and encouraging more insurgent recruiting. It is a very difficult cycle to break. Recent images from the contested areas of Syria and Libya are stark examples of the extent of destruction to civilian property that results from the use of unmitigated military force in an urban setting against non-traditional belligerents.

I have established the nature of asymmetric warfare and its features that militate against prudent application of force by governments. To be sure,
conventional international armed conflict still exists, but it is rarer than internal conflict, and in any case, humanitarian law is well settled, widely understood and fully capable of moderating violence and protecting victims in that situation. That said, international armed conflict is not my concern, and there is a large body of academic literature on that topic. Therefore, if I address it, it will be only peripherally and only for comparative purposes. It is on the fringes of internal conflict, where the law is thin, that is the focus of this thesis.

In the next chapter, I will move the discussion from the characterization of contemporary warfare to the evolution of the law governing the conduct of hostilities between states, and between states and non-state parties. Of particular importance to this thesis is the notion that the law, by its very nature, reacts slowly to changing trends; herein lies a contributing factor to the current tension between humanitarian law, the changed reality of conflict, and hence the ascendancy of human rights norms.
Chapter 3 - The Development of International Humanitarian Law and International Human Rights Law

3.1. Introduction

While not intended to be an exhaustive historical review, this chapter shall briefly examine the development of each body of law with a view to demonstrating the nature of the relationship between the two. The two streams evolved at different times for different reasons, but concurrently cover same general subject matter – the protection of humans. Much of the tension between the two streams that is the focus of this thesis derives from their differing origins and purposes. Comprehension of these frequently overlapping international legal regimes is central to the understanding the current tension and my theories to reduce the competition between the norms.

I have broken this chapter down into two parts. The evolution of international humanitarian law is explained in the first part of the chapter, followed by an explanation of international human rights law in the second. I open the chapter by recounting the development of humanitarian law. In essence, humanitarian law has evolved over a long swath of human history, originally and fundamentally centered on the need to protect persons who are the innocent victims of conflict – a principle that endures to this day. That feature, coupled with developments in prohibitions on the use of certain weapons attempted to reduce the suffering caused by aggressive and indiscriminate violence. As I will describe, humanitarian law has evolved, albeit with a lag time,
to the changing nature of conflict and advances in the means and methods of waging war.

I close the chapter with an explanation of the rise of the current human rights regime. Modern human rights law developed much more recently than humanitarian law. While there was a limited range of human rights available for the protection of foreign nationals resident in a state, the current regime emerged in the late 1940s. Modern international human rights law found major impetus the appalling treatment of civilians by certain belligerent states and widespread atrocities during the Second World War that shocked the conscience of mankind. Quite apart from the destruction and civilian casualties experienced by the failure of humanitarian law, it was the need to govern the treatment of persons by their own governments that distinguished human rights from the laws of war.

3.2. International Humanitarian Law

Prior to the late 1940s, international humanitarian law (also known as the law of war or the law of armed conflict) was the dominant legal regime regulating both the use of force between states and the treatment of the victims of war. While by no means a complete body of international law, humanitarian law had nevertheless undergone a long developmental period. The fundamental motivation for humanitarian law lay in reciprocity between states of equal standing in conflict; each state expected the other to honour the tenets of chivalry
and civilized conduct while pursuing the affairs of state. If the tenets were respected, the victims of conflict, such as prisoners of war, or the citizens of a beleaguered city, would be treated humanely by all parties. But, as Cordula Droege points out, the motivation emanated from charity, not as a principle of rights, and with military strategy and reciprocity being its central elements. This distinction is important as it reflects a fundamental difference in the raison d'être of each regime. The charitable motive has been best expressed in the International Committee of the Red Cross motto, first published on the title page of the Committee’s first 25 year report in 1888 – inter arma caritas.

Since humankind organized social and political activity by nationality or statehood there have been local agreements, custom and practice restraining the conduct of parties in peace and in conflict. Ancient religious and literary sources contain ordinances forbidding certain common practices, including the killing of captives or innocents, and the wanton destruction of crops or property. The Old Testament of the Christian Bible forbade the destruction of fruit trees (while allowing the victorious to eat the fruit), and killing prisoners. The Chinese strategist Sun Tzu, anticipating the humanitarian law principle of distinction by

56 Cordula Droege, *The Interplay Between International Humanitarian Law and Human Rights Law in Situations of Armed Conflict*, (2007) 40 Isr.L.Rev. No. 2 at 311. Was it charity or pragmatism? It is clearly in the best interest militarily not to slaughter all your prisoners when they can be used as slaves or rice-bearers, preserving your own manpower for fighting. Similarly, it makes no sense to destroy the crops or structures that will feed and shelter the victorious army. Conversely, if you are the defeated retreating army, leave nothing standing behind you. 57 Ibid. at 313.
several millennia, advocated attacking only enemy armies, and to avoid attacking cities where possible.\textsuperscript{61} The ancient Greeks and Romans had their own versions of the Geneva and Hague conventions; Homer cited prohibitions on attacking the clergy, murdering captives, poisoning water supplies and using poisoned weapons\textsuperscript{62}; similarly, the Romans forbade barbarism, acts of treachery and the destruction of property in their military operations. The Islamic world also had comprehensive edicts on the conduct of hostilities against the enemies of Islam, in many ways similar to those of the Old Testament.\textsuperscript{63}

The prolonged and destructive course of the barbarian invasions was particularly egregious and destroyed much of the Roman empire, and with it the rules governing the conduct of war in the contemporary world. Redeveloping slowly in the Middle Ages, the contemporary religious authorities revived rules to forbid certain practices and weapons. Known as the code of chivalry, the rules attempted to moderate and civilize the behaviour of the knights.\textsuperscript{64} Of particular interest was the nascent idea of the humanitarian principle of proportionality; the authorities of the time were concerned about the overwhelming destructive power of the newly invented gunpowder-based firearms and cannons and their use against cities in siege warfare.

\begin{itemize}
\item \textsuperscript{59} The Book of Deuteronomy, Ch. 20, Verses 19-20.
\item \textsuperscript{60} The Book of Kings, Ch. 6, Verses 22-23.
\item \textsuperscript{61} Sun Tzu, \textit{The Art of War}, Part 3.
\item \textsuperscript{62} Homer, \textit{The Odyssey}, Bk 1 lines 260-263.
\item \textsuperscript{63} Green, \textit{supra}, note 58 at 23.
\item \textsuperscript{64} Regrettably, the rules of chivalry only applied to the knightly class, not all victims of war.
\end{itemize}
Hugo Grotius is considered the first chronicler of what has become the recognized body of international law, including the sub-set now known as the law of war, but Grotius is also the starting point for the modern academic record on the law of war. Motivated by the destruction visited on Europe by the 30 Years' War and the consequent transfer of power from the church to the state, Grotius recorded local custom and states’ practice and in doing so created a nascent international legal theory. In a substantial work, which has become the theoretical foundation of the law between states, he catalogued the historical record of the development of prohibitions and restraints on human conflict, citing among other sources the Christian bible and Roman historians. Grotius emphasized the diversity of local custom and practice, predating the fragmentation theory and he particularly noted the humanitarian motive underlying the treatment of the victims of states’ conflict.

The best example of a modern, succinct code of behaviour in wartime is the Lieber Code. Interestingly, it was drafted to govern conduct in a civil war, not international armed conflict. It also anticipated, by about 80 years, the rules governing hostile occupation, which became an international instrument in 1949

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66 Marauding armies devastated large swaths of central Europe, with disease and famine brought on by the foraging troops. The war, which lasted from 1618 to 1648, was concluded by the Peace of Westphalia, a multi-lateral treaty that created the modern sovereign state. See note 35.
68 U.S. War Department, Instructions for the Government of Armies of the United States in the Field, General Order No. 100 24 April 1863 (the Lieber Code).
as the 4th Geneva Convention.\textsuperscript{69} One must be cautious in accepting the Code as
determinative, insofar as it reflected practice, and not international law, at the
time of introduction. Nonetheless it was an early codification of existing custom.

Among other things, its text codifies the standard of expected treatment of
the victims of conflict as it existed in the 19th century, and at a time of significant
change in the conduct of modern warfare and the lethality of weapons. The
Lieber Code exemplifies one humanitarian principle; in this case the protection
afforded the victims of hostile occupation, as illustrated in this excerpt:

\begin{quote}
\textquote{44. All wanton violence committed against persons in the
invaded country, all destruction of property not commanded
by the authorized officer, all robbery, all pillage or sacking,
even after taking a place by main force, all rape, wounding,
maiming, or killing of such inhabitants, are prohibited under
the penalty of death, or such other severe punishment as
may seem adequate for the gravity of the offense.}\textsuperscript{70}
\end{quote}

The Lieber Code clearly incorporates glimpses of evolving human rights
principles; the text and intent of the Code became the model language for
subsequent codification of the laws of war.

The second stream of humanitarian law, the law of The Hague, developed
concurrently with the Lieber Code and the contemporary evolution of the laws of
war. It took a series of rules governing the conduct of battle between warriors into

\textsuperscript{69} 1949 Geneva Convention IV, Protection of Civilians (GC IV).
\textsuperscript{70} The Lieber Code, \textit{supra}, note 68, section II, Article 44.
a wider, inclusive body of international humanitarian law with protection for the victims, as envisaged by the International Committee of the Red Cross. While the Geneva Conventions of the era focussed the treatment of victims, the Hague Law was concerned with scientific advances in weapons in the late 1800s. The latter half of the 19th century produced a startling increase in the lethality of weapons. One only has to review the casualty figures from the U.S. Civil War and the Franco-Prussian War of the 1870s to see that weapon efficiency had improved to the point that they were becoming indiscriminate in their effect and causing unnecessary suffering, even when properly used.

The catalyst for the introduction of limits on weapons and ammunition was the Russian invention of a bullet that exploded on contact. Alarmed by the inhumane effects that this projectile could cause, the Russian government invited the European powers to St. Petersburg in 1867 for a conference; the result of which was a declaration prohibiting the use of an exploding projectile of less that 400 grams. As the late Leslie C. Green points out, while the substance of the 1868 Declaration of St. Petersburg was important to the development of humanitarian law, the rationale was even more so. The Declaration explained the reasons this way:

“...the progress of civilisation should have the effect of alleviating as much as possible the calamities of war; the only legitimate object which states should endeavour to

71 Green, supra, note 58 at 33-36.
72 1868 Declaration of St. Petersburg, (the parties) “having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity”.
73 Green, supra, note 58 at 32-33.
accomplish during war is to weaken the military forces of the
eveny; for this purpose it is sufficient to disable the greatest
possible number of men; this object would be exceeded by
the employment of arms which uselessly aggravate the
sufferings of disabled men, or render their death inevitable;
the employment of such arms would, therefore, be contrary
to the laws of humanity.”74

While an important pre-cursor to subsequent conventions limiting the use of
weapons, the St. Petersburg Declaration was ineffective as it only applied to, and
between, the participants; it did not bind participants in conflict involving non-
party belligerents, a problem that continues to limit the effectiveness of
international humanitarian conventions.

Further development of the incipient Hague Law came in a similar
conference of the European powers in 1874 in Brussels; in 1899 and again in
1907 in The Hague. The outcome of these conferences was a series of rules
governing inter alia, exploding projectiles, asphyxiating gases, aerial (balloon)
warfare, naval and submarine warfare, and the duties and rights of neutral states.
Again, all the conventions, now known collectively as the Hague Regulations
were limited in their application due to the participation clause. It was only the
adoption of the critically important Martens Clause (explained below) that limited
the states’ parties conduct against non-party belligerents, and which set the
course for the application and effectiveness of future conventions with embedded
humanitarian principles.

74 1868 St Petersburg Declaration, supra, Preamble.
Adoption of the Hague regulations caused controversy in Europe, particularly as it undermined the Prussian tradition of *Kreigsraison*.\(^{75}\) In the pragmatic words of Chancellor Otto Bismarck: "What leader would allow his country to be destroyed because of international law?"\(^{76}\) Militaristic societies condemned the humanization of war; however the notion of *Kreigsraison* has been carried forward, albeit in a more moderate form, into current humanitarian law as the principle of military necessity. The Hague Regulations directly contributed to the humanisation of warfare and the protection of victims by limiting the types and applications of certain weapons and munitions. Despite there having been no Hague Conference since 1907, the Regulations are still in effect today and have been significantly expanded and modified to limit or prohibit the use of modern weapons. Since 1907, conventions have dealt with specific weapons or munitions\(^{77}\) instead of general prohibitions; modern examples include the Ottawa Convention on the use of anti-personnel mines\(^{78}\) and the most recent convention on the use of cluster munitions.\(^{79}\)

The next critical test of the development of the laws of war was the period 1914–1918. The horrors of the First World War, specifically the lack of codified

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\(^{76}\) Ibid.


\(^{78}\) 1997 Convention on the Prohibition on the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction.
rules for the treatment of prisoners and non-belligerents, galvanised the world powers to improve and expand the existing laws of war to impose a measure of control on the increasing scope and lethality of warfare. It was clear that the law as it existed in the war years had not fully incorporated the principles of humanitarianism, and was inadequate to protect those persons rendered hors de combat.\(^{80}\)

The key humanitarian failure in the First World War was the callous disregard for the principle of distinction. Described by Jochnick and Normand as the “subservience of humanitarianism to military necessity”,\(^{81}\) advances in aerial warfare meant that belligerents could bomb undefended cities, targeting the morale and will of the enemy’s civilian population, a body of non-combatants hitherto enjoying protection from such attacks. This failure was to be re-visited with greater destruction 20 years later. Consequently, the Geneva Conventions were updated in 1929 to attempt to rectify the identified weaknesses and lacunae. Re-titled as the Conventions for the Ameliorations of Conditions of the Sick and Wounded in Armies in the Field and Relative to Prisoners of War, the 1929 Convention set out to codify and extend the existing customary law, particularly with respect to the treatment of prisoners of war, whose harsh treatment during the war revealed a serious deficiency.

\(^{79}\) 2008 Convention on Cluster Munitions.

\(^{80}\) Green, supra, note 58 at 40.

\(^{81}\) Jochnick and Normand, supra, note 75 at 82.
The inter-war years held some hope for peace; the victors of the First World War were motivated to attempt the elimination of aggression as a tool of state diplomacy. In 1927, the League of Nations adopted a resolution condemning aggression; it stated:

“…a war of aggression can never serve as a means of settling international disputes and is, in consequence an international crime (...) [a]ll wars of aggression are, and shall always be, prohibited”.  

The hopes for peace were futile and short-lived. Not only did Germany re-arm after defeat in the First Word War despite strict limitations on the size and composition of the military, the Spanish Civil War was the first modern indication that internal disturbances and domestic law enforcement matters could quickly rise to a level of violence resembling total war, and that internal conflict could become internationalised armed conflict as external powers supported the belligerents, even to the point of sending formed groups of combatants, while maintaining that they were not parties to the conflict. More importantly, the difficulties in protecting civilians from the effects of the civil war, particularly the introduction of modern air power and terror bombing against heavily populated cities, revealed gaps in the protection of non-combatants and presaged the difficulties that arose during the de-colonisation period of the 1950s to 1970s.

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83 See Part V, the 1919 Treaty of Versailles. The preamble of Part V stated: “In order to render possible the initiation of a general limitation of the armaments of all nations, Germany undertakes strictly to observe the military, naval and air clauses which follow”. See also Margaret MacMillan, Paris 1919: Six Months that Changed the World (Random House, 2002)
The incredible scope of the Second World War, with its reach and destruction, and coming so quickly after the First World War, gave international law scholars pause. Clearly the lessons of 1914-1918 had not been learned, or, if they had, then the law as expressed in 1929 was insufficiently codified to properly control the conduct of states. As Sir Hersch Lauterpacht observed: "if international law is the weakest point of all law, then the law of war is its vanishing point"\textsuperscript{84}.

Consequently, the next major step in the converging paths of humanitarian law and human rights was the renewal and expansion of the four Geneva Conventions in 1949, and the introduction of several new, but critically important, conventions that expanded the reach of classical humanitarian law into new subject areas. The effort put into the Hague Convention IV\textsuperscript{85} actually had greater effect on moderating conflict than did the 1929 Geneva Conventions. During one of the post-war trials of the defeated belligerents, the Tokyo Court stated in the Shimoda Case that the rules embodied in the Hague Conventions “were recognised by all civilised nations, as were regarded as being declaratory of the laws and customs of war”.\textsuperscript{86}

\textsuperscript{84} Lauterpacht, Hersch, \textit{The Problem of the Revision of the Law of War}, (1952) Brit. Y.B. Int’l L. at 382. Lauterpacht was discussing the difficulties in introducing new international law principles that were not hitherto customary, particularly the protections that were properly in the realm of human rights, extended to civilians in the 1949 Geneva Convention IV. Lauterpacht was paraphrasing Cicero: \textit{inter arma enim silent leges}; in war the law is silent.

\textsuperscript{85} 1907 Hague Convention IV (Laws and Customs of Warfare on Land).

\textsuperscript{86} \textit{Shimoda v. Japan}, (1963) quoted in Green, supra, note 58 at 38.
One important change that created an opportunity for the inclusion of broader protections for victims was the insertion of the term "armed conflict" to replace "war". This change moved the application of the body of laws away from the classical declared war between two or more sovereign states to a more inclusive recognition that many post-World War Two conflicts did not meet the customary understanding of the state of war. Similarly, "adverse party" replaced the term "enemy".

In the decades following the Second World War, the exhausted European colonial powers lost most of their overseas possessions. Some de-colonisation processes were peaceful, but a notable number were extremely violent, with the parties going to extremes of misconduct in armed conflict in the efforts to either maintain the colonial power, or in order to oust the colonial oppressor. While the 1949 Geneva Conventions had been updated to reflect the inhumane conditions of the 1930s and 1940s, the resort to non-international armed conflict during de-colonisation caused excesses for which the 1949 Geneva Conventions were not well established to manage.

Insurgency and violent rebellion marked colonial warfare, starting in the late 1940s and lasting through to the 1970s. A feature of this type of armed conflict was that one of the parties to the conflict was not a sovereign state, or a party to the Conventions. The only law governing the conduct of the parties in this prevalent type of conflict was Common Article 3 to the 1949 Conventions.
Lacunae in the conventions, particularly in the treatment of victims and the status of rebel and insurgents led to inhumane outcomes for which Common Article 3 was inadequate.

Concerned with the scale of violence and effect of de-colonisation on the residents of the affected states, in 1974 the Swiss government invited representatives of 122 states to the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts. The result of this conference was international agreement on incorporating the principles of humanitarian law to non-international armed conflict.\textsuperscript{87}

The reaction by the world parties to the de-colonisation wars and the efforts of the 1974 Conference produced two new instruments, the 1977 Protocols Additional to the 1949 Geneva Conventions. The participants created two Additional Protocols, which are at the time of writing the most recent international humanitarian law (Geneva) conventions. Of the two protocols, one (AP I) modifies the rules of international armed conflict and the other (AP II), despite infringing on Article 2(7) of the UN Charter\textsuperscript{88}, incorporates non-international armed conflict into the main body of humanitarian law; the result of

\textsuperscript{87} In 1977 the fruits of this conference became the two Protocols Additional to the Four Geneva Conventions.

\textsuperscript{88} “No state may interfere in matters which are essentially within the domestic jurisdiction of any state”. 1945 Charter of the United Nations, Article 2(7).
which expands the protections previously only afforded to victims of classical
armed conflict to non-international armed conflict.

3.3. International Human Rights Law

As I stated on the introduction, it is not the aim of this part of the chapter to
delve into the detailed history of human rights, but some overview of its
development is required to understand the observed trend to convergence with
humanitarian law. Modern international human rights law found major impetus in
the horrors of the Second World War. Quite apart of the appalling destruction of
infrastructure and civilian property and the huge number of civilian casualties
caused by lawful combat under the existing laws of war, it was the treatment of
civilians by certain belligerent states and wide-spread atrocities that shocked the
conscience of mankind. However, it did not originate in the aftermath of World
War Two. Human rights law had little in common with humanitarian law until the
catastrophic events of the 20th century; indeed, its conceptual foundation is
completely different.

Before 1945 there was no body of International human rights law as
such.89 There were certainly nascent legal regimes to protect the rights of
minorities and aliens, but nothing resembled the body of law recognized today.
The excesses of totalitarian regimes, and the horror of the aftermath of World

89 Jeremy Sarkin, The Historical Origins, Convergence and Interrelationship between International
Human Rights Law, International Humanitarian Law and International Criminal Law and Public
International Law and their Application from at least the Nineteenth Century, (2007) Legal Studies
War Two, caused attendant destruction of property, the attacks on civilian populations and the extermination of human beings by racial or religious identification. These excesses forced a re-examination of legal institutions post-war with a view to protecting the innocent victims of conflict and regulating totalitarian behaviour.

While humanitarian law dealt with relations between states in time of conflict, human rights law defined the relationship between a state and its own citizens and was part of the constitutional law of the state. Essentially, human rights are assertions that set out rights that persons should enjoy by virtue of being human. Thus the focus is on the value of humans, who can expect enumerated freedoms and protections from the exercise of power of national governments. From the outset, humanitarian law developed from military efficiency and pragmatism to govern the conduct of warfare between professional armies. Human rights law, conversely, has its modern roots culture and philosophy; in the Enlightenment, and by extension, social organization. There is no bright line defining the creation of human rights; originally they were cast as moral duties and responsibilities, underpinned by humane rationale: equality, human dignity and the sacredness of life. They were not called “rights” such

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until the term was introduced by Thomas Paine in his treatise *The Rights of Man*.  

There are several theoretical streams of origin; religious (covenants regarding the treatment of fellow humans), natural law theory, positivist theory and socialism. The most influential were the natural law theorists; writers such as John Locke, Thomas Paine and Jean-Jacques Rousseau, who thought deeply and wrote extensively about just societies and the relationship between governments and citizens, particularly in the brutally harsh, class-defined social conditions of the 17th and 18th centuries.

Classic natural law theory avers that “the state of nature is one of peace, good will, mutual assistance and preservation”; the protection of private rights in turn protects the collective due to obligations of human reciprocity. The role of government is to protect those rights, and it preserves its legitimacy in the eyes of citizens only if it upholds the so-called “social contract” by enforcing the natural rights, which Locke defined as “life, liberty and the estate”. Regardless, human rights were not considered part of the laws of war until late in its development. As Rousseau stated in *The Social Contract*:

“War is not, therefore, any relation between man and man, but a relation between state and state in which individuals

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are enemies only accidently, not as men, even a citizens, but as soldiers…”92

Apart from early religious traditions and ancient codifications such as the Code of Hammurabi, The Charter of Cyrus, and Magna Carta, the philosophical foundations of modern human rights were turned into domestic law and convention throughout the 17th and 18th centuries. The motivating issues of that period were religious freedom93, slavery94 and the protection of citizens abroad.95

The gradual introduction of human rights norms was fraught with difficulty, as it had powerful opponents whose well being relied on the retention of privilege, property (including slaves), hierarchy and class. Change was frequently forced by violence; witness the French and American revolutions, as well as the turmoil of peasant’s uprisings in continental Europe. The outcomes of the periodic upheavals were instruments such as the 1776 United States Declaration of Independence, and the 1789 French Declaration of the Rights of Man and Citizen. The atrocities committed in the 1930s and 1940s by authoritarian governments during belligerent occupation in Europe, Africa and Asia were the impetus needed to focus attention on human rights during armed conflict.

92 Jean Jacques Rousseau, *The Social Contract, or Principles of Political Right* (1762), Book 1, Chapter 4 Slavery (G.D.H. Cole trans.).
93 See for example the 1648 Peace of Westphalia, *supra* note 35. The treaty was pivotal to the establishment of religious freedom amongst the protestant and catholic states in Europe. Further, the Congress of Vienna in 1815 pledged equality and protection of various religious beliefs.
94 The approbation of slavery gave rise to the truly supra-national agreements prohibiting slaving and most importantly enabled intervention and enforcement irrespective of the nationality of the slaver, and in the case of slave ships, the flag state.
Hitherto, respect for human rights in wartime had remained outside the evolving guarantees for human rights in international law.

Notwithstanding the glimpses of human rights attributes in earlier conventions, the first major international instrument codifying nascent human rights was the 1948 Universal Declaration of Human Rights. A broad declaratory instrument, it not only set out civil and political rights, but economic and social rights as well. And, as international instruments that rely on consensus tend to be, it was a compromise of different interpretations and philosophies of the nature of human rights. \(^\text{96}\) Notably, it had no connection to the laws of war; indeed there is no mention of enemy nationals in times of war, nor did the United Nations International Law Commission include the laws of war among its topics of concern. \(^\text{97}\) Indeed the link between humanitarian law and human rights was not established until the Tehran Conference of 1968, which is explained below.

The Universal Declaration spawned two major subordinate conventions, both dating from 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The former had the most direct influence on international humanitarian law; among other things. Most importantly, it established the right not to be arbitrarily deprived of one’s life (sometimes called the “right to life”), a right that

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seems to run counter to the lawful ability of combatants to take lives of others (and a concomitant immunity from being penalized for doing so) in armed conflict.

Another critical and recent human rights initiative, one that effectively bridges the gap between human rights norms and the right to intervene in the affairs of another state, is the customary international law justification of aggression by humanitarian intervention⁹⁸. An older basis for military aggression, humanitarian intervention was available as justification to protect the citizens of an abusive or conflicted state from its own state authorities. The customary justification has been formulized in the doctrine of the Responsibility to Protect⁹⁹. This doctrine is a mix of ideology, aspiration and rights, which claims that the sovereignty of a state may be overcome through intervention by another state (or a coalition of like-minded states) in situations of serious human rights violations that the host state is incapable of managing or unwilling to deal with. What is most controversial is the use of human rights norms as *jus ad bellum* ¹⁰⁰.

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⁹⁸ Defined as the use of military force against another state where the chief publicly declared aim of that military action is ending human rights violations being perpetrated by the state against which it is directed. For the origin of the doctrine, see John Stuart Mill, *A Few Words on Non-intervention*. The Collected Works of John Stuart Mill, Vol. XXI, Essays on Equality, Law and Education (1825).

⁹⁹ The resolutions of the 2005 World Summit, which emphasized the responsibility of states to protect the human rights of their own citizens, were restated in United Nations Security Council Resolution 1674 of 2006. For an explanation of the need for and development of this aspirational doctrine, see: International Commission on Intervention and State Sovereignty (ICISS), “The Responsibility to Protect” Report, (Ottawa, 2001).

¹⁰⁰ Latin: roughly, “the right to go to war”. A catchphrase for the various legal bases and criteria that should be met before a state resorts to armed intervention. See also “Just War” theory.
Fundamentally, there is no *jus ad bellum* in human rights laws; human rights pre-suppose a state of peace for efficient application.\(^{101}\) *Jus ad bellum* was traditionally confined to international relations and customary international humanitarian law. Modern examples of humanitarian intervention include the protection of the Iraqi Kurds in 1991, The Rwandan genocide in 1994, Kosovo in 1999, and Libya in 2011. Essentially, international humanitarian law and human right law has converged through the doctrine of Responsibility to Protect\(^{102}\) to encourage (or force) states to protect the rights of their citizens in circumstances of gross human rights violations; a responsibility formerly within the domestic jurisdiction of the state.

3.4. Table of Fundamental Differences

Based on the principle that a picture (or at least a table) says a thousand words, even in academic endeavors, I offer the following simple table to highlight the major differences (and hence the tension) in fundamentals, modalities and application of humanitarian law and human rights law. Read across the table to match the humanitarian law principle or modality with the corresponding human rights principle or modality.

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\(^{101}\) Primarily a state responsibility, enforcement of human rights norms requires competent law enforcement institutions, a functioning judiciary and effective remedies, all of which are difficult to implement during armed conflict, particularly in a failing or failed state.
<table>
<thead>
<tr>
<th>Humanitarian Law Context</th>
<th>Human Rights Law Context</th>
</tr>
</thead>
<tbody>
<tr>
<td>Designed to protect states from each other and civilians from effects of armed conflict</td>
<td>Designed to protect citizens from the abuse of power by the state</td>
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<tr>
<td>Proactive, operational results oriented</td>
<td>Reactive, legal process oriented</td>
</tr>
<tr>
<td>Military operations paradigm</td>
<td>Law enforcement paradigm</td>
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<tr>
<td>Status-based targeting</td>
<td>Conduct-based targeting</td>
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<tr>
<td>Rights and privileges based on status</td>
<td>Rights and privileges based on life</td>
</tr>
<tr>
<td>Provides for <em>jus ad bellum</em></td>
<td>No provision for <em>jus ad bellum</em></td>
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<tr>
<td>Intervention/use of force by state consent</td>
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<tr>
<td>Intervention/use of force by authority of UNSCR</td>
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<tr>
<td>Collective self-defence under UN Charter Article 51</td>
<td>Individual self-defence</td>
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<tr>
<td>Customary International law of self-defence</td>
<td></td>
</tr>
<tr>
<td>Humanitarian Intervention/Responsibility to Protect?</td>
<td>Humanitarian Intervention/Responsibility to Protect?</td>
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<tr>
<td>Non combatant evacuation operations</td>
<td>Non combatant evacuation operations?</td>
</tr>
<tr>
<td>Provides for <em>jus in bello</em></td>
<td>No provision for <em>jus in bello</em></td>
</tr>
<tr>
<td>Comprehensive regime of rules regulating conduct in conflict</td>
<td>No regime for regulating conduct in armed conflict outside law enforcement techniques</td>
</tr>
<tr>
<td>Comprehensive regime of prohibitions and limitations on weapons and munitions</td>
<td>No regime to govern the use of weapons and munitions outside law enforcement techniques</td>
</tr>
</tbody>
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As combatant, frequent opportunities to be deprived of life | No arbitrary deprivation of life

“Captured” | “Arrested”

When captured, status of Prisoner of War (GC III) or Internee (GC IV) | When arrested, status of criminal suspect or security detainee

Detained until hostilities conclude | Detained for length of sentence or until security risk subsides

Military interrogation to collect intelligence | Police questioning to gather evidence

Combatant immunity for lawful acts of violence in armed conflict | No immunity for unprivileged acts of violence

Limited or no access to judicial protection | Complete access to judicial protection

One conventional court – the ICC | Many regional conventional courts

Several UNSCR/treaty based or ad-hoc courts | No ad-hoc courts

This table makes clear the stark differences in potential application of the norms to the same subject matter (persons) in similar context (armed conflict) and the corresponding tension between those norms.

3.5. Summary

In this short descriptive chapter I have surveyed the development of the two streams of law. I did not intend that this brief overview to be a comprehensive recitation of history of the progress of international law but I simply needed to set out the main elements of the regimes to facilitate an understanding of their similarities and differences. Simply stated, the two regimes
evolved at different times for different reasons and thus, when applied to the same subject matter, create tension. My attempts set out below to reduce the tension are in some measure bounded by the historical and practical reality of the historical development. In the next chapter I will describe and analyze the path of convergence that has led the rise of the current tension.
Chapter 4 - Convergence

4.1. Introduction

“In 1945, International Humanitarian Law and Human Rights Law were as distant as Scylla and Charybdis; today they are as inseparable as Castor and Pollux.”

If they are indeed twins, as Robert Kolb suggests, then they are more like De Vito and Schwarzenegger than any normal pairing that comes to mind. In this chapter I will examine the gradual and continuing narrowing of the gap between the two regimes and the commensurate rise in tension. The convergence of the two regimes has proven to be pivotal to the current situation. In the previous chapter, I stated that human rights law is a law of peace, while humanitarian law is a law of war. As we shall see, the gap between the regimes created by design at the outset gradually closed as warfare started to change during the decolonisation era, particularly as internal or non-international conflict became the governing conflict paradigm of the Cold War era. The situation that exists today is partly a result of the convergence of the laws, with human rights law coming to dominate the field of application to non-international armed conflict.

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103 Robert Kolb, Human Rights and Humanitarian Law (2012), Max Planck Institute for Comparative Public Law and International law, Heidelberg and Oxford University Press, www.m pepil.com at 5. Kolb uses Greek mythology to illustrate the point: Scylla (a rocky shoal) and Charybdis (a whirlpool) are generally believed to be the opposite sides of the straight of Messina, between Sicily and Italy. For ancient sailors they were a hazard to navigation, and in modern idiom mean a choice between two potentially dangerous outcomes (“between a rock and a hard place”). Castor and Pollux were the mythical twin sons of Zeus who are reputed to intervene favorably in times of crisis. J. Roberts, “Dioscuri”, Dictionary of the Classical World (Oxford University Press, 2007).

104 See the popular Hollywood comedy “Twins” (Universal Pictures, 1988) starring the very un-twin-like actors Danny De Vito and Arnold Schwarzenegger.
As discussed in the previous chapter, the two regimes were designed at different times, for different reasons, and for different subjects. International humanitarian law and International human rights law have evolved in parallel but offset streams, but with convergence to a common objective – the humane treatment of people. In the case of international humanitarian law the target group is the victims of war, but in International human rights law, the victims of abuse in the exercise of sovereign state authority.

Placing the differences on an imaginary graph, one can see that they operate on differing axes. International humanitarian law occupies the horizontal axis (between equal sovereign states: one of the principles of the Treaty of Westphalia) and international human rights law on the vertical axis (between unequals: the state and its people, or in other words, between the powerful and the powerless). As explained in the previous chapter, both regimes now overlap considerably but were not originally designed to do so. The changing nature of conflict has altered the applicability; it is now necessary to reconcile the object of the two regimes of law with the circumstances of the conflict and the characteristics of the subject.

4.2. The Taxonomy of Convergence

Convergence of any two bodies of law is exceedingly complex and the convergence of international human rights and international humanitarian law is even more so. Thus a description of the theoretical structure of convergence will
clarify the underlying reasons for the tension in the application of the two regimes of law. Theories in this area of research abound, and all possible positions concerning the relationship have been put forward. These can been grouped into three general theories of convergence. For convenience and simplicity, they are titled the separatist theory, the complementarist theory and the integrationist theory. Each theory of convergence has a corresponding method of application. They are named: subsidiary application, *renvoi*, and merger. A description of the taxonomy follows.

The original or separatist theory\(^{105}\) was posited in the era immediately after the inception of the foundational human rights conventions of the 1940s and 1950s, long before the adoption of the Additional Protocols to the Geneva Conventions. The separatist theory held that there were two distinct branches of law and they have different purposes and application. Contemporary theorists feared the politicisation of the law of war by human rights proponents. Thus the legal research of the day was designed to support the notion that there was no complementarity between the two regimes of law. The appearance of large insurgent armies in the decolonisation era and the changing nature of warfare, coupled with the burgeoning popularity of international human rights instruments, rendered the distinct separation of the streams untenable. As this approach has been long overtaken by events, I will not discuss it any further.

The second theory, originating in same era, held that the two regimes of international law were complementary. Despite divergent motives and purposes, and different applications and functions, they could complete each other where gaps in either regime arose. For example, where humanitarian law conventions called for a “fair trial”, one could refer to human rights conventions and jurisprudence to provide the essential elements of justice. In other words, human rights norms could be incorporated to provide granularity to the meaning of the term and provide greater protections to the accused, particularly procedural safeguards and the right to an individual remedy. Dietrich Schindler is one of the frequent commentators of the trends of this period. This is now the predominant position and has been cited in the jurisprudence of international tribunals. One can find also this theory described as “supplementary” in the literature and case law.

The complementary theory led naturally to the third theory of co-habitation, integration. The literature in this area holds that the two regimes of international law have a common thread (the humane treatment of persons) and they are in effect one limb with two branches. Within this theory there are two sub-sections. In the first, one body of law is subject to the other (the vertical approach). Within the vertical approach, various academics have posited

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Conflicts” (1976) 15 Rev.Dr.Mil.Dr.Guerre 393. The traditional position on the relationship between the two streams has been overtaken by events and is no longer maintained.  
107 Ibid.
opposing views – that is, either international humanitarian law is the foundation and human rights is subordinate to it (as espoused by Jean Pictet)\textsuperscript{109}, or vice versa (the position held by Hersch Lauterpact)\textsuperscript{110}.

Alternatively, they apply longitudinally, that is, on a continuum of escalating violence. This theory envisions a horizontal structure where context and circumstance of the conflict define the need. Recent world events are leading to greater scope for application of the latter factor. The predominant position was set out in the International Court of Justice’s Nuclear Weapons Advisory Opinion of 1996. In that opinion, the Court advised that international human rights law applied at all times in armed conflict. When, for example, actions taken by the belligerents in armed conflict were a \textit{prima facie} violation of human rights (such as the deprivation of life under Article 6 of the International Covenant on Civil and Political Rights), the \textit{lex specialis} analysis served to permit application of international humanitarian law to govern the acts.

Similarly, Christine Byron\textsuperscript{111} has examined the application of international humanitarian law by human rights bodies, noting that the current trend in the

\textsuperscript{108} Antonio Cassese is cited in the Wall opinion as referring to this approach as "supplementary". \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)} [2004] ICJ Rep 136 ("The Wall"), paras 101-113.
cases has overturned the view identified by Antonio Cassese.\textsuperscript{112} Cassese theorized that the law was confined to separate compartments (indeed, a view reflecting the belief of Pictet), and that humanitarian law norms governed conflict solely and that human rights norms were subordinate. Writers such as GIAD Draper, Cordula Droge and R. Quentin-Baxter\textsuperscript{113} in particular have examined the parallel application of both bodies of law, concluding that it is impossible to compartmentalize either one.

Only through the passage of time and the observation of state practice combined with the decisions of international courts can the scope and breadth of simultaneous application be determined. Dietrich Schindler describes an intertwining of the nature of conflict; nowadays there is decreasing differentiation between civil war, inter-state war, and insurrection, to the point where human rights and international humanitarian law are applied simultaneously.\textsuperscript{114} The ideal and perhaps inevitable outcome, encouraged by writers such as John Cerrone, is a morality-based approach - the preservation of human dignity and the promotion of human welfare by either stream of law.\textsuperscript{115}

Of course, an academic position often provides no guidance to the states’ parties and belligerents for the effective management of conflict or the proper treatment of detainees. As noted by former ICTY President Theodor Meron, the gap between the norms and the reality in human rights and humanitarian law has always been wide.\textsuperscript{116} The difficulty arises, as it does in all realms of public and private law, in the application of the appropriate body of law to practice.

There are three methods of application that correspond to the foundational theories described above: subsidiary application, \textit{renvoi}, and merger.\textsuperscript{117} Subsidiary application is reflective of the complementary approach: one applies the appropriate body of law to the identified or acknowledged type of armed conflict and then refers to the other body of law to fill gaps in the protections afforded to the victims. Logically, since human rights law is universal, and humanitarian law only applies in armed conflict, human rights law should normally predominate. However, in riots, low-level violence, and terrorist attacks, human rights operates much as the Martens Clause\textsuperscript{118} to inform the standard of protection that would have applied had humanitarian law been predominant.

The second method, \textit{renvoi}, is applied mostly in cases where humanitarian law predominates but there is an overlapping of the norms: a double protection situation. \textit{Renvoi} makes indirect or direct reference to human

\textsuperscript{117} Kolb, \textit{supra}, note 18 at 6-8.
\textsuperscript{118} Preamble, Convention With Respect to the Laws of War on Land, (Hague II), 29 July 1899.
rights norms and standards to inform situations where humanitarian law is inadequate. For example, where humanitarian law is the primary regime governing detention, human rights law may assist the detaining authorities in providing a higher standard of care for the detainees. The reverse process is also used; *renvoi* may be a better and more comprehensive analytical tool for arbitrary deprivation of life cases than a simple *lex specialis* analysis or a collateral damage investigation under the proportionality principle found in humanitarian law.

The last of the three methods, merger, grew out an early 1970s movement to find the best way to apply human rights in times of armed conflict. It continues to this day. Merger envisions a very specialised sub-branch of human rights law that is designed for civil emergencies and non-international armed conflict. Merger has seen a recent revival. Theodor Meron\(^{119}\) describes cases in which human rights courts are creating, by jurisprudence, a merged type of law. The cases arising out of the Turkish emergency against the Kurdish rebels (such as the *Ergi* case)\(^{120}\) and the Russian crisis in Chechnya (the *Isayeva* case)\(^{121}\) have seen a pronounced use of the merger method in the jurisprudence. The most recent cases arising out of conflict in Iraq and Afghanistan are having a critical effect on the ability of security organisations to use force lawfully (by well-established and widely recognised humanitarian law norms) in non-international armed conflict.

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\(^{119}\) Meron, *supra* at note 28.

\(^{120}\) *Ergi v. Turkey*, [1998] 31 EHRR 388.
The most pertinent research in the tension between human rights and laws of war in practical application has come out of Israel. Israel’s problems with controlling battlefield conduct in the Occupied Territories are exactly situated at the point of tension between the two bodies of international law. As a result of their experience in managing the conduct of belligerent parties the Occupied Territories, state security forces in Israel deal with applying human rights norms to armed conflict on a daily basis. Similar observations can and have been made about the conflict in Chechnya, Georgia and Iraq. Authors such as Marco Sassoli, Noam Lubell, William Schabas, and Phillip Alston\(^{122}\) have thoroughly examined these emerging themes and especially the main pressure points in the confluence of the two bodies of law and modern conflict. Those pressure points are: civilian casualties (in particular extra-judicial killing in contemporary campaigns, frequently through the use of deliberate targeting), and detention, including the disposition of non-state actors participating in non-international armed conflict. I will revisit these pressure points in greater detail in chapter 6.

4.3. The Trajectory of Convergence

Arguably, convergence of the two bodies of law is rooted in the foundation of the International Committee of the Red Cross, and the adoption of the first

\(^{121}\) Isayeva v. Russia, [2010] ECtHR App 57950.

international conventions on the treatment of victims of war. Before the late 19th century, medical services for armies in the field were non-existent, or at best rudimentary. In the absence of state-organized medical services, it was usually the local citizens who were left to administer to the sick and wounded and to clean up the battlefield after the armies departed.

The incredible destruction and suffering of the constant European wars of succession and territorial acquisition, exacerbated by advances in the lethality military weapons and size of standing armies, coupled with advances in science, economics, politics and social consciousness had given rise to a nascent humanitarian movement. The existing Laws of War did not provide sufficient protection for victims of conflict or guidance to the use of force in the face of these modernizing features of warfare.

We can detect embryonic convergence in the work of another influential figure contemporaneous to the international Committee of the Red Cross and the First Geneva Convention. One de Martens, a professor of International Law at the Imperial University of St. Petersburg, was the author of the major 1882 work “International Law of Civilized Nations”. De Martens most notably was the drafter of the preamble to the 1899 Hague Convention II on the Laws and Customs of extrajudicial, summary or arbitrary executions⁴, Addendum 6, Philip Alston, Study on Targeted Killings (2010) Human Rights Council, A/HRC/14/24/Add.6.
⁴ Geneva Convention for the Amelioration of the Condition of the Wounded of Armies in the Field, 1864.
War. That preamble, now widely known as the Martens Clause, powerfully invoked humanitarian principles. It states in part:

“… Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.”125

The Martens Clause was important enough to be paraphrased and included in all of the four Geneva Conventions of 1949, and in a truncated form in Additional Protocol II. The current (that is, as of 1977) wording says:

“Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principle of humanity and the dictates of the public conscience”.126

While by no means a definitive human rights principle by current standards, we can see, within the intent of the Martens Clause and its successors, the first glimmers of a human rights incursion into international humanitarian law.

A significant event in the convergence in international law was the International Conference on Human Rights in 1968. Convened by the United Nations in Tehran as part of the 1968 International Year of Human Rights, the

125 Laws and Customs of Warfare on Land (Hague II) 1899, Preamble.
126 Preamble to Protocol Additional II to the 1949 Geneva Conventions (Non-International Armed Conflicts) 1977.
conference issued a resolution\(^{127}\) urging respect for human rights in armed conflict, noting that the codification of the laws of war started at the Hague Convention was incomplete. More importantly, the conference noted that the 1949 Geneva Conventions were insufficiently broad to encompass the changing nature of conflict.\(^{128}\) Specifically, the resolution recommended that persons engaged in conflict against racist, oppressive or colonial regimes should be afforded recognition and treatment such as that afforded prisoners of war or political prisoners.\(^{129}\) The principles set out in the Tehran Conference resolution were subsequently codified a decade later in the 1977 Protocols Additional to the 1949 Geneva Conventions, further closing the gap between humanitarian and human rights principles in the laws of war.

One of the critical outcomes of the Tehran Conference and a clear example of convergence was the call upon Israel to apply both the International Conventions on Civil and Political Rights and the Geneva Conventions to the occupation of Palestine.\(^{130}\) Further evidence of the increasing application of human rights norms came in the form of United Nations Resolution 2444 of 1968. Resolution 2444 confirmed a resolution made by the International Committee of

\(^{127}\) *Respect for Human Rights in Armed Conflicts*, United Nations General Assembly Resolution 2444 (XXIII) 19 December 1968.


\(^{129}\) *Respect for Human Rights in Armed Conflicts, supra.* Security forces face the same predicament today with respect to the status of unprivileged belligerents and members of trans-national armed groups.

the Red Cross that arose out of their 1968 Vienna Conference.\textsuperscript{131} In Resolution 2444, the Secretary General urged the member states to give effect the observance of human rights during times of armed conflict.\textsuperscript{132}

Similarly, following the jurisprudence of the Nuclear Weapons opinion,\textsuperscript{133} the International Court of Justice stated in the Wall case\textsuperscript{134} that “the protection offered by human rights conventions does not cease in cases of armed conflict, save through derogation under Article 4 of the International Convention on Civil and Political Rights”.\textsuperscript{135} In the same year, the UN Human Rights Committee affirmed that human rights law does apply in times of armed conflict, at the same time as humanitarian law; they are complementary, not mutually exclusive.\textsuperscript{136}

The end of the Cold War saw the next major shift in the geo-political forces moderating peace and security. The controlling powers of the East and West blocs experienced a reduction in their influence on world events and control of proxy states. Regional and ethnic tension rose again, in an eerie replay of the de-colonization era. The shift from the major alignments of the Cold War, with the expectation of a resort to international armed conflict under the rubric of international humanitarian law disappeared. In its place, evolving regional crises presaged a revival of human rights-governed conflict (internal, with almost

\begin{footnotes}
\footnote{131} Green, \textit{supra} note 58 at 47.
\footnote{132} United Nations General Assembly Res. 2444 (XXIII) 1968.
\footnote{133} \textit{Legality of the Threat or Use of Nuclear Weapons}, Advisory Opinion (1996) I.C.J. Reports 226.
\footnote{134} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} Advisory Opinion (2004) I.C.J. Reports 136.
\footnote{135} \textit{Ibid.}, at para. 104.
\end{footnotes}
exclusively civilian victims) and the concomitant resort to International human
dissolution of Yugoslavia was the index conflict for the new paradigm.

Convergence was further affirmed by the establishment of *ad hoc*
international courts, such as the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda. In a leading case, *Tadic*, the Yugoslavia Tribunal determined that under customary international law the rules of humanitarian law are essentially the same in both international and non-international armed conflict, and that the majority of the rules apply to both types of conflict. This advance in the regime of protection for victims of non-international conflict of course also risks causing confusion with the application of human rights rules - which may enjoy concurrent jurisdiction in the conflict.

The establishment by convention of the permanent International Criminal Court furthered the convergence of human rights and humanitarian norms by conflating war crimes, crimes of humanity and genocide into a single body of

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138 An *ad hoc* tribunal, established in 1994 in Tanzania under the authority of United Nations Security Council Resolution 955 to hear cases of war crimes committed during the Rwandan Civil War.
139 *Prosecutor v. Tadic* (Opinion and Judgment) ICTY-94-1 (7 May 1997).
140 Norm Lubell, *supra* note 7 at 747.
overlapping offences, albeit with a narrower scope than domestic or regional human rights instruments.\textsuperscript{142}

Regional human rights courts and tribunals have also played a leading role in convergence. The 1998 \textit{Ergi} case\textsuperscript{143} is of particular interest to me and to the parties to the European Convention of Human Rights\textsuperscript{144} The case is a very good example of the maturing relationship between humanitarian and human rights norms. It is also a good indicator of the burgeoning primacy of the application of human rights law to internal armed conflict and an instructive exercise in the technique of “merger”.\textsuperscript{145} While I will delve into the case in greater detail in chapter 5, I will introduce the incident in general terms here as an example of norm convergence.

The facts are straightforward. In 1993 a security patrol in southeastern Turkey was ambushed by the PKK (the Worker’s Party of Kurdistan) insurgents who are fighting for an independent Kurdish state. The Turkish patrol fired back at the PKK ambushers and in doing so killed Ms. Haava Ergi, a citizen of the village that was the site of the ambush. The Ergi family brought the case to the

\begin{footnotesize}
\footnotetext[142]{See \textit{ibid.}, Article 8.2 (e) and (f). There is incomplete overlap between the offences in the International Criminal Court statute and enumerated human rights. For example, the International Criminal Court statute protects property rights and includes protection from violence against the person, including sex crimes, but it does not protect political rights.}
\footnotetext[143]{\textit{Ergi v. Turkey}, 31 EHRR (1998) at 388.}
\footnotetext[144]{1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").}
\footnotetext[145]{I discussed the technique of merger in chapter 1. In essence, merger envisions a very specialized sub-branch of human rights law that is designed for civil emergencies and non-international armed conflict and utilizes the principles of humanitarian law to support human rights application. See Meron, \textit{supra} at note 28.}
\end{footnotesize}
European Human Rights Commission on the grounds that the Turkish authorities had violated, among others, Sections 2 and 13 of the European Convention of Human Rights.\(^{146}\) The complaint accused Turkey of failing to provide a secure environment, thereby violating Ms. Ergi’s right to life, and failing to properly investigate the incident. The Court found that the Turkish authorities had failed to protect Ms Ergi’s right to life due to defects in the planning and execution of the security operation, which, coupled with the lack of proper investigation, resulted in a violation of section 2 the Convention.

The Ergi family complained that the Turkish authorities failed to properly plan and execute the mission and this lack of preparation resulted in Ms Ergi’s death. The Court stated that the state had an obligation to take *all reasonable precautions to avoid, and at least minimize incidental loss of civilian life* (emphasis added).\(^{147}\) In applying this standard to domestic security operations, the Court quoted the standard of care for precautions taken when civilians or civilian objects may be collateral damage directly from Article 57 of Additional Protocol I of the 1949 Geneva Conventions.\(^{148}\)

Not only did the Court apply standards found in international humanitarian law they also applied the terms of a convention that did not strictly apply to an internal conflict in a sovereign state. And further, the Court adapted the text of

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\(^{146}\) European Convention, *supra*, note 144, SS.2 and S.13.

\(^{147}\) Ergi, *supra*, note 143 at 431.

\(^{148}\) Additional Protocol I, Article 57. The Court quoted the Additional Protocol I precautions word for word.
Article 57, raising the standard for internal security operations to a stricter level. The Court stated that, in finding that the state had deprived a civilian of the right to life, it must consider whether the security forces planned or conducted the operation in such a manner to minimize to the greatest extent possible any risk to civilians (emphasis added).\textsuperscript{149} Whether the Ergi case has changed the proportionality test for the application of human rights standards to domestic security operations remains an open question, as does the question whether the regional human rights courts will continue the trajectory of expansion into areas once the sole domain of international humanitarian law.

The Ergi case perfectly illustrates the difficulty in determining the level of force to apply for internal security operations that resemble armed conflict, while also highlighting the danger in using troops trained for general-purpose combat in law enforcement roles.\textsuperscript{150} The former – law enforcement, governed as it is by human rights principles, requires the application of minimum force. The latter, armed conflict, is governed by the principle of military necessity, requires the application of optimum force, a level of force that is necessary to overwhelm the enemy while reducing the risk to your own troops. The two standards are difficult to reconcile legally, but the distinction is pivotal to imagining any use of force framework to reduce the tension. Due to the extreme risk and burden of restraint placed on security forces, law enforcement techniques are almost impossible to apply in internal conflicts that, while defined as being within the realm of law

\textsuperscript{149} Ergi, \textit{supra} note 143 at 431.
enforcement, actually resemble combat operations in their breadth, lethality and rates of civilian casualties and property damage.

The *Ergi* case was a domestic operations situation where human rights law dominated and humanitarian law was subordinated. In another controversial approach to claiming jurisdiction by applying the Europe Convention extraterritorially, the European Court of Human Rights has taken the position that sovereignty is no longer an absolute bar to responsibility for misconduct by one of its parties in another state that is not a party to the Convention. The jurisprudence hitherto dealt with situations of belligerent occupation in a domestic setting.\(^\text{151}\)

Further examples in the progressive expansion of human rights norms into situations of armed conflict, coupled with the debut of extraterritorial application arose during the United Kingdom’s mission in Iraq. In the *Al-Skeini* and *Al-Jedda* cases\(^\text{152}\), Iraqi citizens were killed by the acts of British Forces operating in Basra, Iraq, during the second Gulf War. The British Forces applied the standards of international humanitarian law to the conduct of its operations as it was in a condition of international armed conflict with the state of Iraq. The United Kingdom is a party to the European Convention. Iraq is not, and the

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\(^{151}\) See *Loizidou v. Turkey (Judgment)* 18 December 1996, concerning refugee property rights. Turkey was held have “effective control” of northern Cyprus due to its military control and occupation since the Turkish invasion of the northern portion of the island in 1974.

British forces were operating on Iraqi territory under the authority of both United Nations Security Council resolutions and host nation consent; they were not in a situation of belligerent occupation as defined in the 4th Geneva Convention.

Nevertheless, the House of Lords found that, while the British Forces did not have effective control over the territory of Iraq, it did exercise control over the individuals concerned, therefore invoking the extra-territoriality of the Convention. Thus in these cases human rights norms trumped humanitarian law, although humanitarian law could arguably be the primary governing regime for the conduct of the British forces. Decisions such as these should cause grave concern to states taking part in hostile interventions under asymmetric warfare paradigm, simply because of the uncertainty in applying the proper legal regime and unpredictability of outcome.

Since the end of the Cold War, there has been significant change to the nature of armed conflict. The controlling influence of the major powers has waned; the world seems more fragmented than anytime in the 20th Century. As explained in 1993 by Hans Enzenberger in his book Civil Wars and still true 20 years later:

“The most obvious sign to the end of the bi-polar world are the twenty or thirty civil wars being waged openly around the globe. We cannot even be sure of their number, since chaos is unaccountable. (...) What remains is an armed mob. All the self-proclaimed armies of liberation, people’s movements and fronts have degenerated into marauding bands, indistinguishable from their opponents (...) No plan binds
them together other than a strategy (which hardly merits the name) of plunder death and destruction” 153

Writing prior to 1993, Enzenberger did not foresee the results of the incredibly violent non-state conflicts of the first two decades of the 21st Century. Recent conflict has in some measure come to resemble the liberation movements of the 1960s, but with a trans-national tenor, strategic effect and a greater level of sophistication. Witness the current conditions of conflict in, for example, Libya, Egypt and Syria – the consequences of the so-called “Arab Spring”; the rise of ISIL, and the debates swirling about the legality and efficacy of international military intervention.

4.4. Summary

International humanitarian law continues to operate in its well established and widely known constituent parts; the law of Geneva, which governs the treatment of victims of conflict, and the law of The Hague, which governs the means and methods of warfare. However, due to the changing nature of warfare, the strict application of this body of law to current conflicts and the handling of the subjects of those conflicts remain problematic. 154 Concurrently, human rights law continues to expand to occupy the field formerly confined to the laws of war. To borrow a term from medicine, humanitarian law and human rights laws suffer “co-morbidity” 155 in their current tense relationship. Like overlapping

154 Omar Khadr is a startling example of the difficulty in managing detainees.
155 Defined as “the simultaneous presence of two or more morbid conditions or diseases in the same patient.” (2002) McGraw-Hill Concise Dictionary of Modern Medicine.
diseases that defy easy diagnosis and frustrate effective treatment, symptoms of problems in one body of law may reflect a chronic illness in the other, and vice versa. This effect makes diagnosis of the true problem difficult and the regimen of treatment uncertain. To extend the comparison, modern conflict defies easy categorization and therefore identification of the applicable legal regime.

In 2006, John Cerone said “whether and to what extent states are bound by human rights obligations with respect to the conduct of their armed force abroad in armed conflict, occupation and peace operations is one of the most controversial and charged issues in current human rights discourse”. 156 This statement was accurate then and is even more pertinent now in the light of the most recent developments in the nature of conflict and international military intervention. It is clear from the foregoing examination of the nature of asymmetric conflict, the jurisprudence and states’ practice that the “whether” has been firmly established. In the next chapter, I will examine the “to what extent” and the effect of the mixed application of the two bodies of law have had on the maintenance of peace and human rights.

Part 2 - Reducing the Tension

Chapter 5 - Managing the Convergence

5.1. Introduction


As discussed previously, international human rights law and international humanitarian law have been converging, and gradually entering a state of competition and thus creating tension, since the 1950s. Accelerating change in the nature of warfare since the inter-state conflicts of the mid-20th century is one catalyst in the convergence. States participating in contemporary conflict have faced unexpected legal consequences, derived from human rights jurisprudence, in what they thought to be matters governed by traditional humanitarian law. Advocates of humanitarian law primacy complain that the imposition of human rights norms in conditions of armed conflict places unnecessary restrictions on the freedom of state to pursue national (or United Nations mandated) military aims. They observe that humanitarian law provides a rigorous and comprehensive set of conditions that are pragmatic and better suited to the

157 “Are human rights and IHL related? Is there an affiliation, a mutual attraction, between these two branches of international law? In other words, are they living in symbiosis penetrating each other mutually? Or else, are they forming an antithetical couple?” (trans) Michel-Cyr Djiena Wembou and Douada Fall, Le Droit International Humanitaire: Théories et Réalités Africaines (2000).
crises encountered in combat. 158 Conversely, human rights advocates suggest that international human rights provide a higher level of individual protections to civilians who fell victim to the vagaries of armed conflict. 159 In short, many assumptions about the governance of conflict have been overturned in the past three decades. I am not so much interested in who is right, but rather what is the best way to achieve a lawful resolution to situations of armed conflict while offering the best protection to the victims.

The absence of clarity and certainty in law can have significant impact on the conduct of enforcement operations, whether they are domestic, non-international, “intranational” and international. Conducting operations in a case of asymmetric warfare is a perfect storm in the application of theory, convention and policy. There are gaps and gray areas in the law. States fill gaps in law by drafting policy, and experience has also shown that “making stuff up” in the interests of gap filling can have unintended and frequently adverse legal consequences. Questions remain. How does a state manage the convergence? How do state security forces, either military or law enforcement, know under which legal regime they are operating, and further, what are the consequences of getting it wrong?

Past efforts by states to manage the convergence and conflict of the two regimes have largely failed. The responses to the tension created by the convergence have been varied, inconsistent and generally unsatisfactory. In this chapter I shall examine the various positions taken by courts, international bodies and academics in the face of emerging international human rights with particular focus on the methodology of managing the tension between the regimes. In particular, I shall examine a series of cases emanating from the military crises in Afghanistan and Iraq, wherein a new impetus for the primacy of human rights advocacy has dramatically altered State assumptions about the legitimacy of the application of force and the effectiveness of UN Security Council Resolutions.

5.2. Early Attempts at Convergence Management

From the introduction of the 1948 Universal Declaration on Human Rights and its derivative and subordinate conventions, there were two opposing positions on the inception of international human rights and the potential incursion into the arena of the law of war (“Geneva Law”). The traditional position held the view that there were two distinct branches of law; they were completely unrelated, separate entities. The reasons are both historical and institutional. Historically, the law of war held the exclusive domain in the execution of state military power. Human rights, on the other hand, had always been domestic law, with political and societal overtones – it “emanated

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from the struggle of rights-claimants”. The notion of human rights as an international concept was foreign to the practice of international relations. There was no body of customary international human rights law; conversely, the law of war had centuries of custom and tradition and a large body of academic theory. Intellectually, the traditionalists could not conceive an historical connection between human rights and what became to be known as humanitarian law.

There were institutional barriers to any connectivity as well. In the aftermath of the horrors of the Second World War, and with the failure of the League of Nations foremost in their minds, the drafters of the United Nations Charter eliminated the resort to aggression as a means of resolving states’ differences. The Charter opens with a prohibition of war and then proceeds through the subsequent chapters to provide a framework for the peaceful resolution of crises. Thus the aspirational paradigm was to intended to be a permanent state of peace, not the constant state of conflict experienced (at least in Europe) throughout the previous 70 years. This attitude can be found in the wording of the transcript of the Third Plenary Session of the UNGA: “…in a peaceful world, it was essential to ensure respect for human rights”.

Similarly, in 1949 the International Law Commission decided to omit any discussion of the law of war on the agenda for the codification of international law.

161 The most important of which for the purposes of this thesis is the 1966 International Covenant on Civil and Political Rights (ICCPR).
law. The nascent United Nations Charter having just outlawed aggression as a method of resolving disputes,\textsuperscript{164} at least for the original parties of the Charter, optimistic delegates thought that the memory of the horrors of the Second World War would deter any resort to aggression. Thus there would be no apparent need to include reference to the laws of war.

As Hersch Lauterpact explains,\textsuperscript{165} the post-war Geneva Conference simultaneously revised the three 1929 Geneva Conventions as well as adding the Fourth Geneva Convention (Protection of Civilians). Motivated by the terrible abuses so recently suffered by populations of occupied territories, the Fourth Geneva Convention incorporated protections for civilians under belligerent occupation, features hitherto absent from the existing Conventions: quasi-human rights principles. This was an unusual situation. While on one hand an international conference dedicated to developing and codifying international law was apparently ignoring the law of war, on the other hand the International Red Cross, (the guardian of the laws of war), was considering the inclusion of human rights principles into humanitarian law. As will be discussed in the next chapter, the process has come full circle and the International Red Cross is now advocating a revival of humanitarian law principles.

\textsuperscript{163} United Nations General Assembly, Third Plenary Session, 181st meeting, (1948) p.886.
\textsuperscript{164} 1945 United Nations Charter, s. 2(4).
The outcome of the contemporaneous conferences – the Universal Declaration and the 1949 Geneva Conventions – set international law on a direct path to convergence and the tension experienced today. In the words of Max Petitpierre, the president of the human rights conference:

“It is, we think, interesting to compare the Declaration with the Geneva Conventions. Our texts are based on certain of the fundamental rights proclaimed in it – respect for the human person, protection against torture and against cruel, inhuman or degrading punishment of treatment. (…) The Universal Declaration of the Rights of Man and the Geneva Conventions are both derived from the one and the same ideal…” (trans)166

Robert Kolb points out,167 that this was a seminal step in the course of the development for merger of the laws, bringing the two branches closer to each other and consequently giving momentum to the “complementarian” school of thought. Of course, in 1949 few people could foresee the rise of non-state actors and the trans-national conflict of the late 20th century and the concomitant emergence of asymmetric warfare as practiced today.

However, humanitarian law proponents feared the encroachment into the law of war by human rights theorists. Thus the legal research was drafted with view to show that there was no complementarity between the streams. In other words, the “separate stream” theorists took the position that there was no tension; emerging human rights law had no role in governing state conduct in

armed conflict. Since the United Nations intended that peace would be the new paradigm, the Universal Declaration (and its derivative human rights instruments) was intended to apply in peacetime.\textsuperscript{168} Similarly, the laws of war did not apply in times of peace. In the words of Grotius: “\textit{inter Pacem et Belli nihil est medium}”\textsuperscript{169}, which is a position tenable only in an era when war and peace were strictly and distinctly defined in time and space.\textsuperscript{170} The separate stream attitude persisted; indeed the UN maintained that human rights treaties were aimed at preventing war, and not regulating conduct in war.\textsuperscript{171} In 1969 the UN Secretary General stated that “the Second World War gave conclusive proof of the close relationship that exists between the outrageous behaviour of a Government towards it own citizens and aggression against other states, thus, respect for human rights and the maintenance of peace”.\textsuperscript{172}

Human rights have little capacity to govern conduct that surpasses the transition point on the continuum of violence from relative peace to full-blown armed conflict. However, the transition has seldom been stark and is even less


\textsuperscript{168} Cordula Droeg, note 162 at 314.

\textsuperscript{169} “Between war and peace there is no middle ground”, Hugo Grotius, \textit{De Jure Belli et Pacis, Libri Tres}, William Whewell, trans, (Cambridge 1878). Harvard University Edition, 1979. This aphorism was derived from Cicero, \textit{Philippic VIII}. Now we know that there is a huge amount of middle ground between peace and war; in fact contemporary conflict is all middle ground.

\textsuperscript{170} Generally (there are always exceptions) human rights law applies at all times to all people; humanitarian law applies to certain groups of people in defined circumstances of armed conflict past a certain threshold of violence. See also Alison Duxbury, \textit{Drawing Lines in the Sand – Characterizing Conflicts for the Purpose of Teaching International Humanitarian Law} (2007) 8 Melb. J. Int’l L. 259 at 268 - 271.


clear now. As noted in the chapter on the nature of warfare above, contemporary conflict is neither war nor peace. It is a constant grind of medium to low level conflict that attracts the jurisdiction of both regimes. Thus the changing nature of conflict and expanding jurisprudence have overtaken the position of the separate stream theorists over the past six decades. However, they are worth examining as evolutionary antecedents to the current state of convergence.

As an example of the polarizing nature of norm convergence, consider the brief but deadly conflict between the United Kingdom and Argentina over the Falkland Islands or the Malvinas, as Argentina knew them. One of the less-desirable features of combatant status is the opportunity to be targeted anywhere and anytime by your opponent, who, as a state party in an international armed conflict, by the principle of reciprocity, bears the same risk. Thus a member of a state military can be attacked even while sleeping at a leave centre outside the zone of conflict. This concept is not well understood in the public realm. Recall the public outcry surrounding the sinking of the Argentine battleship General Belgrano by the British Forces during the aforementioned Falklands conflict. To observers schooled in humanitarian law, this was a lawful attack – a warship of a state party, on the high seas, during an international armed conflict, sunk by the opposing state party. It doesn’t matter what the General Belgrano was doing at the time: status-based targeting does not need to consider the war-like activity of the opponent or object, or the threat he or she (or it) poses. Even in the fog of war, it doesn’t get much clearer.
Now consider the sinking of the General Belgrano from a human rights perspective. The battleship, albeit fully crewed and armed, posed no immediate threat to the British forces engaged in regaining control of the Falklands. Ignore for the moment the *lex specialis* analysis. Under the absolute necessity requirement established in human rights norms, the General Belgrano should have been attacked in an escalatory fashion through progressive warnings and escalation from non-lethal force up to deadly force, starting with an offer to surrender. Being attacked by a submarine and without warning, the captain and crew of the General Belgrano did not have the opportunity to surrender. The kill/capture priority was followed. But was it necessary? Where all peaceful means to force submission exhausted? Could the British forces have reversed the priority and attempted capture of the warship? In the history of naval warfare, submarines have captured warships. I realise that this perspective sounds absurd to humanitarian law practitioners, but the reality of modern conflict is that all acts of state violence, no matter how lawful or justified, will be reviewed through a human rights lens.

5.3. The Role of Derogation

One of the clearest acknowledgements of the relationship can be found in the political act of derogation. Simply put, derogation is the connective tissue between human rights and humanitarian law. Human rights instruments carve out
limited derogation from norms for times of crisis. The European Convention of Human Rights (ECHR), the American Charter of Human Rights (ACHR) and the Convention against Torture (CAT) all specifically mention a “state of war” in the relevant clauses. Interestingly, the International Covenant on Civil and Political Rights (ICCPR) makes no mention of war or even armed conflict in its derogation clause. Rather, the term “national emergency” is used, signifying the primacy of a domestic law enforcement paradigm envisioned by the ICCPR and reflective of its derivation from of the peace-oriented Universal Declaration.

Derogation can be both helpful and complicating. Helpful, in that once a state declares derogation for certain rights in times of national emergency and giving notice to participating belligerents, it is clearly communicating to oversight bodies the desire apply another set of norms. For the present discussion, the most frequent reason for a state to derogate is the desire to have their security operations viewed through the lens of humanitarian law. Of course, there must be a state of armed conflict to accommodate potential violations of the derogable rights. This type of derogation can only happen once the level of violence and control of territory has passed the domestic disturbance threshold into a situation of non-international armed conflict.

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173 Article 15 of the *European Convention* (ECHR), Article 27 of the *American Convention on Human Rights* (ACHR), Article 2 of the *Convention Against Torture* (CAT) and Article 4 of the *International Covenant on Civil and Political Rights* (ICCPR).
174 Cordula Droege, note 162 at 318.
Derogation is also complicated because it does not completely suspend the relevant right; there are limits. Derogation is only permissible to the extent allowed by the circumstances of the emergency or crisis, and even then the actions of the claiming state must be consistent with the state’s obligations under other international law conventions to which they are a party. Of course, the limitation also applies to Customary International Law. In other words, derogation is not a carte blanche to breach human rights, even in extremis. Further complicating the analysis, states seldom acknowledge the existence of armed conflicts on their territory; sovereignty still informs states’ unwillingness to allow international oversight in internal security matters. As will be discussed below, declaring or not declaring derogation during crises may be critical to the finding of states’ responsibility by the human rights courts. Due to its rarity, I will not rely on derogation from fundamental norms in my proposed framework.

5.4. The Efficacy of the lex specialis technique

Faced with the inevitability of convergence, the organs of international law needed a technique to manage the tension created by the apparent conflict of norms. This part of the chapter focuses on the norm-reconciling maxim lex specialis derogat generali, the “lynchpin of the contemporary understanding of the articulation between international humanitarian law and human rights law”.

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176 Ibid.
177 "Among agreements which are equal, preference should be given to that which is most specific and approaches most nearly the subject in hand, for special provisions are ordinarily more effective that those in general" (trans), Hugo Grotius, De Jure Belli ac Pacis, bk II, s. XXIX.
178 Jean d’Aspremont and Elodie Tranchez, The Quest for a Non-confictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis
In a more orderly world, international humanitarian law would be confined to international armed conflict *simply.* As such there would be no need to analyse the overlap between that law and human rights law. In that unattainable world, states engaged in armed conflict would only need to be concerned with their conduct *vis à vis* the combatants of their conflict opponent and the citizens of the belligerent territory the occupy. The belligerent parties did not need to concern themselves with their conduct being subject to human rights norms; international humanitarian law pre-empted the application of the former law *vis à vis* the citizens of the state. As discussed above, that was the original assumption when human rights law emerged and some states still maintain that position. However, events, conventions and jurisprudence have overtaken that paradigm.

In his “Belt and Suspenders” article, William Schabas set out the two essential theories underpinning the *lex specialis* approach. As he indicates, the starting point of both theories requires one to accept that both streams of law apply simultaneously in conflict; tension exists only in the incompatibility of

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179 For example, the government of Israel holds that international humanitarian law governs their security operations in the West Bank. Specifically, and in a position supported in the Wall advisory opinion, the West Bank, Gaza and the Golan Heights are “Occupied Territories” and not part of the State of Israel. Thus the 4th Geneva Convention governs the conduct of the Israeli security forces present in the areas of military occupation.

Of course, the analysis is unnecessary if there is no conflict of norms; other analytical tools can be used to determine the priority of regimes in those cases. The International Court of Justice examined the *lex specialis* doctrine in a trilogy of the seminal cases.

The first is an advisory opinion on the use of nuclear weapons.\(^\text{182}\) The opinion analysed two conflicting norms: the right against “arbitrary deprivation” of the life as set out in Article 6(1) of the International Covenant on Civil and Political Rights through the use of nuclear weapons, against the legality of the use of the same weapons under the customary norms of international humanitarian law. It is settled law that the use of weapons that cannot distinguish between and civilian and military objectives and also weapons that cause unnecessary suffering are prohibited. The court could not reach a definitive conclusion on the legality of the use nuclear weapons, except to hint that their use might be acceptable as a last resort (under the rubric of self-defence) when the states’ very existence as at stake.\(^\text{183}\) I agree with the position taken by Schabas: the Court did not really state clearly how human rights may operate during times of armed conflict. It merely showed how arbitrary deprivation of life may be interpreted through the lens of humanitarian law.\(^\text{184}\)


\(^{182}\) *Legality of the Threat or Use of Nuclear Weapons, supra.*

\(^{183}\) Ibid., at para. 97.

\(^{184}\) Schabas, *supra* note 180 at 596.
However, the Court’s analysis served to set the stage, eight years later, for another pivotal case: the Advisory Opinion on the wall erected by the government of Israel to enclose the occupied territories of Israel.\textsuperscript{185} In the \textit{Wall} case, the Court drew back from absolute pronouncements in the \textit{Nuclear Weapons} case. In the oft-quoted passage\textsuperscript{186} the Court indicated that with respect to the choice of the application of human rights or the laws of armed conflict, it was either one, the other, or both, depending on the circumstances and the context. The conclusion was that the \textit{lex specialis} analysis did not call for a complete displacement of human rights law; instead, it was a re-iteration of the principle that human rights norms must be interpreted in light of humanitarian law.

In 2005 the International Court of Justice had another opportunity to express the \textit{lex specialis} analysis, this time in the \textit{DRC v. Uganda} case,\textsuperscript{187} the third case in the trilogy. The international law norms in tension in this case were, on one hand, the duties and responsibilities of the state as an Occupying Power under Article 43 of the 1907 Hague Regulations, and on the other hand the duties and responsibilities of the state under the relevant human right instruments. Again the Court re-iterated its position in the \textit{Wall} case: as an occupier, Uganda was responsible for the acts and omissions of its own forces in the Democratic Republic of Congo including the failure to prevent human rights

\textsuperscript{185} \textit{Legal Consequences of the Construction of a Wall in the Occupied Territory}, note 181.
\textsuperscript{186} \textit{Ibid.}, at para 131.
violations by other groups including rebels present in the territory. The Court held that Uganda was bound by those rules of both human rights law and humanitarian law “which are relevant and applicable in the circumstances”.  

Thus, without invoking *lex specialis*, the Court supported the continuing convergence of the two legal regimes. In this case it placed, in effect, a double burden on the Ugandan government to control its own and other belligerents’ unlawful activities – over which it had no effective control - in the part of the Congo under occupation. This outcome could not be satisfactory to any stakeholder in the crisis. Can the Ugandan security forces be expected to contemplate, analyse and decide which legal regime applies, based on the situation of the instant? This would appear to impose an incredibly difficult burden and an unattainable standard on the competence of the security forces and lawful control of a violent insurgency.

Another way to look at the *lex specialis* analysis revolves around the two possible outcomes. The first is that of “regime displacement”, in which one specific covenant or treaty displaces the opposing covenant or treaty. This is a method that bears similarities to the act of derogation. It is however, a complete derogation of a covenant and not just a particular right. If properly applied, regime displacement could provide a single source of law to govern the conflict in question. Largely overtaken by progress in the interpretation of norms and the evolution of conflict in the last few decades, this is an “all or nothing” approach,

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and as with other “all or nothing” approaches has limited efficacy in the resolution of norm conflict in international law.

“Rule displacement” is the other possible lex specialis solution. Rule displacement is more common than regime displacement and is self-explanatory. In this approach only the specific rule in question is replaced by the rule of the other regime, rather than displacing the entire covenant. For example, consider the following scenario in an armed conflict. A civilian (perhaps a terrorist or insurgent) is killed by a member of the state security forces. This killing could be viewed as an arbitrary deprivation of life in violation of Article 6(1) of the International Covenant on Civil and Political Rights. Alternatively, it could be viewed as a legitimate act of targeting under the rules governing attacks on civilians and civilian objectives found in Articles 48 to 57 of Additional Protocol I to the Geneva Conventions, if indeed the Additional Protocols apply. Which legal regime predominates? What are the consequences for the officials of the state security forces? This and similar situations of particular tension in contemporary conflict will be discussed in the next chapter.

But does it work? The lex specialis approach has been criticised by contemporary academics. Consider the position taken by Iain Scobbie. Can the analysis truly provide a “coherent and principled solution to potential conflicts between norms?” A cumulative reading of the trilogy of International Court of

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Justice cases discussed above produces a conclusion that there are three possible outcomes and, in any event, the two regimes were truly complementary. If that is the case, then the two regimes are not in tension and the *lex specialis* analysis is unnecessary. Nowhere did the Court actually compare and contrast the conflicting norms and assess them against an objective standard.

Therein lies the problem. Iain Scobbie states that the Court could have been a bit more specific in its discussion of the mechanics of *lex specialis* analysis. Without specifics, it is difficult to assess the applicability of the *lex specialis* principle to understand and apply the relationship between the two regimes. The *lex specialis* doctrine has its origins in domestic law with defined principles, established fora and settled standards; further, there is nothing to indicate which of the competing norms is “special” and which is “general” between the two regimes. As a context-dependant rather than a legal principle-dependant method, the *lex specialis* doctrine will unlikely produce clear and useable decision of general application in a legal system that lacks a hierarchy of norms, defined relationships and incidentally suffers from increasing fragmentation. In other words, similar norm conflicts in different contexts will produce different results. Inconsistent results and a lack of clarity are anathema to fundamental legal principles and therefore not the least bit helpful to states

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191 Cordula Droege, *supra* note 162 at 339.
wrestling with the application of international law in contemporary conflict. In summary, one could say that bad wars make for bad laws.

Recalling the seminal passage in the Wall case cited in the introduction to this thesis, there were three possible circumstances: in some cases only human rights apply, in other cases only humanitarian law applies and, finally, in some cases they both apply. Therefore, technically speaking, only the third circumstance requires a *lex specialis* analysis, assuming that the state accepts human rights law as *lex generalis*. Given the nature of contemporary warfare, it is difficult to imagine a circumstance (saving a declared derogation under any of the relevant human rights instruments), where humanitarian law solely applies to govern the conduct of the participants. So, if one accepts the notion that both legal regimes are perfectly complementary, one is left with the inevitable conclusion that the *lex specialis* analysis is not required in the effort to resolve the tension between human rights law and humanitarian law. In fact, organisations such as the United Nations Human Rights Committee are moving away from the *lex specialis* doctrine and relying instead on complementarity.\(^{193}\)

Schabas calls the subsidiary application theory of regime application the “belt and suspenders” approach. Espoused by the Human Rights Committee of the United Nations, this theory holds that the two regimes are additive in nature.\(^{194}\) Thus, in the consideration of certain course of action, both competing

\(^{193}\) Scobie, *supra* note 189 at 454.
\(^{194}\) Schabas, *supra* note 180 at 593.
norms, or the norm that offers the best protection to the subject of the security effort, shall be applied. Referring to the *International Covenant on Civil and Political Rights*, the Human Rights Committee stated, in 2004:

“As implied in General Comment 29, 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 especially relevant of the purposes of interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”.

Interestingly, despite the inconsistent record and the academic criticism of the application of the analysis, the Human Rights Committee has not given up on the doctrine of *lex specialis*. As recently as 2008, in Resolution A/HRC/9/9, the Committee stated that “all human rights require protection equally and that protection provided by human rights law continues in armed conflict situations, taking into account when international humanitarian law applies as *lex specialis*”.

The mechanics of *lex specialis* aside, there are other ways to reduce the tension in the competing spheres: subsidiary application, *renvoi* and merger. I introduced these methods in the Taxonomy of Convergence section of chapter 4. They are all slightly different methods of creating complementarity between the two regimes without resorting to a formulaic *lex specialis* analysis. There has been a series of cases in which the regional human rights courts have given

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195 UN Doc CCPR/C/21/Rev.1/Add.13. 26 May 2004
concrete examples of importing humanitarian law principles into human rights jurisprudence, thereby illustrating the various complementary mechanisms. Subsidiary application and *renvoi* can be dealt with briefly, as both seldom feature in contemporary jurisprudence; merger has evolved to predominate the norm conflict analysis and will require greater examination below.

The first method listed, subsidiary application, is a technique reflective of the approach supported by the United Nations Human Rights Committee. One applies the appropriate body of law to the identified or acknowledged type of armed conflict and then refers to the other body of law to fill gaps in the protections offered the victims. Since human rights law is universal, and humanitarian law only applies in armed conflict, it is normally human rights law that predominates. However, in riots, low level violence and terrorist attacks, common situations in which human right law applies, humanitarian law principles can inform the standard of protection that would have applied had humanitarian law been predominant. This is particularly true in cases where human rights norms may not be able to govern the use of force beyond that applied in of law enforcement operations, in other words, where the domestic conflict exceeds the capacity of law enforcement paradigm.

The other technique, *renvoi*, is defined as a technique of interpretation by way of reference to the relevant or similar norm on the other branch of the law.

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197 Schabas, *supra* note 180 at 595.
Renvoi can only operate where the regimes overlap. The example given by Kolb explains that the concept “fair trial” as found in Common Article 3, Article 5 (2), in Articles. 99 – 108 in the Third Geneva Convention (Prisoners of War), and also in Article. 43 of the Fourth Geneva Convention (Protection of Civilians) lack definition\textsuperscript{198}. In seeking greater granularity, the principle of renvoi would look to the requirements for a fair trial in human rights law. Reversing the method, as would be the case in times of armed conflict, the non-derogable right to life in human rights conventions could be amplified by the targeting rules in humanitarian law. However, progress has revealed that merger has largely overshadowed both subsidiary application and renvoi and as such do not need to be examined any further in this thesis.

Merger is self-explanatory – it “merges” the norms of the two regimes to provide greater granularity. It is the ultimate practical expression of the theories of convergence and complementarity. Merger has been around since the inception of human rights law and became prominent in the 1960s. In the period between 1950 to 1980, extant international law instruments could not keep pace with the nature of warfare as it evolved in the de-colonization rebellions and the creation of new states. In response, merger arose out of necessity to find ways to fill the legal vacuum.

\textsuperscript{198} Robert Kolb, supra, note 167. This lack of definition will arise again in the jurisprudence resulting from human rights abuses in Iraq and Afghanistan.
Inevitably, merger was criticized early in the adoption process of human rights law, and before the impetus to draft the 1977 Additional Protocols. Theodor Meron, reflecting on the problems of legal regime merger emanating from the decolonization conflicts, the recent Six Day War\textsuperscript{199} in the middle east, and the reports of the Tehran International Conference, wrote the following in 2000:

“Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of collateral damage.”\textsuperscript{200}

It is precisely this collision of norms that contributes to the current tension.

Despite criticism, the jurisprudence shows that merger has been adopted as a technique of norm reconciliation. The recent human rights courts decisions illustrate the application of the merger technique to inform the analysis of the use of force in those areas of conflict that experience violence that is beyond the scope of law enforcement but short of full-blown armed conflict. In other words, precisely the place where contemporary conflict operates and the tension between norms culminates.

\textsuperscript{199} The United Nations General Assembly, referring to the conditions in the Israel-occupied territories, stated “…essential and unalienable human rights should be respected even during the vicissitudes of war” Preamble, GA Res. 237, para 2, UN Doc A237/1967 (14 June 1967).

5.5. The European Court of Human Rights Perspective

In considering European human rights jurisprudence, there has been a series of cases arising out of the contemporary conflicts in both Turkey and Chechnya, and most recently out of Iraq and Afghanistan. One such example is the decision of the European Court in the 1998 *Ergi* case, which I described above.\(^{201}\) In 1993 a security patrol in southeastern Turkey was ambushed by the PKK (the Worker’s Party of Kurdistan), insurgents who are fighting for an independent Kurdish state. The Turkish patrol fired back at the PKK ambushers and in doing so killed Ms. Haava Ergi, a citizen of the village that was the site of the ambush. The Ergi family brought the case on the grounds that the Turkish authorities had violated, among others, Sections 2 and 13 of the European Convention of Human Rights.\(^{202}\) The complaint accused Turkey of failing to provide a secure environment, thereby violating Ms. Ergi’s right to life, and failing to properly investigate the incident. The Court found that the Turkish authorities had failed to protect Ms Ergi’s right to life due to defects in the planning and execution of the security operation, which, coupled with the lack of proper investigation, resulted in a violation of section 2 the Convention.

What makes this case important to the merger of human rights and humanitarian law is illustrated by the comments made by the Court. One of the bases for the complaint under Section 2 of the European Convention was that the Turkish authorities failed to properly plan and execute the mission and this

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\(^{201}\) *Ergi v. Turkey*, 31 EHRR (1998) at 388.
lack of preparation resulted in Ms Ergi’s death. Under the European Convention, the state is required to take measures to provide a secure environment such that citizens may enjoy the right to life. This requirement is not limited to taking steps to avoid accidental civilian deaths by the state law enforcement authorities. The Court stated that Turkey had an obligation to take *all reasonable precautions to avoid, and at least minimize incidental loss of civilian life* (emphasis added). In applying this standard to a domestic security operation, the Court imported the standard of care for precautions taken when civilians or civilian objects may be collateral damage directly from Article 57 of Additional Protocol I of the 1949 Geneva Conventions.

The Court applied standards found in international humanitarian law, not ones applicable to an internal conflict in a sovereign state. Further, the Court adapted the text of Article 57, raising the standard for internal security operations to a stricter level of precaution. The Court stated that, in finding that the state had deprived a civilian of the right to life, it must consider whether the security forces planned or conducted the operation in such a manner to minimize *to the greatest extent possible* any risk to civilians (emphasis added). The Court adopted this

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203 Ergi v. Turkey, supra note 201 at 431.
204 Additional Protocol I, Article 57 states: “1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. 2. With respect to those attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” Note that the Court quoted the AP I precautions virtually word for word.
205 Ergi, note 201 at 431.
language, despite that fact that Turkey had not proclaimed that the campaign against the insurgents was an armed conflict.

*Ergi* and similar cases discussed below illustrate the difficulty encountered by the state to determine the level of force to apply in law enforcement or internal security operations that resemble armed conflict, while also highlighting the danger in using troops trained for general-purpose combat in law enforcement roles.⁴⁰⁶ Another case illustrating the tension between the legal regimes and their complementarity examined the conduct of Russian forces during the bitter and destructive civil war in Chechnya. The tension in question arose between an arbitrary deprivation of life under Article 2 of the European Convention and the incidental loss of civilian life caused by a disproportionate application of force as prohibited under humanitarian law in the “collateral damage” analysis.⁴⁰⁷ In other words, what is the relationship between “arbitrary” and “incidental” loss of life, and how can they be reconciled?

In *Isayeva v. Russia*⁴⁰⁸, a Ms. Isayeva applied for relief to the European Court of Human Rights following civilian casualties caused by the aerial bombing of her family while fleeing fighting in the heavily contested village of Katyr-Yurt. The Russian authorities claimed that the aerial bombing attack was legitimate, provoked by insurgent anti-aircraft fire and solely aimed at trucks filled with

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⁴⁰⁷ Article 51 of the First Additional Protocol.
fleeing fighters and their ammunition, both legitimate military targets under international humanitarian law.

Just to complicate matters, Russia had not declared a state of emergency, nor had it invoked a derogation in accordance with Article 15 of the European Convention, although the war in Chechnya had certainly achieved the threshold level of violence of non-international armed conflict. Thus the Court could only analyze the use of force by the Russian security operation under domestic law enforcement principles, not the law of war. Interestingly, the lack of an armed conflict did not stop the Court from incorporating humanitarian law principles into the decision, specifically elements of the proportionality analysis. The Court stated that, absent an armed conflict, and barring the evacuation of citizens from the contested region, it could not reconcile the use of aerial bombardment of a populated area with “the degree of caution expected from a law-enforcement body in a democratic society.”

Further, the Court stated that the use of force must be absolutely necessary and proportionate with the stated objectives, and that the state had the responsibility to *take all feasible precautions in the choice of means and methods with a view to minimizing civilian casualties* (emphasis added). This phraseology is taken directly from Additional Protocol 1, and imposes an armed conflict standard on a putative (albeit very violent) domestic law enforcement operation. *Isayeva* raises questions about the technique of merger. What would
have been the outcome if the civilian deaths were examined through the humanitarian law lens? I believe that, had the analysis revolved solely around humanitarian law norms, the victims of the bombing would have been categorized as unavoidable collateral civilian casualties.

Another essential lesson from the Isayeva case concerns the discussion of necessity and legitimate aims. As Schabas points out, if the Russian air force had been bombing a peaceful demonstration of students, the court would not have needed to examine necessity or proportionality, because such an attack would not have met *prima facie* the test of necessity, and thus could not be a legitimate aim.210

The willingness of the European Court to merge the precautionary standards set out in Additional Protocol 1 into Isayeva was reflected in the Finogenov case.211 This case arose out of the 2002 hostage-taking incident in a Moscow theatre by Chechen rebels. In that incident, the Russian security forces assaulted the theatre, causing the death of all of the rebels by gunshot. An undisclosed type of incapacitating gas was used prior to the assault, the aim of which was to render everyone unconscious in an effort to reduce casualties. Regrettably, gas poisoning caused approximately 152 deaths amongst the hostages. The Court had to decide whether that use of force was "absolutely

209 Ibid., para 91.
210 Schabas, supra note 180 at 607.
necessary”, and whether the security officials had exercised strict control over
the conduct of their forces. It further asked whether there was sufficient serious
strategic thought put into the planning and execution of the assault in order to
“minimize incidental loss of civilian life”. The latter phrase is of course taken from
the precautions to be taken in the attack standard found in Article 57 of Additional
Protocol 1.

It is of interest to note that the operation to deal with the hostage takers
could easily be viewed as a purely domestic law enforcement operation.
Nowhere did the Court or the parties to the case claim that the operation was
conducted under a condition of armed conflict. The conclusion from Finogenov is
that the European Court is willing to create a legal fiction of armed conflict within
law enforcement crises that rise above the violence of normal policing, in order to
apply humanitarian law norms governing not only the amount of force, but also
the choice of weapons. Seen against the backdrop of the concurrent Chechen
civil war, one can understand this willingness on the part of the Court to invoke
humanitarian law norms and principles, but what if very well armed and
motivated members of an organized crime syndicate conducted the hostage
taking? Would the outcome differ? Would the Court have characterized violent
but purely criminal activity as armed conflict?
5.6. The Inter-American Perspective

Operating in another hemisphere and with jurisdiction over the parties to the American Convention on Human Rights\(^{212}\), the Inter-American Commission on Human Rights (and the Inter-American Court on Human Rights) has, according to Christine Byron, been overtly proactive in applying humanitarian law principles to human rights cases.\(^{213}\) There are two significant cases in the jurisprudence of the Inter-American Commission: *Avilan*\(^{214}\) and *Abella*\(^{215}\), both of which involve the conduct of armed forces during interaction with dissident armed groups in Colombia and Argentina respectively.

In both of those cases the Commission took the position that both regimes of law applied; there was such “significant overlap” in the subject matter between the regimes that there was no additional burden placed on the state in complying with both.\(^{216}\) Further, the Commission also analyzed the use of force through the *lex specialis* lens, on the basis that the ACHR provides no definition of combatants and no rules for the engagement of civilians or the level of acceptable collateral civilian casualties. The Commission needed to look to the guiding principles for the use of force against civilians found in humanitarian law to resolve allegations of violations of the right to life.\(^{217}\)


\(^{216}\) Byron, *supra*, note 213 at 857.
According to Liesbeth Zegveld, *Abella* is most important, as it was the first case in which the Commission declared its competence to apply humanitarian law norms. In *Abella* (also known as *Tablada*, after the town in which the action took place) an armed group of insurgents attacked an Argentinean military barracks in a prolonged firefight. In the aftermath, captured insurgents were tortured and summarily executed by Argentine security forces. The Commission considered that due to the extreme violence of the clash it resembled armed conflict. Thus it attracted the principles and provisions of Common Article 3 of the Geneva Conventions and also the use of force rules applicable to non-international armed conflict. However, criticism arose in response to this blatant direct application of humanitarian law by a human rights body. In her case comment, Liesbeth Zegveld stated “there is no doubt that the objective of applying international humanitarian law, that is to improve protection, is praiseworthy”. However, “the fact that the substantive norms of human rights law and international humanitarian law are complementary in character does not mean that supervisory bodies set up under human rights law are *ipso facto* competent to apply humanitarian law”.

Clearly, if Argentina (and for that matter any other party to a regional human rights convention) had wished to set up an international enforcement body similar to the Inter-American Commission to monitor compliance with

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219 *ibid*.
international humanitarian law, they could have done so. In a rare moment of introspection, the Inter-American Court in the 2000 judgement in *Las Palmas* undermined the Commission’s position in *Abella* and ruled that neither the Court nor the Commission had the mandate to make judicial conclusions on humanitarian law. This position was further amplified in *Bamaca Velasquez*:

“...Thus, the Court cannot directly apply the rules of international humanitarian law embodied in the 1949 Geneva Conventions and, pursuant to them, decide a dispute, determining that there has been a violation of the provisions of those conventional instruments.

24. As the Court itself has indicated, the foregoing does not preclude taking into consideration these provisions of international humanitarian law - another perspective of the international system - in order to interpret the American Convention. It is not an issue of directly applying Article 3 common to the Geneva Conventions in the case, but of admitting the facts provided by the whole system of laws - to which this principle belongs - in order to interpret the meaning of a norm that the Court must apply directly.”

Earlier and in a similar manner, in *Coard v. The United States* the Commission referred to the provisions of the Third and Fourth Geneva Conventions to interpret the limitations on the right to liberty during armed conflict. *Coard* arose out of the mistreatment of civilian detainees during the Grenada Invasion of 1983. Mr. Coard and his fellow detainees alleged that they were held incommunicado for an undue length of time, beaten and denied

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221 *Bamaca Velasquez v. Guatemala*, Inter-Am.CtHR Case No. 70, Merits, (25 November 2000).
access to legal counsel. The American authorities stated that the detainees were held out of military necessity and for security reasons; and in any event their treatment was that of the standard found in the Third and Fourth Geneva Conventions.  

However, despite being treated as prisoners of war, the detainees were denied that particular legal status under humanitarian law by the American security forces. The Commission responded by stating that treating civilian detainees as prisoners of war did not displace their rights as detainees under applicable human rights law. The technique of holding civilians taken in armed conflict as prisoners of war without providing them with the proper legal status while simultaneously denying their human rights has been used in recent conflicts and is a current example of gap-filling to solve the seemingly intractable detainee problem.

Similar issues arise out of the detainees held in Guantanamo Bay by the United States. Those detainees were captured in Iraq or Afghanistan and were moved to the American leased property at Guantanamo Bay. The Inter-American Commission petitioned the United States to “take measures necessary to have the legal status of the detainees determined by a competent tribunal”.  

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224 Ibid., at para 30.
225 To attain the legal status of Prisoner of War in order to take advantage of “combatant immunity”, a belligerent must meet the criteria found in Article 4 of GC III and Article 44 of AP I.
226 Coard, supra, note 223 at paras 39ff.
Commission determined that the status of the detainees needed clarification before recognition of the fundamental and non-derogable rights of the detainees under the ACHR. In addition, the Commission specifically requested that the United States take all "necessary measures to investigate and prosecute all instances of torture and cruel, inhumane and degrading treatment perpetrated against the detainees". The United States government responded by reiterating the position that international humanitarian law applied to the detainees and not international human rights law, and as such, the IACHR had no jurisdiction. The foregoing cases illustrate that detainee management in contemporary conflict is one of the most common points of tension in the convergence of the two regimes. I will examine the detainee conundrum in the next chapter.

Not surprisingly, the human rights institutions’ use of humanitarian law, both as guiding principles and as authority, has been soundly criticized. This criticism is founded in part on the fundamentally different orientation of the regimes. As discussed above, human rights law protects the powerless citizen from the overwhelming power of the state (on the vertical axis) and humanitarian law protects equal states from each other (on the horizontal axis). Such incongruity, coupled with differing definitions of similar norms, militates against clear and consistent outcomes. As Lindsay Moir points out, human rights courts may make fundamental jurisprudential errors:

228 Ibid. para 2.
229 Ibid. para 3.
“Referring to and applying the relevant provisions of humanitarian law as authoritative sources in order to settle alleged violations of human rights law is not the same as applying international law norms directly in order to assess the responsibility of the state for violations of that law as well as for violations of human rights”.230 (Emphasis in the original)

It is now settled that in non-international armed conflict, human rights law should be the predominant regime; after all, war is the “supreme denial of human rights and the maximum occasion for the denial of humanity”.231 If we follow the path of that logic, then human rights bodies should be the arbiters of its application to conflict. Conversely, criticism has focused on the competence of the human rights courts to apply a body of law that lies outside their sphere of knowledge and judicial experience.

Christine Byron observes that there is a very low level of participation on the human rights bench by jurists with any humanitarian law expertise.232 On the other hand, Theodor Meron took a balanced view, thinking that human rights judges reached conclusions on the law of war that “humanitarian law experts find problematic”. But he also thought that, objectively speaking, it was a good thing that human rights bodies were filling gaps and giving humanitarian law a “pro-human rights orientation”.233 The recent cases have caused the convergence pendulum to swing too far toward a human rights orientation at the expense of

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232 Christine Byron, supra, note 213 at 883
successful security outcomes, especially when viewed through the military necessity lens.

5.7. Significant European Convention Cases

Cases arising out of the recent prolonged and difficult conflicts in both Iraq and Afghanistan and brought before both the European Court of Human Rights (and in the United Kingdom) illustrate the seriousness of the situation and the predicament it causes to state governments afflicted with insurgencies. I will examine the most significant cases in the next section. What is apparent is a trend in the jurisprudence from a question as to whether the European Convention should apply to extraterritorial military action at all\textsuperscript{234}, to the next logical question: if is does, how will it be applied in the context of non-international armed conflict?

5.7.1. Lessons from Hassan v. United Kingdom

A significant contemporary case involving the United Kingdom’s participation in the conflict in Iraq is Hassan v. United Kingdom.\textsuperscript{235} In April 2003 Mr Tarek Hassan, an Iraqi civilian, was brandishing an AK 47 assault rifle on the rooftop of a residence of a known insurgent leader. He was captured, detained

\textsuperscript{233} Meron, \textit{supra}, note 200 at 247.
\textsuperscript{234} Settled in Al-Jedda v. United Kingdom, \textit{supra}, note 2.
\textsuperscript{235} Hassan v. United Kingdom, App No 29750/09 (ECtHR GC) 16 September 2014. The UK was not the only nation subject to lawsuits in Iraq. The Netherlands defended its soldiers in Jaloud v. Netherlands, App No 47708/08 (ECtHR GC) 20 November 2014, in which an Iraqi civilian was shot and killed at a checkpoint manned by Iraq militiamen but supervised by Dutch soldiers. The allegation that the Dutch troops fired the fatal shots was never proved, but the Court nevertheless
and interrogated during the course of the United Kingdom’s military operations that followed the deposal of Saddam Hussein. The date is important, because the detention occurred before the declaration, on 1 May 2003, of the cessation of hostilities between the state of Iraq and the US-led Coalition. Thus he was captured and detained during a situation of international armed conflict and occupation. On the day after the cessation of hostilities, he was released, but regrettably several months later his body was found 700 km away from his place of release. Hassan applied to the European Court of Human Rights for relief on the basis that his detention violated Arts 2, 3 and 5 of the European Convention. The circumstances of his unexplained death aside, Mr Hassan specifically pleaded that his detention was not based on any of the enumerated grounds set out in Art 5(2) to 5(4) of the Convention.

_Hassan_ is significant in that it provides a glimmer of hope for humanitarian law advocates. In _Hassan_, the Court departed from the method of viewing humanitarian law norms in isolation. Such a departure indicates to me that the Court was willing and is capable (at least in _Hassan_) to move away from the separate stream theory of application. What is most significant about _Hassan_ is the departure from the “self-contained” approach taken by the Court in the previously discussed cases rising out of internal conflict in Turkey and Russia.  

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In those two cases, the Court acknowledged the state of conflict but nevertheless applying human rights norms as if the military actions were no different from normal law enforcement operations. However, by moving toward the merger modality, the European Court continues to contribute to the ambiguity and inconsistency surrounding the conflation of the two streams and the application of human rights to armed conflict.

The European Court took a principled approach to two important features of the tension created in such a conflict. First, the Court reviewed the political impulse to derogate from human rights instruments as a signal that the state intends to rely on humanitarian law as the primary regime in the execution of the conflict. Two, the Court undertook a principled examination of the overlapping application of human rights and humanitarian law during the Iraq insurgency to the management of detainees.

Generally, the Court first affirmed the prior jurisprudence that the grounds of detention set out in Art 5(1) of the Convention provide no basis for internment or preventive detention (as provided for in the 4th Geneva Convention). However, the Court agreed with the United Kingdom government’s position that detention in international armed conflict under humanitarian norms is not incompatible with the grounds of detention in Art 5(1). Importantly, the absence of derogation on the part of the United Kingdom government did not prevent the Court from

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237 Ibid., at 28.
238 Hassan, supra note 235 at para 101.
concluding that: “even in situations of international armed conflict, the safeguards of the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law”. Equally significantly, the Court came to these findings without invoking the *lex specialis* analysis. The Court elaborated the conclusion:

“by reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions”.

In summary, *Hassan* was a pivotal moment for non-combatant detainee management in contemporary conflict. One can imagine the sighs of relief in the corridors of the defence ministries of those European states who participate in coalition operations abroad. The Court found that Mr Hassan’s detention was consistent with the permissions and conditions found in humanitarian law and did not breach the European Convention. The Court took pains to emphasise that the scope of this finding was limited to international armed conflict, where the taking of prisoners and interning civilians were accepted features of international

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239 *Hassan*, supra note 235 at para 104.

240 “... *lex specialis* was unhelpful, which might account for the fact that the International Court did not refer to it in the *Congo* judgment. Use of this term has served to obfuscate the debate rather than provide clarification.” *Ibid.*, at para 93.

humanitarian law. In such cases, Art 5 of the Convention could be viewed as “permitting the exercise of such broad powers”.242

Hassan shows us that, even without derogation and without resort to lex specialis, civilians may be captured and detained in situations of international armed conflict without breaching Art 5 of the European Convention. The European Court has confirmed that the technique of merger can inform the application of human rights in conflict, but to get to that position the Court created more problems. By accepting the position that member States may rely on the more flexible and liberal rules of capture and detention found humanitarian law, without declaring a prior derogation, the Court has undermined the safeguards inherent in the European Convention.243

Further, by limiting the humanitarian law detention exception to Art 5 to international armed conflict, the Court has potentially created questions of the characterisation of conflict. Indeed, the United Kingdom and Iraq were in a situation of international armed conflict as between the United Kingdom forces and the Iraqi army. However, Mr Hassan was not a member of the armed forces of Iraq, but an insurgent, and arguably the military operations against the insurgency that arose following the deposal of Saddam Hussein and the collapse of the Iraqi government could be characterised as non-international armed conflict.

242 Ibid.
243 Borelli, supra, note 236 at 40.
In summary, *Hassan* seems to be a complicated way of reaffirming that humanitarian law is the primary body of law applied in international armed conflict, something we already knew. *Hassan* does not help reduce the tension inherent in non-international armed conflict by merging human rights norms with the circumstances of detention under international armed conflict. However, it gives us an analytical roadmap for matching the justification for the military detention of civilians within the rubric of human rights norms.

### 5.7.2. Lessons from *Serdar Mohammed vs MOD*

Another concise exposition of the contemporary primacy of human rights law and the consequent de-legitimising of humanitarian law, but this time in non-international armed conflict, can be seen in the United Kingdom case *Serdar Mohammed vs. MOD.*

Indeed, *Serdar Mohammed* can be viewed as the apotheosis of convergence. It is an interesting pronouncement on the relationship between the European Convention and the law of non-international armed conflict and one that I will examine in detail below. It also holds lessons for other states that are not parties to the European Convention, but are participating in coalition operations alongside European armies who are.

In effect, the judgment states that the United Kingdom forces operating under the aegis of ISAF in Afghanistan had no authority to detain suspected insurgents. This will be a startling conclusion to anyone, government lawyer or

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244 *Serdar Mohammed vs. MOD*, (2014) EWHC 1369 (QB)
security official, who has had experience in recent asymmetric warfare. This case is one of a fusillade of legal challenges to the conduct of the United Kingdom’s military contingent during peace support operations in Iraq and Afghanistan, and in my view is the culminating point of the slow but steady trajectory of convergence since the 1970s. The aforementioned cases have also been labelled as “lawfare” in some informed circles.

The judgment was unanimously affirmed by the United Kingdom Court of Appeal on 30 July 2015, and considered in part by the United Kingdom Supreme Court in January 2017. While disconcerting in many ways for state security officials, Serdar Mohammed does offer some strategic guidance for a framework to successfully converge human rights and humanitarian law norms and avoid future legal difficulties in this type of conflict. But in my opinion, Serdar Mohammed should be of grave concern to all democratic security forces that participate in coalition operations in a foreign state against a civilian belligerent.

249 Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant) [2017] UKSC 2
The United Kingdom contingent of the UN/NATO mission in Afghanistan detained an Afghan citizen whom they had grounds, through an extensive intelligence effort, to believe to be a Taliban commander and thus a security threat to the international mission. Mr Serdar Mohammed was captured in a targeted capture/kill operation in April 2010 and spent a total of 110 days in the custody of the United Kingdom forces in a detention facility in Afghanistan. Upon transfer to the Afghan authorities he was convicted of crimes against the state and sentenced to 10 years imprisonment. Serdar Mohammed subsequently brought his challenge against the United Kingdom Secretary of State for Defence for violation of his right to liberty under Article 5 of the European Convention resulting from his prolonged detention without access to judicial process.\textsuperscript{250}

Some background detail is important to understand the significance of this case. The nature of the United Nations/NATO mission in Afghanistan lies square in the muddled zone of international humanitarian law and human rights law co-application. Described by the International Committee of the Red Cross as an internationalised non-international armed conflict,\textsuperscript{251} the campaign to restore peace and security to Afghanistan was characterised by an insurgency

\textsuperscript{250} Article 1 of the European Convention states that parties to the convention shall “secure to everyone in their jurisdiction the rights and freedoms defined in s. 1 of this Convention”. Jurisdiction triggers the substantive obligations of the Convention. Detention of an individual, even temporarily or briefly, is a core indicator of jurisdiction over a person. See Al-Skeini, supra, at note 151 for an examination of the “personal model” of the European Convention’s extra-territorial jurisdiction.

\textsuperscript{251} The presence of foreign troops by consent of a state suffering an internal conflict is one \textit{indicia} of an internationalized non-international armed conflict. See Hans-Peter Gasser, \textit{Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon} (1983) 33 Am. U. Rev 145; Dietrich Schindler, \textit{International Humanitarian Law and the
conducted by a fleeting and indistinct unprivileged belligerent, who operated and sought refuge among the civilian population. Among other conventions, the conduct of the counter-insurgency was governed by Common Article 3 and (for those parties to it) Additional Protocol II. The parties to the European Convention among the continental European and United Kingdom contingents had the added complexity of being bound by those human rights rules.

This particular conflict saw the newly-reconstituted government of Afghanistan, assisted by the foreign armed forces contingents of the International Security Assistance Force\textsuperscript{252} (ISAF) coalition, fighting against non-state actors, namely the Taliban and similar like-minded factions in a situation of non-international armed conflict.\textsuperscript{253} ISAF had a broad mandate to operate throughout Afghanistan but always in a supporting role; the government of Afghanistan maintained the political direction of the campaign.\textsuperscript{254} In reality, in rural and remote areas without an Afghan government presence or capable local security forces, ISAF contingents conducted security functions unilaterally.

\begin{footnotesize}
\begin{itemize}
\item \textit{Internationalization of Internal Armed Conflict} (1981) IIHL San Remo. The ICRC Glossary also describes the conditions for internationalized non-international armed conflict.
\item \textsuperscript{252} The International Security Assistance Force (ISAF) was envisioned in the 2001 Bonn Agreement and created by UNSCR 1386, UN Doc. S/RES/1386, 20 Dec 2001, It had the mandate to assist in maintenance of security for Kabul and its surrounding areas and establish and train new Afghan security and armed forces. The mandate was extended through successive UNSCRs to eventually include the whole country.
\item \textsuperscript{253} The other major non-state armed groups active in Afghanistan were the Hezb-e Islami Gulbuddin (HIG) and the Haqqani Network.
\item \textsuperscript{254} See the 2002 Military Technical Agreement ("MTA") between the International Security Assistance Force and the Interim Administration of Afghanistan, Annex to UN Doc. S/2002/117 (25 Jan 2002). The MTA provided ISAF the authority, without interference or the need for permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect ISAF and the Mission. Importantly, the MTA did not give ISAF contingents express authority to detain civilians. This omission would be crucial to the outcome of Serdar Mohammed.
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\end{footnotesize}
It is important to bear in mind the nature of the conflict in Afghanistan and the effect it had on the application of military force. Throughout the mid-2000s, faced with open combat with insurgents, increased violence directed at the civilian population, and robust resolutions invoking Chapter VII of the UN Charter, ISAF viewed the campaign through a lens of armed conflict, not law enforcement. This approach has a direct effect in the conduct of counter-insurgency operations and the attitude of the security force members. The result of conducting the insurgency in a humanitarian law modality had unforeseeable legal consequences for the United Kingdom.

The facts in Serdar Mohammed are commonplace in recent counter-insurgency operations. The United Kingdom forces in Afghanistan captured Mr Serdar Mohammed, a suspected Taliban commander, in a military operation on 7 April 2010. He was originally held for 96 hours under the ISAF detention policy, but due to the desire to gain intelligence he was held a further 25 days under the United Kingdom’s national caveat to the ISAF policy for the stated purpose of military interrogation. The United Kingdom had intended to transfer him to the Afghan authorities at that point, but overcrowding in the Afghan

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255 See UNSCR 1776, UN Doc. S/Res/1776 (Sept 19 2007) and UNSCR 1890, UN Doc S/Res/1890 (8 Oct 2009). Both resolutions invoked Chapter VII (‘all necessary means’) thus confirming the existence of armed conflict and renewed the authority for individual and collective self-defense from previous resolutions. Most importantly, the resolutions affirmed the application of international humanitarian law to the insurgency.

256 ISAF detention policy provided three bases for detention: ISAF force protection; self-defense for ISAF forces; and accomplishment of ISAF mission. The policy assumes underlying legal justification for detention for the detaining state. The time limit for detention before release or transfer to Afghan authorities was 96 hours. Contingents could exceed the 96-hour limit under national policy considerations. ISAF SOP 632, Standard Operating Procedures for Detention of Non-ISAF Personnel (2006)(unclassified).
detention facility necessitated retention in the hands of the United Kingdom forces for a further 81 days, for the aforementioned total of 110 days.\footnote{Serdar Mohammed, supra note 244 at para 35.} On 25 July 2010 he was transferred to the Afghan authorities, whence he was tried, found guilty and, after an unsuccessful appeal to the Afghan Supreme Court, sentenced to 10 years’ imprisonment.\footnote{Aughey and Sari, supra note 245 at 68.}

Mr. Mohammed then pursued a civil suit against the United Kingdom for a human rights violation on the basis of his prolonged detention. In a lengthy judgement, Justice Leggatt of the High Court of Justice of England and Wales held that Mohammed’s detention after the first 96 hours was a breach of Article 5 of the European Convention and Afghan domestic law. In the judgment, Leggatt J. made four critically important findings, the essence of which has created a policy crisis in the United Kingdom Ministry of Defence.\footnote{To review the policy aftermath of Mohammed and similar cases, see Government of the United Kingdom, “UK Armed Forces Personnel and the Legal Framework for Future Operations”, House of Commons Defence Committee, HC 931 (London: The Stationary Office Limited, 2013).} The four findings are (1) Mr Mohammed’s detention was attributable to the United Kingdom, and not to the UN;\footnote{Serdar Mohammed, supra note 244 at paras 116-148.} (2) the United Kingdom exercised effective control over Mr Mohammed, thereby attracting the jurisdiction of the European Convention;\footnote{Ibid., at paras 158-187.} (3) Article 5 of the European Convention was not displaced by the authority to apply force (“all necessary means”) granted by the various UNSCRs or Article 103 of the UN Charter,\footnote{Ibid., at paras 158-187.} and (4) the rules of international humanitarian law only recognise and regulate, but do not authorise, detention in non-international
armed conflict.\textsuperscript{263} I will examine only the last three of the four findings in the following section.

In the second finding, Leggatt J. found that the United Kingdom exercised effective control over Mr. Mohammed by virtue of his presence in the United Kingdom-operated detention facility. Applying the principles of extraterritorial application of the European Convention as set out found in the \textit{Al-Skeini case},\textsuperscript{264} Leggatt J. concluded that the exercise of effective control over Mr Mohammed brought him within the jurisdiction of the European Convention. Consequently the United Kingdom had a obligation grounded in convention to ensure he could enjoy those protections.

With respect to the authority established in Security Council resolutions invoking Chapter VII of the UN Charter, it appears from the judgment that “all necessary means” (or “measures”) has a much more limited meaning than that which the troop-contributing states believes it means. Despite its wording and plain meaning, in the third finding Leggatt J. said that it did not displace Article 5 of the European Convention. In established practice, and in the absence of a UN-controlled standing force, the phrase in question authorises a state, or a coalition of like-minded states, to use force while employing all the combat power of a modern military in order to implement the terms of the resolution. Article 42 of the UN Charter confers the authority on the Security Council to use armed

\textsuperscript{262} \textit{Ibid.}, at paras 188-227.  
\textsuperscript{263} \textit{Ibid.}, at paras 228-268.
force to maintain international peace and security, and the exact words of that section are:

“Should the Security Council consider that measures\textsuperscript{265} provided for under Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockade\textsuperscript{266}, and other operations by air, sea or land forces of Members of the United Nations”\textsuperscript{267}

Context and international law limit the full expression of “all necessary measures”, and the Security Council cannot be expected to impose obligations on member states that deliberately breach human rights norms without compelling reasons. In the \textit{Al-Jedda} case,\textsuperscript{268} the European Court of Human Rights examined the norm conflict between states’ obligations under the European Convention and the obligations created by Security Council resolutions. It did so with reference to Article 103 of the UN Charter.\textsuperscript{269} The important part of the judgment (particularly for \textit{Serdar Mohammed}) states:

“…the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event

\textsuperscript{264} \textit{Al-Skeini, supra}, note 151.
\textsuperscript{265} Measures under Article 41 of the UN Charter are those not requiring the use of armed force, such as the severance of diplomatic relations, trade restrictions and embargo.
\textsuperscript{266} Blockade, in its customary application (i.e. the complete denial of the necessaries of life to the target state to the point of starvation) could be a \textit{prima facie} breach of human rights.
\textsuperscript{267} UN Charter Article 42.
\textsuperscript{268} \textit{Al-Jedda v. United Kingdom, supra}, note 2.
\textsuperscript{269} Article 103 states: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”
of any ambiguity in the terms of a Security Council resolution, the court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In light of the United Nations’ important role in promoting and encouraging respect for human rights, it has to be expected that clear and explicit language would be used were the Security Council to intend that States take particular measures which would conflict with their obligations under international human rights law.”270 (emphasis added)

In accepting that Security Council resolutions may contravene human rights norms when put into effect by member states, and to overcome the presumption that the Security Council does not intend to breach human rights norms, the European Court required the language of authorisation to be unambiguous. Thus the term “all necessary measures” by itself is not enough and the omission of unambiguous language cannot be cured by reliance on Article 103, according the Court.

In the Court’s view, “all necessary measures” must be amplified and restricted by more precise language and specific detail to overcome the presumption of compliance with human rights. As Marko Milanovic states, “if the Council now truly wishes to release states from their human rights obligations, it will have to do so through clear and unambiguous language – language that does not get used very often in its chambers – and members will have to take political responsibility for their actions.”271 It is highly unlikely that any State party to human rights conventions would publicly proclaim a disregard for human rights

270 Al-Jedda, supra, note 2 at para 102 (emphasis added).
norms even in the direst of internal crises. Compromise is the key to managing norm conflict.

In the finding with the most critical practical consequences for coalition security forces in a non-international armed conflict scenario, Leggatt J. found that there was no express authority to take detainees within the humanitarian law rules governing non-international armed conflict. In discussing the unlawful restriction on the liberty of Mr Mohammed, the High Court put forward two related propositions. First, those rules of humanitarian law applicable to non-international armed conflict do not provide the legal authority to detain civilians. Second, humanitarian law provides no enumerated grounds for security detention in the same kind of conflicts.

With respect to the first proposition, it is true that there is no express authority, either in permissive or restrictive terms for taking captives in either Common Article 3 or the Additional Protocol II. Specifically, those regimes, while providing scant direction on the minimum level of protection and human treatment to be awarded a detainee, omit any authority to detain an adversary in the first instance. One must look elsewhere for that authority, such as the domestic law of the host state, the UNSCR or a formal written agreement between the coalition security forces and the host state. The omission is strange, in that the regime sets out a standard of treatment without mention of the act of capture. Presumably a belligerent must somehow be seized before being
subjected to a regime of detention, but there is no express permission to do so outside domestic law.

But the Court’s finding does not provide a complete answer to the question. Presumably these detained persons did not fall into the hands of the security forces by misadventure or accident. Humanitarian law may not explicitly authorise detention in non-international armed conflict, but it does not expressly prohibit it. Clearly, seeking and capturing a suspected insurgent leader in a deliberate quasi-law enforcement action requires express authority or (at the risk of conflating law enforcement standards with humanitarian norms) reasonable and probable grounds. But there are other ways that an insurgent may be captured. One such example is in the exercise of self-defence by the security forces; if the insurgent engages the security forces members (at a traffic control point, for example) and is disarmed and wounded in the encounter, then the insurgent will be treated and detained. The questions about detention then become: in whose hands, for how long, and what is the final disposition of the detainee. But I maintain that any belligerent may be lawfully detained in non-international armed conflict outside the limitations exposed by the lack of conventional authority.

By way of comparison, the Third Geneva Convention does provide express authority to detain: “the Detaining Power may subject prisoners of war to
This statement is followed by an extensive list of the precise conditions of internment. However, it is difficult to argue that the Geneva Conventions are not a suitable model for the application of force in non-international armed conflict, and that express authority to detain in one can be understood to mean implied authority in the other. The nature of the belligerent is the friction point using status-based detention under the Third Geneva Convention as analogous to conduct-based detention in non-international armed conflict. After all, state parties are understandably reluctant to offer any legitimacy to internal conflicts by granting prisoner of war status (with its attendant combatant immunity and other privileges) to insurgents and other civilian belligerents who lack the status to conduct armed attacks without legal justification.

I disagree with the Court’s second proposition that humanitarian law provides no regulation of detention in non-international armed conflict. On the contrary, I think that humanitarian law writ large does provide a substantial set of measures for the care and conditions of detainees. While it is true that Common Article 3 and Additional Protocol II lack granularity with respect to a standard of treatment for non-combatant detainees, the very structure of humanitarian law provides guidance on the limits of permissible conduct. As Ryan Goodman points out, the rules regulating conduct in international armed conflict are more restrictive than those regulating internal conflict are. Thus it is difficult to contemplate actions not authorised or prohibited under non-international armed

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272 Article 21, Third Geneva Convention.
conflict somehow become permitted actions if and when a given conflict morphs into international armed conflict.\textsuperscript{273} By analogy, a regime in one modality of conflict applies to the other, in the context of open warfare.

Not content with the outcome and anticipating serious difficulties for the United Kingdom’s military operations abroad,\textsuperscript{274} the United Kingdom government appealed \textit{Serdar Mohammed} to the United Kingdom Supreme Court. Among other issues, the United Kingdom government specifically asked for a decision on two narrow but critically important questions. First, whether Her Majesty’s Armed Forces had the authority to detain Serdar Mohammed in excess of 96 hours pursuant to: (a) the relevant Resolutions of the UNSC, and/or (b) international humanitarian law applicable in a non-international armed conflict. Second, if so, whether Article 5(1) of the ECHR should be read so as to accommodate, as permissible grounds, detention pursuant to such a power to detain under a UNSC Resolution and/or international humanitarian law.\textsuperscript{275}

The United Kingdom Supreme Court, having had the advantage of reading the \textit{Hassan} decision, applied the same analysis expressed in the European Court in answering the questions on appeal in \textit{Serdar Mohammed}. By a 7 to 2 majority, the Supreme Court held that the United Kingdom’s forces in


Afghanistan did have the authority to take and detain civilians taking part in hostilities for periods longer than 96 hours for reasons of security. Their rationale followed that of *Hassan*; the Court was able to reconcile the power recognised under humanitarian law with the six permitted grounds of detention under Article 5 of the ECHR. The Court concluded that the six permitted grounds for detention were designed for peacetime conditions and “could not be regarded as exhaustive in conditions of armed conflict”. Recognizing that the object of Article 5 of the ECHR was to protect individuals from arbitrary detention, this objective could be achieved under humanitarian law if there was a legal basis for detention and the power to detain was not exercised under grounds that were “unduly broad, opaque or discretionary”.

However, the Court acknowledged that such a detention violated Article 5(4) of the ECHR because the United Kingdom’s forces did not provide the detainees with an effective right to challenge their detention. The court concluded that Article 5(4) ECHR protection from arbitrariness is equivalent to the conditions imposed upon detaining powers in Articles 43 and 78 of the 4th Geneva Convention. That is, the detaining power must create an impartial body capable of conducting regular reviews of detention with a fair procedure, allowing the detainee a reasonable opportunity to exercise the right to challenge the grounds for detention. According to the Supreme Court, the military detention

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277 *Ibid*. 

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review committee set up by the United Kingdom to conduct such reviews did not meet the requirements of fairness and impartiality.\textsuperscript{278}

\begin{quote}
\textit{Hassan, Serdar Mohammed} and the companion cases described above are hard-learned lessons for states participating in contemporary armed conflict, whether international or non-international in status. Although the conclusions about humanitarian law applicability in those cases would directly apply only to member states of the European Convention, it is instructive for other non-European states participating in UN sanctioned missions abroad, particularly if operating in a multi-national coalition under unified command.\textsuperscript{279} Specifically, \textit{Serdar Mohammed} it shows how the lack of clarity and specificity in the protection afforded to belligerents and victims under Common Article 3 and Additional Protocol II have permitted human rights fill the gap and thus become the primary regime for governing the use of force.
\end{quote}

The cases described above provide a judicially considered roadmap to successful applications of force in contemporary conflict. There is a lesson for parties to a conflict of this nature. That is, to ensure that the relevant legal authorities such as UNSCRs and agreements with the host state are comprehensively drafted and applied universally to fill any potential gaps in the

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\textsuperscript{278} \textit{Ibid.}, paras 104-106.
\textsuperscript{279} Generating multi-national use-of-force instructions in a coalition mission is fraught with complexity due to the different domestic laws, different memberships in regional conventions and varied use of force policies. See Abbott, Kirby. \textit{A Brief Overview of Legal Interoperability for NATO Arising from the Interrelationship between IHL and IHRL in Light of the European Convention on Human Rights} (2014) 96 I.R.R.C. 893 at 107, and Borelli, Silvia. \textit{Jaloud v
regime of protection for detainees. As shown by the spate of cases arising out of contemporary conflict and now before the various courts and tribunals, any gap in the legal governance of the conflict in question will be exploited by the putative victims.

As discussed in earlier chapters, the warfare for which humanitarian law was designed to moderate has changed; the modalities of asymmetric warfare militate against the application of humanitarian law. Humanitarian law provides no express authority to target or detain civilians in non-international armed conflict. Further, humanitarian law provides no grounds for security detention and no judicial process for the protection of those detained by foreign (coalition) forces in non-international armed conflict. Therein lies the core argument for human rights primacy.

As a general proposition, I believe that there is a certain time in a given conflict, or a threshold of violence in non-international armed conflict, where the conflict progresses to a point at which the state has lost control of public order. The war in Afghanistan is a perfect example. The strength, violence and reach of the belligerent groups overwhelm the state security forces. No peaceful means of resolution remain. At this point, greater force is required to restore order beyond that available under the law enforcement based human rights paradigm. In other words, the conflict has left the realm of policing and has entered the domain of

military force. In this instance, humanitarian law has a pivotal role to play in non-
international armed conflict, particularly in providing the force necessary to permit
the rebuilding of state security institutions and to enable the restoration of public
order.

The failure of domestic authority is the pivotal point in the conflict at which
human rights norms are impossible to apply, in the absence of other domestic
legal control, all that is left to govern the conduct of the participants is
humanitarian law. In this eventuality, the conduct of the security forces must be
measured by humanitarian law norms, and thus the application of force and the
restrictions of liberty placed on belligerent participants must be viewed in the
scope of the Third and Fourth Geneva Conventions. In other words, the primary
determinant of the appropriate body of law should be the scale of ferocity and
nature of the conflict, rather than the identification of the nationality or status of
the belligerents.

Humanitarian law provides robust and permissive rules for use of force in
situations of violence exceeding the application of restrictive policing rules. This
is particularly true in conditions where domestic law has failed, such as in Iraq
and Afghanistan, and is unable contain the crisis. Further, human rights law lacks
the tools to manage open warfare. Coalition (foreign) forces engaged in non-
international armed conflict in a host state are better positioned to apply
humanitarian law rather than human rights law, or to apply the domestic law of
the receiving state. If humanitarian law is to remain relevant, the rules governing conduct in non-international armed conflict need to be revived and updated to reflect the character of asymmetric warfare and the status of its belligerent participants.

I understand the political and legal consequence of the lack of derogation and also agree that there is no express authority to detain in Common Article 3 or Additional Protocol II. However, I do not accept the finding that there is no implicit authority to detain in non-international armed conflict. Clearly the state parties contemplated the permissible collection of detainees by virtue of creating rules of humane treatment for detainee handling. In reality, security forces detain those belligerents who surrender to them during searches or checkpoint operations, especially in situations where the local law enforcement authorities are degraded or non-existent. In addition, I do not accept the narrow reading of the term “all necessary measures” (customary UNSCR drafting practice to authorise the use of combat power) as providing no authority for the application of force including conduct-based targeting and detention as a necessary consequence of restoring peace and security. Further, if one accepts the plain text of the sufficiency of UNSCRs, I suggest that the term “all necessary measures” does contain the authority to detain belligerents as incidental to engaging in combat. Surely the restoration of peace and security would be undermined significantly if security forces had no recourse to detention. This would place the security forces in an untenable situation: they could target the belligerents, and use deadly force,
either in self-defence or by rules of engagement, but could not capture surrendering or wounded belligerents. This is absurd from an operational and legal standpoint.

_Serdar Mohammed_ and similar cases arising out of the counter-insurgency efforts in the South-West Asia and elsewhere reinforce my argument that regularly constituted armed forces need to apply force against individuals taking part in hostilities outside the authorities and permissions of human rights norms in order to restore public order. This is particularly true in situations where the local security forces have collapsed under the overwhelming military-like capabilities of the insurgents. Human rights law has no war-fighting framework. The use of force is strictly limited to “absolute necessity” (the law enforcement paradigm). The permissiveness and flexibility in the application of force and the ability to detain found in humanitarian law is needed to manage non-international armed conflict pursued by non-state armed groups and individuals. The measured and controlled application of humanitarian law can facilitate success by legitimate government forces.

The upshot of the European Convention cases was a high-level policy review conducted by the United Kingdom Ministry of Defence. Alarmed by the outcome of the recent cases, the Ministry of Defense has identified the need for legal means to apply humanitarian law norms in non-international armed conflict. Titled the “United Kingdom Armed Forces Personnel and the Legal Framework

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280 UN Charter, Art 42.
for Future Operations”, the report underscores the difficulty in managing the convergence of legal regimes in recent asymmetric conflicts. As explained in the report, “The number of legal challenges facing the United Kingdom Ministry of Defence is large, uncertain and growing”. The study set out the critical limitation on the conduct of expeditionary campaigns by the United Kingdom armed forces: the tension and overlap of the two bodies of law. One critical outcome of the overlap was the extraterritorial application of the European Convention to foreign civilians (as unprivileged belligerents) in the custody of United Kingdom forces, which permitted those persons to sue for damages in the European and United Kingdom courts. Another area of concern was the effect of human rights limitations on United Kingdom forces working in conjunction with other, less human rights-limited states in a coalition operation.

It is at this intersection that an attempt to completely merge the two regimes is bound to fail, barring the introduction of new international law instruments or a resurgence of international armed conflict *simpliciter*. Have the jurists reached the finite limit of the merger problem? Where do the law and policy go from here? In light of the jurisprudence, state practice and academic writing, human rights law is the clearly defining paradigm for the interpretation for

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282 Ibid., at 28
283 It is very difficult to coordinate combined operations (i.e. operations involving the armed forces of two allied sovereign states) when trying to match the use of force capabilities between nations subject to regional human rights norms and those not subject to the same restrictions and limitations. Commanders of multi-national force invariably use the states with the more permissive
the use of force in contemporary conflict. Having said that, the current state of
complementarity does not provide a complete answer to the tension that
continues to exist between the regimes. I close this chapter with a quote from the
late Leslie C. Green:

“What is important in regard to human rights whether in
peace or war is not so much what the law proclaims as a
right as what it provides for the protection and
enforcement”\textsuperscript{284}

It is worth remembering this statement when reviewing the claims of human rights
breaches occurring during armed conflict. After all, while the process may be
important, the most critical issue is the measure of care afforded the victims,
civilian or combatant.

5.8. Summary

What lessons can be learned from the discussion about managing the
convergence? The academic literature and the jurisprudence have offered some
guidance. If the humanitarian law regime does not authorise detention in non-
international armed conflict, and UN Security Council Resolutions authorising “all
necessary measures” are insufficient authority as customarily written, what can
be done to reduce the tension? How can international security forces restore

\textsuperscript{284} Leslie C. Green, \textit{The Relations between Human Rights Law and International Humanitarian
Boundaries of International Humanitarian Law”, (British Institute of International and Comparative
peace and security in asymmetric conflicts without causing *prima facie* breaches of human rights? States engaged in security missions in failed or failing states against violent and well-organised insurgencies or genocidal regimes surely wish to avoid the tedium, expense and uncertainty of human rights claims.

In the next chapter I will highlight the most pressing areas of contemporary conflict that cause the most tension. I will also examine the attempts made (both legal and policy) by state security forces to find a solution to the gaps in international law that meet both the needs of military necessity and the humane treatment of belligerents and civilians. Finally, I will apply the lessons learned in the long trajectory of convergence to find conventional and policy-based practical solutions to reduce the inherent tension.
Chapter 6 – Reduction

6.1. Introduction

“‘You will observe the Rules of Battle, of course?’ the White Knight remarked, putting on his helmet too. ‘I always do’, said the Red Knight, and they began banging away at each other with such fury that Alice got behind a tree to be out of the way of the blows. ‘I wonder, now, what the Rules of Battle are,’ she said to herself.”

Alice could be observing any one of the contemporary conflicts referenced in chapter 1 and could easily ask the same question. Presumably the Red Knight and the White Knight are both combatants, and can rely on a commonly understood set of rules for single combat. But what if the Red Knight was fighting as a member of a foreign coalition against a non-state actor in an internal armed conflict? What, then, are the rules of battle? The significance of this chapter revolves around my attempt to offer new solutions to reduce the tension created by regime convergence.

Reconciling the norm conflict is a complicated and multifaceted endeavour. As practise and jurisprudence show, and despite disadvantages, convergence will continue to dominate the debate. Therefore solutions will have to be crafted to take effect within the convergence trajectory. It would be quixotic and impractical to return to the immediate post-World War Two era in which human rights and humanitarian laws were considered inviolably separate regimes. It has taken forty years of evolution to get to the existing tension-riddled
impasse and it will probably take an equivalent amount of time to undo the competitive aspects of convergence.

As discussed in chapter 2, the changing nature of conflict has spawned new techniques and actors. Additionally, human rights norms are ascendant; jurists and critics of modern warfare tend to view the belligerents’ actions in conflict through a human rights lens. Consequently, acts in armed conflict that are customary and lawful under humanitarian law norms now raise cries of alarm. The very vocal cries of public alarm in turn cause political leaders to direct their state security forces to conduct operations without causing excessive or visible property damage or civilian casualties, even during the lawful and prudent application of force under humanitarian law norms. Facing a determined insurgency while employing law enforcement methods places the security forces at greater risk. This in turn leads to a value judgement and a question seldom debated in the organs of state governance: whose safety is worth preserving – the expensively trained, professional security official, the citizen of the beleaguered state, or the unprivileged belligerent?

Reliance on a predominant human rights regime to govern belligerent conduct in asymmetric warfare is flawed. The humanitarian law regime, with the permissive, proactive, and flexible application of force provides a better normative framework to restore peace and security in contemporary asymmetric warfare.

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crises. To restore the appropriate significance and relevance of humanitarian law, I must challenge the opinions of the advocates of human rights predominance. This is a challenging task and runs counter to the evolved view that humanitarian law is inadequate in scope and depth to control non-international armed conflict. However, there are valuable lessons to be gained from using the findings set out in the human rights jurisprudence. As an example, the findings of the Serdar Mohammed case\textsuperscript{286}, which I set out in the chapter above, are instructive in reducing the tension. Indeed, the case underscores the importance of establishing a sound and detailed legal framework before engaging in armed conflict in a UN sanctioned mission.

In the previous two chapters I examined the tension created by the trajectory of convergence of the two bodies of law as they competed for primacy in the arena of contemporary conflict. I also reviewed the various attempts by state actors and tribunals to manage that convergence. Hitherto there has been no bright line between situations where one or the other of the regimes enjoys primacy. It is clear to me that the development of a bright line, either by jurists or convention is unlikely in the short term. But some clarity would help military forces and security organisations conduct their operations without fear of unintended breaches of human rights norms and nugatory litigation.

\textsuperscript{286} Leggat J. noted in Serdar Mohammed, op cit, that the Technical Agreement between the Government of Afghanistan and the UK did not provide express permission for the UK forces to detain Afghan citizens under Afghan law. Such wording would have reduced (but not eliminated) the human rights impact of the case.
In the first part of this chapter I will examine the fundamental elements that define the reduction model – the contemporary pressure points, classification of the conflict and participants, the role of the principle of humanity, and finally the tension between absolute necessity and military necessity. I will focus first on the most important impetus of the convergence debate and the main pressure points of armed conflict-based human rights jurisprudence – civilian casualties and detainees. I will demonstrate how the converging norms dictate differing and frequently fatal outcomes to common confrontations in contemporary conflict. I have chosen these pressure points because any effort to de-conflict the norm application and thus reducing the tension will have an immediate and lasting effect on the maintenance of peace and security.

I will follow the examination of civilian casualties and detainees with the issue of classifying the conflict and belligerents. As discussed in previous chapters, rigid classification tends to limit the range of available responses to peace and security efforts. Insights into the differing norms and rules dictated by proper classification will inform my proposed framework for reduction. I will finish the first part of the chapter with an examination of two competing principles in the application of force – absolute necessity (the human rights standard) and military necessity (the humanitarian law principle).

In the second part of the chapter I will set out the conditions for creating a legally sound and simple analytical framework for the use of force in non-
international armed conflict. This discussion will revolve around the key tools available to reduce the tension – a rejuvenation of humanitarian law, a universal application of force framework, a reappraisal of the kill/capture priority and finally blended rules for detainee management. My conclusions from examination of these tools will inform a framework for my proposal. This framework will reduce the tension between human rights and humanitarian law, while maintaining international legal norms and contributing to the effectiveness of peace and security missions. I will close the chapter with my contribution to reducing the tension by applying the best features of both humanity-based regimes and applying them to the conduct of hostilities in asymmetric warfare. I will attempt to achieve Noam Lubell’s objective: “The focus of arguments is now shifting from the question of if human rights law applies during armed conflict to that of how it applies, and to the practical problems encountered in its application”.287

6.2. Common Pressure Points in Asymmetric Warfare

In this section I will situate the civilian casualty and detainee management problems encountered during asymmetric warfare within the norm conflict debate. Civilian casualties are the most common and frequently unnecessary (and often unjustified) negative outcome of the application of force in contemporary warfare. Civilian casualties are abhorrent to both human rights and humanitarian law and as such a good starting point to examine the principles and processes governing the use of force under both law enforcement standards and

287 Noam Lubell, supra note 7 at 738.
military operations. I chose the term “civilian casualties” advisedly, but for simplicity. There is a whole range of mistreatment that may be suffered by the civilian population in a conflict zone and which falls under the broad category of civilian casualties. While it is beyond the scope of this thesis, there is certainly enough evidence of abuse of civilians at the hands of domestic law enforcement officials during counter-insurgency operations, sometimes accidental, but usually deliberate. I wish to focus on the civilian casualties caused by accident and misadventure during the conduct of peace support operations.

Second, I wish to highlight the problems that arise when the two legal regimes compete for the status, treatment and disposition of detainees. As evident from the international response to the situation in Guantanamo Bay, and the jurisprudence discussed in the previous chapter, this theme continues to resonate in the governments of states involved in this warfare. Detainee management remains one of the most legally complicated and politically difficult operations within an intervention mission. I hope to offer a detainee prescription that provides the detained person with the conditions of care and treatment found in the Third Geneva Convention with the legal safeguards provided by human rights conventions.

6.2.1. Irreducible Civilian Casualties

Normally mistreatment of civilians would properly fall under human rights or domestic criminal law, but my interest lies with the injury and death suffered by
civilians present in situations of armed conflict and subject to the mixed application of human rights and humanitarian law. Media sources produce an overwhelming reportage of civilian casualties. The news networks cycle the video clips of fatal incidents repeatedly to stress the apparent carelessness (or deliberate acts) of the belligerents. Viewers unschooled in humanitarian law immediately cry foul. No thought is given to the nature of the conflict or the proportionality analysis, and commentators invariably misunderstand the application of the law to the facts. Granted, in an ideal conflict only the belligerents would become casualties. Of course there is no such thing – the “cleanest” recent war was the Falklands campaign between the United Kingdom and Argentina. It was “clean” because the fighting took place on the high seas and on a remote, sparsely inhabited archipelago and between two professional militaries; contemporary conflict among the population and in heavily urbanised areas invariably causes casualties, even when operations are conducted at the highest standard of humanitarianism. It is equally true that unnecessary civilian casualties are morally abhorrent, but despite advances in weapon accuracy and training in the laws of war for soldiers, civilian casualties continue to occur.

Generally, civilians may fall victim to the kinetic effects of armed conflict through deliberate targeting or by proximity to detonating munitions. However, in peace and security operations civilian casualties often occur by misfortune, commonly at a security checkpoint. Security checkpoints are a common movement control measure in counter insurgencies and hold the potential for the
accidental use of deadly force. Consider the scenario set out in the introduction. A region of the afflicted state is in a situation of insurgency. Legitimate armed forces, that is, members of the international coalition, operate a checkpoint on a major thoroughfare in order to restrict the movement of insurgents. A civilian vehicle containing three adult males approaches the checkpoint. Outwardly, they exhibit no hostile activity; however, recent intelligence gathering has reported that certain types of vehicles carrying certain ages of males make up the greater proportion of the suicide car bombs in this theatre of operations. The troops are thus alert to the possibility of suicide bombers and are braced for response.

The civilian vehicle approaches the checkpoint without slowing down and the driver ignores the hand signals of the security officials staffing the checkpoint. Perhaps the driver is distracted and has not noticed the signals. Perhaps the windshield is too dirty. Alternatively, there is the real possibility, based on up-to-date intelligence, that the car contains insurgents. What is the on-scene commander to do? Is the failure to stop a legitimate ground to enable conduct-based use of force under a case of “taking part in hostilities”? Should the commander order the troops to engage to disable the car or wound the occupants (both easier said than done)? Absent indications of hostility, should the commander let the car pass without interference? Should the commander stop the car and risk casualties if the car bomb is detonated?288

288 A good example of the dilemma facing security authorities at vehicle checkpoints can be found in Jaloud v. The Netherlands, [2014] App. No. 47708/08 (ECtHR [GC]), and described in Silvia Borelli, Jaloud v the Netherlands and Hassan v the United Kingdom, Time for a Principled Approach in the Application of the ECHR to Military Action Abroad (2015) QIL Zoom-in 25 at 30.
Humanitarian law states that, under the principle of distinction, and without further indicators of hostile activity, the target car contains civilians and thus protected from the application of force. Thus the “correct” answer: let the car pass. But humanitarian law is not meant to be a suicide pact. Commanders have to answer to their governments on a legal basis and to family members on a moral basis if they are careless or negligent with the lives of their subordinates and of their allies.

But the analysis is not complete. If the on-site commander distinguishes an occupant or the driver of the car to be a threat to the safety and security of the checkpoint and local civilians, he or she may order the troops to use deadly force. Just before the order to stop the car and seize the occupants is given, the commander must consider the likely outcome of this use of force. At this point proportionality - the handmaiden of distinction - takes effect. As discussed above, the principle of proportionality simply states that the incidental collateral civilian casualties and damage to property caused by the targeting of a person or object must not exceed the military advantage gained.

Thus, assuming the troops have reason to open fire to disable the vehicle and possibly kill the driver, what is the legal effect? The other occupants of the car, if not insurgents (they could be innocent civilians) and the car itself as a

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Dutch soldiers were supervising a checkpoint manned by Iraqi forces; Mr. Jaloud was killed in a shooting at the checkpoint, allegedly by the Dutch troops. While the shooting was not proven, the Netherlands was nevertheless held by the ECtHR not to have conducted a sufficiently thorough investigation of the incident as required under Article 2 of the ECHR.
civilians, are collateral damage. The actions of the commander may be justifiable under humanitarian law if the removal of a suicide bomber and the supporting cast enhances the effectiveness of the overall counter-insurgency campaign and the security of the local civilian population. However, such an outcome is unsettling to human rights sensibilities; a human rights tribunal might find that the use of force was excessive and the killing of the civilians an unjustifiable deprivation of life, because there is no proportionality analysis to weigh the casualties against the military advantage gained in the counter-insurgency.

Now consider the same scenario from a human rights perspective. Under the law enforcement/national security paradigm, the checkpoint serves the same operational purpose for the police as it did under military control. The critical difference lies in the conduct of the officials staffing the post. Under this approach, the police could only use force in an escalatory manner under conditions of absolute necessity and within the states’ policing laws and policies. Of course, faced with suicide bombers, the police are subject to the same disadvantage as the soldiers. They can approach and stop the car, and either arrest or subdue the driver by force. Or they can let the car pass. Either way, they may perish in the detonation of the car bomb. However, in contrast to the military force paradigm, if the police have cause to apply lethal force, they do not have access to the proportionality analysis available under humanitarian law norms. Instead, their actions may be subject to review and possible disciplinary
or criminal sanction through a proportionate response analysis. This is a much
different approach and a more difficult standard to meet than that found in
humanitarian law. As can be seen in recent events, the knock-on effect causes
the military forces to become more restrained and causes the police forces to
look and act more like soldiers in the interest of self-preservation. Then the
essential question remains - is it possible to balance the competing norms so that
security is maintained without undue casualties to innocent civilians and security
forces?

6.2.2. The Pitfalls of Detainee Management

The other critical pressure point in contemporary conflict, one that
contains a great potential for public approbation and political failure, is the
management of detainees. Again, consider the campaign scenario that I set out
in the introduction. The event that I describe below is one frequently faced by
security forces in contemporary conflict.

During military patrols to restore peace and security in a contested region,
intelligence has identified a walled compound in the remote rural area where a
top-tier insurgent leader is believed to be hiding. The compound is also believed
to be a bomb factory and a transit point for insurgents moving to and from safe
havens in a neighbouring sponsor state. Capture of the leader and removal of the
bomb-making facility and safe house would significantly improve the local
security situation and contribute to the overall aim of the international mission.
Thus a helicopter-borne raid is planned with the aim of capturing the leader and destroying the bomb-making material. Upon arrival at the site of the compound, the raiding force is met with anti-aircraft missiles and heavy small arms fire. Invoking the inherent right of self-defence, they return fire to suppress the belligerent weapons, killing several insurgents in the process. After landing, the team encounters and captures the insurgent leader, seriously wounding him in the process. The force then destroys the bomb-making material and flies back to base with the captured insurgent leader.

Viewing their results a success (another named insurgent leader taken out of the fight and a bomb factory neutralised), the coalition forces are unaware that their legal troubles are really just beginning. The security forces now have to decide what to do with their wounded detainee. They know by virtue of training on the laws of war that detainees must be treated “humanely” and so they ensure that his wounds are treated promptly. Once treated and stabilised, the insurgent is removed to a secure detainee facility to convalesce and for processing. The most important question remains: what is the legal status of the detained insurgent?

The answer really depends on the start point of the analysis. One must go back to first principles: What is the nature of the conflict? The analysis will have surprisingly different outcomes depending on the characterisation of the conflict. In the case of international armed conflict, the detainee might hold certain
privileges under the Geneva Conventions. If detainees meet certain criteria, then they may be classified as a “combatant” and as such enjoy the status of Prisoner of War upon capture. In that case, they are entitled to the standard of treatment set out in the 3rd Geneva Convention. One of the most important (and sought-after) features of combatant status is known as combatant immunity.

Simply put, combatants cannot be charged for crimes committed in the lawful execution of their military duties (including taking the lives of other humans and destroying property) as members of a regularly constituted armed force in an international armed conflict. For anyone wishing to take part in hostilities, this is the status one should desire. It provides a certain peace of mind and lets members of security forces execute their missions without fear of criminal prosecution. However, combatant immunity has certain limitations. It is only available through participation as a member of a state-raised armed force in a situation of international armed conflict. Even then, combatant immunity may run counter to the principles of international human rights law. Other practical and policy reasons militate against awarding combatant status. In the case of transnational war or insurgency, the state authority is reluctant to award any

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289 See GC III and Hague (IV). To qualify for PW status, the belligerent must be a member of a regularly constituted armed force of a state, or a member of an armed group meeting strict criteria (Hague IV Regulations Article 1).

290 Often called “lawful combatant”, as opposed to “unlawful combatant” both of which are misleading labels. There are two primary classifications of persons in international armed conflict: combatants and civilians. All other labels are sub-species of these two primary classifications. Only combatants and some civilians in certain limited circumstances have the right to take part in hostilities. Anyone else who chooses to take up arms without lawful authority (such as an insurgent or rebel) is an “unprivileged belligerent” and can claim no special immunities under international humanitarian law upon capture.

291 See article 14 of the ICCPR.
privilege or status to members of insurgent groups. Why would a state provide political and international legitimacy to unlawful acts under the guise of a rebellion?

From the perspective of the state authority trying to manage an insurgency that involves non-state actors as insurgents, Prisoner of War status is anathema. Even if Prisoner of War status were available to the state authorities, there would be no appetite to apply such protection; it rewards what is widely viewed as criminal behaviour and lends legitimacy to the insurgency. And the idea of immunity from prosecution and repatriation instead of a trial and incarceration for insurgent acts is politically unacceptable. What then is the solution? One method of dealing with detainees who have breached humanitarian law norms is to create special (military) tribunals under the authority of the detaining power to try captured civilian insurgents for their unlawful acts. But as we have seen from recent experience, creating tribunals outside of the jurisdiction of domestic criminal law process and procedural safeguards has been criticised for failing to meet basic legal norms for criminal trials. To address the issue, should states create a humanitarian regimen of capture, treatment and disposition that protects the detainee without granting the unwarranted status of Prisoner of War, but enables access to the elements of justice and eventual disposition by a regularly constituted court? Is there such a detention framework?
6.3. Framing the Reduction Analysis

Before any attempt can be made to imagine a reduction framework, I must situate the preconditions of and limitations on the use of force as dictated by the two regimes. This discussion will clarify the embedded problems that militate against simple solutions to the norm convergence. To do so I will examine the effect of the current classification regimes for conflict and the participants, the role of the unifying principle of humanity and the distinction between absolute necessity and military necessity. All of these themes impinge directly on any use of force framework designed to reduce the tension.

6.3.1. Classification of the Conflict

The start point of any discussion of the rules governing the use of force is the classification of the conflict. Precise terms are very important here. State governments tend to use rhetorical devices to rouse their populations, and to invoke certain legislative permissions, but they are misleading. Labels such as “the war on drugs” or “the war on terror” carry no legal status under international humanitarian law; they are for the most part law-enforcement campaigns to which national and international human rights laws apply.292

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The choice of conflict is currently binary: the conflict is either international or non-international, and the rules that apply to each are well known. As discussed in the chapters above, asymmetric conflict does not fit squarely into either choice; it has elements of both classifications and other features that do not fit the available choices. Any reflection of the situation in the Gaza and Syria, for example, reveals a conflation of the law of occupation, the domestic law governing law enforcement activity and non-international armed conflict, all of which are subject to human rights norms. How does a state manage the confluence of the diverse legal constructs? Clearly the current options, such as parallel application, do not fully meet the needs of contemporary trans-national warfare.

There are several terms in use now: internationalised non-international armed conflict, or transnational conflict; labels that attempt to capture the features of both intra-state and extra-state conflict. Wars such as that in Vietnam (1960s), Lebanon (in the latter half of the 20th century) and Afghanistan (1979 to present day) bear these labels. These conflicts would be non-international in nature, but for the support of external, third party state(s) which actively supports one party to the conflict, and the presence of non-state actors. The common

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293 Several choices are binary in humanitarian law: civilian vs. combatant; international vs. non-international; internee vs. prisoner of war; lawful vs. prohibited targets; self-defense vs. offensive operations, to mention a few. The problem with binary choice is that it limits the use of one’s imagination and stultifies consideration of alternatives.

294 See Schabas, supra note 180, for a detailed examination of the theory of parallel application of human rights and humanitarian law. Essentially, a state can apply both regimes but manage the incompatibilities in different manners, either by the lex specialis approach or by additive application.

295 Roy S. Schondorf, supra, note 7 at 12 – 14.
attribute of these conflicts is that cannot be easily categorised by the existing
conventions. Thus the rules are unclear, as I have been emphasising throughout
this thesis. These conflicts are a hybrid type of warfare and require a new
perspective.

What is evident from the recent historical record is that there is no clear
and practical distinction between the current classifications of conflict. Contemporary conflict appears to reside on an unbroken spectrum of violence;
there is no obvious threshold between low-level riots and disturbances. The
frequent car bombs in the marketplace and catastrophic raids by insurgents on
security force installations all resemble conventional warfare. In addition, there is
often no clear territorial limit to the insurgency. Hence, the current classification is
difficult to apply with precision, which leads to gap filling by innovative terms as
suggested above. Is it now time to discard the outdated distinctions in the
classification of warfare? Would a consistent application of a single type of
conflict that encompasses all violence above the level of domestic disturbances
(the true realm of law enforcement), irrespective of location, reach and status of
belligerent parties, aid in reducing the tension? The risk of lowering the threshold
of armed conflict is that states may relinquish human rights standards regulating
the use of force and instead resort to the military targeting standard. Such a
relinquishment would undoubtedly lead to an increase in civilian casualties and
property damage. The key lies in balancing the competing norms.
As discussed in a previous chapter, trans-national or extra-state conflicts are a distinguishing factor of contemporary warfare and they are expanding. Confounding classification is a lack of a clear definition of trans-national conflict. It could be defined as whatever is left once the other types have been defined, but that is insufficient for clarity and consistency. The traditional types are set out in the conventions and have also been subjected to judicial interpretation. However, glimpses of a third type can be detected in the jurisprudence and academic research. For example, in Tadic, the Appeals Chamber stated:

“An armed conflict exists when there is resort to armed force between states, or protracted armed violence between governmental authorities and organized armed groups or between groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states, or in the case of internal conflicts, the whole territory under the control of a party…”

Missing from this jurisprudence is the description of a third type: armed conflict with a non-state actor outside the sovereign territory of the party. While not included, it was not excluded from the Tadic definition. Using state force outside one’s territory against non-state actors was defined by Yoram Dinstein as

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296 Perhaps there never really was a clear distinction until conflict was defined in the Conventions.
“extra-territorial law enforcement”\textsuperscript{299}, but he did not envision the conditions of conflict that resemble inter-state combat nor the protracted nature of campaigns against a motivated and widely dispersed belligerent. But Dinstein’s view is an indication that there may be a nascent type of conflict ready to be categorized and formalized.

Roy Schondorf has discussed the classification of conflict in detail.\textsuperscript{300} He proposes four ways of classifying extra-state hostilities: a situation of peace (irrespective of the level of violence); an intermediate situation that is neither complete peace nor full-scale war; extra-territorial law enforcement, where the security forces act within the rules of self-defense\textsuperscript{301}; and the last, classical armed conflict. Schondorf states no preference for the third over the fourth model; they both involve military use of force, but under differing legal frameworks and authorities. He notes that the second category offers the first step to the creation of an intermediate category between war and peace; he envisions the guidelines for the use of force lying somewhere between the regulation of law enforcement and the rules of engagement in humanitarian law.

Schondorf’s description resembles the convergence model discussed in above, albeit with the application of formal rules rather than expedient ones. The

\begin{footnotesize}
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\item \textsuperscript{299} Yoram Dinstein. War, Aggression and Self-Defense, 3\textsuperscript{rd} ed., (Cambridge University Press 2001) at 218.
\item \textsuperscript{300} Roy S. Schondorf, \textit{supra} note 7, 12-14.
\item \textsuperscript{301} Schondorf cites the \textit{Caroline} Case in which self-defense is governed by the principles of necessity, proportionality (better called “proportionate response”, so as not to be confused with the similar principle found in humanitarian law) and immediacy. \textit{Ibid.}, at 30.
\end{itemize}
\end{footnotesize}
convergence trajectory has largely been achieved by circumstance, with the resultant confusion in the proper application of legal regime. On examination, transnational or extra-state warfare closely resembles intra-state warfare, in that the belligerents share many characteristics. Frequently, *locus delecti* of the non-state actor is the only discriminating factor. Israel has experienced this phenomenon in its operations against members of Hezbollah (a non-state actor) outside its sovereign territory (in Lebanon). Experience has shown that states and non-state actors, in the pursuit of self-interest on conflict, would seek to act with legal impunity in the absence of a comprehensive legal framework.

Any unifying use of force framework that I intend to create must take into account the rules applicable to each classification of the conflict. Absent any agreement in the applications of the norms, I must find the underlying principles that unify conflict for the purpose of protecting the rights and privileges of the belligerents.

6.3.2. Classification of the Belligerents

Does status matter? Decisions regarding the application of force, status, the type of detention and final disposition are grounded in the classification of a belligerent. Classification of the participants is inextricably linked to the classification of the conflict. Belligerent status is the most significant item in the application of human rights or humanitarian law principles and has been debated
for decades.\textsuperscript{302} Status is critical to the determination of disposition of the belligerent. As discussed in the chapters above, lawful management of unprivileged belligerents is a vexing issue in contemporary conflict. States involved in a non-international counter-insurgency do not wish to grant legitimacy to the insurgents by awarding status and consequent special protection. Such an approach complicates an already difficult situation when belligerents are captured and detained. Is it time to reconsider the classification of non-state actors? As Francis Bugnion stated there is no incentive for an unprivileged belligerent or insurgent to follow the customs and usages of war if they in turn will be denied the same legal protection as that provided to combatants when captured or defeated.\textsuperscript{303}

The type of conflict and type of belligerent are inextricably linked. One cannot change the status of one without changes to the status of the other. This is a controversial topic. I accept that there controversy inherent in awarding special status to those persons who many states regard as criminals. But progress needs to be made in getting such persons before properly constituted tribunals for their war crimes or international criminal acts. In addition, there

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\textsuperscript{303} Francis Bugnion, \textit{supra} note 17 at 538
needs to be a reciprocal burden placed upon them to abide by the customs and usages of war.

In questions of status in international armed conflict, the rules are well known and the choice is again a binary one: one is either a combatant or a civilian (all other labels are sub-species of those two categories). Combatants, once captured, enjoy prisoner of war status and fall under the substantive protection set out in the 3rd Geneva Convention. Persons who took part in hostilities and who do not meet the criteria for being granted combatant status fall under the substantive protection found in the 4th Geneva Convention. Article 4 of the 4th Convention states:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves (...) in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.

This classification applies even if the detaining party treats the detainees as unprivileged belligerents.\(^{304}\) However, protection is curtailed to those who have taken part in hostilities against a state party. In recognition an unprivileged belligerent has forfeited some of the freedoms set out in the 4th Convention, Article 5 provides the following conditions:

\(^{304}\) Originally, this was not a settled issue. During the meetings leading up to the drafting of the 1949 conventions, parties were split over the extent of protection to be offered civilians who participated in hostilities. The debate was highlighted in the ICTY case *The Prosecutor v. Delalic et al*, Judgment, 16 November 1998, IT-96-21-T at para. 271: “if an individual is not entitled to the protection of the Third Geneva Convention as a prisoner of war (or the First or Second Conventions) then he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are met”. See Knut Dormann, *The Legal Situation of Unlawful/unprivileged Combatants* (2003) 85 I.R.R.C. No. 849 at 45.
Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

In cases of international armed conflict, Article 75 of Additional Protocol 1 provides protection for the same class of belligerent. It states:

“…persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article…” 305

If the detaining power is not a party to Additional Protocol 1, then the only protection for the detained belligerent is found in Common Article 3. As discussed above Common Article 3 provides only the most basic of protections and offers no granularity for a process to lawfully dispose of an unprivileged belligerent. Of course, the reverse is not true: a combatant who is captured by a non-state actor is entitled to neither prisoner of war status nor the basic protections of Common Article 3. At best, the detained combatant can hope that the non-state actor will abide by customary law or the internal rules of warfare for their particular movement or ideology. 306

305 Additional Protocol I, Article 75, op cit.
Is there another choice of status? Is it possible to create a type of person who has both the obligations of a combatant and the protections of a civilian? Perhaps all persons should be treated to the same standard, irrespective of status. Would this approach risk providing too many benefits to unprivileged belligerents while denying combatant immunity to prisoners of war? Possibly, but this approach may not be necessary. After all, non-state actors committing acts of violence are simply criminals and subject to the domestic law of the state in which they are present during the criminal acts. This position necessarily assumes that the state in question is not a sponsor state, or a failed state, and that there exists a functioning police force with a competent judiciary.

Should status matter? In order that peace and security efforts are effective, the classification of the conflict and the belligerents should not be a limiting factor. As has been shown in recent events, having different rules for differing types of conflict and different types of belligerent is nugatory and confusing to state security forces and ultimately leads to inconsistent or improper application. As a consequence, improper application leads to human rights breaches, gives rise to complaints on behalf of the victims and ultimately appearances at human rights tribunals. The point of creating a unifying framework to manage the norm convergence is the avoidance of error and abuse.

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306 For example, the Taliban had a code of conduct that, among other things, called for the sparing of women and children. Regrettably it was observed more often in the breach.
6.3.3. Leveraging the Principle of Humanity

The principle of humanity is oft quoted and frequently unchallenged in international discourse. However, if I am to leverage its best attributes in a meaningful way to reduce the tension and reanimate the discussion, I need to define the principle. Jean Pictet described the principle of humanity as the principle “from which all other principles are derived” and the founding principle of the Red Cross movement and its derivatives. Humanity, humanitarianism, and humane treatment all invoke the best characteristics of human behaviour – the appeal to the inherent value and dignity of people. Within the context of my thesis, its overarching, normative purpose in situations of armed conflict is to prevent arbitrary death, to reduce suffering and to protect the health and well being of humans. Thus it implies restraint in the application of force, compassion to wounded and injured belligerents and prudence in the planning and execution of missions. It necessarily includes the protection of victims and assistance to all persons suffering the negative consequences of armed conflict, be they the effects of munitions or the denial of necessities of life.

A principle founded on the compassionate treatment of fellow human beings in need should be uncontroversial. In the words of Antonio Donini, “what unites the various facets of humanitarianism is a broad commitment to alleviating

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the suffering and protecting the lives of civilians caught up in conflict or crisis”. However, the wide acceptance of the principle conceals varied differences in opinion about its operational effectiveness. We must recall that its origin as a legal principle derives from the First Geneva Convention of 1864. Henri Dunant, the aforementioned founder of the International Committee of the Red Cross, intended that the principle of humanity be primarily and solely concerned with the treatment of wounded soldiers on the battlefield, and not concerned with civilians suffering from the consequences of 19th century warfare. But humanitarian law has since evolved to encompass all subjects of an armed conflict, combatant and civilian alike.

The principle of humanity is often reversed to gain political support for a state’s efforts to counter the enemy. Inhumanity is much easier to define and inhumane conduct is often specifically prohibited in the conventions. Belligerents are labelled “inhumane” to de-legitimise their insurgency and bring attention to their misconduct in conflict. Inhumanity is thus the mirror image of humanity and implies inhumane treatment, the violation of fundamental rights and abuse of victims of conflict. In addition, humanity and humanitarian treatment often conceal a power imbalance: the richer, better-developed states extend discretionary aid (with conditions) to the less well off states or groups, exhibiting a power gradient and an unequal exchange.

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310 For example, torture, killing prisoners, abusing detainees.
311 Fast, *supra*, at 113.
The principle of humanity has a wide meaning. According to Robin Coupland there are two alternative meanings: humanity as a collective noun describing human beings, and humanity as sentiment, that is, the behaviour and disposition of being humane.\textsuperscript{312} It might apply to civil defence matters, disaster relief, food and medical supplies delivery, and it also guides the operating modality of non-governmental aid organisations. For my approach to reconciliation of human rights and humanitarian norms, I need to focus the on relationship between the concept and its application to international law, and in particular how it penetrates humanitarian norms. I am not referring to the beneficiary aspects of humanitarianism; that is, the giving/donating impulse activated by the benevolent organisations. That is a completely different industry and one that is beyond the scope of this thesis and best discussed in another forum.

The definition of humanity that I wish to exploit is the one that governs the proper treatment of victims and moderates the application of force in armed conflict settings. In its original form, humane treatment was accorded to one’s enemies by custom. The changing nature of conflict post World War Two caused the principles to be extended to persons other than combatants. The adoption of Additional Protocol II in 1977 further codified the boundary between military necessity and humanity, particularly as it applies to persons other than combatants. In order to leverage the principle of humanity, I need to extend the

\textsuperscript{312} Robin Coupland, \textit{Humanity: What Is It and How Does It Influence International Law?} 83 I.R.R.C. No. 844 at 972
application of humanitarian conventions, such as the Additional Protocols, to internationalised non-international conflict, thereby embedding humanity into the rules governing the conduct of security forces in peace and security operations.

Humanity, as it is embedded in humanitarian law, acts as the counterweight to military necessity. The two principles operate in a delicate balance; aggressive acts and offensive operations, enabled as they are by military necessity, and are tempered by the humanitarian impulse. As explained in chapter 3 in the discussion of the Martens Clause, what the laws of war do not forbid is not necessarily permitted. Where the limitations prescribed in the written conventions become vague or non-existent, the conduct of the parties in conflict is governed by the principle of humanity.

The unifying principle of humanity has the potential to reinvigorate the application of humanitarian law, and the proper understanding of the principle of humanity informs my proposed framework. Humanitarianism underpins the aspirations of human rights and humanitarian treaties and consequently informs the conduct of states in the application of force in both armed conflict and law enforcement. With respect to the former, the role of humanity impinges directly on my attempt to reduce tension. In 1971, at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law, the ICRC submitted a report on the value of the humanitarian principle,
based on the St Petersburg Principle\textsuperscript{313}—“the rights of belligerents to adopt means of injuring the enemy are not unlimited”. The report stated in part:

“Recourse to force must never be an end in itself. It will consist in employing the constraint necessary to obtain that result. Any violence beyond this aim would prove useless and cruel. The principle of humanity enjoins that capture is to be preferred to wounding, and wounding to killing: that the wounding should be effectuated in the least serious manner…”\textsuperscript{314}

It must be remembered that these sentiments were being expressed when the international community was discussing and developing the framework of protections that were eventually incorporated in the 1977 Additional Protocols. But it is instructive to see that the same questions were being asked then as they are now: warfare has changed, the rules are incomplete, what should be done to improve the rules?

As revealed in the chapters above, the two regimes have much in common by design. I need to leverage the common principle of humanity to derive a useful tension-reducing framework. I will also consider the subsidiary attributes of humanity— the two that should be embedded in the humane application of force: restraint and prudence. Those two humane attributes, when applied to a given crisis at a point of contact, can substantially reduce unnecessary injury and damage.

\textsuperscript{313} This principle became enshrined in Article 35 of the First Additional Protocol.
While the application of the principle of humanity differs in quality and granularity depending on context, I believe there is potential to find common ground. The key to reducing the tension is moderating the profligate use of force. State authorities could look to the minimum humanitarian standards as set out in the 1990 Turku Declaration.\(^{315}\) The Turku Declaration urges the adoption of a universal humanitarian standard that binds all participants in all conflict and without distinction by individual status. Endorsed by human rights stakeholders,\(^{316}\) the Declaration has one advantage of removing the differing standards of application and accountability between states and non-state actors experienced in the asymmetry of insurgent warfare.\(^{317}\)

The principle of humanity, as the common thread in both regimes of law, engages the consequential attributes of restraint and prudence. Both attributes contribute to reducing the application of deadly force, and hence capable of reducing the tension. Those attributes combined with caution and deliberation on the part of security forces may reduce unnecessary civilian casualties in contemporary conflict.

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\(^{315}\) Institute of Human Rights, Abo Academi University, “Declaration on Minimum Humanitarian Standards”, (Turku, Finland, 1990). Cited in the Tadic case: “weapons or other material of methods prohibited in international armed conflicts must not be employed in any circumstances” Prosecutor v. Tadic, Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para 119.


\(^{317}\) See David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, (2009) 42 Isr. L. Rev. 8 at 38.
6.3.4. Absolute Necessity and Military Necessity

Are they compatible in their governance of force? One of the pivotal points of tension revolves around the differing standards of application of force. In violent confrontations during which the level of conflict exceeds riots and disturbance but resembles low-intensity armed conflict, the human rights norm of absolute necessity clashes directly with the principle of military necessity. The former requires peaceful means to be exhausted before lethal force is used. Conversely, military necessity lacks the same requirement – lethal force can be applied in the first instance and without escalation. Could a compromise between the two standards combine the application of best human rights practices with the optimum humanitarian principles to reduce the risk of casualties in a confrontation?\footnote{318 Ohlin, supra note 20, at 1310 - 1312} Think of this potential approach as very robust law enforcement (or combat lite)\footnote{319 Interestingly, peacekeeping operations authorized under Chapter VI of the UN Charter (Pacific Settlement of Disputes) already use this model – the peacekeeping contingents may only use force through the related principle of self-defence \textit{in extremis}, and in an escalatory fashion.}, a practical means to fill the grey area in the spectrum of conflict between law enforcement and military operations. To put it another way, compromise could fill the legal gaps between the law of peace and the law of war.

Consider the different use of force principles at play. In the human rights-based policing paradigm, “absolute necessity” is the guiding factor in determining whether to use force up to the resort to deadly consequences without violating
the right to life while pursuing public order and safety.\textsuperscript{320} In other words, all peaceful means of solving a violent confrontation must be exhausted in an escalatory fashion before deadly force is to be applied, and then only if the object of the application of force constitutes a danger to life of the security forces and bystanders. This implies that where possible, capture (arrest) must be effected by using non-lethal means, at least as a start point. Thus, “absolute necessity” is a limiting factor.

Contrast the process described above with the application of force under humanitarian law norms. “Military necessity” is an enabling factor that has nothing to do with escalation of force in the policing paradigm. In armed conflict, the state may use “that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission if the enemy at the earliest possible moment with the minimum expenditure of life and resources”.\textsuperscript{321} In other words, a state may use force against an opponent to resolve a given conflict in the most efficient military means to preserve ones’ territory and protect ones’ armed forces and citizens from the effects of belligerency. Under the principle of military necessity, the application of force is specifically limited by the

\textsuperscript{320} See for example, ECHR Art 2, Para. 2: “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection” (emphasis added).

humanitarian law principles of distinction\textsuperscript{322} and proportionality\textsuperscript{323} and more generally by the Hague Convention of 1907.\textsuperscript{324} In principle, but not always in practice, military necessity in no way resembles the cautious, stepwise, escalatory application of force in the law enforcement model.

One practical effect of moderating military necessity with human rights principles can be seen in the ISAF Headquarters policy of “courageous restraint” as applied to the participating states in the peace support mission for Afghanistan.\textsuperscript{325} The legal and public consequence of causing civilian casualties (even if lawful), coupled with the direction issued by the Afghan president\textsuperscript{326} led the Commander of the Afghanistan mission to impose a policy of restraint on the forces operating in that country. Courageous restraint approximates the law enforcement modality of escalation and the principle of absolute necessity, but can also be viewed as an amplification of the precautionary rules set out in Additional Protocol II. Irrespective of its underlying rationale, courageous restraint is one policy technique for incorporating human rights norms into war-fighting techniques.

\textsuperscript{322} Distinction demands that, as military operations may only be directed against combatants and military objects, armed forces must distinguish between combatants and civilians, and between military objects and those civilian objects protected from attack. First Additional Protocol, Arts 48 and 49(3). Distinction is also founded in the custom and usages of war.
\textsuperscript{323} Proportionality requires that civilian casualties and damage to civilian objects resulting from military action must not be excessive in relation to the expected military advantage. First Additional Protocol, Article 51.
\textsuperscript{324} “The rights of belligerents to adopt means of injuring the enemy are not unlimited”. Article 22, Convention (IV) respecting the Laws and Customs of War on Land (Hague IV), The Hague, 1907
\textsuperscript{325} ISAF Standard Operating Procedure 373 “Guide to the Escalation of Force”. Courageous restraint emphasizes the need to take risks, even to the point of risking physical harm to the soldier, in order to avert civilian casualties and damage to property.
While expected to reduce the incidence of civilian casualties during the conduct of security missions, the courageous restraint policy was widely criticised in the United Kingdom and elsewhere as unnecessarily increasing the risk to the security forces.\textsuperscript{327} The criticism highlights the difficult position that security forces are placed in by risk-averse governments, while facing well-armed and violent insurgents. It reveals the dangers and the tension inherent in fighting a war under commingled human rights and humanitarian principles.

Of course, there is no easy way to determine whether lack of mission success or the casualties taken by the security forces can be attributed to an imposed abundance of caution and the resultant acceptance of elevated risk to one’s own forces. Intuitively, applying human rights procedures to situations of combat will cause higher risk to the participants, particularly when the opposing belligerent is bound by no such limitations. That begs the question: should risk to one’s own security forces be determinative of the course of action to follow in dealing with belligerents? Intuitively, if a commander or a security force assesses the risk to his own force to be high, that commander may bring more assets to bear on the threat and potential, in doing so create a collateral damage situation though excessive or unmediated force.

\textsuperscript{326} President Hamid Karzai’s direction (“the Karzai 12”) for conducting military operations in Afghanistan are included as an Appendix to this thesis. ISAF Headquarters promulgated these rules in 2009 as policy direction to the contributing nations of the Afghan mission. \textsuperscript{327} See for example the 6 July 2010 article in The Telegraph: “Courageous Restraint putting troops at risk”, at: http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7874950/Courageous-restraint-putting-troops-lives-at-risk.html
Security forces garner undue attention from the media, citizens and human rights advocates when those stakeholders misunderstand the difference between the two standards. How does one resolve the resulting tension between the duty to arrest in human rights law, and kill/capture paradigm extant in humanitarian law? In the next section I will reconcile the two standards by reverting to an examination of humanitarianism’s first principles.

Moderating military necessity has decades-old antecedents. Jean Pictet’s restraint maxim is often quoted and embedded in the ICRC Direct Participation study (DPH). Pictet stated:

“…if we can put a soldier out of action by capturing him we should not wound him. If we can achieve the same result by wounding him, we should not kill him. If there are two means to achieve the same military advantage we must chose the one which causes the lesser evil”

This escalatory maxim tempers the customary view that combatants are subject to the immediate application of lethal force wherever they may be and whatever they are doing, unless they are hors de combat or indicate a willingness to surrender. The ICRC included this maxim in the DPH Study to underpin their interpretation of military necessity. The ICRC statement read: “the kind and degree of force that is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a

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328 Quoted at p. 82 of the ICRC DPH Study op cit, but originally written in Pictet’s Development and Principles of International Humanitarian Law, (1985) at 75.
legitimate military purpose in the prevailing circumstances”.\textsuperscript{329} The ICRC restatement of the maxim has been criticised\textsuperscript{330} as being an unnecessary and unfounded limitation on the well-established permissible level of force in armed conflict. Irrespective of the critique, the notion is worth closer examination in the light of changes in contemporary warfare and the evolution of humanitarian law.

Is there a rational foundation to the Pictet maxim? Are there situations in which restraints on the use of force are appropriate? Ryan Goodman, in his 2013 article on the scope of the authority to use force thinks so.\textsuperscript{331} In order to respond to the critics of the ICRC DPH Study, one must go back to the 1970s when the humanitarian law stakeholders were attempting to incorporate human rights into the Geneva Conventions. The two Additional Protocols were the result, and the impetus for restraint is found in Article 41(2) of the First Additional Protocol. It states:

A person is hors de combat if:
(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or otherwise incapacitated by his wounds or sickness, and therefore incapable of defending himself

\textsuperscript{329} ICRC DPH Study op cit at 77.
\textsuperscript{331} Goodman, Ryan. The Power to Kill or Capture Enemy Combatants, (2013) 24 E.J.I.L. No.3 at 819.
Subparagraph (a) is critical to invoking restraint. The ICRC Commentary on the Additional Protocols refuted the belief that an adversary had to be captured to be within the power of the adverse Party. Instead, subparagraph (a) includes “cases in which land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat”. Therefore in those situations where the belligerent is incapable of resisting the power of the attacking force, whether or not they are armed, lethal force is prohibited. In other words, the term hors de combat includes those belligerents who are vulnerable, not just those who fall into the conventional categories of sick, wounded, or surrendered. In summary, a defenceless adversary is considered hors de combat and thus subject to restraint in the attack. This is an important principle and will provide one of the justifications for flipping the kill/capture priority discussed below.

Subparagraph (a) also resonates with the implied authority to detain belligerents in non-international armed conflict. Subparagraph (a) contains no guidance on the means and method of capture – merely that the belligerent has somehow found him of herself in the power of the adversary. There is no express requirement to execute the physical act of capture; the protections afforded in Article 41 resemble the conditions of “in the territory of or under the control” found in the trigger clause for the application human rights protection for civilians.

332 ICRC Draft Additional Protocols to the Geneva Conventions of 12 August 1949: Commentary (October 1973) at 1612.
So not only are civilians expressly protected from attack or capture; falling within the hors de combat definition may also protect them indirectly.

The text of Article 35 of Additional Protocol I also contains the rationale for the adoption of restraint. I discussed Article 35 (1) in the section above as it engenders the principle of humanity ("the rights of belligerents to adopt means of injuring the enemy are not unlimited"). Article 35 (2) continues the trend of restraint by invoking restrictions on the means and methods of attack. Specifically, paragraph (2) states that "it is prohibited to employ weapons, projectiles and material and methods of warfare to cause superfluous injury and unnecessary suffering".\textsuperscript{333} In a 1981 treatise concerning Additional Protocol I, Bothe, Partsch and Solf\textsuperscript{334} opined that Article 35 requires that, among other things, belligerents must chose weapons that cause the least injury. Thus the choice of a less harmful weapon stands, even when a more effective weapon is available.

In summary, reducing the tension in asymmetric warfare means limiting the exercise of military necessity and the concomitant application of force, even when such force is lawful. Humanitarian law norms may forbid killing a belligerent adversary, even under circumstances when the opponent meets the criteria of a legitimate target. The lawful authority to kill and maim in armed conflict is strictly limited. Humanitarian law operates to engender restraint when killing is clearly

\textsuperscript{333} Additional Protocol 1, Art 35 (2).
unnecessary, for example when the belligerent is considered *hors de combat*, in situations other than by physical incapacitation or surrender. This is a careful balancing act. Security force planners must weigh the potential for superfluous injury and unnecessary suffering against the efficacy of military necessity. A proportional outcome can be achieved by embedding restraint and prudence into the use of force framework.

6.4. Techniques for Reducing the Tension

There is a point of time on the continuum of escalating violence during internal armed conflict where the state has lost control of public order. At this point (never a bright line) the strength and violence of the belligerent non-state armed group overwhelms the lawfully constituted security forces. The insurgents are intractable and determined, and attempts to resolve the crisis peacefully have failed. At this point, greater force beyond that available under the law enforcement paradigm is required to restore peace and security for the civilian population. This is the tipping point in an insurgency at which the state security organs need to use more and more force to contain the situation. As the application of force starts to exceed that permitted during normal police operations, the risk of human rights breaches by the state intensifies. In this instance, humanitarian law has a pivotal role to play, particularly in permitting a level of force necessary to contain the insurgency, enabling the restoration of public order, and to permit the rebuilding of state security and judicial institutions.

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In circumstances of internal armed conflict in which the state has lost the ability to control the conduct of the insurgents, the sole application of human rights law norms is sometimes an inappropriate response. Not all situations of violence arising during internal conflict are amenable to the law enforcement paradigm and the application of human rights norms. In such situations, the ability of the state to rely upon and apply humanitarian law norms must be maintained and strengthened. It follows that internal conflict, once it has escalated in violence beyond the scope of the normal policing paradigm, require an armed (i.e. military) response. Humanitarian law provides the means and methods to respond to those belligerents whose activities transgress the boundaries of criminality and enter into the realm of combat, while at the same time providing a rigorous set of rules to govern the conduct of the belligerent parties.

In this section I will introduce the prospect of rejuvenating humanitarian law, first through an examination of the elements of humanitarian law that make it a more effective regime. Second, I will imagine a unified use of force model that merges the controlling attributes of both normative regimes by comparing the principles of military necessity and absolute necessity. Third, based on those conclusions I will flip the kill/capture targeting paradigm in humanitarian law by injecting restraint into the process; in other words, to reverse the paradigm to reflect a capture/kill priority so that it meets use of force standards established by human rights norms. Adopting a capture/kill paradigm will invariably create more
detainees, so I will close the section by offering a modified detainee management regime that provides Geneva-based protections as well as human rights-based judicial safeguards to non-state actors and unprivileged belligerents captured by foreign security forces in asymmetric warfare.

6.4.1. Rejuvenating Humanitarian Law

My rationale for advocating for the rejuvenation of humanitarian law is mostly pragmatic. Only humanitarian law provides robust and permissive rules for the use of force in situations of violence exceeding the response available under restrictive and reactive policing rules. Coalition (foreign) forces engaged in non-international armed conflict under host state consent are better trained and equipped to apply humanitarian law than human rights law or the domestic law of the receiving state.\(^\text{335}\) If humanitarian law is to remain relevant then the rules governing conduct in non-international armed conflict need to be reinvigorated and updated to reflect the character of asymmetric warfare and the status of its belligerent participants.

Regularly constituted armed forces and security officials need to apply force against those individuals taking part in hostilities without permission or privilege. They need to do so in order to manage the risk to civilians and civilian property and to maintain public order in situations of open combat. International

\(^{335}\) While it is true that nations have constabulary forces that can participate in para-military activities beyond the capabilities of domestic police forces, only armed forces can manage the level of violence encountered in open warfare by a determined insurgency.
human rights law has no war-fighting construct. That is, human rights norms provide no justification for engaging in armed conflict (*jus ad bellam*), and no rules for governing the means and methods of conflict (*jus in bello*). The use of force is strictly limited to “absolute necessity” (the law enforcement paradigm). The permissiveness and flexibility in the application of deadly force found in humanitarian law is needed to manage situations of violence resembling that of combat conducted by non-state armed groups. The measured and restrained application of humanitarian law norms can facilitate success in restoring peace and security.

As explained above, human rights jurisprudence showed that humanitarian law norms provide insufficient protection to detainees in internal armed conflicts. I will rebut that finding by offering practical modifications to the current rules, in order to raise the standard of detention of persons engaged while taking a direct part in hostilities to equate to the protections provided to prisoners of war. I have found useful guidance within recent developments in the subject of detainees – specifically, in a section below I will examine the Copenhagen Process to determine if that aspirational and voluntary set of guidelines can produce a common standard for detainee management that satisfies both regimes. More importantly, I need to see if adherence to the

336 The human rights conventions are largely silent on very important topics such as the conduct of hostilities on land, at sea or in the air; prohibitions on anti-personnel landmines, chemical weapons, cluster munitions, etc., all of which contain pivotal rules and constraints on the means and methods of armed conflict. Human rights also only bind the state party in the conflict, which creates an imbalance in accountability and defeats the principle of reciprocity.

Copenhagen Process guidelines will shield security forces from unnecessary and expensive human rights challenges. On another trajectory, but directly related to the humane treatment of persons, I will suggest that the current kill/capture paradigm favored by the principle of military necessity can be moderated by reversing the paradigm; in other words, security forces should attempt capture where possible and kill only if unavoidable.

I am a proponent of humanitarian law primacy in armed conflict, irrespective of the classification of the conflict. Relying on a pre-dominant human rights approach to govern belligerent conduct in asymmetric warfare is flawed. The humanitarian law regime, with the permissive, offensive and flexible framework for the application of force is better suited for the restoration of peace and security in contemporary crises. There is no such thing as the human rights law of armed conflict for the reasons stated in the previous two chapters, and the efforts by jurists to create one have only confused the issue. To restore the appropriate significance and relevance of humanitarian law, I must rebut the advocates of human rights predominance. This is a challenging task and runs counter to the evolved jurisprudential view that humanitarian law is inadequate in scope and depth to control non-international armed conflict.

The human rights regime has no framework to govern the means and methods of warfare. The belligerent parties in such conflicts are fighting in an armed conflict, irrespective of the labels and jurisdictional limitations imposed by

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338 For an examination of the kill/capture paradigm, see Jens Ohlin, supra at note 20.
the terms of the humanitarian conventions. Security forces operating in recent asymmetric, non-international conflicts are at the risk of becoming ineffective due to the restrictive and reactive use-of-force framework dictated by human rights norms. This especially true when they are confronted by a non-state belligerent party whose numbers and violence transcends normal law enforcement control methods. The reactive, judicial process-oriented law enforcement paradigm is incapable of managing situations of violence generated by well armed, intractable insurgents whose methods resemble armed conflict in scope, breadth and ferocity. I conclude that reconciliation of the convergence of the differing norms requires a rejuvenation of humanitarian law.

Thus I am an advocate for a revival and expansion of humanitarian law norms into asymmetric, non-international conflict. The International Committee of the Red Cross is currently leading an initiative in this area and I wish to leverage their efforts.339 In 2011 the 31st International Conference of the Red Cross and Red Crescent confirmed that:

“…international humanitarian law, in its current state, provides a suitable legal framework for regulating the conduct of parties to armed conflicts. In almost all cases, what is required to improve the victims’ situations is stricter compliance with that framework, rather than adoption of new rules. If all the parties concerned showed perfect regard for

I wish to take the notion further. Humanitarian law writ large customarily governs all armed conflict, but is particularly undermined in its effectiveness due to a lack of rule density in internal conflict. Thus an expansion of the existing regime will thicken the currently thin framework, and reduce the concomitant use of human rights norms for gap filling. Any such progress in this area will be significant for the states taking part in such missions, in that it will reduce the uncertainly of the outcome of the use of force and reduce the inefficiencies inherent in costly and time-consuming legal processes. In other words, what can be done to make the counter-insurgency operations human rights litigation-proof?

My contribution to this area of international law builds upon the contemporary efforts of humanitarian law advocates. The most serious consequence of pursuing a human rights agenda in non-international armed conflict is disarming the power of the security forces summoned (by UN Security Council Resolution or by state consent) to enforce the restoration of peace and security for a state in crisis. Flexibility in the application of force is lost and the operational initiative transfers to the belligerents. In international armed conflict, surrendering the initiative to the opponent results in avoidable casualties, but surrendering the initiative in asymmetric warfare will ultimately cause greater

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abuse of the victims, civilian casualties and political failure.\textsuperscript{342} What was originally designed to protect victims from the abuse of power of their own state inhibits the lawful application of force under humanitarian law to response to a powerfully belligerent insurgency.

As discussed in the previous chapter, recent jurisprudence from human rights courts in Strasbourg and the United Kingdom has undermined specific application of humanitarian law to a point where parties to the European Human Rights Convention believe that they can no longer operate effectively in non-international armed conflict. In particular, the United Kingdom government, smarting under a series of adverse judicial decisions, is concerned about its ability to conduct lawful counter-insurgency operations abroad.\textsuperscript{343} This situation cannot continue unchallenged if security forces, authorized by appropriate Security Council Resolutions and operating under lawful authority, are able to conduct missions to restore international peace and security in conditions of internal conflict, without adverse legal consequence.

Clearly new frameworks or adaptations of existing frameworks need to be created to fill the gaps and reduce the tension created by norm convergence and

\textsuperscript{341} See also the International Institute for Humanitarian Law, “Respecting International Humanitarian Law: Challenges and Responses”, Report of the 36\textsuperscript{th} IIHL Round Table, (Sanremo, 2013)
\textsuperscript{342} Reports of widespread abuse of the resident population emanating from the territory controlled by ISIS are evidence of the conditions experienced when lawful and humane governance fails. See Amnesty International, “Rule of Fear: ISIS Reports of Abuses in Detention in Northern Syria” 19 December 2013, http://www.countercurrents.org/amnesty201213.pdf
human rights primacy. This thesis is not the first time that attempts have been made to reconcile the norm conflict; the process is fraught with disagreement. The fact that states taking part in current conflicts have to apply international humanitarian law by national policy documents rather than by the operation of law is telling. State parties know they have reached the finite boundary of law when they have to make law by policy to operate lawfully and prudently in an armed conflict. Hence the need for new solutions to reduce the tension. Gloria Gaggioli, writing on behalf of the International Committee of the Red Cross stated the problem succinctly in a recent article:

“Solutions that are meaningful in theory and in practice have to be found in order to ensure an appropriate application of international law. Effective determination of the appropriate paradigm is not just a theoretical issue that interests international lawyers and military experts. On the contrary, it may have a crucial impact on the humanitarian

344 I have included several examples of draft conventions and guidelines in the Appendices to this thesis. They are: Karzai’s Rules of Engagement, 2009 (Appx 2), the 1956 ICRC Draft Rules for Limitation to the Dangers Incurred by the Civilian Population in Times of War (Appx 3), the 2012 Copenhagen Process (Appx 4), and the 1990 Turku Declaration (Appx 5).
345 Theodor Meron, On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument, (1983), Notes and Comments, 77 Am. J. Int’l L. 589. Written in 1983, with the ink on the 1977 Additional Protocols still wet, Judge Meron examines the difficulties surrounding the introduction of new covenants and suggesting a new instrument (he calls it Additional Protocol III) to govern the interplay between burgeoning human rights law and humanitarian law. We are still coming to terms with the interplay over 30 years later.
346 Canada, the UK, and the USA, among other like-minded nations, apply the whole body of international humanitarian law (those to which they are parties) to all types of conflict and all military operations (except domestic disturbances) irrespective of their character or status in international law. See, for example, the Canadian Forces (CF) manual The Law of Armed Conflict at the Operational and Tactical Level, Govt. of Canada doc B-GJ-005-104/FP-021 (2001), ch 17, at para 1702 (2): “Today a significant number of armed conflicts in which the CF may be involved are non-international in nature. As stated, the law applicable to such conflicts is limited. It is CF policy, however, that the CF will, as a minimum, apply the spirit and principles of the LOAC during all operations other than domestic operations.”
consequences of an operation because it has a direct effect on the loss of life and injury to persons.”

I further suggest that any proposed solution must maintain the existing responsibilities of the states’ parties and protections to the victims of conflict. Effective solutions need to reconcile the sovereign rights of states as expressed in humanitarian law with the individual rights established by human rights law and concurrently the tension between laws of general application: human rights law (the *lex generalis*) versus laws of specific application: humanitarian law (the *lex specialis*).

I examined this process in the previous chapter and concluded that the *lex specialis* method was an incomplete solution to the problem. I came to this conclusion primarily because the outcome of a trial is uncertain and delayed until long after the battle, and secondly because the justices of the various regional human rights bodies have little or limited experience in the application of humanitarian law norms. Further, the delayed decision of a remote international tribunal is of limited application to security forces at the time and place of the incident in question or its immediate aftermath. In other words, it provides no useful guidance on the conditions of or limits to the application of force.

Therefore the key to reducing tension lies not in accepting the inevitable expansion of human rights into armed conflict but by reinforcing and expanding

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humanitarian law. In other words, permitting humanitarian law to do what it was
designed to do by custom and tradition – moderate armed conflict, irrespective of
labels and classifications. I am not opposed to the application international
human rights; it is a worthwhile and powerful tool to control state power, but I am
sceptical of its inappropriate application to armed conflict. However, having
discussed the disadvantages of convergence in the chapter above, particularly
the inappropriateness of human rights primacy, my proposed solutions must not
enable greater penetration of human rights norms into armed conflict, but
encourage a renewal of humanitarian law norms and practice.

The reasons are simple - the current impasse cannot stand. If the ultimate
aim is a reduction in the effect of conflict, then the creation of a regime that does
so effectively is desirable. In reality, contemporary conflicts, even if outside the
reach of the full panoply of humanitarian law, reveal a level of violence
resembling (or indistinguishable from) what is defined as armed conflict. The
level of intensity exhibited by non-state actors mirrors the use of the heavy
weapons and tactics that professional state militaries employ, Under such
conditions, to ignore the utility of the humanitarian law creates unintended
results. Human rights law, the law of peace, is not designed for or appropriate to
large-scale violence by non-state armed groups. The law of peace has no
mechanism for dealing with such topics as air attack, the prohibition of anti-
personnel land mines or the means and methods of warfare. Thus human rights
norms become largely irrelevant and the opportunity to rejuvenate humanitarian law arises.

As discussed previously, unprivileged belligerents do not have the right to target combatants – that would be a criminal act for which they enjoy no combatant immunity – but in a reciprocal fashion they may only be attacked when taking direct part in hostilities. This feature is what Jens Ohlin calls the “functional equivalent” of combatant status; it is the link between status-based and act-based targeting. Managing an insurgency brings state security forces head to head with the very problem of lawfully attacking unprivileged belligerents. Faced with the direct participation in hostilities limitation, states go to great lengths, often in a Procrustean fashion, to make the facts fit the principle and to enable the use of force. The International Committee of the Red Cross has conducted extensive research on the topic and provided an analytical approach to identifying and targeting unprivileged belligerents in their “Direct Participation in Hostilities” (DPH) study.

The International Committee of the Red Cross has attempted to bridge the gap between act-based loss of protected status and the loss of protection on the basis of a continuing combat function when conducted by an unprivileged belligerent. In other words, prevent the door from revolving. The outcome of the study, for those states’ parties that ascribe to the Red Cross view, provided

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348 Ohlin, supra at note 20 at 1308.
greater flexibility in the use of force options for security forces. In effect, the problem with easing the limitations on the ability to target civilians and civilian objects under humanitarian norms lies in the greater potential for offending human rights principles.

Interestingly, criticism of the DPH study revived some of the old debates surrounding the extent of the conventional text: “when and for such time”, particularly in regard to sporadic or recurring participation. The criticism went both ways; some felt that the Red Cross’s interpretation simply awarded immunity for sporadic acts of combat (a return to the “revolving door” theme) 350 while others felt that the attribution “continuous combat function” went too far. In addition, criticism was also levelled at the Red Cross’s inclusion of the principle of “necessity” into the targeting analysis at Recommendation IX 351. The grounds for the criticism centred on the fact that Recommendation IX is not supported by existing humanitarian law. In my view it is an innovative conflation of two similarly named but completely different principles: military necessity and absolute necessity, which I discussed in the section above.

What other options are there for detaining powers? In situations outside the legal scope of international armed conflict, where combatant immunity is not

applicable, and without access to the internment authority in GC IV, detaining powers have little choice but to treat detainees as civilian criminal suspects – or release them. That means the domestic law of the host state may apply (absent any bilateral agreements), with its attendant process and protections. Alternatively, in a failed state, the detaining power must abide by the minimum standards of treatment for criminal suspects set out in Article 14 of the ICCPR. The standards of detention, treatment and potential trial for civilian detainees places a distracting burden on the detaining state.

In another example, amendments to operational policy governing detainee handling could create a blended of treatment which I will describe below. Some NATO members have taken such steps already to fill the gaps that arise between the protections provided under the Geneva and Hague Conventions and the lower standards provided by common Article 3 and Additional Protocol II in cases of non-international armed conflict.352 By adding features of human rights norms into the GC III detainee handing regime, these policies can reduce the exposure to legal risk and assuage the concerns of human rights advocates.

While it is not my intention to create a comprehensive detainee management system in this thesis, I will highlight those features I feel necessary

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351 “...the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances”. Interpretive Guidance, Recommendation IX.
352 See note 302. While not a complete answer to the problem, the practise of treating all detainees to the standard set out in GC III ensures a high and well-understood standard of treatment.
to meet an acceptable standard for both humanitarian law rules and human right norms. Assuming that the detainees captured while taking part in hostilities in non-international armed conflict should face consequences for their unlawful acts, an optimum hybrid model of detainee management would require, at a minimum, the provision of legal counsel and a rigorous detention review process.

6.4.2. Re-appraising the Kill/Capture Priority

The consequence of reassessing military necessity within a human rights context leads inexorably to a reappraisal of use of force priorities. Jens Ohlin states that the duty to capture “stands at the fault line between competing legal regimes that might govern targeted killings”. In other words, human rights require that one must attempt capture before resorting to more forceful and eventually deadly force. Conversely, humanitarian law demands no such restraint in the identification and targeting of a belligerent. Once status is confirmed, deadly force may be applied without escalatory steps (assuming all other precautions in the attack have been considered). Military planners need not start at the peaceful end of the use of force spectrum and work their way up to achieve the desired result. Overwhelming and lethal force can be used in the first instance.

The apparent incompatibility in the application of force is derived from the origins of the two versions of “necessity”. Military necessity is defined in the

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353 Ohlin, supra note 20 at 1268.
Lieber Code as consisting “in the necessity of those measures which are indispensable in securing the ends of the war, and which are lawful according to the modern law and usages of war”. The International Committee of the Red Cross, in the DPH study, amplified the Lieber Code definition:

"only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required to achieve the legitimate purpose of the conflict, namely the complete or partial destruction of the enemy at the earliest possible moment with the minimum expenditure of life and resources".

Is it therefore possible, based on the general principle of “minimum expenditure of life” to derive a duty to capture in humanitarian law? Whose minimum expenditure of life is it? Is the intended target, or the attacking troops, or both? Originally, it meant your own state’s lives and resources, but as the convention-based limits on the conduct of warfare evolved, it grew to mean sparing civilian lives and the infrastructure of your opponent. But Jens Ohlin points out with some accuracy that military necessity, when applied as a limiting factor to the use of force, has not changed much since Lieber. Indeed, military necessity, as set out in the Lieber Code, emphasises the primacy of the permissive nature of humanitarian law over its prohibitory nature. Lack of constraint negates the minimum force objective of force under human rights norms. Over time, restraint has been codified in the widespread and inexorable focus on the

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355 ICRC Interpretive Guidance, op cit., at 79.
356 Ohlin, supra, note 20 at 1290.
357 Ibid., page 1291.
adoption of specific prohibitions in humanitarian law (poisonous gas, land mines, cluster bombs, booby traps, perfidy), following the Hague stream rather than the Geneva stream in the of humanisation of warfare. Restrictions on specific means and methods have replaced a general attitude of self-restraint based on the fundamental principle of humanity.

The principle of humanity bridges the gap between human rights and humanitarian law, and could inform the notion that both parties should be subject to a minimum expenditure of life.\textsuperscript{358} If that is legally sound, then one can derive a principled duty to capture in humanitarian law, particularly in trans-national conflict against non-state actors. Understanding that capture in armed conflict is only possible in intimate contact with the belligerent target, I suggest that the humanitarian law use of force maxim should read: “kill if necessary/capture if possible”.

With respect to the kill/capture paradigm, one may understandably consider that the death of an opponent is the desired outcome in an humanitarian law regime, and the priority for application of deadly force is to cause a kill, and then if that fails, try for a capture. This is an oversimplification of reality. Certainly it is very difficult for a common soldier to shoot only with the intention of wounding in order to effect a subsequent capture. Battlefield marksmanship (apart from specially trained persons) is a blunt instrument, and soldiers are

\textsuperscript{358} ICRC Interpretive Guidance, \textit{op cit.}, at 82: “it would defy the basic notions of humanity to kill an adversary or to refrain from giving him or her the opportunity to surrender”.
trained to aim for the centre of the mass of the visible target. In addition, it is impossible to achieve a capture by the use of artillery or air power. Thus the norm seems to be tilted toward the kill half of the equation.

One has to turn to the experience of Israel to examine the kill/capture paradigm. The lead jurisprudence is the Targeted Killings case,\textsuperscript{359} in which the Israeli High Court of Justice discussed the application of mixed human rights and humanitarian law rules to the use of force by the Israeli security apparatus. In a good example of conflation, Justice Barak stated that the humanitarian principle of proportionality demanded that a civilian directly participating in hostilities should only be killed as a last resort – the state must attempt "less harmful means".\textsuperscript{360} In other words, the Court mixed the escalatory nature of use of force in human rights situation (law enforcement) with the military necessity priority of kill/capture. Interestingly, the Court held that the principle of proportionality was also a human right. To be clear, the Court was analysing the principle though a domestic law lens in concluding that, if it is possible to arrest a civilian taking part in hostilities, then that approach should be taken.

Commentators thought that it was unclear whether the court derived the rule from international law or Israeli constitutional law,\textsuperscript{361} but it did apply a human

\textsuperscript{359} Public Comm. Against Torture in Isr. vs. Gov’t of Isr., HCJ 769/02, 53(4) PD 459 (2005) (hereafter cited as Targeted Killings case)
\textsuperscript{360} Targeted Killings case, supra, at para 40.
rights rule to the case. This interpretation of the international humanitarian principle of proportionality sets a very high standard for the application of force in situations of internationalised conflict and appears to be a skewed interpretation of the principle of “proportionate response” found in self-defence doctrine.

The Israeli High Court is correct about one practical matter. Contemporary warfare is driven by the intelligence effort, much more so than in situations of pure international armed conflict. Consequently, it is often more desirable and effective to capture rather than kill a non-state actor; their intelligence value is far greater as a live detainee than as a dead insurgent. This is particularly true of the insurgent commanders. In my personal experience, the majority of ground operations (particularly Special Forces operations) aimed to capture the key insurgents and seize contraband rather than eliminating the threat through a war of attrition. As such, one humanitarian law-based approach may resemble the human rights approach, in which law enforcement principles dictate a capture/kill priority (as a term of art in law enforcement, the phrase should properly read “arrest/incapacitate”). But that is by operation of policy rather than international law.

Another related area of tension that requires reconciliation is the application of the humanitarian law principles of distinction and proportionality. Tension is informed by the identification of the belligerent to be targeted; the deliberate targeting of civilians is prohibited, with a notable exception in both
Customary International Law and humanitarian law. The unjustified killing of a civilian by state security forces is also a breach of human rights norms. Consider the human rights perspective on the deliberate targeting of an alleged Al Qaeda commander in Yemen by a missile fired from a drone. In a press release, Amnesty International stated: “if this was the deliberate killing of suspects in lieu of arrest, in circumstances where they do not pose an immediate threat, the killing would be extra-judicial executions in violation of international human rights law.”\(^{362}\) Clearly Amnesty International did not share the view that this was a lawful targeting of a combatant under humanitarian law rules, the view taken by the state operating the drone.

Traditionally, belligerents were readily identifiable; they wore a uniform and carried their weapons openly, among other attributes. As discussed in chapter 2, a major feature of contemporary conflict is the participation of non-state actors as belligerents. Under current legal constraints, and assuming that the state armed security forces are applying humanitarian law, civilians can only be targeted when and for such time as they take part in hostilities. As such they are distinguished from combatants. Distinction is the heart and soul of humanitarian law; it is the founding principle for the protection of civilians against the application of military force.\(^{363}\) Targeting combatants has always been status-based; combatants are distinguished by their membership in armed forces, and

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such a status entitles a combatant to be targeted at any time and in any place, 
*but only by the legitimate armed forces of an opponent*. Conversely, targeting 
civilians is conduct-based; that is, the civilian to be targeted can only be treated 
as an opponent while engaging in conflict.\textsuperscript{364} Otherwise, they are protected. 
Interestingly, criminal suspects in law enforcement operations are pursued based 
on conduct as well. But herein lies the problem for the application of force by 
state security organisations.

Erring on the side of caution in contemporary conflict can have significant 
effects on the application of force. Non-state actors routinely take advantage of 
the prohibition against targeting civilians to shield their activities and belligerent 
operations. Some contemporary armed groups have a chain of command and an 
identifying symbol, but not many carry their arms openly, thus avoiding 
identification as a combatant and consequently attracting obligations under 
humanitarian law.\textsuperscript{365} As noted by Blank and Guiora,\textsuperscript{366} you are either in or out – 
there is no such category as a “quasi-combatant”. But that doesn’t mean state 
authorities are bound by an either-or condition. The state may grant privileges to 
unprivileged belligerents that exceed the minimum standard set out in the 
conventions. But doing so has consequences. The whole regime of prohibitions 
on the use of force in humanitarian law could be undermined by awarding

\begin{footnotes}
\item[363] “Distinction is one of the cardinal principles of humanitarian law and an intransgressible principle of customary international law”, Advisory Opinion on the Threat of Use of Nuclear Weapons [1996] ICJ Rep 257.
\item[364] Additional Protocol II, Article 50.
\item[365] Additional Protocol I, Article 44.
\end{footnotes}
protections to a species of civilian who could attack with impunity, or in the reverse, an armed force that could be attacked without recourse to a lawful response.

Armed groups may eschew any outward symbol of their identity and as such remain well below the positive identification threshold for legitimate targeting. In effect, when combined with the doubt rule,\(^ {367}\) the requirement to make a positive identification of a belligerent to enable lawful targeting can offer a “free pass” to non-state actors.\(^ {368}\) Consequently a state security official may be faced with a difficult choice – put one’s own troops at risk through an abundance of caution or face condemnation for indiscriminately targeting civilians.

Recall the checkpoint scenario. In reality, the moderation of force in contemporary conflict is a mix of both regimes. In contemporary peace support operations, often the checkpoint is protected by soldiers, but staffed by police. The soldiers provide a secure environment for the police to enforce the law, which in this case would mean stopping and searching the car for insurgents or contraband, should the grounds exist. But even under a mixed use of force scenario, the lethal advantage lies with the insurgent; they can attack at will, but may only be attacked by the state under strict conditions of active participation or under absolute necessity. But the problem of tension remains unresolved, especially if the two contingents on the checkpoint have not synchronised their

\(^{367}\) Additional Protocol I, Article 50(1). In case of doubt whether a person is a civilian, that person shall be considered to be a civilian (and thus protected from being targeted).
use of force guidelines. Theodor Meron reflects on the problem through a humanitarian law lens:

“Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage.” 369

These words were written in 2000. The quote could be quite different since the events of September 2001. Witness the steady unravelling over the past decade of conditions of peace and stability in the Middle East and South West Asia, with the concomitant rise of trans-national armed groups. Clearly there needs to be a unified use of force approach to managing the phenomenon of belligerent non-state actors who do not avail themselves of armed group combatant status.

In summary, flipping the kill/capture priority to reflect a duty to capture may ease the tension by moderating military necessity. But the risk to one’s own forces remains high when dealing with determined and suicidal insurgents. I would amend Ohlin’s conclusion 370 about the duty to capture in non-international armed conflict to read the “duty to attempt capture”. Thus I would restate the priority as follows: “capture of possible/kill if necessary”.

368 Blank and Guiora, supra, at 64.
369 Theodor Meron, The Humanization of Humanitarian Law, op cit., at 240.
370 Ohlin, supra note 20 at 1329.
6.4.3. Detainee Management

One of the potential consequences of flipping the kill/capture priority is an increase in the number of detainees a security force will collect. This is a direct result of applying restraint in the use of force when confronting and capturing armed insurgents through the pursuit of mission objectives.

Detainees continue to be a vexing issue for state security forces. On the current trajectory, detainees will continue to cause legal and policy issues out of proportion to their utility. States will continue to detain and manage belligerents with the best of intentions, applying the most efficacious body of law and policy, but will continue to be beset by potential human rights breaches. In order to avoid unnecessary, lengthy and costly human rights litigation, states must find a regime of detainee handling that satisfies the highest standard.

When confronted with detainees, military forces are tempted to treat their captives as prisoners of war. This is an attractive option as the rules are well known and most professional militaries have training in the basic rules of treatment for prisoners. But in non-international armed conflict detainees are not legally prisoners of war\textsuperscript{371}. While the standards of care and treatment found in the 3\textsuperscript{rd} and 4\textsuperscript{th} Geneva conventions are acknowledged to be very high if applied properly, certain norms of human rights are missing from the conventional regime.
Treating detainees as prisoners of war (without the status) irrespective of the type of conflict and their status does not ease the tension. The rules for detention under the 3rd Geneva Convention demand a very high standard of treatment, but for a human rights advocate, a critical aspect is missing - access to justice. If the detaining state is only holding detainees on a temporary basis until transfer to the host state for disposition, then this aspect is less critical but still a point of tension. But when the host state has collapsed, and there are no functioning organs of the host state to manage the detainees, then the detaining power has to provide all the features of a judiciary, in a manner similar to an occupier under the 4th Geneva Convention. If the detaining power has neither the political will or resources to recreate a functioning judicial system in order to properly dispose of the detainees, then crises such as Guantanamo Bay arise and attract human rights supervision.

The International Committee of the Red Cross has a fundamental role in detainee matters and indicated in a recent publication that a very effective framework already exists. In their 2013 report “Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Non-international Armed Conflict,” the Red Cross pointed out that the law of armed conflict generally does not prohibit deprivation of liberty, by either states or non-state actors. Rather it governs the conditions of those detained. Prohibition on the deprivation

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371 Common Article 3 and Additional Protocol II make no mention of a legal status for combatants. Without combatant status, one cannot be a prisoner of war. See also Lubell, supra note 7 at 748.
372 A “traditional” prisoner of war enjoys combatant immunity and therefore requires no access to justice.
of liberty is found in human rights law. Recognising the very sparse regime for the conditions of detention in non-international armed conflict, the Red Cross explained that there are 175 provisions relating to detainee handling across the four Geneva Conventions. As explained earlier in this chapter, the ideal solution would be to extend the jurisdiction of the four Geneva Conventions to non-international armed conflict, thereby reinforcing and amplifying the regime for persons detained in non-international armed conflict. But as treaty amendment is difficult and uncertain under the current international structure, I must offer other innovations to protect detainees.

In an *ad hoc* diplomatic process started in 2007, the Government of Denmark, in consultation with state parties, published an aspirational regime of detainee management. Denmark recognised that modern armed conflict rarely involves force between states, and more commonly force between states and non-state actors, and frequently below the threshold of armed conflict. But the process understood that every contemporary conflict necessitates detention. Given the tension inherent in converging legal regimes, and the widespread disagreement on the appropriate basis for and conditions of detention, Denmark sought consensus among the major troop-contribution states engaged in contemporary peace and security operations. The result was a set of principles

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and guidelines that sought to leverage the common characteristics of the various detention regimes.

The Copenhagen Process produced a set of guidelines (appended to this thesis) which bridges both human rights and humanitarian law norms for persons deprived of their liberty. It is important to note that the Process did not create any new international law; it was a distillation of existing rules and obligations. For the purpose of reconciling tension, I believe that there value in finding balance between the need to observe human rights norms and the best features of the protections built into the Third Geneva Convention’s comprehensive prisoner of war regime and the Fourth Convention’s civilian internment scheme. This can be done without invoking the inevitable arguments about status, immunity and privilege.

I will assess the efficacy of adopting the Process in order to meet my stated aim of reducing tension. Being a product of consensus and an amalgam of differing legal regimes, there inevitably some advantages and disadvantages inherent in the Process. First, in order to avoid arcane debates about detainee status and privilege, the process introduced a new term: “international military operations”. While not a term of art, the term sought to capture the essence of multi-national non-international armed conflicts, that is, the modern type of

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conflict in which states form armed coalitions to support a foreign government to restore a failing security crisis.\textsuperscript{378}

Second, the Process does not define “detention”, but distinguishes the term from describing persons whose liberty is restricted, implying that detention is more severe. A lack of definition engages a wide range of methods of restricting a person’s liberty, from a cell in a detention facility (the most severe restriction) to restrictions on civil mobility, such as confinement to a certain area of land or a protected zone in a theatre of military operations.

The preamble states that “…detention is a necessary, lawful and legitimate means of achieving objectives of international military objectives”,\textsuperscript{379} a statement that implies that there is a customary basis for detention in all types of armed conflict. The basis (or lawful authority) for detention in non-international armed conflict was challenged in the European Court of Human Rights in the \textit{Serdar Mohammed} case,\textsuperscript{380} described in Chapter 5. The European Court found that there was no such basis. That decision was revisited in the \textit{Hassan} case,\textsuperscript{381} also described in Chapter 5, in which the Court found that the enumerated grounds detention set out in Arts 5(2) to 5(4) of the European Convention could be interpreted to accommodate detention of civilians in international armed conflict. So, despite attempting to simplify the grounds for detention, the Process

\textsuperscript{378} \textit{Ibid.}, at 4.
\textsuperscript{379} The Copenhagen Process, \textit{supra} at note 374, Preamble.
\textsuperscript{380} \textit{Serdar Mohammed}, supra at note 151.
\textsuperscript{381} \textit{Hassan}, supra at note 244.
is still handicapped by both the definition of the type of armed conflict and the decisions of the European Court, at least for those troop-contributing states party to the European Convention.

In its favour, the Process adds elements of human rights norms, particularly in the topic of access to justice. One example can be found in Principle 5, which established a duty to inform the detainee of the reasons for the detention, a feature not found in the humanitarian law rules applicable to non-international armed conflict. The Process also distinguishes between those persons whose liberty is restricted for reasons of security and those who are suspected of committing a criminal offence.

This is an important and useful distinction as it clarifies the trajectory of disposition that each type of detainee will follow. The former are afforded protection in the form of a periodic review by an impartial authority, and the latter are subject to criminal proceedings by an appropriate authority. Both of these oversight features are designed to protect the detainee from arbitrary or lengthy unnecessary detention, and to ensure that the security detainee is released as soon as the threat subsides, and the criminal suspect is subject to judicial process, enjoying the rights and protections therein.

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382 The Copenhagen Process, Principle 5.
383 Ibid., Principle 12.
Despite the flaws, I view the Copenhagen Process as a useful and effective policy tool. It would not have prevented the situation created by the Guantanamo Bay operation, but it might have reduced the abuse inflicted on the Iraqi detainees in Abu Ghraib. The former situation was the exercise of the sovereign power of a state to establish tribunals to deal with those who harm its citizens, while the latter was a situation of misconduct, poor training and inadequate leadership. However, for smaller states whose military forces are not resourced to establish long-term detainee centres or must rely on transfers to the host state for detainee disposition, the Process is a handy distillation of the rules. If applied diligently, and amplified as required by national law, adoption of the Process as a guide for detainee management by the military coalition forces intervening in non-international armed crises could reduce the legal risk and exposure to public censure. I would therefore add the Copenhagen Process to my proposed universal framework and would urge detaining powers to consider its relevance and utility to their military detainee management regimes.

6.5. Universal Application of Force Framework

In this part of the chapter I will examine the efficacy of a tension-reducing framework for the application of force. States already reflect international legal norms in their operational practise. Treaty negotiation is a lengthy and unpredictable process, but states need not wait for conventional changes to guide their methods. States can voluntarily, unilaterally and multilaterally adopt
operational policies that reduce the tension through moderation in the use of force, in order to reduce civilian casualties and improve detainee management.

In researching use of force models I was tempted to review state practice by an examination of rules of engagement. Rules of engagement are telling documents in that they reveal what level and manner of force states consider lawful and appropriate to a given conflict. But rules of engagement are inappropriate tools for my purposes for several reasons. First, they are a peculiar blend of international law, domestic law, military law, humanitarian principles and state policy. Second, they apply only to the issuing state and may not reflect universally held custom and principle. Third, they are normally drafted to reflect the classification and nature of a particular conflict. Last and most importantly they are a product, not a source, of international legal norms. For these reasons I eschewed the rules of engagement exemplars. Instead I founded my universal application of force model on the primary sources of international law: custom, convention and jurisprudence. Research led me to a particular example of universal rules that I discuss in the next section.

In 2001 Francisco Martin set out a proposal for a Unified Use of Force Rule. He asked a fundamental question: “How can we place greater legal restraints on the use of force in order to decrease casualty rates of both civilians and combatants while achieving the very important objectives of peace and

385 For an examination of this process see Andrew Carswell, Converting Treaties into Tactics on Military Operations, 96 I.R.R.C. (895/896) at 919.
international security?" I am examining Martin’s proposal in light of recent jurisprudence and policy developments in the two decades since his article and using his model rules as a start point for my proposal.

Martin grounds his proposed rules on a combination of the absolute necessity threshold from human rights, the superfluous injury and unnecessary suffering rule, as well as the principle of proportionality from humanitarian law, overlaid with conclusions from the relevant jurisprudence. He also places a lot of emphasis on the lessons from the McCann case. McCann involved the shooting of Irish Republican Army members in Gibraltar by UK Special Forces. The European Court found that there had been a deprivation of the right to life, and that the authorities had used lethal force that was not absolutely necessary in defence of persons from unlawful violence. Martin applied this standard to his model rules.

Martin’s three-part Unified Use of Force Rule is reproduced here:

“First, military authorities may use force against combatant or mixed combatant-civilian targets only if there is no other alternative to inflicting injury and suffering for achieving lawful objectives, both tactical and strategic.

Second, if the means or method per se of such use of force is not illegal, the employed means or method must inflict only the least possible amount of suffering and injury.

Third, suffering and injury may be escalated incrementally through the additional use of force by the original or another
means or method only if at each incremental use, the use of such means or method is absolutely necessary for achieving the lawful objectives.” 389 (Emphasis in the original)

The consequence of adopting such a framework would require re-thinking the pure military necessity approach to the application of force. First, the military contingent no longer has the option of lethal force or no force at all. Second, once the use of force is chosen, the application must start at the peaceful end of the violence spectrum – the minimum force required to achieve the aim – and escalate the force until the aim is achieved, but no more, and certainly without resort to excessive or illegal means. So one starts at the bottom and works up, rather than starting at the top (maximum force) and then reducing the level of effort to achieve the same end.

Martin’s Unified Use of Force Rule is a useful comparator for merging conflicting norms, but was criticised by humanitarian law advocates. 390 Martin created a framework for military force that only reproduces the absolute necessity requirement from the law enforcement modality, without providing the flexibility inherent in military necessity. Only the second part of the rule incorporates the superfluous injury and minimum suffering rules from humanitarian law. In addition, to illustrate the tension between absolute necessity and military necessity, Martin drew upon U.S constitutional jurisprudence. He

389 Martin, supra note 21 at 373.
recreated a spectrum of necessity by commingling the two competing interpretations of necessity.

Starting at the lowest level, he described a “minimum rational basis test”, within which the force applied must be rationally related to a legitimate government purpose. The next level, which he called a “heightened scrutiny test” requires that the level of force must be substantially related to achieving the objective. The highest level of necessity, which approximates the “absolute necessity” standard in human rights, requires that force be used only in the last resort, and after all other peaceful means and methods have been exhausted.391

But this construct, while sound in theory, is difficult to understand and apply. First, Martin relies on American constitutional law, which has little or no bearing on international legal norms. Second, the model rules presuppose that targets fall into one of three categories – some require very little diligence (the minimum scrutiny), some in the middle of the necessity spectrum require a little more diligence, and the most sensitive require all one’s attention. Unfortunately, in non-international armed conflicts, targets don’t easily fall into three discrete categories. In addition, potential targets require the highest level of necessity – all civilian persons and objects (including unprivileged belligerents) share the same protections392 under human rights norms and thus must be regarded by the same standard of necessity. Lowering the standard to reflect a minimum

391 Martin, supra note 21 at 355 – 356.
relationship between the threat posed by the target and the necessity of removing the threat has the potential to create more collateral civilian casualties and damage.

Using *McCann* as the jurisprudence exemplar for the standard of necessity in his model rules is problematic and leads to incorrect conclusions about using force in non-international armed conflict. The *McCann* case had nothing to do with armed conflict whatsoever: the Irish “Troubles” was never considered an armed conflict, international or internal. The means and methods used to control violence in the Troubles as based on the law enforcement model.

In addition, Martin interprets the prohibitions in human rights on the arbitrary deprivation of life, the absolute necessity provisions and the non-derogability of certain protections as *jus cogens*. The problem with this view is that the international *corpus* of human rights can in no way be considered *jus cogens*. Many fundamental rights are ignored or favourably interpreted, such as the prohibition on torture and the exercise of religious freedoms. Certainly the acceptance and application of international human rights norms varies widely across states, reducing their effect as “general principles of law recognised by civilised nations”.

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392 Until and for such time that they participate in hostilities (Article 51(3) AP I), but the right to life under human rights norms still applies until displaced by absolute necessity.

393 Article 38(1)(c) of the Statute of the International Court of Justice (United Nations, 1945).
Finally, recent jurisprudence arising from conflicts in Southwest Asia and Russia has undermined this model. Thus Martin’s spectrum of necessity has little utility as a model of the use of force for internal conflict.

In this last section of the chapter I will describe a workable universal use of force framework. My aim is the same as the other advocates of humanity in conflict: to create a framework that enables the lawful application of force by military authorities that creates minimum civilian casualties while engaging a violent armed insurgency. My subsidiary aim is to enable the military application of force in the pursuit of legitimate objectives without causing prima facie breaches of human rights norms. My solution incorporates all the themes discussed in the chapters above; the solution is founded on a combination of customary, conventional and jurisprudential factors.

I will start by laying out the conditions that would facilitate the application of the framework and then the law and policy guidance for analysing a situation of armed confrontation in asymmetric warfare. I will situate the problem within the insurgency crisis and the intervention scenario that I described in the introduction. Because I have structured the proposed framework within a contemporary insurgency, certain legal and policy conditions must be considered before any use of force model is contemplated. I will describe these considerations from the point of view of a State party contemplating participation in the coalition intervention force.
The classification of the conflict is the start point of the analysis: all considerations for the application of force paradigm flow from there. I described my scenario as one of internationalised non-international armed conflict. The fictitious conflict meets the *Tadic* threshold for the application of humanitarian law. It has also been listed as number 6 on David Kretzmer’s taxonomy of non-international armed conflict. As such, this conflict sits astride the fracture where human rights-based law enforcement measures become ineffective but where humanitarian law is potentially at its weakest. Military techniques may need to be employed to restore peace and security. Hence this type of conflict is at the culminating point of norm convergence and has the greatest potential for human rights breaches. Consequently the state authorities must chose techniques and methods of peace enforcement to be employed by the international intervention force that satisfy human rights norms. These policies must be robust and enforceable, and ones that, above all other considerations, minimize the danger to the lives and property of civilians (the *Ergi* and *Isayeva* standard).

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394 For a description of the threshold, *Tadic*, supra note 298.
395 See Kretzmer, *supra* note 317 at 41. Kretzmer’s escalatory taxonomy of non-international armed conflict has six types: 1. protracted low threshold conflicts between organized armed groups and government forces in a State; 2. protracted low or high threshold conflicts between organized armed groups in a State; 3. high-threshold conflicts between organized armed groups and governmental authorities in a State which meet the requirements of AP II; 4. conflicts between dissident armed forces and the armed forces of the State; 5. civil war between armies representing different regions or different ethnic/national/religious groups in a State; 6. high-threshold conflicts between dissident groups, organized armed groups, and authorities of the State, which has agreed to the intervention of forces of another State or States. Type 6 conflict most closely resembles international armed conflict in scope, violence and participation.
The type of conflict determines the status of belligerents. The rules for dealing with combatants are clear; the rules for dealing with unprivileged belligerents less so. In the type of conflict I described in the fictitious scenario, the insurgents, as non-state actors, do not meet the definition of combatant and must be treated as civilians. Therefore targeting and detention of the unprivileged belligerents will be governed by both normative regimes. Thus the state authorities need to consider the lessons learned from the jurisprudence\textsuperscript{397} and plan accordingly.\textsuperscript{398}

First, \textit{Serdar Mohammed} tells us that, in order to use force in another sovereign state, the parties must first obtain a clear and unambiguous United Nations Security Council Resolution that includes the authority to use “all necessary means” to restore peace and security. The Resolution must include express authority to use force, with a conciseness of text beyond the simple phrase “all necessary means”. Precision is required to overcome the presumption that human rights norms limit the use of deadly force and to enable the engagement of the insurgents with military techniques where indicated by the level of violence. In addition, \textit{Serdar Mohammed} indicates that the intervention force must obtain clear and unambiguous consent from the host state to permit the use of force and capture of detainees.

\textsuperscript{397} See the most important cases discussed in chapter 5 – \textit{Ergi, supra} note 143, and \textit{Hassan} and \textit{Serdar Mohammed, supra} note 2.
\textsuperscript{398} Coalition intervention missions invariably contain nations that are not a party to local or regional human rights conventions. As such they are not bound, only persuaded by the decisions of human rights tribunals. But the participants need to synchronize their use of force policies to be effective. This requires adoption of policies that reflect the spirit and principles of human rights decisions. For an examination of the importance of “interoperability” see Abbott \textit{supra} note 279.
Inevitably in the course of peace and security operations insurgents will be captured. *Hassan* tells us that the detaining powers may apply the standard of treatment and care of Prisoners of War found in the 3rd Geneva Convention. However, this standard of detention must be overlaid with the judicial guarantees demanded by human rights norms (the *Coard* standard). Specifically, the detaining powers must establish fair and impartial oversight bodies to supervise and enforce the standards of protection for detainees, as well as permitting the detainee to challenge the grounds for detention. Human rights norms also require that the detainees be afforded access to counsel and legal process guarantees similar manner to those of criminal suspects.

Following an incident involving civilian casualties or property damage, the authorities must follow up. *Ergi* tells us engagements causing civilian casualties, however justified under humanitarian targeting rules, need to be properly investigated. Prompt and thorough investigations of incidents, followed by appropriate sanctions and compensation, may satisfy the human rights norms set out in Art. 2 of the European Convention.

There are disadvantages to this framework. First, it requires close personal contact with the belligerents. Attempting capture demands physical engagement with the belligerent. Many means and methods of modern armed conflict are conducted remotely; drone strikes, air attack and indirect fire by long

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399 *Coard, supra* note 223 at 39. Treating detainees as Prisoners of War without granting that legal status does not displace the judicial guarantees established in human rights conventions.
range munitions including cruise missiles launched from hundreds of kilometres away from the intended target. None of these systems can effect “capture” or are escalatory in nature. In addition, “softening up” an insurgent target by a preliminary bombardment is normally beyond the scope of lawful force in non-international armed conflict due to the high likelihood of causing civilian casualties. Thus these weapon systems may be used in the first instance only where the necessity threshold has been exceeded and all precautions for the protection of civilians have considered in the planning process. The precautionary rules continue during the whole engagement process, including suspending an attack if the status of the target changes.

Second, detainee management that meets the highest standards of both human rights and humanitarian norms is a very time-consuming and manpower intensive process. Not all states committed to intervention operations such as that described in the model scenario have the means or capacity to divert scarce resources away from the battlefield to create and manage detention centres. They may not be able to provide access to the judicial guaranteed required by human rights. Thus they may elect to avoid taking detainees at all (a perverse incentive to kill rather than capture) or handing them over to the host state security apparatus. Detainee transfer contains its own legal issues; the host state judicial infrastructure may not be capable of processing detainees.

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400 Ergi, supra note 143 and Article 13 ECHR.
Third, accountability regimes differ from state to state. Discipline is a sovereign power and as such very difficult to synchronise across coalition members, leading to inconsistent and variable application of sanctions. Professional militaries have internal disciplinary systems to investigate, charge, try and dispose of unlawful incidents in armed conflict. Other states have less robust internal discipline and may breach human rights norms by failing to take appropriate action against individual misconduct.

6.6. Summary

In this chapter I have examined factors to reduce the inherent tension created by convergence in the two streams of law. I started by setting out the conditions of non-international armed conflict that both complicate the convergence trajectory but also provide insight for framing solutions. Because I have determined that rolling back international human rights law from its jurisdiction over armed conflict is impractical, I am left with only one choice when it comes to reconciliation – change the policy. Changing international law is a long and uncertain process, but national policy can be adopted relatively quickly, if the state has the will and the expertise. I have determined that the principle of humanity gives rise to restraint and prudence, and can inform the conduct of participants. Both restraint and prudence are key secondary characteristics that have great potential for the reduction of civilian casualties and improve the conditions of detention. Those attributes are absent from the legal text of the
major instruments, but they should be fundamental to the application of force, irrespective of the type of conflict and status of the participants.

Many tension-reducing approaches stem from national policy or in some cases as coalition or mission standing orders (NATO, ISAF, UNFICYP, MFO etc)\textsuperscript{401}. But they are not law, and as such remain outside the corpus of enforceable international law norms. The policies, however, are mostly enforceable through domestic or military law sanctions\textsuperscript{402} by their states of origin, especially if they are crafted as lawful commands to a military force or alternatively as governmental direction to domestic security agencies.

But making law by policy does not provide a complete answer. While quicker to develop and to impose than international agreements, policy is by its very nature falls victim to shifting political winds. It is temporary and malleable; it can change as frequently as do the attitudes of state officials in leadership positions. In addition, because it can be so easily changed, it does not have the certainty and predictability of law. Further, it is of specific, not general application and thus only binds those who fall within the policy’s jurisdiction. Policy is often difficult to enforce if not positioned as regulations or orders, and almost impossible to enforce in cases of misconduct by bodies or agencies outside normal governmental or mission command structures (contracted private security companies, for example).

I examined the preconditions and factors that contribute to the tension and proposed an analytical framework to reduce breaches of human rights norms in two fundamental consequences of non-international armed conflict: civilian casualties and detainees. I encouraged greater perpetration of humanitarian law into internal conflict. I reviewed the role of the principle of humanity. I examined the conflicting principles of military necessity and absolute necessity and their application. I compared the kill/capture priority against the duty to capture.

6.6.1. Restatement of the Framework

In light of all the foregoing, my proposed framework for the reduction of tension is restated below:

a. Obtain international approval for intervention operations. Ensure any UN Security Council Resolution or regional arrangement under chapter 8 of the UN Charter contains precise enabling language, such that the term “all necessary measures” is fully developed to set out the permissions and restrictions on the use of force with precision. Avoid vague or arbitrary language.

b. Obtain host state consent for the use of force within the sovereign boundaries of the state and the capture of detainees in order to meet

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402 Carswell, supra at note 383, at 923-924.
domestic human rights and criminal law requirements. Obtain express and unambiguous host state permission to take, hold and process detainees.

c. Determine the proper classification of the armed conflict. In cases other than international armed conflict presume that human rights prevail, and that law enforcement techniques form the foundation for the application of force. Departure from that model is justified only in situations where the level of violence and capacity of the insurgency overwhelms the law enforcement capability of the state authorities. Guidance on that decision point can be found in Additional Protocol II and the Tadic decision. If a state resorts to the armed conflict model to control an internal conflict, then the permissions, prohibitions and limitations found in the humanitarian conventions and protocols shall apply.

d. Determine the classification of the participants and treat them within the governing norms. Take all feasible precautions to avoid civilian casualties. Detainees who do not enjoy Prisoner of War status may be treated as such provided that judicial guarantees established by human rights norms are accessible. Create a robust and objective oversight mechanism for detainees. Guidelines on management regimes for detainees of mixed or undetermined status may be found in the Copenhagen Process (see Appendix 4).
e. In cases of doubt about the precautions in the attack, serious injury and unnecessary suffering, and doubt about the protections afforded all parties to the conflict consider the principle of humanity. To minimize damage and reduce the risk of breaches of human rights, consider the adoption of the minimum humanitarian standards set out in the Turku Declaration in the planning and execution of peace and security missions (see Appendix 5).

f. To satisfy the absolute necessity requirement in human rights while maintaining the flexibility of military necessity, adopt a targeting policy that flips the kill/capture priority. That is, if possible attempt to capture, and kill only if unavoidable. Where feasible, apply force in an escalatory manner rather than immediately resorting to lethal force. Use the least harmful means and methods available and employ lethal force as a last resort.

g. In the event of an incident in which the application of force caused civilian casualties or property damage, initiate a thorough investigation to determine, at a minimum, the circumstances of the incident and the legal justification for the use of force. The investigation should include any disciplinary consequences, as warranted by national accountability mechanisms, and appropriate compensation for the victims.
Chapter 7 - Conclusion

7.1. Introduction

The purpose of this research project was to reduce the tension inherent in the scope and application of international humanitarian law and international human rights law in an era of increasingly complex and non-traditional conflict. In the introductory chapter I posed two questions:

(1) Is the convergence of international human rights law and international humanitarian law norms creating unsustainable tension in their application to asymmetric conflict?

(2) If yes, is there a universal framework of application of force that will reduce the tension between the norms?

In this chapter I will offer my conclusions regarding the first question and my proposed analytical framework for reducing the tension in the second.

7.2. Restatement of the Thesis

As I stated at the very start of this thesis, there are always wars, small or large, in progress around the world. For the most part these conflicts are not the traditional state on state, “conventional” warfare as expressed from the Napoleonic era, progressing through the wars of the late 19th century, and to the ultimate expression of international armed conflict (as “total war”) in the early and
mid 20th century. Although it does resurface from time to time (for example, the Iran – Iraq War, the Falklands Conflict and Gulf War 1), that type of warfare, perpetuated as it was by the Cold War, has largely disappeared. A type of conflict that is rooted in the insurgencies and rebellions of the post-colonial movement has mostly replaced it. The reasons for the rarity of conventional international armed conflict is not as important as the effect its absence has on the states that have trained for decades to practise it.

Contemporary conflict has evolved to a point where application of existing international instruments can be problematic. Contemporary warfare is increasingly asymmetric, that is, a weak opponent acting in an insurgency and lacking the military resources of an industrialised state must use techniques that are either expressly prohibited or at the very least abhorrent to domestic or international law norms. The asymmetric belligerent operates within civil society, using anonymity and privacy provided by law to mask belligerent acts. Lacking access to the sophisticated weapons of the industrial state, the insurgent relies on common household goods to create weapons and bombs. The asymmetric belligerent targets citizens and public objects that would otherwise be prohibited under humanitarian law norms and in doing so causes state security forces to overreact. In their efforts to control the insurgency and restore peace, state security forces frequently cause collateral civilian casualties and damage to infrastructure, thereby losing the support and confidence of the population.
Increasingly, conflict involves non-state actors, cross-border mobility and violent techniques that were not contemplated by the academics, jurists and practitioners during the protracted development of international humanitarian law. Consequently, the new techniques and actors are difficult to “fit into” the current classifications of conflict and recognised status of belligerent participants. The fundamental humanitarian law procedures, such as identifying combatants, avoiding incidental civilian casualties and lawfully disposing of detained belligerent participants are fraught with legal uncertainty. Consequences for misjudgment have strategic reach and can be politically severe, frequently engaging domestic public criticism and a loss of confidence in the ability of the state to manage security crises.

As a consequence, conflict–affected states (and their allies) struggle to determine the legal foundation and the correct body of international law to apply to the operations of the security forces and coalitions of national armed forces in the conflict space. Confounding the problem is the progress in the evolution and penetration of human rights law since 1945. Originally intended as a law of peace, the incipient human rights law faced challenges soon after the adoption of the major conventions. With the contraction of the major colonial powers in the aftermath of World War 2 came the rise of wars of liberation. Humanitarian law was ill suited to meet the appearance of irregular armies and armed groups; it was designed to control the conduct of the regularly constituted militaries of sovereign states. Major revision was needed as the world moved away from
international armed conflict in the classic sense. That revision came in the form of the 1977 Protocols Additional to the 1949 Geneva Conventions.

The salient feature of the Additional Protocols was the adoption of principles and terminology derived from human rights norms; convergence was in full flight and the tension between the conflicting norms was beginning to be felt by state security forces. Under the spectre of converging streams, government officials became confused as to which body of law applied and in which circumstance. Confusion led to incoherent national security policies; incoherence led to conduct that satisfied one regime while invariably offending the other.

The growth and diffusion of international human rights law has exacerbated the tension. There are several reasons for the ascension of International human rights law: first, the nature of warfare and the type of belligerent has changed dramatically in the past 30 years and the development of humanitarian law conventions cannot keep up with the change. The most recent Geneva Convention to govern non-international armed conflict is dated 1977; the world has changed considerably since then.

Human rights law is filling the vacuum. In addition, there has been exponential growth in the scope and breadth of human rights since its inception in 1945. Third, the world has become increasingly inter-connected in the last few decades; with knowledge comes the desire to rely on the protection afforded by
human rights norms. Last, enforcement of humanitarian law violations remains a slow, difficult and uncertain process with no scope for a personal remedy. Victims of the excesses of state officials will turn to a process that provide access to justice; increasingly those processes are found in regional human rights systems.

I have shown that, as international human rights law gains in breadth and depth it is displacing international humanitarian law, and as such is occupying the conflict space that should be dominated by the latter. I have discussed the reasons for this; in essence, traditional international armed conflict is rare, and the rules governing non-international conflict are thin. I do not mean to say that humanitarian law has been made redundant. The possibility of international armed conflict remains a stark reality in the 21st Century as seen on the fringes of Eastern Europe and in the Middle East. International armed conflict does not predominate, but should it erupt, the humanitarian law governing the conduct of hostilities is mature, well known and highly developed. However, complicating matters in contemporary conflict is the inapplicability of the majority of international treaties governing international armed conflict. The obvious exceptions are the jus cogens and the fundamentals of customary law.

To further confuse the analysis, international human rights law and international humanitarian law have fundamental differences. For example, the international human rights law protects the right to life, while international humanitarian law enables lawful killing in armed conflict. Similarly, international
human rights law views operations to control the conduct of the citizens of a state through the law enforcement paradigm, while international humanitarian law operates mostly to control the application of military force.

Seen from another perspective, international human rights law protects the innocent from abusive exercises of power of their own state, whereas international humanitarian law protects states and the victims of war from the use of force by a foreign state. These incongruent attributes of the respective bodies of law contribute to the difficulty in application. Simply put, human rights law is a poor regime for governing armed conflict, and humanitarian law does a similarly bad job at law enforcement. Clearly there needs to be clarity and consistency in the approach to dealing with members of transnational armed groups and their methods.

I have examined the contemporary attempts to reduce the tension between the convergent streams of law and found then wanting. Disappointingly, the cases of conflicting norms that been decided in human rights courts by means of the *lex specialis* approach have led to incoherence and discord rather than clarity. In any event, a decision of a court that is remote in time and space from the event in question, and is decided years later by those not familiar with the other body of law. As such, these decisions are useless as precedent or policy guidance for state security forces immersed in the conflict of the moment.
As I believe that human rights law is ascendant, I have suggested that the application of humanitarian law norms must be tempered, where possible and practical, to meet the standard of application of force founded in human rights principles. I am fully aware that, in situations of close combat, resort to law enforcement methods may endanger one's own security forces. Alternatively, in cases of engagements at a distance such as aerial bombardment or artillery barrage, the application of force may violate human rights norms. That said, restraint has always been a guiding principle in the application of force; it is common to both streams of international law, and it is particularly important in conflict among a civilian population if the fundamentals of human rights law are to be met.

In summary, the status quo cannot withstand the changes in modern warfare, especially that of an asymmetric nature. Collateral civilian casualties and damage to property in armed conflict have been dropping over the past decades due to the employment of more accurate weapons, better intelligence and the inculcation of international humanitarian law norms into the training of state security forces. In a better world there would be no collateral damage, but as long as contemporary warfare takes place in densely populated urban centres, casualties are inevitable. But it is the deliberate civilian deaths at the hands of non-state actors that remain anathema to international jurists, academics and government leaders. Thus the challenge remains to control the conduct of security forces and non-state actors in contemporary conflict.
7.3. Reducing the Tension

My vision for reduction would require that there be no difference in the standard of treatment under either branch of law, irrespective of the type of conflict. Whether the conflict consists of riots or disturbances, low level insurgency or total war, the rules should no differ. The status of the belligerents may vary, but the treatment should be consistent. Consistency in application is a normative hallmark of international law and justice. To achieve consistent application, the outcome of any violent act or incident in armed conflict, from the victims' or belligerents' perspective, must be the same. Combatants and unprivileged belligerents who are captured or detained, irrespective of status of the person, or classification of the conflict, should expect the same standard of protection, treatment and access to justice while in the hands of a detaining power. In an effort to avoid unnecessary civilian casualties, the human objects of attack should expect that the attacking party would demonstrate restraint and prudence in the application of force.

A parting thought. I once attended a course conducted by the International Institute of Humanitarian Law (IIHL) in Sanremo, Italy. The course was designed to examine the role of human rights in non-international armed conflict. The international student body was a mixed group of law enforcement officials, military lawyers, and legal advisors to the ICRC, the UN and various major international NGOs. One of the group discussion problems featured a scenario of insurgency in a fictitious northwestern European country. In the particular fact
scenario, a small group of armed insurgents had captured the main railway station (the “Hauptbahnhof”) in the capital city. The problem required the course candidates to provide a reasoned and lawful solution to subdue the insurgents and restore the situation to civil order. A little simplistic perhaps, but typical of that type of international course. The course was then broken out into small groups to consider the problem and present a solution.

Predictably, one group, consisting of candidates with a military or national security background derived a legally sound, practical and well-reasoned solution that included conducting a military assault of the railway station to clear out the insurgents. The solution went as planned; the assault was lawful under the rules of engagement approved by the host state and conducted within the constraints of humanitarian law norms. But in the process of killing the insurgents and restoring the situation to peace, the assault caused a lot of infrastructure damage to the railway station and caused several civilian fatalities. However, it was declared a military success.

Equally predictably, when another group presented (a group composed mainly of NGO lawyers and human rights advocates), their solution was quite different. Their spokesperson said, in rebutting the military solution: “Why did you need to attack the railway station? I know it was lawful under the humanitarian law and the rules of engagement, but you violated several human rights norms in

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403 This fact scenario was based on the real events of Juan Carlos Abella v. Argentina [1997] IACommHR Rep 55-97 (the “Tablada” case).
doing so, and caused a lot of unnecessary deaths and property damage. All you needed to do was establish a secure police perimeter and then wait. The insurgents aren’t going anywhere, and they will eventually have to come out. When they do, we will arrest them and put them on trial for crimes against the state.”

What I have proposed in this thesis bridge these two extremes. It is possible to manage the scenario differently. It is also possible that the insurgent group was sufficiently armed and motivated to overcome the police cordon proposed by the human rights group and escape to fight another day. The insurgent group could also represent a continuing threat to the lives of civilians. In those cases, only a military solution, properly grounded in necessity and conducted with restraint and prudence, could meet the objectives of clearing the railway station while satisfying the norms of both regimes of law. I propose that the railway station be attacked, but executed with a clear capture/kill priority of execution and using minimum force to avoid unnecessary property damage and avoidable civilian deaths. This is precisely my point. Prudence and restraint can inform the effort to reduce the tension between the application of humanitarian and human rights law norms in contemporary conflict.
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Appendices

Appendix One

Article 3 Common to the 1949 Geneva Conventions

Conflicts not of an international character.

In the case of conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(a) taking of hostages;

(b) outrages upon personal dignity, in particular humiliating or degrading treatment;
(c) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples.

The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.
Appendix Two

President Karzai’s Rules of Engagement (2009)

What follows is an abridged version of the Afghanistan President’s use-of-force instructions issued to the International Security and Assistance Force (ISAF) in Afghanistan. These rules were converted into Standard Operating Procedures by order of the Commander of the ISAF and consequently into policy direction and orders, depending on national practice, by the participating nations of the ISAF mission. Their adherence was closely monitored by the ISAF command structure, and a checklist of positive compliance was included in every commander’s briefing document for planned operations.

These rules are a fascinating mixture of human rights and humanitarian law norms (especially Additional Protocol II), designed to mitigate the negative effects of foreign troops conducting counter-insurgency mission in a non-international armed conflict amid a wary or hostile populace. The instructions reflect both the law enforcement and military operational paradigms. In addition, the rules provide insight into norm convergence in the application of the two regimes of law to a contemporary conflict situation.

Rule 1. Conduct coordination with local government officials and tribal leaders when conducting searches. No night searches or surprise searches. Villagers must be warned before any searches are conducted.
Rule 2. Ensure personnel receive training on local customs and courtesies prior to conducting authorized searches. Avoid the cuffing or binding of hands, unless required for security.

Rule 3. Afghan National Army or Afghan National Police must accompany any ISAF unit on searches.

Rule 4. Ensure soldiers conducting searches ask for doors to be opened by occupants rather than soldiers forcing entry.

Rule 5. During low risk operations, use a local person to enter the home or business of the person to be searched to explain what is happening.

Rule 6. ISAF soldiers must not fire on the enemy unless the enemy is preparing to fire first.

Rule 7. ISAF forces must not attack the enemy if civilians are present.

Rule 8. Only women can search women.

Rule 9. ISAF may fire on an enemy placing an explosive device but must not fire if the enemy is walking away from the site where the explosives were placed.
Rule 10. Gain Commander ISAF approval before arrest, apprehension, or detention of a current or former government-appointed official. Sustain the use of interpreters for direct interpretation while conducting raids or detaining Government of Afghanistan personnel.

Rule 11. Ensure the prompt return of materials/documents taken during searches, unless the owner is detained and the property becomes evidence.

Rule 12. Ensure there is an infusion of reconstruction funds to areas where local people were detained and subsequently released.
Appendix Three

Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC, 1956

PREAMBLE

All nations are deeply convinced that war should be banned as a means of settling disputes between human communities. However, in view of the need, should hostilities once more break out, of safeguarding the civilian population from the destruction with which it is threatened as a result of technical developments in weapons and methods of warfare, the limits placed by the requirements of humanity and the safety of the population on the use of armed force are restated and defined in the following rules.

In cases not specifically provided for, the civilian population shall continue to enjoy the protection of the general rule set forth in Article 1, and of the principles of international law.

CHAPTER I: OBJECT AND FIELD OF APPLICATION

Object

Article 1. Since the right of Parties to the conflict to adopt means of injuring the enemy is not unlimited, they shall confine their operations to the destruction of his military resources, and leave the civilian population outside the sphere of
armed attacks. This general rule is given detailed expression in the following provisions:

Field of application

Art. 2. The present rules shall apply:

(a) In the event of declared war or of any other armed conflict, even if the state of war is not recognized by one of the Parties to the conflict.

(b) In the event of an armed conflict not of an international character.

Definition of term "attacks"

Art. 3. The present rules shall apply to acts of violence committed against the adverse Party by force of arms, whether in defence or offence. Such acts shall be referred to hereafter as "attacks."

Definition of term "civilian population"

Art. 4. For the purpose of the present rules, the civilian population consists of all persons not belonging to one or other of the following categories:

(a) Members of the armed forces, or of their auxiliary or complementary organizations.

(b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting.
Relation with previous Conventions

Art. 5. The obligations imposed upon the Parties to the conflict in regard to the civilian population, under the present rules, are complementary to those which already devolve expressly upon the Parties by virtue of other rules in international law, deriving in particular from the instruments of Geneva and The Hague.

CHAPTER II: OBJECTIVES BARRED FROM ATTACK

Immunity of the civilian population

Art. 6. Attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited. This prohibition applies both to attacks on individuals and to those directed against groups. In consequence, it is also forbidden to attack dwellings, installations or means of transport, which are for the exclusive use of, and occupied by, the civilian population. Nevertheless, should members of the civilian population, Article 11 notwithstanding, be within or in close proximity to a military objective they must accept the risks resulting from an attack directed against that objective.

Limitation of objectives which may be attacked

Art. 7. In order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives. Only objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as
military objectives. Those categories are listed in an annex to the present rules. However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.

CHAPTER III: PRECAUTIONS IN ATTACKS ON MILITARY OBJECTIVES

Precautions to be taken in planning attacks

Art. 8. The person responsible for ordering or launching an attack shall, first of all:

(a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rules, and are duly identified. When the military advantage to be gained leaves the choice open between several objectives, he is required to select the one, an attack on which involves least danger for the civilian population:

(b) take into account the loss and destruction which the attack, even if carried out with the precautions prescribed under Article 9, is liable to inflict upon the civilian population. He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated:

(c) whenever the circumstances allow, warn the civilian population in jeopardy, to enable it to take shelter.
Precautions to be taken in carrying out the attack

Art. 9. All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum. In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked. The person responsible for carrying out the attack must abandon or break off the operation if he perceives that the conditions set forth above cannot be respected.

Target-area bombing

Art. 10. It is forbidden to attack without distinction, as a single objective, an area including several military objectives at a distance from one another where elements of the civilian population, or dwellings, are situated in between the said military objectives.

"Passive" precautions

Art. 11. The Parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in an attack -- in particular by removing them
from the vicinity of military objectives and from threatened areas. However, the rights conferred upon the population in the event of transfer or evacuation under Article 49 of the Fourth Geneva Convention of 12 August 1949 are expressly reserved. Similarly, the Parties to the conflict shall, so far as possible, avoid the permanent presence of armed forces, military material, mobile military establishments or installations, in towns or other places with a large civilian population.

Civil Defence bodies
Art. 12. The Parties to the conflict shall facilitate the work of the civilian bodies exclusively engaged in protecting and assisting the civilian population in case of attack. They can agree to confer special immunity upon the personnel of those bodies, their equipment and installations, by means of a special emblem. Intentional exposure to danger.

Art. 13. Parties to the conflict are prohibited from placing or keeping members of the civilian population subject to their authority in or near military objectives, with the idea of inducing the enemy to refrain from attacking those objectives.

CHAPTER IV : WEAPONS WITH UNCONTROLLABLE EFFECTS
Prohibited methods of warfare
Art. 14. Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects -- resulting in
particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population. This prohibition also applies to delayed-action weapons, the dangerous effects of which are liable to be felt by the civilian population.

Safety measures and devices
Art. 15. If the Parties to the conflict make use of mines, they are bound, without prejudice to the stipulations of the VIIIth Hague Convention of 1907, to chart the mine-fields. The charts shall be handed over, at the close of active hostilities, to the adverse Party, and also to all other authorities responsible for the safety of the population. Without prejudice to the precautions specified under Article 9, weapons capable of causing serious damage to the civilian population shall, so far as possible, be equipped with a safety device which renders them harmless when they escape from the control of those who employ them.

CHAPTER V: SPECIAL CASES
"Open towns"
Art. 16. When, on the outbreak or in the course of hostilities, a locality is declared to be an "open town" the adverse Party shall be duly notified. The latter is bound to reply, and if it agrees to recognize the locality in question as an open town,
shall cease from all attacks on the said town, and refrain from any military operation the sole object of which is its occupation.

In the absence of any special conditions which may, in any particular case, be agreed upon with the adverse Party, a locality, in order to be declared an "open town," must satisfy the following conditions:

(a) it must not be defended or contain any armed force;
(b) it must discontinue all relations with any nation or allied armed forces;
(c) it must stop all activities of a military nature or for a military purpose in those of its installations or industries which might be regarded as military objectives;
(d) it must stop all military transit through the town.

The adverse Party may make the recognition of the status of "open town" conditional upon verification of the fulfillment of the conditions stipulated above.

All attacks shall be suspended during the institution and operation of the investigatory measures. The presence in the locality of civil defence services, or of the services responsible for maintaining public order, shall not be considered as contrary to the conditions laid down in paragraph 2. If the locality is situated in occupied territory, this provision applies also to the military occupation forces essential for the maintenance of public law and order. When an "open town" passes into other hands, the new authorities are bound, if they cannot maintain its status, to inform the civilian population accordingly.

None of the above provisions shall be interpreted in such a manner as to diminish the protection which the civilian population should enjoy by virtue of the
other provisions of the present rules, even when not living in localities recognized as "open towns."

Installations containing dangerous forces

Art. 17. In order to safeguard the civilian population from the dangers that might result from the destruction of engineering works or installations -- such as hydro-electric dams, nuclear power stations or dikes -- through the releasing of natural or artificial forces, the States or Parties concerned are invited:

(a) to agree, in time of peace, on a special procedure to ensure in all circumstances the general immunity of such works where intended essentially for peaceful purposes:

(b) to agree, in time of war, to confer special immunity, possibly on the basis of the stipulations of Article 16, on works and installations which have not, or no longer have, any connexion with the conduct of military operations.

The preceding stipulations shall not, in any way, release the Parties to the conflict from the obligation to take the precautions required by the general provisions of the present rules, under Articles 8 to 11 in particular.

CHAPTER VI: APPLICATION OF THE RULES (1)

Assistance of third parties

Art. 18. States not involved in the conflict, and also all appropriate organizations, are invited to co-operate, by lending their good offices, in ensuring the
observance of the present rules and preventing either of the Parties to the conflict from resorting to measures contrary to those rules.

(1) Articles 18 and 19, dealing with the procedure for supervision and sanctions, are merely given as a rough guide and in outline; they will naturally have to be elaborated and supplemented at a later stage. ' (Note in the original). '

Trial and judicial safeguards

Art. 19. All States or Parties concerned are under the obligation to search for and bring to trial any person having committed, or ordered to be committed, an infringement of the present rules, unless they prefer to hand the person over for trial to another State or Party concerned with the case. The accused persons shall be tried only by regular civil or military courts; they shall, in all circumstances, benefit by safeguards of proper trial and defence at least equal to those provided under Articles 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Diffusion and details of application

Art. 20. All States or Parties concerned shall make the terms of the provisions of the present rules known to their armed forces and provide for their application in accordance with the general principles of these rules, not only in the instances specifically envisaged in the rules, but also in unforeseen cases.
Appendix Four

The Copenhagen Process: Principles and Guidelines

1. The Copenhagen Process Principles and Guidelines apply to the detention of persons who are being deprived of their liberty for reasons related to international military operations.

2. All persons detained or whose liberty is being restricted will in all circumstances be treated humanely and with respect for their dignity without any adverse distinction founded on race, colour, religion or faith, political or other opinion, national or social origin, sex birth, wealth or other similar status. Torture, and other cruel, inhuman or degrading treatment or punishment is prohibited.

3. Persons not detained will be released.

4. Detention of persons must be conducted in accordance with applicable international law. When circumstances justifying detention have ceased to exist a detainee will be released.

5. Detaining authorities should develop and implement standard operating procedures and other relevant guidance regarding the handling of detainees.

6. Physical force is not to be used against a detained person except in circumstances where such force is necessary and proportionate.
7. Persons detained are to be promptly informed of the reasons for their detention in a language they understand.

8. Persons detained are to be promptly registered by the detaining authority.

9. Detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water, accommodation, access to open air, safeguards to protect health and hygiene, and protection against the rigours of climate and the dangers of military activities. Wounded and sick detainees are to receive the medical care and attention required by their condition.

10. Persons detained are to be permitted to have appropriate contact with the outside world including family members as soon as reasonably practicable. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations. Persons detained are to be held in a designated place of detention.
Appendix Five

Declaration of Minimum Humanitarian Standards (Turku Declaration)

Institute for Human Rights, Abo Akademi University, Turku, Finland

2 December 1990

Recalling the reaffirmation by the Charter of the United Nations and the Universal Declaration of Human Rights of faith in the dignity and worth of the human person;

Considering that situations of internal violence, disturbances, tensions and public emergency continue to cause serious instability and great suffering in all parts of the world;

Concerned that in such situations human rights and humanitarian principles have often been violated;

Recognizing the importance of respecting existing human rights and humanitarian norms;

Noting that international law relating to human rights and humanitarian norms applicable in armed conflicts to not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency;
Confirming that any derogation from obligations relating to human rights during a state of public emergency must remain strictly within the limits provided for by international law, that certain rights can never be derogated from and that humanitarian law does not admit of any derogation on grounds of public emergency;

Confirming further that measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments, that the imposition of a state of emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law, that measures derogating from such obligations will be limited to the extent strictly required by the exigencies of the situations, and that such measures must not discriminate on the grounds of race, colour, sex, language, religion, social, national or ethnic origin;

Recognizing that in cases not covered by human rights and humanitarian instruments, all persons and groups remain under the protection of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience;

Believing that it is important to reaffirm and develop principles governing behaviour of all persons, groups, and authorities in situations of internal violence, disturbances, tensions and public emergency;
Believing further in the need for the development and strict implementation of national legislation applicable to such situations, for strengthening cooperation necessary for more efficient implementation of national and international norms, including international mechanisms for monitoring, and for the dissemination and teaching of such norms;

Proclaims this Declaration of Minimum Humanitarian Standards.

Article 1
This Declaration affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed.

Article 2
These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.

Article 3
1. Everyone shall have the right to recognition everywhere as a person before the law. All persons, even if their liberty has been restricted, are entitled to
292

respect for their person, honour and convictions, freedom of thought, conscience and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.

2. The following acts are and shall remain prohibited:

a) violence to the life, health and physical or mental well-being of persons, in particular murder, torture, mutilation, rape, as well as cruel, inhuman or degrading treatment or punishment and other outrages upon personal dignity;

b) collective punishments against persons and their property;

c) the taking of hostages;

d) practicing, permitting or tolerating the involuntary disappearance of individuals, including their abduction or unacknowledged detention;

e) pillage;

f) deliberate deprivation of access to necessary food, drinking water and medicine;

g) threats or incitement to commit any of the foregoing acts.
Article 4

1. All persons deprived of their liberty shall be held in recognized places of detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information.

2. All persons deprived of their liberty shall be allowed to communicate with the outside world including counsel in accordance with reasonable regulations promulgated by the competent authority.

3. The right to an effective remedy, including habeas corpus, shall be guaranteed as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.

4. All persons deprived of their liberty shall be treated humanely, provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions.
Article 5

1. Attacks against persons not taking part in acts of violence shall be prohibited in all circumstances.

2. Whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved.

3. Weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances.

Article 6

Acts or threats of violence the primary purpose of foreseeable effect of which is to spread terror among the population are prohibited.

Article 7

1. The displacement of the population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Persons or groups thus displaced shall be allowed to return to their homes as soon as the conditions that made their displacement imperative have ceased. Every effort shall be made to enable those so displaced who wish to remain together to do so. Families
whose members wish to remain together must be allowed to do so. The persons
thus displaced shall be free to move around in the territory, subject only to the
safety of the persons involved or reasons of imperative security.

2. No persons shall be compelled to leave their own territory.

Article 8

1. Every human being has the inherent right to life. This right shall be protected
by law. No one shall be arbitrarily deprived of his or her life.

2. In addition to the guarantees of the inherent right to life, and the prohibition of
genocide, in existing human rights and humanitarian instruments, the following
provisions shall be respected as a minimum.

3. In countries which have not yet abolished the death penalty, sentences of
death shall be carried out only for the most serious crimes. Sentences of death
shall not be carried out on pregnant women, mothers of young children or on
children under 18 years of age at the time of the commission of the offence.

4. No death sentence shall be carried out before the expiration of at least six
months from the notification of the final judgment confirming such death
sentence.
Article 9

No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations. In particular:

a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him or her, shall provide for a trial within a reasonable time, and shall afford the accused before and during his or her trial all necessary rights and means of defence;

b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

c) anyone charged with an offence is presumed innocent until proved guilty according to law;

d) anyone charged with an offence shall have the right to be tried in his or her presence;

e) no one shall be compelled to testify against himself or herself or to confess guilt;
f) no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure;

g) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed.

Article 10

Every child has the right to the measures of protection required by his or her condition as a minor and shall be provided with the care and aid the child requires. Children who have not yet attained the age of fifteen years shall be recruited in or allowed to join armed forces or armed groups or allowed to take part in acts of violence. All efforts shall be made not to allow persons below the age of 18 to take part in acts of violence.

Article 11

If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review.
Article 12

In every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, shall be protected and treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them on any grounds other than their medical condition.

Article 13

Every possible measure shall be taken, without delay, to search for and collect wounded, sick and missing persons and to protect them against pillage and ill-treatment, to ensure their adequate care; and to search for the dead, prevent their being despoiled or mutilated, and to dispose of them with respect.

Article 14

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian missions.

2. Under no circumstances shall any person be punished for having carried out medical activities compatible with the principles of medical ethics, regardless of the person benefiting therefrom.
Article 15
In situations of internal violence, disturbances, tensions or public emergency, humanitarian organizations shall be granted all the facilities necessary to enable them to carry out their humanitarian activities.

Article 16
In observing these standards, all efforts shall be made to protect the rights of groups, minorities and peoples, including their dignity and identity.

Article 17
The observance of these standards shall not affect the legal status of any authorities, groups, or persons involved in situations of internal violence, disturbances, tensions or public emergency.

Article 18
1. Nothing in the present standards shall be interpreted as restricting or impairing the provisions of any international humanitarian or human rights instrument.

2. No restriction upon or derogation from any of the fundamental rights of human beings recognized or existing in any country by virtue of law, treaties, regulations, custom, or principles of humanity shall be admitted on the pretext that the present standards do not recognize such rights or that they recognize them to a lesser extent.